THE PRACTICE

OF THE

EXCHEQUER COURT

OF

CANADA

I hold every man a debtor to his profession.
—*Bacon.*

SECOND EDITION

BY

LOUIS ARTHUR AUDETTE, K.C.
REGISTRAR OF THE EXCHEQUER COURT OF CANADA.

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Judges of the Exchequer Court of Canada.

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Appointed 1st October, 1887.
Died 18th February, 1908.

THE HONOURABLE SIR THOMAS W. TAYLOR.

Appointed Judge *pro tempore* on 21st of Jan., 1908.
Commission expired with death of Mr. Justice Burbidge on 18th of February, 1908.

THE HONOURABLE WALTER G. P. CASSELS.

Appointed 2nd of March, 1908.

Officers of the Court.

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ADDENDA ET CORRIGENDA.

Errors in cases cited are corrected in Table of Cases Cited.

Sec. 13 of *The Exchequer Court Act*, p. 102, has been repealed by 8-9 Ed. VII. (1909).

The Repealing Act has been passed since the printing of page 102 hereof.

PREFACE TO SECOND EDITION.

A period of over twelve years having already elapsed since the publication of the first edition (now exhausted) of the Exchequer Court Practice, the necessity for a second edition has become manifest in view of the publication of a new set of Rules of Practice which came into force on the 11th of January, 1909, and the old rules appearing in the first edition having thus been repealed.

The Parliament of Canada has also since 1895, the date of the publication of the first edition, passed several Acts giving the Exchequer Court new jurisdiction. Some of the statutes dealing with the jurisdiction of the Court have been repealed and some have been amended, and the Revised Statutes of Canada, 1906, have materially altered and changed the sections of the several Acts dealing with the Court.

Then a great many judicial decisions have since been given both upon the law and the practice of the Court. These decisions are published in this volume by way of annotations both to the Rules of the Court and the statutes bearing upon the jurisdiction. The present edition embodies a digest of the Exchequer Court decisions up to date (Vol. I to part 2 of Vol. II.) the notes of such decisions being annotated under their proper heads.

As was said in the first edition the great number of inquiries received from members of the Bar in all parts of Canada on the subject of the practice of the Exchequer Court, justifies the hope that this book, notwithstanding its crudities and imperfections, will prove useful to practitioners before this Court.

The subject of Admiralty has not been dealt with in this volume, although the Court has both original and appellate jurisdiction in such matters, for the reason that it would make this volume too bulky. It is, however, the intention to make it hereafter the subject of another publication by itself.

PREFACE TO FIRST EDITION.

I have, in this work, endeavoured to measure and follow the pace of judicial work in the Exchequer Court from its early origin in England down to the present day in Canada, and have made such notes upon the jurisdiction and practice of the Court as I have thought might be of use to the practitioner.

The preparation of the work has been undertaken with the view of collecting in one book and in a convenient shape such parts of the most important Acts of Parliament as have an immediate bearing upon the jurisdiction and practice of the Court, and also all the rules and orders of the Exchequer Court, which rules and orders are now scattered through a large number of books.

By the last General Rules and Orders, published on the 1st day of May, 1895, quite a number of new rules have been put into force and a great many amendments have been made to the rules heretofore in force. All these changes have been carefully noted.

Thinking this book would not be complete unless it contained all the Rules and Orders, as well on the Revenue and Common Law side of the Court as on the Admiralty side, I have deemed it advisable to print separately, in an Appendix, at the end of this volume, the Rules and Orders governing the practice and procedure in Admiralty cases in the Exchequer Court of Canada.

The great number of inquiries received by me since 1887, as Registrar of the Court, from members of the profession in all parts of Canada, on the subject of the practice of the Exchequer Court, leads me to hope that my book, notwithstanding the crudities and imperfections of which I am only too well aware, may be received with some measure of favour by those members of the Bar who have occasion to practice before the Exchequer Court, and that its usefulness will justify its publication.

While I do not anticipate that the financial return from this publication will be in any way remunerative, yet should it prove to be a good working tool for the profession, I shall feel amply repaid for the expense and labour involved in the enterprise.

ABBREVIATIONS.

App. Cas.	Appeal Cases.
Art.	Article.
B. & S.	Best & Smith.
B. C. L. R.	British Columbia Law Reports.
Beav.	Beaven.
Bk. Com.; Bl. Com. / Bla. Com. / Black. Com.	Blackstone's Commentaries.
Bro. Ab.	Brooke's Abridgment.
C. L. J.	Canada Law Journal.
Cam. Cas.	Cameron's Canada Supreme Court Cases.
Cas. Dig.	Cassels' Digest Supreme Court of Canada.
Cassels' D. S. C. C.	Cassels' Digest Supreme Court of Canada.
Cassels' Practice S. C. C.	Cassels' Practice Supreme Court of Canada.
C. C. L. C.	Civil Code, Lower Canada.
C. C. P. L. C.	Code Civil Procedure, Lower Canada.
C. B. N. S.	Common Bench, New Series.
C. P. D.	Common Pleas Division.
Ch. & ch.	Chancery and chapter.
Ch. D.	Chancery Division.
Com.	Comyn's Reports or Digest.
Con. S. N. B.	Consolidated Statute of New Brunswick.
Coop. temp. Brough.	Cooper's cases Tempore Brougham.
Cout. Cas.	Coutlee's Canada Supreme Court Cases.
E. O.	English Order. This refers to the Orders made in pursuance of the Supreme Court of Judicature, to regulate the practice in the High Court of Justice in England. See Wilson's Judicature Acts.
Ex. C. R.	Exchequer Court Reports of Canada.
Gen. Rules(Ont.) Tr.T.,1856.	Refers to the General Rules of Court made in Trinity Term, 1856, for regulating the practice of the Courts of Queen's Bench and Common Pleas of Ontario. These Rules will be found in Harrison's Common Law Procedure Acts.
Gneist Hist. Eng. Const.	Gneist's History of the English Constitution.
Gneist Hist. Eng. Parl.	Gneist's History of English Parliaments.
Han.	Hansard.
How. St. Tr.	Howell's State Trials.
Inst.	Coke's Institutes.
Imp.	Imperial.
J.	Judge.
L. C. J.	Lower Canada Jurist.
L. J. Ch.	Law Journal Chancery.
L. J. C. P.	Law Journal Common Pleas.
L. J. N. S.	Law Journal, New Series.
L. R. App. Cas.	Law Reports, Appeal Cases.
L. R. H. L.	Law Reports, House of Lords.
L. R. P. D.	Law Reports, Probate Division.
M. & G.	Manning & Granger's C. P. Reports.

M. & W.	Meeson & Welsby's Exchequer Reports.
M. L. R. S. C.	Montreal Law Reports, Superior Court.
M. L. R. Q. B.	Montreal Law Reports, Queen's Bench.
M. M. Reg.	Mitchell's Maritime Register.
Murdoch's Ep. N. S. L.	Murdoch's Epitome of Nova Scotia Law.
N. Sc. Rep.	Nova Scotia Reports.
Old.	Oldright's N. S. Reports.
Ont. App. R.	Ontario Appeal Reports.
Ont. P. R.	Ontario Practice Reports.
O. R.	Ontario Reports.
O. L. R.	Ontario Law Reports.
P. & p.	Page.
Q.	Quebec.
Q. R. S. C.	Quebec Official Reports, Superior Court.
Q. R. K. B.	Quebec Official Reports, King's Bench.
Q. B. D.	Queen's Bench Division.
Rot. Parl.	Rotulæ Parliamentaria.
R. S. C.	Revised Statutes of Canada.
R. S. 1906.	Revised Statutes of Canada, 1906.
R. S. Q.	Revised Statutes of Quebec.
R. S. U. S.	Revised Statutes United States.
Ryley Plac. Parl.	Ryley's Placita Parliamentaria.
Sch.	Schedule.
S. C. R.	Reports of the Supreme Court of Canada.
Sec.	Section.
Sim.	Simons.
Skin.	Skinner.
Spence's Eq. Juris.	Spence's Equity Jurisprudence.
Ss.	Sections.
Staun. Prær.	Staundeforde's Prærogatives.
Steph. Com.	Stephen's Commentaries.
St. T.	State Trials, (Howell's Ed.)
Tasw. Lang. Const. Hist.	Taswell Langmead's English Constitutional History.
Taylor's C. Chy. O.	Refers to Taylor's Consolidated Chancery Orders, being the Orders regulating the practice of the Court of Chancery in Ontario.
U. C. Q. C. (O.S.)	Upper Canada, Queen's Bench, Old Series.
U. K.	United Kingdom of Great Britain & Ireland.
U. S. R.	United States Reports.
W. R.	Weekly Reporter.
Y. B.	Year Book.

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INTRODUCTION TO FIRST EDITION.

The Exchequer Court of Canada in respect of its jurisdiction in revenue cases has a historic lineage.

The Exchequer in England.

The date of the origin of the Exchequer in England cannot be precisely determined. In the *Dialogus de Scaccario*, (1) the earliest work especially devoted to the history of this court extant, we are told that "the institution of the Exchequer is con-"firmed as well by its authority, as also by the authority of the "great men that sit there. For it is said to have been erected by "King William at the time of the Conquest of this Realm, its "model being taken from the transmarine Exchequer; but they "(the Exchequer of England and that of Normandy) differ from "one another in several and very material things. Again, there "are some who think there was an Exchequer under the Anglo "Saxon Kings." This, however, the learned author of the *Dialogus* does not think probable, because, as he says, "in Domesday "Book (which contains an exact description of the lands of the "whole Realm, and mentions the value of all men's lands as well "of the time of King Edward as also of King William, under "whom it was written) there is no mention at all made of the "*album firmae*." (2) This conclusion is shown to be erroneous by Stapleton in his preface to the *Rolls of the Norman Exchequer*. Mr. Stapleton establishes, in an argument which is as unanswerable as it is exhaustive, that the "blanch-ferm" was purely English in its origin and character, and was unknown to the monetary system of the Normans at the time of the Conquest. But apart from this argument, the omission of any reference to the "blanch-ferm" in Domesday does not by any means prove its Norman origin, for many matters relating to the fiscal economy of the country of greater importance than this have escaped notice therein. Moreover, satisfactory authority is not wanting to show that there existed a central department of finance in England before

(1). This work is erroneously ascribed by Madox and earlier writers to Gervase of Tilbury, an English Latin writer of some prominence in the 13th century; but it is now recognized as the production of Richard Fitzneal, Bishop of London. It was apparently commenced in 1176, but it refers to events which transpired as late as 1178.

(2). This was a money rent paid by the sheriffs into the royal Exchequer. The ferm was said to be blanched when it had been tested by fire, weighed, and brought to the standard of the royal mint at Winchester. Twice a year the sheriffs had to appear at the Exchequer and settle accounts in respect of their ferms.

the Conquest, from which the constitution and the procedure of the Exchequer, as it subsequently appears in history, were derived. (*Cf. Stubb's Const. Hist. of England*, 1. *p.* 408.) It is strange that so painstaking a writer as Gneist (*Vide Hist. Eng. Const.* 1. pp. 35, 137-139-144) should be misled into believing the Exchequer to be a bodily importation from Normandy in the face of evidence to the contrary so easily accessible. However, he is not the only German student of the English Constitution that has fallen into this error. Brunner in his *Schwurgericht* (p. 150) gives expression to the same view.

But as the author of the *Dialogus* quaintly observes, "at "what time soever the Exchequer began, it is certain that it is "founded on so great an authority that no man ought to break "the statutes (*sic*) of the Exchequer, or to be so hardy as to op- "pose them. For this the Exchequer has in common with the "King's Court (Curia Regis) (wherein the King personally sits in "judgment) that it is not lawful for any man to contradict what "is recorded or adjudged there."

This reference to the *Curia Regis* is instructive, for in its rudimentary stages the Exchequer was really nothing more than a branch of the great Council of the Nation. It seems to have been a sort of committee of that general council or court having special jurisdiction in the affairs of the public revenue. This phase in the history of the Exchequer becomes apparent in the reign of Henry I. Then, for the first time, the members of this committee were called *Barones Scaccarii*, and the committee itself *Curia Regis ad Scaccarium*, a name derived from the fact that the accounts of the King's debtors were taken at a table covered with a chequered cloth, which suggested a game of chess between the receiver and the payer. (*Cf. Tasw. Lang. Const. Hist.* 160.) Blackstone, speaking of the etymology of the name 'Exchequer,' says:—"It seems to be derived from the low Latin "word *scaccarium* or *scaccus*, a chequered board or cloth, resem- "bling a chess-board, which covered the table on which, when "certain of the King's accounts were made up, the sums were "marked and scored with counters." (Bl. Com. III. 44). Basnage, in his *Custumary of Normandy*, derived the name 'Exchequer' from the German word *Skeckan*, which means to send, because the court was composed of *de Missis Dominis*, or of such great Lords as were particularly sent for, to hold Court with the Senechal or Steward on any occasion. Chief Baron Gilbert, in his *Treatise on the Court of Exchequer* (page 2), says, "that "the more common derivation of the word 'Exchequer' is from "a chequered board. They called the board on which they played

"at chess a chequer, because in that game they give cheques; "and the Court was so called because they laid a cloth of that "kind upon the table upon which the accountants told out the "King's moneys, and set forth their account in the same artificial "manner as in the Cofferer's account was done." (See also Price's *Law of the Exchequer*, p. 4).

Sir W. Anson, in his *Law and Custom of the Constitution*, at p. 412, says:—"The function of the Exchequer had always "involved some enquiries of a judicial character, and while it be- "came a department distinct from others, it did not cease to be a "court for revenue purposes."

Down to the reign of King John the *Curia Regis* continued to be the one Supreme Court of the Realm, of which some of the judges, selected from time to time out of the whole body, held a continuous session at the Exchequer for the determination of all business appertaining to the revenue; but shortly after the granting of *Magna Charta*, this great court was permanently divided into three committees or courts, i.e.:—(1), the Exchequer, having exclusive cognizance of fiscal matters and of the management of the King's revenue; (2), the Common Pleas, where civil disputes between subject and subject were to be adjudged; and (3), the King's Bench, which had jurisdiction, under the head of *placita coram Rege*, of all suits savouring of a criminal nature and matters cognate thereto. It is interesting to note how these several jurisdictions were enlarged by reciprocal encroachments of the three courts upon each other, due to the litigiousness (1) of the people (which seemed to increase in an equal ratio with their civilization) and the wonderful development of legal ingenuity at the time.

The jurisdiction of the ancient Court of Exchequer is thus defined in the *Mirror of Justice* (temp. Edw. II.) cap. 1, sec. 14: "The Exchequer is only ordained for the King's profit, to hear "and determine torts done to the King and his Crown, in right "of his fiefs and franchises, and the accounts of bailiffs, and of "the receivers of the King's money, and the administrators of his "goods, by the view of a Sovereign who is the Treasurer of "England."

In speaking of this definition of the court, Lord Keeper Somers, in his celebrated argument in the *Banker's Case* (14 How. St. Tr. 47), says:—"These words of the *Mirror* contain "a short but effectual description of the Court of Exchequer, and "my Lord Chief Justice Coke comments upon and expounds

(1). See Jessop's *Coming of the Friars*; also Pike's *Introduction to the Year Book of Edward III.*

"them in their full extent; nothing falls from him as if this "account were defective, or did include only one part of the "business of the court."

For a period after the segregation of the courts in the manner mentioned, the Great Justiciar was still the head of the whole forensic system; but after the fall of the celebrated Hubert de Burgh, the office became extinct, and each of the three courts acquired a chief or presiding judge of its own. When the office of the Chancellor of the Exchequer was created in the reign of Henry III, the Exchequer was first enabled to enlarge its jurisdiction. The Lord Treasurer, the Chancellor of the Exchequer, the Chief Baron and three puisne Barons formed an equity branch of the court, while the common law branch was administered by the Barons only. (*Vide Black. Com.* Bk. III., p. 44.) In this way the Exchequer was the first court to be endowed with equity jurisdiction in England—the Court of Chancery not being formed as a distinct court until the reign of Richard II. (See *Spence's Eq. Jur.* i, 345; and *Kerly's Hist. Eq.* 5.) This extension of jurisdiction was, of course, solely attributable to the Crown, but it was reserved for the finesse of the lawyers to effectually circumvent the efforts that had been put forth by the reformers of the time to specialize the work of the three courts. As pointed out, the business of the Exchequer on its common law side was originally confined to matters connected with the royal revenue; but after the erection of the court into a separate tribunal, practitioners at that bar conceived that it would be a very convenient thing to transact in the Exchequer business properly coming within the cognizance of the other courts. To accomplish this they devised a writ of *quo minus*, wherein it was alleged that the plaintiff being a debtor of the King, was, by reason of the wrong done to him by the defendant, deprived of the means of satisfying the debt due by him to the Crown, and was obliged to invoke the aid of the Court to recover the same. Thus they succeeded in giving that part of the Exchequer, which was presided over by the Barons, concurrent civil jurisdiction, both in respect of common law and equity, with the other courts between subject and subject, an accession of business which its judges were by no means averse to, as they thereby received a substantial increase in their fees—the system then in vogue for the remuneration of the judiciary.

Until the reign of Elizabeth, the Barons of the Exchequer occupied a much lower status than the judges of the other courts. Indeed they were not necessarily chosen from the legal profession. The Statute of *Nisi Prius*, 14 Edward III, enacted that,

"if it happen that none of the justices of the one bench nor of "the other (Queen's Bench and Common Pleas) come into the "county, then the *Nisi Prius* shall be granted before the Chief "Baron of the Exchequer, *if he be a man of the law.*" But owing to the great increase of litigation brought about by the fiction of *quo minus*, it was found necessary to appoint only lawyers to the Exchequer bench. After the twenty-first year of Queen Elizabeth's reign, the Exchequer judges were chosen from the ranks of the sergeants-at-law. They were styled "Barons of the Coif." As these Barons had not as their predecessors had, served an apprenticeship, so to speak, in the Exchequer, it became necessary to appoint an officer to the court who was able to discharge its purely fiscal business. He was called the *Cursitor Baron*. He had no judicial authority in the Exchequer as a court of law, and his principal function was to inform the Barons of the Coif of the procedure of the court in matters touching the King's prerogative. This office was abolished in 1856. (See Foss's *Judges of England*, Pref. p. viii. and Price's *Law of the Exchequer* p. 78.)

Sir Charles E. Pollock was born in 1823, and died on the 21st of November, 1897. He was the fourth son of the late Chief Baron Pollock. Sir Charles E. Pollock was "the last of the Barons" and the English Bench now, for the first time in six hundred years, is without an occupant bearing this ancient title. He was also the last but one of the renowned and ancient order of Sergeants-at-law. (32 *The Law Journal*, p. 589 et seq.)

Speaking of the character of the Exchequer and its judiciary in the reign of Edward I. and Edward II., Dr. Gneist (*Const. Hist. Eng.* 2nd Ed. Vol. 1, p. 387) says:—"Its members were usually "appointed from among the higher officials of the Exchequer de- "partment from whom it was difficult to eliminate the financial "spirit. Hence it is the more readily conceivable that the reten- "tion of the old method of assigning ordinary pleas to the Exchequer now led to loud complaints. In 5 Ed. I., a royal writ was "addressed to the Barons, which in general terms prohibits them "from dealing with *communia placita*, as being contrary to the "letter of Magna Charta. This was repeated in the statute of "Rutland (10 Edw. I.), with the remark that in this manner the "King's suits as well as those of the people were unduly pro- "tracted. As, however, (probably in consequence of the interest "in the court fees) the rule was often evaded, it was again re- "peated in the *Articuli super Chartas*, 28 Edw.I., and then once "more in 5 Edw. II. In later times the rule was again evaded by "fictions."

Sir Wm. Anson, in his work on the *Law and Custom of the*

Constitution, at p. 413, makes also the following observation with reference to the usurpation of jurisdiction by the Exchequer Court during the period under consideration:—"It was useless to "pass a statute in 1300 forbidding the Exchequer to deal with "common pleas, except in so far as they might touch the King or "ministers of the Exchequer. Fictions were introduced into the "pleadings of each court by which common pleas were brought "within their cognizance, and while each retained its special busi- "ness, and some matters remained special to the Common Bench, "all three courts became, in the fourteenth century, for most "purposes, accessible to all."

But Virgil's apothegm—

> Muta dies variusque labor mutabilis ævi
> Retulit in melius,

applies with especial significance to jurisprudence, and among the earliest achievements in the direction of law reform which mark the present century was the passage of 2 Wm. IV. c. 39, which, amongst other things, abolished the fictitious proceeding by writ of *quo minus* in the Exchequer and established a uniformity of process in personal actions in all the courts of law at Westminster.

Equity business was never satisfactorily discharged in the Exchequer; the procedure was never systematized, and apart from this *crux* to the exact mind of the Chancery lawyer, the Equity side of the Exchequer was so constituted as to render possible the anomaly of a layman deciding the law where judges disagreed. This actually happened in the case of *Naish v. The East Company* (2 Com. 463). This case was tried on the Equity side of the Exchequer in Michaelmas term, 1735, when Sir Robert Walpole was Chancellor of the Exchequer. The court, consisting of Reynolds, C. B., and Carter, Comyns and Thompson, B. B., were divided in their opinions upon the issues, and it became necessary for the Chancellor of the Exchequer to exercise his judicial functions in the matter. Sir Robert was not a lawyer, and possibly no rival of King Solomon in intuitive legal wisdom, but, happily, his logical mind and sound common sense enabled him to determine the case in a way that gave satisfaction to all parties concerned. This was the last occasion when the Chancellor of the Exchequer was called upon to discharge his duties as an Equity judge. In 1841, the ancient equity jurisdiction of the Exchequer between subject and subject, which, as Mr. Kerly says in his recently published *History of Equity* (p. 277), "had be-

"come very ineffective," was transferred bodily to the Court of Chancery by 5 Vict. c. 5.*

It would not be proper to omit brief mention of the Court of Exchequer Chamber in this historical sketch. This court, according to Lord Coke (*Inst.* IV., 110, 119), was originally a tribunal composed of all the judges of England assembled for the decision of matters of law. Lord Campbell (*Lives of Chancellors*, i., 10) says that the Lord Chancellor, in the early days of the court's existence, adjourned cases of great importance before him into the Exchequer Chamber in order to avail himself of the opinions of the whole bench of judges. The Exchequer Chamber was thus, at the start, more of an advisory board for the Lord Chancellor than a court properly so called; but by 31 Edw. I., c. 12, its forensic character was established by making it a court of review for cases decided on the common law side of the Exchequer. Its bench was composed of the judges of the Queen's Bench and Common Pleas. By 27 Eliz., c. 8, it was enacted that the judges of the Common Pleas and Exchequer should form a second Court of Exchequer Chamber for review of a certain class of cases decided in the Queen's Bench. The appellate jurisdiction of the court was further augmented by 11 Geo. IV. and 1 Will. IV., c. 70, sec. 8, which constituted it a court of review for all proceedings in error from the three courts of common law, the judges of two of the courts hearing the appeals coming from the third. The latter enactment also provided that the court should have jurisdiction to review criminal cases on writ of error from the Queen's Bench.

The Court of Exchequer Chamber was abolished and its jurisdiction transferred to the Court of Appeal by the Judicature Act of 1873.

In the year 1842 certain offices on the revenue side of the Exchequer, the history of which is now only of interest

*See Chief Baron Pollock's views upon the effect of this enactment in abolishing the court's equity jurisdiction in purely revenue cases, in *Atty.-Gen. v. Halling*, 15 M. & W., 687. See also Lord Langdale's opinion upon the same question in *Atty.-Gen. v. London*, L. J. N. S. 14 Eq. 305; Lord Cottenham's opinion in the same case in 1 H. L., 461; and the consideration given to the question by Vice-Chancellor Giffard in the *Atty.-Gen. v. Edmunds* in L. R. 6 Eq., 389. See also Chief Baron Kelly's opinion (in which Huddleston, B., concurred) in *Atty.-Gen. v. Constable*, L. R. 4 Ex., Div. 172. For a Canadian Judge's view of the effect of this statute, see the judgment of Chancellor Vankoughnet in *Miller v. Atty.-Gen.*, 9 Grant, 558.

It would appear to be a fair inference to draw from the weight of judicial opinion that the effect of the Act was to transfer from the Court of Exchequer to the Court of Chancery the equity jurisdiction of the former in respect of cases arising between subject and subject only and not in respect of revenue cases.

to the antiquarian (such as those of the sworn and side clerks, the Bag-bearer, etc.), were abolished and the duties thereof transferred to the Queen's Remembrancer in the Exchequer.

By Rule 313 of the Rules of the Exchequer Court of Canada it is provided that, "the Registrar shall have power in revenue "cases to do any ministerial act which the Queen's Remembrancer "in His Majesty's late Court of Exchequer in England could "have done in the same class of cases," and, therefore, a brief account of the character and duties of the Remembrancer's office may be useful here.

As pointed out by Madox (*History of the Exchequer*, Vol. II, pp. 62, 114 and 264) there were originally two Remembrancers in the Exchequer, one called the King's Remembrancer, and the other styled the Treasurer's Remembrancer. Of the King's Remembrancer it may be said generally that he was an officer charged with the duty of reminding the lord-treasurer and judges of the Exchequer of such matters, as came within the scope of the business of the revenue side of the court, which demanded their attention for the benefit of the King. The functions of the Treasurer's Remembrancer were of a similar character, and while the two offices were quite distinct, the difference between their respective duties consisted in distribution rather than in kind. The records kept by the two Remembrancers were called *memoranda* or remembrances, and a remembrance was, "anciently wont to be made for every year in each of the offices," (Madox, ii, p. 114). The Treasurer's Remembrancer's record, or Bundle, as it was styled in the terminology of the Exchequer, comprised process against sheriffs, escheators, receivers, and bailiffs for their accounts, and also entries of *fieri facias* and extent for debts due to the King. The King's Remembrancer's record was made up of entries of all recognizances taken before the Barons of the Exchequer for debts due to the King, of recognizances for appearances in revenue suits and for observing orders of the court, and of all process against collectors of Customs and collectors of royal subsidies, etc.

So far, we have been discussing the functions of the two Remembrancers in matters touching the Royal revenue only; but when we come to consider suits between subject and subject we find there was a more marked distinction between the duties of these officers. The Treasurer's Remembrancer's office was originally the common law side of the court in such cases, while the King's Remembrancer's office was the department where the ministerial proceedings of the equity side of the court in such cases were carried on. (Cf. Price's *Law of the Exchequer*, p. 272).

In the progress of time the machinery of the two departments became too unwieldly for them to be kept distinct, and the office of Treasurer's Remembrancer was abolished and its functions and duties consolidated with those of the King's Remembrancer.

As the business of the Exchequer waxed in volume and complexity, it was found necessary from time to time to re-adjust the powers of the Remembrancer. By certain rules and orders made, about the year 1687, by the Barons of the Exchequer for regulating the practice in the King's Remembrancer's office, the Remembrancer was given power to tax costs, to decide upon irregularities in procedure after hearing the attorneys on both sides, with right of appeal from such decision to the court, and to attend the sittings of the court for the purpose of giving information touching any proceedings therein that might be required. (See *Manning's Exch. Pract.*, 2nd ed., p. 310.) Under the provisions of 7 Anne, c. 20, the Queen's Remembrancer was made, in common with certain officers of the courts of Chancery, Queen's Bench and Common Pleas, a Registrar of Deeds and Wills within the County of Middlesex. By 22 and 23 Vict. c. 21, this function of the Remembrancer was abolished. By the last mentioned Act, provision was made for the office of Queen's Remembrancer being held by one of the Masters of the Court of Exchequer on its revenue side, who was empowered to discharge the duties of both offices. Finally, the Queen's Remembrancer, his historic office and dignity, disappeared under the sweeping reforms introduced in England in respect to legal offices by *The Judicature (Officers') Act of* 1879. By this Act the office of Queen's Remembrancer was, amongst others, concentrated in and amalgamated with the Central Office of the Supreme Court of Judicature, established under such Act. (See *Wilson's Jud. Acts*, 6th Ed., pp. 95, 96.)

The English Court of Exchequer clung most tenaciously to its ancient procedure until well into the present century. So late as 1830, Price, in his *Law of the Exchequer*, (p. IV.), says:—

"It is because the modern practice of the Court of Exchequer "is, in principle and form and substance still so analogous "with the proceedings of the Court in former times, that prece- "dents and usage are in a remarkable degree, with reference to the "primary objects of its jurisdiction, allowed on all occasions to "have greater authority and weight, and are more resorted to and "relied on in this than in any Court in Westminster Hall."

However, by 22 and 23 Vict. c. 21, entitled "*An Act to "regulate the office of Queen's Remembrancer and to amend the "Practice and Procedure on the Revenue Side of the Court of*

"*Exchequer*," several important steps were taken in the direction of reform, and by section 26 thereof the Barons of the Exchequer were empowered to make rules for the purpose of assimilating the pleadings and practice of the Revenue side to those of its Plea side. In the following year the Barons acted upon the authority thus given them, and made a number of rules and forms with respect to such pleadings and practice. They will be found, together with some slight amendments, in 6 *Hurlstone & Norman's Exchequer Reports* at pp. i. to lxii, and 7 *Ibid.*, at p. 505.

By 28 and 29 Vict. c. 104, entitled *The Crown Suits, etc., Act*, 1865, further reforms were made in the procedure of the Court of Exchequer in revenue cases, and under sections 28, 39, 62, power is given to the Barons to make rules for carrying into effect the provisions of the several portions of the Act. By section 22 of Pt. II. of this Act it is enacted that, "the Court shall "be deemed to be a Court of Civil Judicature within the mean- "ing of section 103 of the *Common Law Procedure Act*."

Rules of procedure made under this Act in respect of suits by English Information may be found in L. R. 1 Ex. p. 389.

By the *Supreme Court of Judicature Act*, 1873, secs. 16 and 31, the jurisdiction of the Court of Exchequer as a Court of Revenue as well as a Common Law Court, was vested in Her Majesty's High Court of Justice, the Exchequer becoming one of the divisions of the High Court of Justice, and by section 18, sub-section 4 of the same Act, the jurisdiction and powers of the Court of Exchequer Chamber were transferred to Her Majesty's Court of Appeal.

In virtue of an order of Her Majesty in Council of the 16th December, 1880, which came into force on the 26th February, 1881, the ancient Court of Exchequer disappeared altogether from history, and became, together with the Court of Common Pleas, consolidated with the Court of Queen's Bench under the name of the Queen's Bench Division of the High Court of Justice. (1). This was the result of the legislative measures for re-organizing the courts which began with the Judicature Act of 1873. (2). There is now one Supreme Court of Judicature in England, which is divided into "Her Majesty's High Court of "Justice," and "Her Majesty's Court of Appeal," the former being composed of the Queen's Bench Division, the Chancery Division and the Probate, Divorce and Admiralty Division, the Queen's Bench Division, of course, exercising Exchequer jurisdiction.

(1). Annual Practice, 1893, p. 49.
(2). *Wilson's Judicature Acts, 6th Ed. pp. 2 and 6.*

The Judicature Acts have done a Herculean task in slaying the hydra of technical pleading in England. But with all its radical reforms this *fin de siécle* legislation did not venture to relegate the Crown's prerogative in judicial proceedings to the shades of oblivion, for by Order lxviii, r. 1., it is provided that, save certain matters of practice therein specified, nothing in the whole code of rules shall affect the procedure or practice in any proceedings on the Revenue side of the Queen's Bench Division. (See *Attorney-General v. Barker*, L. R. 7 Ex. 177; *Attorney-General v. Constable*, L. R. 4 Ex. Div., 172; *Chitty's Arch. Prac.* 14th Ed., pp. 10, 203.)

THE EXCHEQUER COURT OF CANADA.

A brief outline of the jurisdiction, in respect of revenue cases, exercised by the courts of the several Provinces, prior to Confederation, will be useful as an introduction to the consideration of the jurisdiction of the Exchequer Court of Canada.

By an Act of the Upper Canada Legislature, 34 Geo. III., c. 2, entitled "*An Act to establish a Superior Court of Civil and "Criminal Jurisdiction and to regulate the Court of Appeal*," it was, amongst other things, enacted that the Court of King's Bench for the Province of Upper Canada should have as full power and jurisdiction to hear and determine causes with regard to the King's revenue as the Court of Exchequer in England.

Under this statute the Court of King's Bench for Upper Canada exercised the ancient jurisdiction, both at common law and in equity, of the English Court of Exchequer. (See *Reg. v. Bonter*, 6 U. C. Q. B. (O. S.) 551).

An instructive case touching the equity jurisdiction of the Court of Queen's Bench in revenue matters is that of *Miller v. The Attorney-General* (9 Grant, 558). In this case the Court of Chancery (per Vankoughnet, C.) declined to entertain a bill, filed by a defendant in a revenue suit at law in which the Crown had judgment, asking for a stay of proceedings on such judgment. The Court held that the equitable relief sought in such a case could only be granted by the Court of Queen's Bench. But Vice-Chancellor Spragge in *Norwich v. The Attorney-General* (9 Grant, 568), a case involving the same question, says, "I "have not considered the general question of jurisdiction, as that "point is *res judicata* by the decision of *Miller v. The Attorney-"General*. It certainly is an anomaly that the equitable jurisdic-"tion in matters of revenue at the suit of a subject in this pro-"vince resides in a court of common law, *if at all*, and not in a "court of equity."

In an earlier case in the Queen's Bench (*The Queen v. Bon-*

ter, supra), Sir John Beverly Robinson, C. J., in delivering the judgment of the Court, says (p. 552):—"We are of opinion that "our statute 34 Geo. III. c. 2 gives to the Court all the jurisdic- "tion, in regard to the collection of debts due to the Crown, that "belongs to the Exchequer in England."

Mr. Vice-Chancellor Spragge's strieture, upon the anomaly of a court of law administering an equity jurisdiction which was denied to the Court of Chancery, would seem to have borne weight with the Provincial Legislature when we examine the Act 28 Viet. c. 17. By section 2 of that statute it was enacted that the Court of Chancery in Upper Canada should have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England then possessed.

After the passing of the last mentioned Act the case of *Rastall v. The Attorney-General* (18 Grant, 138) was decided. This case arose upon a bill filed in the Court of Chancery, by two sureties upon a recognizance for the due appearance of a person arrested upon a criminal charge. The recognizance was prepared as if the accused and his two sureties were to join therein; but the magistrate discharged the prisoner without obtaining his acknowledgment of the recognizance. The accused then fled the country; the recognizance was estreated at the next sitting of the Court of Quarter Sessions for the county, and, it having been entered on the roll of extents, execution was issued thereon, under which the sureties' goods had been seized by the sheriff, who was about to sell them. The bill alleged that the plaintiffs had executed the recognizance upon the understanding that the prisoner was to execute it also, and prayed that inasmuch as he had been released from custody without being required to do so, that the sureties might be declared to be discharged from all liability on the recognizance. The Court of Appeal held that inasmuch as the forfeited recognizance had never been estreated into the Queen's Bench it was not a record of that Court, sitting as a Court of revenue, and, therefore, the powers conferred by statute upon that Court and on the Court of Chancery similar to those possessed by the Court of Exchequer in England in matters of revenue, did not attach upon and could not be exercised in regard thereto.

The opinions of the judges on appeal in the above case, as well as that of Vice-Chancellor Strong in the Court below, are prepared with great research and ability, and, constituting,as they do, a most valuable repository of the law pertaining to revenue matters both in England and the Province of Ontario, will well repay perusal by those interested therein.

In the case of *The Attorney-General v. Walker*, (25 Grant,

233, and 3 Ont. App. 195) it was held that where the Crown seeks to enforce a claim for excise duties fraudulently withheld, proceedings for that purpose may be instituted by the Attorney-General in the Court of Chancery although there are no particular equitable circumstances connected with the demand requiring the interposition of a Court of Equity. Besides deciding a number of questions, a discussion of which is not within the scope of the matter here in hand, the Court of Chancery (Per Spragge, C.) expressed the opinion that the general principle of law that the Crown may choose its own forum must be taken with this qualification, that the course of procedure in the forum chosen is not inappropriate, but is fitted for the hearing and disposition of the suit instituted by the Crown. (1).

By the Ontario Judicature Act (44 Vict. c. 5), the Court of Appeal, and the Court of Queen's Bench, Chancery and Common Pleas were consolidated into the Supreme Court of Judicature for the Province of Ontario. The Supreme Court of Judicature was divided into two permanent parts, i.e., the High Court of Justice for Ontario, and the Court of Appeal for Ontario; the High Court of Justice being in turn subdivided into three divisional courts—the Queen's Bench, Chancery, and Common Pleas. Unlike the English Act, the Ontario Act distinctly makes the High Court and its several Divisions a continuation of the Courts existing at the time of its passage, with merely a new name. (2) (See Holmstead and Langton's Ont. Jud. Acts, pp. 8, 10.) The High Court in each of its divisions administers both a Common law and Equity jurisdiction. By sec. 24 of the Act, as embodied in R. S. O. 1887 c. 44, the High Court is expressly given the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possessed on the 18th day of March, 1865.

This brings us to the end of the legislative enactments regulating the jurisdiction of the courts in Ontario in respect of revenue cases.

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(1). For the views of English judges and text-writers upon this principle of law, see *Cawthorne v. Campbell* (1 Anstr. 205); *Corporation of London v. Attorney-General* (1, H. L. 440); *The Attorney-General v. Allgood* (Parker's Rep. 1); *Baron de Bode v. The Queen*, (13 Q. B. 364); *Lamb v. Gunman* (Parker's Rep. 143); *Pennington's Case* (1 Anstr. 214), *Re Kingsman* (1 Price, 206); *Chitty's Prerog.*, p. 244; *Bacon's Abr. tit. Prerogative.* The principle has also been considered in a recent case (that of *Farwell v. The Queen*), in the Supreme Court of Canada. See the judgment of King, J., in 22 S. C. R., p. 562.

(2). Since then the constitution of these Courts has undergone material changes, and the end is not yet; for at the present moment there is an agitation in progress seeking for a reform of the appellate jurisdiction, with the view of minimizing appeals.

The procedure of these courts in matters of petition of right is briefly referred to in another place.

***For reasons known to all persons familiar with the early history of Canada, the laws of the Province of Quebec differ materially from those of the other provinces of the Dominion.

Preceding the date at which the Colony passed under the British flag, French law prevailed all through Canada. During the first three years of the English period, the administration of justice was left to a purely military Government. This period was afterwards called the "Military Reign."

By a Royal Proclamation of the 7th October, 1763, made under the Treaty of Paris, King George III. provided for the establishment of Courts of Judicature and Public Justice within the Colony for the hearing and determining of all causes as well criminal as civil, according to law and equity, and as near as may be agreeably to the laws of England, with leave to appeal in civil cases, under the usual limitations and restrictions, to the Privy Council in England.

General Murray, who took part in the siege of Quebec in 1759, and who was commandant of the city after its capitulation, was in the year 1763 appointed civil Governor of the Province, and by his Commission was, among other things, empowered to create and constitute such Courts of Judicature as to him seemed fit and necessary. Under an Ordinance passed under his direction on the 17th September, 1764, a Supreme Court of Justice or Court of King's Bench was duly created, having jurisdiction and power to adjudicate according to the laws of England and the Ordinances of the Province.

This system of judicature was maintained until 1774, when, by the passing of the *Quebec Act*, 14 Geo. III., ch. 83 (U. K.) section 8, French law as it obtained in the Province of Quebec between Canadian citizens before the cession was re-established in civil matters; while, by the 11th section, the criminal laws of England were made applicable to the Province. And these laws, as from time to time modified by statute, have remained in force in the Province up to the present day.

By section 2 of 34 Geo. III., ch. 6, Courts of King's Bench for the Districts of Quebec and Montreal were constituted and such Courts were given "original jurisdication to take cognizance "of, hear, try and determine.....all causes, as well civil "as criminal and where the King is a party.....etc., "etc."

The next step of importance in the way of legislation affecting the courts, was the *"Act to amend the laws relating to the*

"*Courts of Original Civil Jurisdiction in Lower Canada*, (12 Vict. ch. 38) by which the Court of Queen's Bench was abolished and the Superior Court for the Province constituted and (sec. VI.) given, with certain exceptions therein specified, "original civil "jurisdiction throughout Lower Canada with full power and "authority to take cognizance of, hear, try and determine in the "first instance and in due course of law, all civil pleas, causes and "matters whatsoever, as well those in which the Crown may be a "party, etc., etc."

The several Courts of justice now having jurisdiction in the Province of Quebec are regulated by Art. 2289 of the Revised Statutes of the Province of Quebec.

The laws of the Province of Quebec in civil matters in force at the present day are mainly those which, at the time of the cession of the country to the British Crown, obtained in that part of France then governed by the Custom of Paris, as modified, however, by provincial statutes, or by the introduction of portions of the law of England in particular cases, and are to be found in the Civil Code of Lower Canada made in pursuance of 29 Vict. ch. 41.

The procedure of the Courts in civil matters is also regulated by a code founded upon and following the general lines of the Ordinance of 1667, which governed the procedure of the courts in France at the time of the cession.

In the case of *The Attorney-General v. Black*, decided in the King's Bench in 1828 (Stu. R. 324), it was held that where the greater rights and prerogatives of the Crown are in question, recourse must be had to the public law of the Empire by which alone they can be determined; but where its minor prerogatives and interests are in question they must be regulated by the established law of the place where the demand is made. Since Confederation, some decisions to the same effect have also been rendered by the courts of the Province, namely:—*Monk v. Ouimet* (19 L. C. J., 71) which decided that the privilege of the Crown to take precedence in respect of its claims over those of private creditors, being one of the minor prerogatives, is to be governed by the law of Canada derived from France and not by the law of England. In this case the court was also of opinion that the Ordinance of August, 1669, was not the origin of the legal hypothec of the Crown in France upon the property of its officers, *comptables*; but that such privilege existed there by the judisprudence of the country before the creation of the *Conseil Supérieur* in 1663. See also upon this point the case of *The Queen v. Bank of Nova Scotia*, 11, S. C. Rep. 1. In the case of *The Attorney-General of Quebec v. The Attorney-General of Canada*, (2 Q. L. R., 236)

the decision was to the effect that an escheat is one of the sources of revenue which, as a minor prerogative of the Crown, was, prior to 1867, vested in the respective provinces now confederated into the Dominion of Canada. This case is also an authority for the proposition that all territorial Crown rights and privileges possessed by the late Province of Canada, Nova Scotia and New Brunswick before the Union have been, by *The British North America Act*, 1867, given to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick. The able opinions of the judges of the Queen's Bench in this case will repay careful examination. (1).

Another case of some importance dealing with the rights of the Crown in the Province of Quebec is that of *The Exchange Bank of Canada v. The Queen*, (11 App. Cas. 157), in which the question raised was whether the Crown, being an ordinary creditor of a bank which has been put in liquidation, had any priority or privilege over other creditors in respect of a debt due by such bank. On appeal to the Judicial Committee of the Privy Council from the Court of Queen's Bench (Appeal Side) for Lower Canada, it was held that the Crown is bound by the two codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors. Prior to the codes, the law relating to property in the said Province was, except in special cases, the French law, which only gave the King priority in respect of debts due from "*comptables*,"—that is, officers who received and were accountable for the King's revenues. (a).

Article 1994 of the Civil Code must be construed according to the technical sense of "*comptables*," and Article 611 of the Code of Civil Procedure, giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the legislature was that in the absence of any special privilege, the Crown has a preference over unprivileged chirographic creditors for sums due to it by a defendant being a person accountable for its money. (b.)

*** Some years elapsed after the Treaty of Utrecht, before England began to recognize the fact that the Province of Acadia,

(1). For the opinion of the Privy Council upon a cognate question arising in the Province of Ontario, see *Mercer v. The Attorney-General of Ontario*, (8 App. Cas. 767).

(a). See also *Maritime Bank v. Rec. Gen. of New Brunswick*, [1892] A. C. 437; and *Maritime Bank v. The Queen*, 17 S. C. R. 657.

(b). See now *The Bank Act*, 53 Vict., ch. 31, sec. 53.

or Nova Scotia, was of considerable military and commercial importance. It was not until 1749 that the Lords Commissioners for Trade and Plantations entered upon a policy of colonization for the Province. (*See* the "Proposals of the Lords Commission-"ers to His Majesty for the Introduction of British Settlement "and of Civil Government in the Province of Nova Scotia," dated 7th March, 1749, in Houston's *Const. Doc. of Can. p.* 7.) In the Commission issued to Governor Cornwallis on the 6th of May, 1749, power was given him, with the advice and consent of Council, to constitute and establish "Courts of Judicature and "Public Justice for the hearing and determining of all causes, as "well criminal as civil, according to Law and Equity." From 1749 to 1754 the general jurisdiction over criminal causes was exercised by the Governor and Council who sat under the name of the General Court, a sort of provincial *Curia Regis*. (*See* Murdoch's *Ep. N. S. L. III., p.* 53). In 1754 this jurisdiction and the records of the court were transferred to the Supreme Court, which had been created under the powers conferred upon the Governor by his Commission.

In the early days of the Colony, by the terms of the Royal Commission and instructions, the Governor for the time being always acted in the capacity of Chancellor of the Province. (*See Murdoch's Ep. N. S. L. IV., p.* 44.) But in 1826, by the Provincial Act, 7 Geo. IV. c. XI., provision was made for the appointment of a Master of the Rolls, and upon the nomination of the Honourable Simon Bradstreet Robie to that office equity business became systematized.

By sec. 1 of chapter 126 of *The Revised Statutes of Nova Scotia*, 1st Series (1851), it was provided that "The Supreme "Court shall have within this province the same powers as are "exercised by the Courts of Queen's Bench, Common Pleas, and "Exchequer in England." In 1855 the provincial Court of Chancery was abolished and its jurisdiction transferred to the Supreme Court, and by 23 Vict. c. 32, sec. 1 (1860) it was provided, that "in all causes in the Supreme Court, in which matters of law and "equity arise, the Court shall have power to investigate and de-"termine both the matters of law and equity, or either, as may be "necessary for the complete adjudication and decision of the "whole matter, according to right and justice, and to order such "proceedings as may be expedient and proper." Thus, it will be seen that this enterprising little Province forestalled the Mother country in consolidating the law and equity jurisdiction of the courts by some thirteen years. In view of these enactments there can be no doubt that the Supreme Court of Nova Scotia

after 1860 had all the jurisdiction of the Exchequer and Chancery Courts in England in respect of revenue cases within the Province.

The most important revenue case to be found in the Nova Scotia Reports is that of *Uniacke v. Dickson* (James, 287) decided in 1848. In this case the Supreme Court of Nova Scotia had to consider the question of the application to the Province of the statutes 33 Hen. 8, c. 39 and 13 Eliz. c. 4, which gave the Crown a lien upon the real estate of certain public officers as a security for the fulfilment of their bonds, and they decided, quite contrary to the view held by the Supreme Court of New Brunswick in *The King v. Morse*, *The King v. McLaughlan*, and other cases referred to *infra*, that the former statute (as well as the latter) was not in force in the Province of Nova Scotia. The *ratio decidendi* of the case is, that, in general, the revenue laws of England are not applicable to the Province of Nova Scotia except in so far as the Provincial Legislature has seen fit to adopt their provisions; that the whole of the English Common Law will be recognized as in force there, excepting such parts as are obviously inconsistent with the circumstances of the country; while on the other hand none of the Statute Law will be received except such parts as are obviously applicable and necessary.

The Vice-Admiralty Court for the Province of Nova Scotia had jurisdiction in revenue matters conferred upon it by Imperial Statutes.

By the Act, 49 Geo. III, (U. K.), c. 107, it was enacted that "all penalties and forfeitures which may be incurred in the "British Colonies under any law relative to trade or revenue, may "be prosecuted or sued for in any Court of Record or Vice-"Admiralty Court, etc." In *The Providence* (Stew. 199) it was held that under this Act the Vice-Admiralty Court at Halifax had jurisdiction to decree forfeiture of goods under 12 Car. II. c. 18, s. 2.

For instructive opinions as to the extent of the general jurisdiction of the Nova Scotia Vice-Admiralty Court, reference is directed to *The Neustra Senora Del Carmen* (Stew., p. 83) and *The City of Petersburg* (1 Old., 814).

*** The question of Exchequer jurisdiction in the Province of New Brunswick has received considerable attention from some of the able judges who have sat upon its Supreme Court Bench.

The Supreme Court of New Brunswick was organized by virtue of the Royal Commissions issued to the judges and not by statute.

By the Commission issued by King George III. on the 25th November, 1784, to the Honorable George Duncan Ludlow, the first Chief Justice of the Province, he was empowered to hear, try and determine "all pleas whatsoever, criminal and mixed, "according to the laws, statutes and customs of that part of Our "kingdom of Great Britain called England, and the laws of Our "said Province of New Brunswick, not being repugnant thereto; "and executions of all judgments of Our said Court to award, and "to act and do all things which any of Our justices of either "bench or Barons of the Exchequer in England may or ought to "do."

The question of the extent of the Exchequer jurisdiction exercisable by the Supreme Court of the Province was, it seems, first considered in the unreported case of *The King v. Morse*, (East. Term, 1826). There it was held that the Supreme Court exercising, by the commissions of its judges, the power of the Barons of the Exchequer in England, had authority to relieve against estreated recognizances under the statute 33 Hen. VIII, c. 39 (1). The same statute was also pronounced upon in a similar way in the unreported case of *The King v. McLaughlan*, (Mich. Term, 1830). (See Stevens *Dig. N. B.*, pp. 412, 1179). The earliest reported case which discusses this question appears to be that of *The Queen v. Appleby*, (Berton's Rep., p. 397). In this case the court decided, as was held in the two earlier cases mentioned, that the statute referred to applies to the Province of New Brunswick. In the course of his judgment, Chipman, C. J., says:—(p. 408) "Whether the jurisdiction, "in matters actually relating to Crown debts, which is exercised "on the *equity* side of the Court of Exchequer—in proceedings on "which side of the Court it seems that the *Chancellor of the "Exchequer* is still deemed and named as one of the judges— "(*Price's Ex. Prac. p.* 39; *Wall et al., v. The Attorney-General*, "11 Price, 643) can be exercised by this Court, it is not necessary "now to consider. There could never be any pretence for this "Court holding the jurisdiction which the Court of Exchequer in "England, either on the common law or equity side, exercises by "fiction in cases between subject and subject. It seems to me to "be clear that the matter with which we are now dealing would, "by virtue of the statute 33 Hen. VIII. c. 39, be within the "jurisdiction of the Barons of the Exchequer in England sitting "*on the common law side of the Court*, and, therefore, I conceive, "without any question, falls within our jurisdiction by virtue of

(1). This statute has been held by the Supreme Court of Nova Scotia not to apply to that Province. (See *ante* p. 57).

"our Commissions as judges of this Court. I feel great satisfac-
"tion that the careful and anxious attention which I have
"bestowed upon this subject has conducted me to this result, be-
"cause it is in unison with the conclusion to which this Court came
"upon a similar question, although without all the light now be-
"fore us, in the case of the estreated recognizance of *Rex. v. Morse,*
"*et al.,* (East Term, 1826) and because I consider it to be a most
"beneficial authority for us to possess, and, in the words of one of
"the Barons in *Ex parte Williams,* (8 Price, 3), 'it would be quite
"lamentable if we were without it.' "

In the case of *The Attorney-General v. Baillie,* (1 Kerr, 443), decided in 1842, an information was filed on the Exchequer side of the Supreme Court against the defendant, the Commissioner of Crown Lands for the Province charging him with having, in such capacity, received large sums of money in respect of Crown lands, amongst other things, which he had not accounted for, and praying the court to direct the defendant to account for the same under oath. The usual process as in like cases in England was prayed for by the information. The Court declined to entertain the information on the ground that being exclusively a Court of Common Law it did not possess the jurisdiction of the Equity side of the Court of Exchequer in England even in revenue cases. Chipman, C. J., in delivering the judgment of the court, said:—"Reliance is placed on the following clause of
"the Commission, (to Chief Justice Ludlow) to act, and to do
"all things which any of our Justices of either Bench or Barons
"of the Exchequer in England may or ought to do. But the
"acts and doings here authorized, must be in relation to the
"pleas which the court is empowered to hear, try and determine.
"And the power of the Barons of the Exchequer, which this
"clause of the Commission conveys, must be confined to the
"judicial powers exercised by them in the Common Law Court
"of Exchequer where they are the sole judges, and cannot be
"stretched to include powers which they exercise in another
"court, in conjunction with other judges, especially powers of a
"Court of Equity, which are altogether distinct from and foreign
"to the powers known to the Common Law. If it had been in-
"tended to clothe this Court with a power to hold pleas in Equity,
"a power so remarkable annexed to a Court of Common Law
"would never have been left to be inferred from the obscure im-
"plication, but would have been openly expressed....."

"Then it is said that this Court has actually, from the
"beginning of its existence, exercised the powers of the Court of
"Exchequer in England. But the only powers which this Court

"has exercised, are those incident to the Court of Exchequer as a "Court of Common Law. Informations of debt and intrusion, "Commission to find the King's debts, *scire facias* on bonds, "and extents, are all proceedings on the Common Law side of the "Exchequer, in which the subject has opportunity to plead "according to the course of the Common Law, and to have issues "of fact tried by a jury. Even the power to afford relief in cases "of forfeited recognizances, which the Court has exercised, was "sustained expressly on the ground that this was a power "exercised by the Barons of Exchequer in England, in the "Common Law branch of the Court. (*The Queen v. Appleby*, "Berton, 397). The present, as I stated at the outset, is the first "instance in which it has been attempted to attribute to this "Court the powers of the Court of Equity in the Exchequer "Chamber. The Court has no officers nor organization fitted for "the exercise of such powers. I think it is clear that it does not "possess them. I am, therefore, of opinion that the information "now before us cannot be entertained. The Crown is not "without remedy. It was stated to us on the argument that the "Attorney-General had already filed a Common Law information "in this case. The debt may also be found under a Commission. "If the powers of a Court of Equity are necessary for the "assertion of the Queen's rights, why may not the Attorney-"General proceed in the Court of Chancery?

Wilson v. Briscoe (2 Allen, 535) decided in 1853, was a case where a summary action of trespass was brought in the Mayor's Court for the City of St. John against the defendants for seizing goods in their capacity as revenue officers. The Attorney-General moved the Supreme Court for an order for the removal of the action into that court, sitting as a Court of Exchequer, upon the ground that the action involved the rights and revenues of the Crown. The court made the order. In delivering the judgment of the court, Carter, C. J., said:—"The application is "resisted, first, on the ground that this Court does not possess the "jurisdiction by which the Court of Exchequer in England "entertains such applications. We have no doubt that the "jurisdiction so exercised emanates from the plea side of the "Court of Exchequer, and that this court possesses the jurisdic-"tion of the plea side of the Court of Exchequer. The second "objection was that no question affecting the revenue is in-"volved; but from the statements of the Attorney-General "and the affidavit read, we think questions affecting the "revenue may arise. The third objection was that these being "summary actions cannot be removed under the Act 12 Viet.

"c. 40, s. 13. That section only, however, forbids the removal "by *habeas corpus or certiorari*, neither of which means of "removal are now sought. The fourth objection is that the "notice of a motion states that a "writ" will be moved for, "whereas the Attorney-General now asks for an order. There "can be little force in the objection; but if there be anything in "it, the difficulty might easily be removed by adopting the "original practice of the English Court of Exchequer and granting "a 'writ' of *supersedeas*, to which the objection would not apply "here, which led to the change of practice in England."

*** The Royal Commission issued in 1769 to Walter Paterson, Esquire, first Governor of the Province of Prince Edward Island (then called the Island of St. John), empowered him, by and with the consent of the Council, to erect, constitute and establish such and so many "Courts of Judicature and Public Justice" within the Island as he and they should see "fit and necessary for the "hearing and determining of all causes, as well criminal as civil, "according to Law and Equity, and for awarding execution "thereupon with all reasonable and necessary powers, authorities, "fees and privileges belonging thereto."

The Commission further gives "full power and authority to "constitute and appoint judges, and, in cases requisite, Commis- "sioners of Oyer and Terminer, Justices of the Peace, Sheriffs, "and other necessary Officers and Ministers in our said Island, for "the better administration of Justice, and putting the laws in "execution, and to administer or cause to be administered unto "them, such Oath or Oaths as are usually given for the due "execution and performance of offices and places, and for the "clearing of truth in judicial cases."

This Commission is printed, *in extenso*, in the Dominion Sessional Papers, Vol. 16, No. 70 (1883). A communication from Mr. Arthur Newbery, Assistant Provincial Secretary, to Lieut.-Governor Haviland, also printed at length there, states that he had searched the records of the Province, and, with the exception of the above mentioned Commission to Governor Paterson, he could find no document on file relating to charters or constitutions granted to the Province by the Crown, nor could he find the instructions referred to in such Commission.

The jurisdiction of the Supreme Court of the Island, like that of New Brunswick's Supreme Court, was created under Royal Commission to the judiciary instead of by provincial legislation. John Duport was appointed the first Chief Justice of the Island on the 19th September, 1770, and it is proper to assume that by his Commission the Court over which he was to preside

was clothed with a jurisdiction substantially identical with that given some years later to the Supreme Court of New Brunswick, under the Commission to Chief Justice Ludlow of that Province. Certain it is that no time was lost by Governor Paterson and his Chief Justice in establishing Courts of Judicature for the Province, for by the second Act passed by the first Legislature convened in the year 1773, all proceedings in the courts of the Province prior to that date were confirmed.

By the Provincial Revenue Act, 25 Geo. III., c. 4 (1785) it was provided (sec. 29) that all causes or trials for forfeitures and penalties inflicted in respect of breaches of such Act might be commenced and prosecuted in any of His Majesty's Courts of Record in the Province. Sec. 34 provided that either of the parties to a revenue suit who might be dissatisfied with the judgment of an inferior court might appeal to the Supreme Court. By the Provincial Revenue Act, 19 Vict. c. 1, sec. 90, the Supreme Court was empowered to issue Writs of Assistance to Customs' officers. This power is now exercisable by the Exchequer Court of Canada.

*** Under the Act of the United Kingdom, 12 and 13 Vict., c. 48, and the Order of the Queen in Council of the 4th April, 1856, the Supreme Court of Civil Justice of Vancouver Island was created. The order in council gave the Supreme Court full power and authority to make rules and forms of practice, process and proceedings to correspond, as nearly as possible, with the rules and forms in use in Her Majesty's Supreme Courts of Law and Equity at Westminster. The Supreme Court was also given by this Order, "full power, authority and jurisdiction to apply, "judge and determine upon and according to the laws then and "thereafter in force within Her Majesty's said Colony." A very full account of the creation of this court is given in Mr. Justice Crease's judgment in the famous *Thrasher Case* (1 B.C.L.R., 189 et seq.). Speaking of the Commission of David Cameron, Esquire, the first Chief Justice of the Court (at p. 194), he says:— "Chief Justice Cameron's commission and jurisdiction were very "full, and covered all matters whatsoever, criminal and civil. A "reference to the Act and Order in Council will show that the "powers of the Court and the judge thereof were as ample as "could be made. And these were sent out ready made, direct "from the Imperial Government, so that the Court was not "constituted by the Colony, and a *fortiori* not by a subordinate "province of a Colony." The remark, in the concluding portion of this excerpt from the learned judge's opinion, was evoked by the contention put forward by Counsel in argument that the

Supreme Court of Vancouver Island was originally created by a Provincial Ordinance. By an Ordinance of 8th June, 1859, (*B. C. Con. Stat.* 1877, *Cap.* 51), this court was styled "The Supreme Court of Civil Justice of British Columbia," and was given "complete cognizance of all pleas whatsoever," and vested with "jurisdiction in all cases, Civil as well as Criminal, arising "within the said Colony of British Columbia." It is proper to mention here that in the opinion of Mr. Justice Crease, expressed in the *Thrasher Case*, (1 B. C. L. R., 194) by the Proclamation (having the force of law) dated the 19th November, 1858, so much of the Statute Law of England as was not inapplicable was introduced into the Colony as well as "*all* the common "law (if any) as had not been brought in, as their natural "heritage, by the colonists themselves when they settled in the "country." By the Ordinance made after the union of the Island with the Mainland, on 6th March, 1867, (*Con. St. B. C.* 1877 *c.* 103) this proclamation was however repealed and the civil and criminal laws of England, as they stood on the 19th November, 1858, were, so far as applicable, and saving modification by previous provincial legislation, brought into force in the whole Province of British Columbia. This, of course, comprehends both substantive law and procedure.

The jurisdiction of the Supreme Court of Civil Justice for British Columbia was added to from time to time during the period which elapsed between its creation and the union of British Columbia with the Colony of Vancouver Island. When that event was consummated, the court was possessed of full and complete jurisdiction in respect of Common Law, Equity, Probate, Divorce, Bankruptcy, and Admiralty.

Some three years after the union of the Island and the Mainland, an Ordinance was passed, dated 1st March, 1869, (*Con. St. B. C.*, 1877, *c.* 53) altering the names of the Supreme Courts therein to "The Supreme Court of Vancouver Island," and "The Supreme Court of the Mainland of British Columbia," respectively. Provision was also made for the ultimate merger of the two courts into one, and on the 9th March, 1869, an Ordinance (*Con. St. B. C.*, 1877, *ch.* 104) was passed, declaring that the "Common Law Procedure Act, 1852," the "Common Law Procedure Act, 1854," the "Common Law Procedure Act, 1860," (with the exception of sections 104 to 115, both inclusive, of the "Common Law Procedure Act of 1852") and the rules of practice and pleading made in pursuance of the said Acts should, so far as the adoption of them was practicable, regulate the practice and procedure of each and every of the Superior

Courts of this Colony in all actions and proceedings at law. It was further provided that the several statutory enactments regulating the practice, pleadings and procedure of the High Court of Chancery, in force on the 14th day of February, 1860, and the several orders and regulations in force in the said High Court on the said 14th day of February, 1860, should, so far as practicable, regulate the proceedings of the said courts, and each of them, sitting in equity.

By section 1 of the "*Courts Merger Ordinance*, 1870" (being Cap. 54 of the *Consol. Stats. of B. C.*, 1877) it was enacted that "the merger of the Supreme Court of the Mainland of British "Columbia and the Supreme Court of Vancouver Island into the "Supreme Court of British Columbia, under the "Supreme Courts "Ordinance, 1869," shall be deemed and taken for all purposes "whatsoever to have taken place as from the 29th day of March, "A. D. 1870, and shall be so recognized in judicature, and there- "out, in all proceedings, matters and things by all persons and "for all purposes whatsoever."

Thus, as has been said by a writer in *The Canada Law Journal* for January 16th, 1882 (p. 28), the Supreme Court of British Columbia, is "no mushroom tribunal, but an old and "honoured court of Imperial statutory creation and descent, and "heir of all the powers, authorities and jurisdiction of the "Supreme Courts of the Colony in all pleas civil and criminal "whatsoever arising within it."

*** Although established since Confederation mention may be made *en passant* of the revenue jurisdiction of the courts of the Province of Manitoba. The Court of Queen's Bench for that Province was created in 1872, (35 Vict. c. 3). By an Act of the Provincial Legislature in 1874 (c. 12), it was provided that the said court should decide and determine all matters of controversy relative to property and civil rights, according to the laws existing or established and being in England on the 15th July, 1870, so far as applicable to such matters in the Province. It was also provided that the Court of Queen's Bench should have and exercise all the jurisdiction, both civil and criminal, as was exercised on the date mentioned by Her Majesty's Supreme Courts of Common Law at Westminster or by the Court of Chancery at Lincoln's Inn, in England.

*** It is not within our present purpose to discuss the jurisdiction of the Courts of the North West Territories, the new provinces of Saskatchewan and Alberta, in respect of revenue cases, as such courts were constituted since the establishment of the Exchequer Court of Canada.

*** Having examined at as great length as space would permit the Exchequer jurisdiction of the courts of the several provinces for the purpose before mentioned, we now come to a consideration of the jurisdiction of the Exchequer Court of Canada.

In the year 1875 the Supreme and Exchequer Courts of Canada were created by the Act. 38 Vict. c. 11. By section 58 it was enacted that:—

"The Exchequer Court shall have and possess concurrent "original jurisdiction in the Dominion of Canada, in all cases in "which it shall be sought to enforce any law of the Dominion of "Canada relating to the revenue, including actions, suits and "proceedings, by way of information, to enforce penalties and "proceedings, by way of information *in rem*, as well in *qui tam* "suits for penalties or forfeitures as where the suit is on behalf of "the Crown alone; and the said Court shall have exclusive "original jurisdiction in all cases in which demand shall be made "or relief sought in respect of any matter which might in "England be the subject of a suit or action in the Court of "Exchequer on its revenue side against the Crown or any officer "of the Crown."

By section 59, the Exchequer Court was given concurrent original jurisdiction with the courts of the several provinces "in "all other suits of a civil nature at common law or equity, in "which the Crown in the interest of the Dominion of Canada is "plaintiff or petitioner."

By section 4 it was enacted that the Chief Justice and Judges of the Supreme Court of Canada should be, respectively, the Chief Justice and Judges of the Exchequer Court of Canada.

When the Bill to constitute these federal courts was introduced into Parliament, by the Attorney-General (afterward Mr. Justice Fournier of the Supreme Court of Canada), some opposition to its passage was encountered at the hands of several legal members of the House who were apprehensive that the new courts might lessen the sphere of action of the provincial courts and depreciate their authority. Especially was this objection urged against the creation of a federal Court of Exchequer. Mr. Palmer (St. John, N.B.,) said, (Hans., 1875, p. 738):—"The clauses (of the Bill) "from 58 to 62 which had reference to the Exchequer Court were "entirely unnecessary. A grave mistake had been made in "making provision in the Bill for such a court. He believed "there was ample jurisdiction in the courts of the different "Provinces for deciding Exchequer cases, and for dealing with "them more conveniently and at less expense than before the "proposed court."

Mr. Irving (Hamilton, Ont., now Sir Æmelius Irving), objected to the establishment of a Court of Exchequer largely upon the ground that it would introduce a new practice into the country just at a time when there was a desire to break down differences in practice and have uniformity of procedure. (See Hans., 1875, p. 746.) Mr. Moss (West Toronto), who was in favour of the Bill, at p. 751 of Hans., 1875, said:—"One objection made was that the "Bill would cause a change in the practice prevailing in the "different provinces, and no lawyer liked to change the practice. "But there was a tangible advantage to be gained in securing a "similarity of practice in the Exchequer business. That was a "class of business that particularly pertained to the Dominion; it "was a branch in which the principles of the law were the same "in all the provinces, and, therefore, it was desirable to secure "uniformity of practice which could be best obtained by trans- "ferring this branch of business to the court which would be "known as the Court of Exchequer."

The Attorney-General in introducing the Bill, said:—"The "Bill also provided for the creation of a Court of Exchequer. "Some objection has been made to one of the Bills presented by "the honourable member for Kingston (Sir John A. Macdonald) "for the reason that it gave to the Court of Appeal an original "jurisdiction. He would avoid that difficulty by creating two "courts, one of appellate jurisdiction—the Supreme Court of Ap- "peal—and another, a tribunal of the first instance, composed of "the same members, but being a totally different court. There "was ample authority for adopting that course, and he found it "in clause 101 of the Constitution (The B. N. A. Act)....." "The measure was certainly of the greatest importance. It had "been mentioned in the Speech from the Throne four times, "and this was the third Bill that had been submitted to the "House. Everyone admitted that it was very important that the "Federal Government should have an institution of its own in "order to secure the due execution of its laws. There might, "perhaps, come a time when it would not be very safe for the "Federal Government to be at the mercy of the tribunals of the "Provinces..... Everyone, he believed, would ad- "mit that it was not a party measure, and think it his duty to "assist in carrying a good law which had for its sole object the "harmonious working of our young Constitution." (See Hans., 1875, pp. 285, 288.)

The bill passed its third reading by a large majority of votes.

The wisdom, from a federal point of view, of establishing such a court as the Exchequer in Canada is made manifest by the large volume of important revenue business it has discharged since the year 1875 with the most satisfactory results; and the best refutation of the fears expressed by members of the House that its operation would be regarded with a jealous eye by the provincial authorities lies in the fact that some of the provincial legislatures have passed enactments giving the Exchequer Court of Canada jurisdiction in certain cases between such provinces and the Dominion, and in certain matters of controversy which may arise between any two of such provinces.

By the Acts 42 Vict. c. 8, s. 2 and 44 Vict. c. 25, s. 40, the Exchequer Court of Canada was given appellate jurisdiction in all cases of arbitration arising under the "Act respecting the Official Arbitrators" (R. S. C. ch. 40) when the claim exceeded in value the sum of $500.

In the year 1887, in virtue of the Act, 50-51 Vict. c. 16, the Chief Justice and Judges of the Supreme Court ceased to be Judges of the Exchequer Court, and provision was thereby made for the appointment of a single judge for such court. By this Act the jurisdiction of the court was also very materially enlarged. The Board of Official Arbitrators was abolished, the Arbitrators becoming Official Referees of the court, and the jurisdiction exercisable by them under chapter 40 of *The Revised Statutes of Canada* being vested in the Exchequer Court.

Great inconvenience had been experienced in prosecuting claims before the Official Arbitrators. The Board was composed of four members residing in different parts of the Dominion, and as they had to travel long distances for the purpose of adjudicating upon claims, it was found that the system was attended with considerable expense and difficulty in getting the Board together. Besides this disadvantage in proceeding before the Arbitrators, there was the further objection that they were laymen, and consequently lacked a knowledge of legal procedure, which is so essential to the prompt discharge of business and the saving of expense before tribunals dealing with such a class of cases as those coming before the Board.

By section 58 of 50-51 Vict. c. 16, it is provided that whenever in any Act of the Parliament of Canada, or in any Order of the Governor in Council, or in any document, it is declared that any matter may be referred to the Official Arbitrators acting under the "Act respecting the Official Arbitrators," or that any powers shall be vested in, or duty shall be performed by such Arbitrators, such matters shall be referred to the Exchequer Court,

and such powers shall be vested in, and such duties performed by it; and wherever the expression "Official Arbitrators" occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

By the Act 50-51 Vict., c. 16, a remedy was given to the subject against the Crown in certain cases arising out of the negligence of its officers. Provision was also made for the reference of claims to the court by the Heads of the several Departments of the Government as the alternative of proceeding by petition of right. Under this Act the court has also concurrent jurisdiction with the provincial courts in several specified cases, among them being cases in which it is sought, at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention, or any patent, lease, or other instrument respecting lands. An appeal to the Supreme Court of Canada from the judgment of the Exchequer Court was provided for in cases in which the actual amount in controversy exceeds $500. This statute, with its amendments, will be found in the later portion of this book.

By the Act 52 Victoria, c. 38, the Exchequer Court Act of 1887 was amended in respect of the reference of cases by the court, to the Registrar, Official Referees and Special Referees. This Act also empowered the court to call in the aid of specially qualified assessors when it may be found expedient so to do in any case before the court. Provision was also made for the making of General Rules and Orders by the Judge of the Exchequer Court to regulate the practice and procedure of the court, as well in cases arising under *The Exchequer Court Act* as under any statute giving jurisdiction to the court; for fixing the amount of costs and fees to be taxed in Exchequer cases, and for defining the rights and duties of the officers of the court. An important provision of this Act is one enabling the Crown, in cases where lands are injuriously affected by the construction of a public work, and where the injury may be removed in whole or in part by an alteration or addition to the work in question, to undertake, in the pleadings or at the trial, to make such alteration or addition; and in such a case the damages are to be assessed in view of the undertaking. Another provision of this Act enables the Minister of Finance and Receiver-General to pay to any person entitled by the judgment of the court to any moneys or costs, interest thereon at a rate not exceeding four per cent. from the date of such judgment until payment.

By the Act 53 Vict., c. 35, the 51st section of the Act 50-51 Vict., c. 16, respecting appeals from the Exchequer Court to the Supreme Court of Canada, is repealed and new provisions enacted

in lieu thereof. This Act will be found *post*.

By the Act 54-55 Vict., c. 26, a wide jurisdiction in cases arising upon conflicting applications for any Patent of Invention or for the registration of any Copyright or Trade-mark, and in proceedings to impeach or annul the same was given to the Exchequer Court. It also gave the court concurrent original jurisdiction with the provincial courts where a remedy is sought respecting the infringement of any Patent, Copyright and Trade-mark. Sec. 6 gives the Attorney-General of Canada the right to apply to the court for an interpleader issue when the Crown or its officer is under liability for any debt, money, goods, or chattels in respect of which the Crown or its officer may be sued or proceeded against by two or more persons making adverse claims thereto, and where Her Majesty's High Court of Justice in England could, at the time the Act came into force, grant such relief to any person applying therefor in the like circumstances. By 53 Vict., c. 13 (as amended by 54-55 Vict., c. 33) the Exchequer Court is invested with the jurisdiction in cases for forfeiture of patents of invention theretofore exercised by the Minister of Agriculture, and the court is further given concurrent jurisdiction with the provincial courts in proceedings for the impeachment of patents. By 54-55 Vict., c. 35, the Minister of Agriculture is empowered to refer any matter in dispute touching the registration of a trade-mark to the Exchequer Court, to be therein heard and determined. By the same Act the court is given jurisdiction for making, expunging or varying any entry in the register of trade-marks; for the rectification of the register, as well as for the alteration of a trade-mark; furthermore the court is given jurisdiction for making, expunging or varying any entry in the register of industrial designs, and for adding to, or altering, any industrial design. By 53 Vict., c. 12 (as amended by 54-55 Vict., c. 34) the Exchequer Court was endowed with jurisdiction in cases arising upon conflicting claims to copyrights. These statutes, with their amendments, will be found in a subsequent portion of this work.

By *The Admiralty Act*, 1891, it was enacted (sec. 3) that "the Exchequer Court of Canada is and shall be, within Canada, "a Colonial Court of Admiralty, and as a Court of Admiralty "shall, within Canada, have and exercise all the jurisdiction, "powers and authority conferred by the said Act (*The Colonial "Courts of Admiralty Act* [*U.K.*] 1890), and by this Act." By sec. 5, power was given to the Governor in Council to constitute Admiralty Districts in Canada; and (by sec. 6) to appoint Local Judges in Admiralty for such districts. Both these requirements

of the statute have been fulfilled. These two Acts, with the Rules regulating the practice and procedure in the Exchequer Court on its Admiralty side, will be found in the appendix to the first edition of this book.

PETITION OF RIGHT.

The unanimity with which English jurists declare their ability to see in the famous clause of Magna Charta:—"*Nulli "vendemus, nulli negabimus aut differemus rectum vel justitiam*" —the origin of the petition of right of to-day, does perhaps more credit to their patriotic zeal than to the acuteness of their critical vision. In the formative period of English jurisprudence, the maxim *Ubi jus, ibi remedium* was not always applicable. It was one thing to obtain the recognition of a right, and quite another thing to possess the means of securing its observance.

It would appear to be beyond dispute that petition of right was not known until more than half a century after the Great Charter was wrested by the English nobles from the hand of pusillanimous King John. According to some authorities, (among the most recent, so far as text-writers are concerned, being Mr. Cutbill in his pamphlet on *Petition of Right*, published in 1874) this remedy took its origin from a deliberate act of Sovereign authority in or about the time of Henry III or Edward I; others hold the view that the remedy is a necessary incident of the English Constitution which always existed, but which only took definite shape in the great jural epoch which began with the reign of Edward I. (*See Chitty's Prerog.*, 339, 341; *Com. Dig. Action, c. i.*; 3 *Black. Com.*, 255; *Steph. Com.*, 11 *Ed., III.*, 680 *n* (*f*)).

It has long been taken for granted that no writ will lie against the Crown at the suit of a subject at common law (*Staundf., Prærog. Regis c.* 15, *fol.* 42; *Chitty's Prerog.* 339); and many writers assert that the only remedies the subject had against the King in ancient times were *petition of right*, *monstrans de droit* and *traverse of office*.

The remedy by petition of right will receive as thorough an examination in the following pages as space will permit; but having mentioned the remedies by *monstrans de droit* and *traverse of office*, it will be well before proceeding further to dispose of them with as succinct an exposition as possible.

The method of obtaining redress by *monstrans de droit* was in this wise:—Where the right to the possession of real or

personal property was in dispute between the Crown and a subject, and the right of the subject as well as that of the Crown appeared upon record, the subject was entitled to his *monstrans de droit*, which simply meant putting in a manifestation or plea of right grounded upon facts already acknowledged and established, and praying the judgment of the court whether the King or his subject had the better right. The judgment, if against the Crown, was that of *ouster le main* or *amoveas manus*. (Cf. *Step. Com.*, III., 680, n.).

Although *monstrans de droit* is designated by Blackstone (3 Com. 256) as a common law remedy, yet Staundforde (*Prarog.* 72, b) distinctly says that this remedy was given by 36 Edward III, and did not lie at common law. This is the view held by the judges in the *Sadlers' case*, according to the report of the case by Anderson (See 1 *And.*, 181). This reporter moreover says (ibid.) that the *traverse of office* was also given by that statute. This opinion was adhered to by Lord Keeper Somers in the *Bankers' case*, (14 *How. St. Tr.* 78 *and* 79). In the early days of Crown suits the subject's procedure to obtain possession of real or personal property was always by petition (*Chitty's Prerog.* 341); but this mode was found to be attended with so much expense and procrastination that the cheaper and more summary proceeding by *monstrans de droit* was soon introduced in respect of this class of cases. After the statute 2-3 Edw. VI, c. 8, the proceeding by petition of right in the class of cases above referred to became practically superseded, and when it is considered that such cases represented the bulk of Crown litigation until the present century, it does not seem surprising that for four hundred years, little, if any, attention was bestowed by lawyers upon the doctrine and practice of this great remedy.

Before the Judicature Act, *monstrans de droit* might have been brought in the Petty Bag Office in Chancery, or in the Office of Pleas in the Exchequer. It would now have to be brought in the corresponding divisions of the High Court of Justice.

Traverse of Office was a mode of procedure whereby the subject could dispute an office or inquisition finding the Crown entitled to any property, the possession of which was claimed by the subject. This procedure was more generally resorted to in resisting extents than in any other cases. When the writ of extent had been executed, and the rule limiting the time for appearance of claimants endorsed thereon, the person disputing the debt came and entered his appearance and claim on the back of the writ. This was followed by a formal plea traversing the

alleged debt of the Crown. The Crown in turn replied or demurred to this until issue joined, when the cause was set down for trial by jury at Westminster. If the Crown succeeded either upon verdict or non-suit, the judgment was that the subject "take "nothing by his traverse." If title was found in favour of the traverser, the judgment was that the King's hands be amoved, and the party restored to the possession of the property in dispute.

The practice in respect of the two remedies of *monstrans de droit* and *traverse of office* will be found fully set forth in Chitty's *Prerogatives of the Crown* at pp. 352, 356, and Manning's *Exchequer Practice* pp. 86, 87 et seq.

It must be remembered that formerly petition of right was always a concurrent remedy in matters which might have been made the subjects of *monstrans de droit* or *traverse of office* (*Mann. Exch. Prac., 2nd Ed. p.* 121); and since the Act 23 & 24 Vict., c. 34, which, while it does not abolish these old remedies, yet provides a much simpler and more effective remedy in respect of the same causes of action by petition of right, such remedies seem doomed to fall into obsolescence.

We have already said that it is postulated that the Crown is not amenable to an ordinary action at common law, but it is worthy of mention that the contention has been strenuously put forward that before petition of right was introduced the King was liable to an action in the same way and to the same extent as his subjects. This view is adhered to by Mr. Cutbill in his pamphlet above referred to. The chief authority upon which he relies is a dictum by Wilby, J. (*Y. B.* 24, *Edw. III*, 55*b*.) that he had seen a writ thus framed:—"Præcipe Henrico Regi Angliae," in lieu whereof, he says, "is now given petition by the prerogative." While this statement by Wilby, J., is adversely criticised by Brooke, C. J., in his *Abridgement*, tit. Pet. 12, and tit. Prærog. 2 (d), as well as by Erle, C. J., in the comparatively recent case of *Tobin v. The Queen* (16 C. B. N. S. 356), the proposition is not so untenable as would at first appear. Nearly half a century before Mr. Justice Wilby's statement above mentioned was made, we find the following clear expression by counsel in *Thomas Corbett's case*, (*Y. B.* 33 & 35, *Edw.* 1, 470): "In old times every writ, whether of right or of the possession, "lay well against the King, and nothing is now changed except "that one must now sue against him by bill (par bille—petition?) "when formerly one sued by writ." This opinion does not appear from the report, which is a very full one, to have been controverted by the Bench or at bar. Speaking of this very passage in

this report, Mr. Horwood, the translator and editor of the "Year Book" last cited, says (at pp. XV and XVI of his preface) that this passage not only confirms the dictum of Wilby, J., but other statements to the same effect to be found in the "Year Books" of Edw. III. He refers to Y. B. 22 Edw. 111, 3b, where he says:—"It is said that in the time of King Henry "and before, the King was impleaded like any other man, but "his son Edward ordained that one should sue the King by "petition." Mr. Horwood also refers to Y. B. 43 Edw. III, 22a, where, to use his own words again:—"Cavendish said that "in the time of King Henry, the King was only as a common "person, for then one might have a writ of disseisin against "the King, and all other kinds of actions just as against any "other person." Mr. Horwood seems to incline strongly to the correctness of Wilby's dictum. He says (p. XVI):—"The "ordinance of the Council and of the twelve chosen by the Com- "mons made in the year 1258, and confirmed by Henry III in the "following year, seems plainly to give the subject the right to sue "by writ against the King; (see Rymer's *Fœdera*, i, 381, ed. "1816) and it may have been one of the writs issued after this "provision that Wilby saw." Dr. Stubbs, by all odds our most painstaking and reliable constitutional historian, also seems to look upon Wilby's dictum as one not lacking strong authority to support it. (See *Const. Hist. Eng., Vol. 2, p.* 250.)

Proceeding by writ against the Sovereign would certainly be an anomaly to-day, but the question is really of small moment, as it is conceded by all our jurists that however wide the Sovereign's liability to the subject is or may hereafter be made, the proper and becoming remedy must always be the petition of right.

We now come to a consideration of the remedy by petition of right, the "birth-right of the subject," as it is called by Chitty in his *Prerogatives of the Crown* (p. 341).

The great difficulty which has been experienced in tracing the history of the modern forensic petition back to its origin in the reign of Edward I. has been caused by unnecessary and futile attempts to discriminate with respect to the characters of the earliest recorded petitions, in other words, to classify them into petitions to Parliament and petitions to the King.

Even conceding that these petitions have in many instances been found inscribed upon the rolls of the National Council, or 'Parliament,' so called, this does not by any means affect their obvious and essential character. Besides the fact that the constitutional body which is now known as *Parliament* was at that time in its embryo state with the functions of its constituent

parts wholly undefined, the word 'Parliament' itself had then no settled and exclusive meaning. The conference between King John and his armed vassals when *Magna Charta* was signed was called *"Parliamentum Runemede,"* and 'Parliamentum' is indiscriminately applied in the reign of Edward I. to a session of the select or King's Council, a session of the Great Council, or a session of the *Commune Concilium* (*Cf. Gneist's Hist. Eng. Parl.* 112; and *Stubbs' Const. Hist. Eng.* (Vol. II, p. 274).

From the earliest times it was recognized that under the constitution of England the King was the fountain of justice, and that all petitions for redress, for grievances and wrongs must be presented to him; but, so long as the fountain was accessible, its environment—whether that was the King's Council or the *Commune Concilium*—would be a matter of small concern to the suppliant. But as a matter of fact we find that the petitions are invariably addressed *to the King*, or *to the King and his Council, and not to the Parliament* either literally or by any forced construction that can be placed upon the words used. That there was in the reign of Edward I. a recognized Council consisting of bishops, barons and judges permanently attendant upon the King, whose duty it was to advise him in all his Sovereign acts and to sit with him in open court for the purpose of assisting him in hearing suits and receiving petitions, is established by Stubbs in his *Constitutional History of England*, Vol. II, p. 273. At page 268 he makes the following clear statement as to the origin and character of this body as distinguished from the National Council or Parliament:—"It is to the minority of Henry III that the real "importance of this body must be traced. Notwithstanding the "indefiniteness of the word *concilium*, it is clear that there was "then a staff of officers at work, not identical with the *Commune "Consilium Regni. The Supernum* or *Supremum Concilium*, "to which, jointly with the King, letters and petitions are "addressed, clearly comprised the great men of the regency—: "William Marshall, the *rector regis et regni*, Gualo, the legate "and Pandulf after him, Peter des Roches, the justiciar, chancel- "lor, vice-chancellor and treasurer. It is addressed as *nobile "consilium, nobile et prudens consilium*; its members are *majores "or magnates de consilio, consiliarii* and *consiliatores*." At page 271 of the same volume, speaking of Edward I.'s dealings with this Council, Stubbs says:—"He seems to have accepted the "institution of a Council as a part of the general system of "Government, and, whatever had been the stages of its growth, "to have given it definiteness and consistency."

Reeves, in his *History of the English Law*, in speaking of

the judicature of the Council, (Vol. III, p. 155) says:—"The "tribunal next in authority to the parliament was *the Council.* "As the parliament was often called by this name, and there was "besides more than one assembly of persons called the council, "much difficulty has arisen in endeavouring to distinguish be- "tween them. We have seen that petitions to Parliament in "private matters were addressed à *nostre seignour le roi et à son* "*conseil.* The King had a council which consisted of all the lords "and peers of the realm, who, it should seem, were called to- "gether by him at times when the Parliament was not sitting; "this was called the *grand council,* as well as the parliament "(being probably the original *commune concilium regni* before the "commons were summoned thither), and was so termed to "distinguish it from the other *council,* which the King used to "have most commonly about him for advice in matters of law" ....."In both these councils the King sat as a judge and "causes heard there were said to be *coram rege in concilio.*"

Mr. Frederick W. Maitland, in his very instructive *Introduction to the Parliament Rolls of* 33 *Edward I* (1305), has this to say (at p. lxxxviii) about the parliaments of those days in general:—"Perhaps more than enough has already been said "about these controverted matters; but it seemed necessary to "remind readers, who are conversant with the parliaments of later "days, that about the parliaments of Edward I.'s time there is "still much to be discovered, and that should they come to the "opinion that a session of the King's council is the core and "essence of every *parliamentum,* that the documents usually "called parliamentary petitions are petitions to the King and his "council, that the auditors of petitions are Committees of the "Council, that the rolls of parliament are the records of the busi- "ness done by the Council,—sometimes with, but more often "without, the concurrence of the estates of the realm—that the "highest tribunal in England is not a general assembly of barons "and prelates, but the King's Council, they will not be departing "very far from the path marked out by books that are already "classical."

Palgrave, in his work on the *King's Council,* p. 21, says:— "All parliamentary petitions, whether of the prelates, peers, "commons or individuals, until the reign of Henry V, were "addressed generally to the King conjointly with the Council."

Dr. Gneist, in his *History of the English Parliament,* (at p. 164) expresses the opinion that it was not until the House of Commons had acquired its definite status as one of the estates of the realm, in the fifteenth century, that the true parliamentary

petition came into vogue. (See also p. 163 of the same work, and Hearn's *Government of England*, p. 572).

As our enquiry into the nature of the ancient petitions and the procedure upon them has largely to do with the reign of Edward I, we can do no better than to again refer at length to Mr. Maitland's valuable *Introduction to the Parliament Rolls of* 1305. At p. lxvii, he says:—"When we examine the character of these "petitions we soon see that for the most part they were not fit "subjects for discussion in a large assembly. They do not ask "for anything that could be called legislation; the responses "that are given to them are in no sort private 'Acts of parliament.' "Generally the boon that is asked for is one which the King "without transcending his legal powers might either grant or "deny. Sometimes we may say that, if the facts are truly stated "by the petitioner, the King is more or less strictly bound by the "rules of common honesty to give him some relief:—The King "owes him wages, or his lands have been wrongfully seized by "the King's officers. At other times what is asked for is pure "grace and favour. . . . As yet no hard line is drawn between the "true petition of right which shall be answered by a *fiat justitia* "and all other petitions. 'Right' and 'grace' shade off into "each other by insensible degrees, and there is a wide field for "Governmental discretion."

These petitions, as Mr. Maitland points out, (Introd. p. lxviii) were not enquired into by the King in Council, nor yet by Parliament. The suppliant merely got a reference of his plaint to some person or tribunal qualified to decide upon the merits thereof. As Mr. Maitland tersely expresses it, "he did not get "what he wanted, he was merely put in the way of getting it."

Sir Matthew Hale, (*Jurisdiction of the House of Lords*, pp. 67-68) speaking of the reference of these ancient petitions, says:—"But although the council received the petitions from the hands "of the receivers, yet they rarely (if at all) exercised any decision "or decisive jurisdiction upon them, but only a kind of delibera- "tive power, or rather direction, transmitting them to the proper "courts, places or persons where they were proper to be decided. . . . . "Hence it is, that most of the answers that the council gave "were in the nature of remissions of the petitions to those persons "or courts that had properly the cognizance of the causes."

If the petition involved a matter touching a mere common law right between subject and subject it was referred to the King's Bench or Common Pleas; if it involved an account between the Crown and its debtor it was referred to the Treasury and the Barons of the Exchequer; if a matter of equity was

concerned therein, the petition was sent to the Chancellor; or if it concerned a matter over which no existing forum had jurisdiction, it was referred to a special Committee created for such purpose by the Chancellor, the warrant for the issue of the commission being contained in the answer endorsed upon the petition.

Lord Keeper Somers says, in his celebrated judgment in the *Bankers' case*, (How. St. Tr. XIV, p. 59):—"The truth is, the "manner of answering petitions to the person of the King was "very various; which variety did sometimes arise from the "conclusion of the party's petition; sometimes from the nature of "the thing; and sometimes from favour to the person: and "according as the indorsement was, the party was sent into "Chancery, or the other courts."

"If the indorsement was general, *'soit droit fait al partie,'* "it must be delivered to the Chancellor of England, and then "a commission was to go to find the right of the party; and "that being found, so that there was a record for him, thus "warranted, he is let in to interplead with the King; but if the "indorsement was special, then the proceeding was to be, "according to the indorsement, in any other court."

Let us take a special instance from the multiplicity of precedents and follow the proceedings upon it as briefly as possible. Suppose our petition is for the restitution of property. We have seen that in such a case the suppliant might proceed by a *monstrans de droit* or *traverse of office* as well as by petition. He has elected to pursue the latter remedy. The initial stages would be the same as in all other cases of petitions addressed to the King or to the King in Council; the petition would be indorsed by the King with a direction to the Chancellor that certain persons should be commissioned to enquire into the facts alleged in the petition and "do what was right or just." Then the commission would issue; but as the matters involved in such a petition were properly cognizable in a court of law, the Commissioners would not presume to finally dispose of the case. They would merely return into the Chancery their finding as to whether the suppliant had made a *primâ facie* case, so to speak, and if such were their finding, the Crown was then called upon to plead. This being done, the plea was entered upon the record, and the case sent from the Chancery to the King's Bench for hearing and determination. (*See Staundforde's Prærog. Reg.* 77b.).

In the process of time, owing to legislation and other causes, all such petitions as were based on claims in respect of which there was ample remedy afforded by the courts fell into disuse,

and thus the true petition of right became the sole remedy known by that name. The practice upon petitions remained, however, substantially the same until the present century, as will appear from the following summary taken from the 5th edition of Comyn's *Digest* (published in 1822) Vol. 7, p. 82 (D) 80,:—

"A suit by petition may be to the King in Parliament, or in "Chancery, or other court.

"If it be in Parliament, it may be established by Act of "Parliament, or pursued as in other cases. Staun. Prær. 72. b.

"Upon petition out of Parliament, or there (if it be not "pursued as a statute) it shall be endorsed by the King *soit droit "fait*, and then delivered to the Chancellor. Staun. Prær. 73. a. "Mo. 639.

"Or a petition may have a special conclusion, that the King "command his justices of B.R. or C.B. And if it be indorsed "accordingly, it shall be pursued there. Staun. Prær. 73. a.

"If a petition be delivered to the Chancellor, there ought to "be an inquisition which finds the right of the party, before the "petition be depending, or there be any proceeding upon it. "Staun. Prær. 72 b. Except where the Attorney-General "confesses the suggestion. Skin. 608. Ld. Somers's Arg. 41.

"If the inquest finds for the King, there ought to be another "inquisition till a title be found for the party. Staun. Prær. "73. a.

"If a petition be indorsed to B.R. or C.B., it may be "proceeded upon without an inquisition; for the indorsement "warrants it. Staun. Prær. 73. b.

"So, where no office is found to entitle the King, the party "may pursue a petition, without an inquisition for him. R. Mo. "639.

"After a commission, whereon a title is found for the party, "before he can interplead with the King, there ought to be a "writ to enquire of the King's title. Staun. Prær. 73. b.

"And this, in all cases where a petition was in Parliament, "or elsewhere, where land was in the King's hand, or granted to "another; for after issue found, upon petition, for the party, the "King shall be concluded for ever. Ibid.

"If the land be granted to another, there shall be a *Scire "facias* also against the patentee. Ibid.

"So, where a petition disaffirms the King's possession, there "ought to be four writs of search to the Treasurer and Chamber- "lains of the Exchequer. Mo. 639.

"But writs of search are not necessary, where the petition

"affirms the King's possession; as, upon a petition of right of "dower. R. Mo. 639."

In some instances proceedings which afterwards took upon themselves distinctive features as common law remedies originally were instituted by petition of right. Notably is this the case with *scire facias* to repeal letters patent. This writ was formerly obtained upon a petition in the nature of a petition of right. (*See Earl of Kent's Case*, Hil. 21, Edw. III, fo. 47, pl. 68; also referred to as establishing this historical fact in 6 M. & Gr. 251 n. (a).).

*** The question as to whether a tort may be made the subject of a petition of right deserves more than a passing notice.

No doubt the opinions of the English courts in the cases of *Lord Canterbury v. The Queen* (12 L. J. Ch. 281), *Tobin v. The Queen* (33 L. J. C. P. 199) and *Feather v. The Queen* (6 B. & S. 257), *Thomas v. The Queen* (L. R. 10 Q. B. 31); of their Lordships of the Privy Council in the *Windsor and Annapolis Railway Case* decided in 1886 (11 Ap. Cas. 607) and of the Supreme Court of Canada in the cases of *The Queen v. McFarlane* (7 S. C. R. 216), *The Queen v. McLeod* (8 S. C. R. 1) to the effect that, at common law, a petition of right will not lie against the Crown in respect of any wrongful act of the Crown or its agents, must be accepted as settling the question; but before these decisions it was by no means clear that a tort could not be made the subject of a petition of right. Indeed, in a note by the reporters to the case of *Smith v. Upton*, in 6 M. & Gr. 252-253, we find the following:—"A petition of right lies against the "Crown for a tort done by the King's officers for the King's "profit; as for a disturbance in the perception of tithes (*Prior "of Christchurch's case*, 31 Edw. I., 1 Rot. Parl. 59 b., and Ryley "*Plac. Parl.* 218); for tithes subtracted by the King's officers "8 Edw. II., 1 Rot. Parl. 319, a); for a wrongful distress (*John "Mowbray's case*, 33 Ed. I., 1 Rot. Parl. 163, a, and Ryley, 218); "for wool wrongfully taken to the King's use (*Michael de Harcla's "case*, 33 Ed. I., 1 Rot. Parl. 163 a. and Ryley 248); for wheat "seized under pretence of a royal Commission (14 Edw. II., 1 Rot. "Parl. 320 a); for trespasses to land (18 Edw. II., 1 Rot. Parl. "416).....The general result of the cases seems "to be, that where the subject is entitled to a right which the "Crown withholds, or has suffered a wrong which the Crown "ought to redress, the remedy at common law is by petition of "right."

The cases immediately above cited were discussed from the Bench and by Counsel on the argument of the case of *Feather v.*

The Queen (ubi sup.), Bovill (afterwards Lord Chief Justice of the Common Pleas and the father of the Imperial Petition of Right Act of 1860), for the suppliant contended, with much force, that petitions there under consideration were petitions of right as they are now understood. The judges (pp. 278-279), without advancing any reason for discriminating between the precedents as to claims arising *ex contractu* and those arising *ex delicto*, agreed that a petition of right would lie for a breach of contract, but denied that it would lie in respect of a tort. They further expressed themselves (p. 294) to be entirely in accord with a decision in the same sense upon this point of the Court of Common Pleas in the case of *Tobin v. The Queen* (ubi sup.).

The fallacy of attempting to discriminate between the sufficiency of the ancient precedents of petitions founded upon tort and of those based upon contract is more sharply emphasized in the judgment of the Court of Queen's Bench in the case of *Thomas v. The Queen* (ubi sup.). There the Court (at pages 42-43 of the report) rests its judgment on Lord Somers's opinion in the *Bankers' Case*, that there were old precedents which conclusively demonstrated that petitions of right might be entertained when founded upon claims arising out of contract. In so many words the court says that Lord Somers expressed a "distinct and considered judgment that a petition of right "would lie against the Crown for a simple contract debt, such "as that for wages." Now, as a matter of fact, Lord Somers does not attempt to distinguish between the two classes of petitions in respect of their authority. His whole argument in this connection proceeds upon the opinion that all the petitions to be found in Ryley's *Placita Parliamentaria* (and they include both classes of claims) are petitions of right in the modern parlance of the courts. (See 14 How., St. Tr. 47, 62 and 83.)

In speaking of the character of the petition in *Everle's case*, (Y. B. 33 Edw. I and Ryley, 251), Lord Somers says—(14 How. St. T. at p. 58):—

"It was urged that this petition was not a petition of right, "but of complaint against the King's officers. And to shew that "it was so, it was said, that if it had been a petition of right, it "must have had another indorsement, viz:—'*soit droit fait al* "*partie*,' and then have been sent into Chancery; and that in "such cases the petition is the original upon which the proceeding "is; and that petitions of right must be so answered."

"As to this, in the first place, there needs not much labour "to shew that this was not a petition of complaint. It imports "nothing like it. The petitioner states his case; he prays what

"he wanted, and what was necessary, and it was granted him; "that is, a warrant under the great seal, empowering the respec- "tive proper officers, the barons, to see if he had right, and the "treasurer, if it were so, to pay him his arrears. Nobody is "complained of in the petition, and nobody is blamed in the "answer; a writ is to go, the charter is to be seen, and justice is "to be done.

"In the second place, the answer given to this petition is a "very proper answer to a petition of right. And, therefore, there "was no ground to say that this was not a petition of right, "because the answer was not general, 'soit droit fait.'

"There are more petitions to the King in Ryley's *Placita "Parliamentaria* than in all the books which are printed; and "throughout the whole book there is not one in twenty which is "so answered; *and yet nothing is so plain as that these were petitions "of right.*

"It were endless to cite particulars, there being scarce a leaf "in the book which does not shew what I assert.

"And if more authorities were wanted, the bundles of "petitions in the Tower, which I have caused to be looked into, "are full of petitions of right, otherwise answered than in those "general words."

This opinion of Lord Somers quite coincides with the views expressed by Mr. Maitland and others (*Ante p.* 75) to the effect that the petitions, such as he had under consideration in the *Bankers' case*, were not of the kind known at a later date as "Parliamentary petitions," but simply petitions addressed, as all petitions were then addressed, to the King or to the King in Council.

So much for a question which, owing to decisions in the recent cases before referred to, is now purely an academic one; but yet one which by reason of the new light which is now being thrown upon the constitutional history of medieval England by scholarly research may at any time become a very live one to the minds of practical lawyers.

*** *Petitions of Right in Equity* also require mention here.

In England during the last half-century the practice has sprung up of proceeding against the Crown for purely equitable relief by a petition of right. Such a sly clutch at the strong arm of Equity which, according to the old maxim, always acts *in personam* and can only enforce its decrees by attachment of the person or sequestration, would never have been successful had the court been awake to the fact that by entertaining such petitions it was usurping a jurisdiction that was essentially anomalous and

possibly abortive. It is quite true that the old authorities recognize that a suppliant might in certain cases obtain the aid of the Court of Chancery in pursuing his remedy against the Crown at common law,—for instance where the King had granted by letters patent to a stranger a rent-charge by wardship, the ward on coming of age might have brought his petition, or have obtained a *scire facias* from the Chancery to repeal the letters patent. (*See Bro. Abrid. tit. Pet. II*). It is to be observed that in such a case the proceeding is not to enforce an equitable claim against the Crown, but is merely one to obtain the helpful intervention of Chancery process towards expediting the proverbially slow relief at common law.

The first case where the subject sought relief against the Crown by a petition of right in equity was that of *Clayton v. The Attorney-General*, (1 Coop. temp. Cottenham, 97). There Lord Brougham declares (p. 120) that a petition for equitable relief was an unusual proceeding; and it is probable that it was at his suggestion that the character of the case was changed by the suppliant filing an ordinary Bill in Chancery, which was answered in the usual way by the Attorney-General.

The only other reported case of a petition for equitable relief before *The Petitions of Right Act*, 1860, is that of *Taylor v. The Attorney-General*, reported in 8 Sim., p. 413. Since the Act quite a number of petitions of a similar character have been entertained in the Court of Chancery, apparently upon the assumption that the two cases just cited constitute sufficient precedent for such a course. These cases are collected in chronological order and fully discussed by Mr. Clode in chapter XI of his recent work on *Petitions of Right*. He says it is difficult to see upon what principles the Chancery Division has acted in entertaining such petitions, and he affirms that "these "cases should be regarded not so much as authorities showing for "what a petition of right *can* be brought, but for what a petition "of right *has* been brought, in this Division of the High Court."

In 1860 the Petition of Right Act, 23 & 24 Vict. c. 34 was passed to simplify the procedure in such matters in England.

It is not our intention to pursue the history of the subject in England at any greater length, inasmuch as the modern doctrine and practice are fully discussed in Mr. Clode's excellent work before mentioned.

*** The subject of petition of right received very little attention from the courts or the legislatures in Canada until after the passing of the Imperial Act of 1860 dealing with the subject. This stimulated the minds of Canadian lawyers to place the Colonial

prerogative in line with the latest legal reforms; and indeed we have, in so far as Dominion legislation at least is concerned, outstripped the Mother country in widening the liability of the Crown.

The Province of Ontario passed its first Petition of Right Act in the year 1872, (35 Vict. ch. XIII). By section 17, (re-enacted in R.S.O., 1877, c. 59, sec. 2), it was enacted that the relief to be sought by petition should comprehend "restitution of "any incorporeal right, or a return of lands or chattels, or a "payment of money, or damages, or otherwise." By section 21 of this Act, (re-enacted in R. S. O., 1877, c. 59, s. 20) it was provided that nothing therein contained should "prevent any "suppliant from proceeding as before the passing of this Act." By *The Statute Amendment Act*, 1887 (50 Vict. c. 7, s. 6), the last mentioned section was amended as follows:—"Nothing in "this Act contained shall prevent any suppliant from proceeding "as before the passing of this Act; nor entitle a subject to "proceed by petition of right in any case in which he would not "be so entitled under the Acts heretofore passed by the Parliament of the United Kingdom."

In the case of *The Muskoka Mill Company v. The Queen*, (28 Grant, 577) which arose upon a petition of right against the Crown, *quoad* the Province, for damages for alleged tortious acts done by certain Provincial officers, Spragge, C. says:—"It is "contended that the language of our Provincial Act being "general as to the relief to be obtained, and being without the "qualification which is found in the Imperial Act, and also in "the Acts on the same subject of the Dominion Parliament, "gives relief in cases of wrong committed by officers of the "Crown, as well as relief which is given by, or existed before, the "Imperial Act. In the interpretation clause in our Act the "word relief is made to comprehend every species of relief "claimed or prayed for in any such petition of right, whether a "restitution of any incorporeal right, or a return of lands or "chattels, or a payment of money, or damages or otherwise. The "same words are used however in the Imperial Act and in the "Dominion Acts; and I apprehend that such general words "would not suffice to make the Crown liable for a wrong com-"mitted by its officers. The maxim that the Crown can do no "wrong is applicable to cases of this nature."

The case of *The Canada Central Railway Company v. The Queen* (20 Grant. p. 273), will repay examination as it contains much valuable information concerning procedure by petition of right.

*** In 1873 the Province of British Columbia passed a Petition of Right Act in all essential respects the same as the English Act of 1860.

Under this Act, the case of *De Cosmos v. The Queen* (1 B. C. Rep. Pt. II, p. 26) was decided by Mr. Justice Gray. The suppliant had been appointed Special Agent for the Province, at Ottawa, by an order in Council which was silent as to remuneration for his services. It was held that as the services were honorary and as there was no provision for payment of such services, he could not recover.

*** In 1875 the Legislature of the Province of Manitoba passed an Act, entitled *An Act to regulate proceedings against and by the Crown*, (38 Viet. c. 12). By this Act it was provided (sec. 1), that a petition of right might be presented against the Crown, in right of the Province, in which, "the subject matter, or any part "thereof, would be cognizable by action or suit if the same were "a matter of dispute between subject and subject." It is also provided (sec. 2) that the petition shall be left with the Provincial Secretary, who shall forthwith submit the same for consideration to the Lieutenant-Governor, who in turn, shall, with all convenient dispatch, endorse thereon, if he thinks the matter should be litigated, "Let right be done;" if he thinks otherwise, "Refused." If a fiat is granted the petition when filed is to be taken, in a common law action, as the declaration, and in a suit in equity as the bill of complaint. A copy of the petition is left in the office of the Provincial Secretary, who is empowered to accept service thereof, upon which copy shall be endorsed, in the case of an action at law, "the defendant is to plead or demur within eight "days, otherwise judgment," or in the case of a suit in equity, "the defendant is to answer or demur hereto within twenty-eight "days, otherwise the complaint will be taken as confessed." Then it is provided that the action or suit and all proceedings therein shall in all respects thereafter be governed by the same rules, principles and practice as in ordinary actions or suits between subject and subject.

*** In the year 1875, the Dominion Parliament passed an Act, entitled "*An Act to provide for the institution of suits against "the Crown by Petition of Right, and respecting procedure in "Crown suits.*" This was, in the main, an adoption of the English act of 1860. At the time of its passage the Supreme and Exchequer Courts of the Dominion had not been created, and jurisdiction to try suits by petition against the Crown in right of the Dominion was given therein to the superior courts of the several Provinces. In the following session of Parliament the

establishment of the two federal courts was provided for, and *The Petition of Right Act, Canada*, 1875, was repealed by 39 Vict., c. 27, which gave jurisdiction in respect of petitions of right in Dominion matters to the Exchequer Court.

The last mentioned Act was, in substance, reproduced in Chapter 136 of *The Revised Statutes of Canada*. By subsequent legislation (50-51 Vict. ch. 16) the integrity of this chapter has been sorely shaken, its provisions in some instances being repealed and in others bodily transferred to independent Acts. However, as some important cases have been decided under the Act previous to the year 1887, it has been considered advisable to print it entire in this work. It will be found in a subsequent part hereof, as now embodied in ch. 142 of *The Revised Statutes of Canada*, 1906.

The following cases of importance have been decided under 39 Vict. c. 27:—*Chevrier v. The Queen*, 4 S. C. R., 1; *O'Brien v. The Queen*, 4 S. C. R., 529; *The Queen v. Robertson*, 6 S. C. R., 52; *The Queen v. Doutre*, 6 S. C. R., 342; *Belleau v. The Queen*, 7 S. C. R., 53; *Jones v. The Queen*, 7 S. C. R., 570; *Tylee v. The Queen*, 7 S. C. R., 651; *Wood v. The Queen*, 7 S. C. R., 634; *Isbester v. The Queen*, 7 S. C. R., 696; *The Queen v. McFarlane*, 7 S. C. R., 216; *The Queen v. McLeod*, 8 S. C. R., 1; *The Queen v. MacLean*, 8 S. C. R., 210; *The Queen v. Smith*, 10 S. C. R., 1; *Windsor & Annapolis Ry. Co. v. The Queen*, 10 S. C. R., 335; also L. R., 11 A. C., 607, *The Queen v. Dunn*, 11 S. C. R., 385; *The Queen v. McQueen*, 16 S. C. R., 1; *The Merchants Bank v. The Queen*, 1 Ex. C. R., 1; *Clarke v. The Queen*, 1 Ex. C. R., 182. Want of space and the knowledge that the reports of these cases are in the hands of the profession generally throughout the Dominion induces to omit a review of them here.

In 1887 the Exchequer Court of Canada was erected into a tribunal separate and apart from the Supreme Court of Canada. By sec. 23 of *The Exchequer Court Act* of that year (which, as amended by subsequent enactments, now sec. 38, is printed in full in a later part of this work) it is provided that, "any "claim against the Crown may be prosecuted by petition of "right, or may be referred to the court by the Head of the 'Department in connection with the administration of which "the claim arises, and if any such claim is so referred no *fiat* "shall be given on any petition of right in respect thereof."

Sections 19, 20 and 21 deal with the exclusive jurisdiction of the Court; and it is under sub-section (c) of section 21 that the most important cases have been decided. This clause gives a remedy to the subject against the Crown for any claim arising

out of any death or injury to the person, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. The extent to which the Sovereign's ancient immunity from actions of this character is affected by such legislation is fully discussed by Mr. Justice Burbidge in his able judgments in *The City of Quebec v. The Queen*, (2 Ex. C. R., 256) and *Lavoie v. The Queen*, (3 Ex. C. R., 96). The above cited section has also been discussed in *Brady v. The Queen*, (2 Ex. C. R., 273); *Gilchrist v. The Queen*, (2 Ex. C. R., 300); *Martin v. The Queen*, (2 Ex. C. R., 328); *Leprohon v. The Queen*, (3 Ex. C. R., 100); *Filion v. The Queen*, (4 Ex. C. R., 134). Cases upon other sections of *The Exchequer Court Act* will be found in the annotations to the Act in a subsequent part of this work.

*** There would seem to be no doubt that during the period which elapsed between the date of the establishment of the first civil courts of justice by Governor Murray, on the 17th of September, 1764, and the passage of the *Quebec Act*, 1774, the remedy by petition of right was open to the subjects of the Crown within the Province of Quebec in common with all their other rights and remedies under English law.

In the case of *Harvey v. Lord Aylmer*, decided in the Court of King's Bench, at Quebec, in the year 1833, (Stuart's Rep. p. 542) it was contended by counsel for plaintiff that under the old law of France, which he submitted, governed such matters in the Province of Quebec, the King was answerable in the Courts for wrongs of a private nature done to his subjects. The issues in the case did not call for a consideration of this question, and, therefore, there was no judicial pronouncement upon it. In *Laporte v. Les Principaux Officiers de l'Artillerie* (decided on appeal in 1857, *see* 7 L. C. R., 486) the Superior Court expressed the opinion that the subject's remedy against the Crown by petition of right obtained as well in the Province of Quebec as in England, and that the plaintiff, being the owner of certain real property in dispute in that case, might have interrupted prescription by the Crown by a petition of right. The real issue in the case was whether the plaintiff could sustain a petitory action for the recovery of a tract of land taken and used in the construction and fortifications of the City of Quebec, and this issue was decided against him. Aylwin, J., one of the judges on appeal, however, appeared to share the opinion of the judges below respecting his remedy by petition of right.

In the year 1883 the Legislature of the Province of Quebec passed a Petition of Right Act, giving the subject a remedy when-

ever he seeks relief against the Government of the Province in respect of a revendication of moveable or immoveable property, or a claim for the payment of money on an alleged contract, or for damages, or otherwise. This Act is now to be found in *The Revised Statutes of the Province of Quebec* under Art. 5976.

INTEREST.

It was thought convenient at this place to discuss with some detail the question of the payment of interest by the Crown in Canada.

It is now a well established principle that in England interest, between subject and subject, is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest and where such promise is to be implied from the usage of trade or other circumstances. *Higgins v. Sargent*, 2 B. & C., 349.

In the case of the *Algoma Central Railway Co. v. The Queen*, (7 Ex. C. R., 239) (1), decided by the Exchequer Court of Canada, the Crown having been condemned to repay the sum of $3,500 it had collected for customs duties, the question arose as to whether this amount should be so repaid with interest. As there was no statute authorizing the Court in a case such as this to allow interest, it was refused. The learned Judge in discussing this question of interest (7 Ex. C. R. 269) said:—"Perhaps in "passing one might point out that in that respect the statute "law of Canada is not less liberal than that of other countries. "In England there is no statute allowing interest to be recovered "in such a case; and in the United States it is expressly enacted "that no interest shall be allowed on any claim up to the time "of the rendition of the judgment by the Court of Claims, unless "upon a contract expressly stipulating for the payment of interest. "(Acts of the 3rd of March, 1863, R. S. U. S. s. 109; *Tillou v. "The United States*, 1 C. Cls. 232).

"It is certain also that there is in the case of the *Algoma "Central Railway Co.* no contract on the part of the Crown to "pay interest. That being so, it only remains to ask the ques- "tion, whether or not damages in the nature of interest may be "allowed for the wrongful exaction of the duties, or for the "wrongful detention of the money. But that obviously cannot

(1). This judgment was reversed on Appeal to the Supreme Court of Canada (32 S. C. R. 277) and the judgment of the Supreme Court affirmed by the Judicial Committee of the Privy Council (1903, A. C. 478) upon the question of the interpretation of *The Customs Act* only.

"be done without making the Crown liable for a wrong done to "the suppliant. And the Crown can in law do no wrong, and for "the wrongs of its servants it is not answerable, unless expressly "made liable by statute.

"Then with regard to the wrongful detention of money, the "case of *The London, Chatham and Dover Railway Co. v. The "South Eastern Railway Co.* ((1893), L. R. App. Cas. 429) is an "authority that even as between subject and subject interest "cannot at common law be given by way of damages for the "detention of a debt, the law upon the subject, unsatisfactorily "as it was said to be, having been too long settled to be departed "from.

"There are, of course, statutes such as the Acts of the "Parliament of the United Kingdom, 3 & 4 Wm. IV, c. 42, ss. 28 "& 29, which make interest or damages in the nature of interest "recoverable in cases where it was not recoverable at common "law. The provisions of that Act, either by express re-enactment "here, or by reason of its application as part of the law of "England, are in force in most of the Provinces of Canada. 7 Wm. "4 (U. C.) c. 3, ss. 20, 21; C. S. U. C. c. 43, ss. 1, 3; R. S. O. "(1877) c. 50, ss. 266, 268; R. S. O. (1897) c. 51, ss. 113, 115; "R. S. N. S. 1st S. c. 82, ss. 4 & 5; R. S. N. S. 4th S. c. 94, ss. 231 "& 232; 12 Vict. c. 39 (N.B.) ss. 27 & 28; C. S. (N.B.) c. 37, "ss. 118 & 119; 28 Vict. (P.E.I.) c. 6, ss. 4 & 5.

"The Act in force in the Province of Ontario goes further "than the English Act and provides that interest shall be pay- "able in all cases in which it was payable by law, or in which it "has been usual for a jury to allow interest. See *Michie v. "Reynolds* (24 U. C. Q. B. 303) and *McCullough v. Newlove* "(27 Ont. R. 627). But the rights and prerogatives of the Crown "are not affected by these statutes, it not being provided therein "that the Crown shall be bound thereby.

"If the action were against the Crown's officer, he would "be bound, and his liability to damages in the nature of interest "would depend upon the law in force in the Province in which "the cause of action arose; but it is not so with respect to the "Crown.

"It has been held by the Supreme Court of Massachusetts "that where taxes, assessed without authority, are recovered "back, interest may also be recovered. *The Boston and Sandwich "Glass Co. v. The City of Boston* (4 Metcalfe 181); but the Crown "stands in this respect in a wholly different position from a civic "or municipal corporation.

"Then there is a class of cases in which where administration

"on behalf of the Crown to the estate of a person dying intestate "without leaving any known next of kin is taken out, and the "proceeds are paid into the treasury; if thereafter the next of kin "obtains a decree in his favour interest is allowed on such pro- "ceeds. (*Turner v. Maule*, 18 L. J. Ch. N. S. 454; *Edgar v. Rey- "nolds*, 27 L. J. Ch. N. S. 562; *Attorney-General and Reynolds v. "Kohler*, 9 H. L. C. 655; *Bauer v. Mitford*, 3 L. T. N. S. 575; "*Partington v. The Attorney-General*, L. R. 4, E. & I. App. 101). "But in these cases the action was brought against the Crown's "nominee or representative, not against the Crown itself, by "petition of right. They stand upon a footing of their own and "cannot be considered as authorities for the proposition that the "Crown is liable for damages in the nature of interest.

In the case of *The Toronto Railway Co. v. The Queen* ((1896) App. Cas. 551) the plaintiff recovered against the Crown the amount of certain duties of Customs paid under protest and interest on that amount. But although interest was claimed by the plaintiff in the statement of claim, the question of the Crown's liability to pay it was not raised until after the Queen's order had been made. Subsequently a petition was presented praying that the order should be so amended as to make it clear that the question of interest claimed in the action had not been concluded but left open to be dealt with by the tribunal below. The petition was dismissed. Lord Macnaghten is reported, by the shorthand-writer who took notes of the argument, to have stated that that question was not presented when the case was before the Judicial Committee of the Privy Council, and that he could hardly understand the Government, who had wrongly taken a person's money, refusing to pay interest upon it; that he could quite understand that the representatives of the Government would not think of arguing such a question, and that he did not think they ought to. The case cannot, however, be taken as an authority that the Crown may be condemned to pay interest, or declared liable therefor in such a case, if the Government refuse to pay it out of money available for the purpose, if any, or to invite Parliament to make provision for its payment in case no money is so available. That is a question for the Crown's advisers, and the responsibility of deciding it rests with them and not with the Court.

The suppliants having imported, at different times during the years 1892-1893, large quantities of steel rails into the port of Montreal to be used by them as contractors for the construction of the Montreal Street Railway, the Customs authorities claimed that the rails were subject to duty, and refused to

allow them to be taken out of bond until duties, amounting in the aggregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council of the case of *The Toronto Railway Company v. The Queen* ((1896) A. C. 55, supra), and some time in the year 1897, the Customs authorities returned the amount of the said duties to the suppliants. The suppliants then claimed that they were entitled to interest on the same during the time it was in the hands of the Crown, and they filed their petition of right therefor. The Court held (1st), That as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec; (2ndly), That on the particular question as to interest at issue in this case the law of the Province of Quebec (Arts. 1047 and 1049 C. C.) is the same as the laws of the other provinces of the Dominion, and further, that the Crown is not thereunder liable to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the Customs officer upon the Customs Tariff Act. *Wilson v City of Montreal* (24 L. C. Jur. 222) approved; (3rdly), That as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed, it could not be made liable by the institution or commencement of an action. *Ross et al. v. The King*, 7 Ex. C. R. 287; 32 S. C. R. 532.

This question of interest between subject and subject in the Province of Quebec is settled by the Civil Code (Arts. 1067 to 1077) and the jurisprudence thereunder.

No interest will be allowed against the Crown on the amount representing the loss of profits resulting from the breach of a Government contract. *The Queen v. McLean*, et al., Coutlee's Digest, S. C. 727.

Under the provisions of sec. 48 of *The Exchequer Court Act* (R. S., 1906, ch. 140) the Court, in adjudicating upon any claim arising out of any contract in writing, must decide in accordance with the stipulations of such contract and must not allow interest on any sum of money due the claimant, in the absence of any contract in writing stipulating for the payment of such interest or of a statute providing in such a case for the payment of interest by the Crown.

Then section 31 of *The Expropriation Act* (Ch. 143, R. S., 1906) provides for the payment of interest by the Crown on the Compensation money, at the rate of 5 per cent. from the time the

land was acquired, taken or injuriously affected to the date when the judgment is given; provided no delay in the final determination of any such matter is attributable in whole or in part to any person entitled to such compensation money.

With reference to interest payable after judgment, sec. 53 of *The Exchequer Court Act*, (Ch. 140 R. S., 1906) provides that the Minister of Finance may allow and pay, to any person entitled by judgment of the Court to any moneys or costs, interest thereon at a rate not exceeding four per cent. from the date of such judgment until such moneys or costs are paid.

The practice followed by the Department in this respect is to allow interest upon judgments at the rate of four per cent. from the date of the judgment until payment; unless the Deputy Minister of Justice report undue delay on the part of the claimant in prosecuting his claim, or when there has been undue delay in any other proceedings and when there have been circumstances in the case which would justify the Crown in refusing to pay interest on the judgment.

Mr. Justice Taschereau, sitting on Appeal from the Award of the Official Arbitrators and acting as Judge of the Exchequer Court prior to 50-51 Vict. ch. 16, decided, *in re Paradis v. The Queen*, (1 Ex. C. R. 191) that under the law of the Province of Quebec, where interest has been allowed on an Award by the Official Arbitrators (1) a claim for loss of profits or rent cannot be entertained by the Court of Appeal, as such interest must be regarded as representing the profits. *Re Fouché-Lepelletier*, (Dal. 84, 3. 69) and *re Pechwerty* (Dal. 84-5, 485, No. 42) referred to.

The case of *St. Louis v. The Queen* (25 S. C. R. 665) is authority for allowing interest, from the date of the Petition of Right in cases arising in the Province of Quebec, upon the balance remaining unpaid under a contract between the Crown and the suppliant. This would imply that interest would be allowed until payment and would thus appear to somewhat clash and conflict with sec. 53 of *The Exchequer Court Act*, which provides that the Minister of Finance may allow and pay interest after judgment at the rate of four per cent. from the date of such judgment.

This decision of *St. Louis v. The Queen* (25 S. C. R. 665) was adopted and followed, with some modification, by the Exchequer Court in the case of *Lainé v. The Queen* (5 Ex C. R. 103) where interest was allowed from the time the petition of

(1). The Act respecting the Official Arbitrators, ch. 40 of the R. S. C., has been repealed by 50-51 Vict. ch. 16.

right was left at the office of the Secretary of State, as provided by sec. 4, ch. 142 R. S., 1906, and not until payment but to the date of the judgment. (Sec. 53, ch. 140 R. S., 1906).

As a petition of right might be antedated and bear the date of a year or so before it is actually left with the Secretary of State, moreover, as the latter step is the first one contemplated by *The Petition of Right Act* and as it is in accordance with the practice of the Province of Quebec, where under similar circumstances, interest is allowed from the date of the service of the writ of summons, it would appear that the course adopted in the *Lainé* case is the more reasonable and more in accordance with the spirit of the law.

Interest is also payable by the Crown on a balance due for goods sold and delivered under contract, from the date of filing of the Reference of the Claim in the Exchequer Court. *Henderson v. The Queen*, 6 Ex. C. R. 39.

In a case of forfeiture under a contract for the construction of a public work, where the contractor was not allowed interest upon the value of the plant taken, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. *Stewart v. The Queen*, 7 Ex. C. R. 55.

And the case of *The Algoma Central Ry. Co. v. The King*, (7 Ex. C. R. 239) is further authority that the Crown is not liable to pay interest except upon contract therefor, or when its liability therefor is fixed by statute.

In the case of *Beach v. The King* (9 Ex. C. R. 289, confirmed on appeal 37 S. C. R. 259) interest was allowed against the Crown on the amount of damage recovered by the suppliant for the permanent stoppage of water supply enjoyed by him under a lease from the Crown.

The rule is now well established that no interest is allowable against the Crown, except when made payable by statute or by contract. This principle has been discussed and decided by the Chancery Division of the High Court of Justice in England in the case of *re Gosman*, L. R. 17, ch. D. 771; 50 L. J., Ch 624; 45 L. T. 267; 29 W. R. 793. See also *Dunn v. The King*, Coutlee's Digest, S. C. 729.

Although interest is not allowable against the Crown, with the exception of the class of cases above mentioned, it is clear that the Crown may recover interest against the subject in all cases in which interest is made payable between subject and subject. *The Queen v. The Grand Trunk Railway Co.*, 2 Ex. C. R. 132.

The Exchequer Court Act.

(R. S., 1906, ch. 140).

THE EXCHEQUER COURT ACT.

R. S., 1906.

CHAP. 140.

An Act respecting The Exchequer Court of Canada.

This Act came into force on the 31st January, 1907.

The different statutes dealing with the constitution of the Exchequer Court, since its origin up to the passing of 50-51 Vict., ch. 16, are as follows, viz.:—

(1). *The Supreme and Exchequer Court Act* (38 Vict. ch. 11) by which a Court of Exchequer was first established in Canada.

(2). *An Act to make further provision in regard to the Supreme Court and the Exchequer Court, of Canada,* (39 Vict. ch. 26).

(3). *An Act to amend the Act to make further provision in regard to the Supreme and Exchequer Courts,* (40 Vict. ch. 22).

(4). *The Supreme Court Amendment Act of* 1879, (42 Vict. ch. 39).

(5). *The Supreme and Exchequer Court Amendment Act,* 1880, (43 Vict. ch. 34).

(6). *The Supreme and Exchequer Courts Act* (R. S. C. ch. 135), by which the above mentioned Acts were repealed and consolidated within the meaning of section 8 of 49 Vict. ch. 6.

The introduction of *The Exchequer Court Act* (50-51 Vict. ch. 16) marks a new era in the history of the court. The Act, 50-51 Vict. ch. 16, came into force on the 1st day of October, 1887, under the provisions of section 60 thereof, by the issue of a proclamation bearing the same date and published in the Canada Gazette on the same day. By the passing of this Act the court was entirely re-organized and its jurisdiction materially enlarged. An important change made by this statute was the taking away from the Judges of the Supreme Court of Canada all original Exchequer Court jurisdiction and the transferring of the same to one single judge, called the Judge of the Exchequer Court of Canada, duly appointed under the Act; the Court from that period constituted a tribunal entirely distinct from that of the Supreme Court of Canada.

The Exchequer Court Act (50-51 Vict. ch. 16) has been amended by the following Acts, viz.:—

(1). By 52 Vict. ch. 38. The effect of this Act, stated in a summary way, has been to enlarge the scope and the nature of the References to the registrar or other officers of the court; to allow the court to call in the aid of Assessors, when it thinks expedient to do so and to give the judge larger and more definite powers in respect of making Rules of Court as well in connection with *The Exchequer Court Act* as with any Act giving jurisdiction to the Court. The Act further provides for undertakings to be given by the Crown in cases of expropriation, the effect being to materially reduce the compensation in such cases, and finally makes provision for the payment by the Crown of interest after judgment.

(2). By 53 Vict. ch. 35, which was passed to make better provisions in respect of appeals from this court to the Supreme Court of Canada.

(3). By 54-55 Vict. ch. 26. By this Act the jurisdiction respecting patents of invention, copyrights, trade-marks and industrial designs, patents of public lands and interpleaders in certain cases, is given to the

Exchequer Court. The same Act deals also with certain considerations to be taken into account in expropriation matters, and finally makes provision for appeals to the Supreme Court of Canada with regard to the subject matter of the Act and determines upon what part of the Supreme Court list an Exchequer Court appeal shall be entered.

(4). By 62-63 Vic. ch. 44, the Court is given jurisdiction as to railway debts. However, by 62-63 Vict. ch. 45, the operation of the Act 62-63 Vict. ch. 44 was suspended until 1st August, 1900.

(5). By 2 Ed. VII ch. 8. This Act deals with the salary of the Registrar, enlarges the scope of the appeals to the Supreme Court with respect to judgments upon any demurrer,—provides for services upon a defendent beyond the jurisdiction of the Court and finally allows certain appeals by the Crown when the amount in controversy in any one case does not exceed $500.

(6). By 3 Ed. VII ch. 21, the Exchequer Court is given jurisdiction as regards any railway not wholly within one province, or as regards any section of a railway not wholly within one province, or as regards any railway otherwise subject to the legislative authority of the Parliament of Canada.

(7). By 3 Ed. VII ch. 29, provision is made respecting the pension of the Judge of the Exchequer Court.

(8). By 4-5 Ed. VII ch. 47, the judge's salary is made $8,000, and provision is made with respect to his travelling expenses.

(9). By 6 Ed. VII ch. 11, the Act is amended by adding to sec. 51 a sub-section determining when a judgment shall be deemed final.

(10). By the Revised Statutes of Canada, 1906.

(11). By 6-7 Ed. VII ch. 15, the salary of the Registrar is increased.

(12). By 7-8 Ed. VII ch. 27, provision is made in cases of illness or absence of the judge, etc., and further for the appointment of a *judge pro hac vice*. The Act also makes provision for giving the Registrar jurisdiction of judge in Chambers.

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Short Title.

1. This Act may be cited as the Exchequer Court Act.

INTERPRETATION.

Exchequer Court—Supreme Court—The Crown—Public Lands—Letters Patent—Patent—Original Claimant—Witness.

2. In this Act, unless the context otherwise requires,—

(*a*) 'the Exchequer Court' or 'the Court' means the Exchequer Court of Canada;

(*b*) 'the Supreme Court' means the Supreme Court of Canada;

(*c*) 'the Crown' means the Crown in the right or interest of the Dominion of Canada;

(*d*) 'public lands' extends to and includes Dominion lands, Ordnance or Admiralty lands, Indian lands and all other lands which are the property of Canada or which the Government of Canada has power to dispose of;

(*e*) 'letters patent' or 'patent,' when used with respect to public lands, includes any instrument by which such lands or any interest therein may be granted or conveyed;

(*f*) 'original claimant' means the person from whom title must be traced in order to establish a right or claim to letters patent for the lands in question;

(*g*) 'witness' means a person, whether a party or not, to be examined under this Act. R.S., c. 135, s. 96; 50-51 V., c. 16, s. 1; 54-55 V., c. 26, ss. 2 and 5.

CONSTITUTION OF COURT.

Exchequer Court continued.

3. The Court now existing under the name of the Exchequer Court of Canada is hereby continued under such name, and shall continue to be a court of record. 50-51 V., c. 16, s. 2.

This court was established under the provisions of section 101 of *The British North America Act*, 1867, which vested in the Dominion Parliament the right to establish courts for the better administration of the laws of Canada.

The Exchequer Court Act, as it now exists, in a large measure consists of legislation taken respectively from chapters 40, 135 and 136 of *The Revised Statutes of Canada* (1886), as well as from some provisions of the Revised Statutes of the United States, with necessary modifications,—and while some legislation is entirely new, some has also been borrowed from England, as for instance the jurisdiction given to the Court in Railway matters, dealing with the sale of insolvent railways and Schemes of Arrangement under *The Railway Act*. The latter was taken from 30-31 Vict. (Imp.) ch. cxxvi, sections 6 and following.

Constitution of Court.

4. The Exchequer Court shall consist of one judge, who shall be appointed by the Governor in Council by letters patent under the Great Seal. 50-51 V., c. 16, s. 3.

Who may be Appointed Judge.

5. Any person may be appointed a judge of the Court who is or has been a judge of a superior or county court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. 50-51 V., c. 16, s. 3.

To hold no other Office.

6. The Judge of the Court shall not hold any other office of emolument, either under the Government of Canada or under the Government of any province of Canada. 50-51 V., c. 16, s. 3.

See also sec. 33 of ch. 138, R. S., 1906.

Residence.

7. The Judge of the Court shall reside at Ottawa or within five miles thereof. 50-51 V., c. 16, s. 3.

Substitute in case of Illness or Absence—Judge pro hac vice in case of Interest, etc.—Oath of Office—Powers of Temporary Judge to conclude Trial, etc.

[8. In case of the illness of the Judge of the Court, or if the Judge has leave of absence, the Governor in Council may specially appoint any person having the qualifications hereinbefore mentioned to discharge the duties of the Judge during his illness or leave of absence, and the person so appointed shall, during the period aforesaid, have all the powers incident to the office of the Judge of the Court.

"2. If the Judge of the Court—

"(*a*) is interested in any cause or matter, or is disqualified by kinship to any party, or

"(*b*) has been professionally engaged in any cause or matter as counsel or solicitor for any party previously to his appointment to the office of judge, and considers himself thereby incapacitated from sitting or adjudicating therein, or

"(*c*) has other judicial duties which make it impossible for him to hear, without undue delay, any cause or matter,

the Governor in Council may, upon the written application of the Judge, setting out such impediment, appoint any other person having the qualifications hereinbefore mentioned to act as judge *pro hac vice* in relation to any such cause or matter.

"3. Every such temporary judge, or judge *pro hac vice*, shall be sworn to the faithful performance of the duties of his office.

"4. Any judge temporarily appointed to discharge the duties of the Judge may, notwithstanding the expiry of the term of his appointment, or the happening of any event upon which his appointment terminates, proceed with and conclude the trial or hearing at that time actually pending before him of

any cause, matter or proceeding, and pronounce judgment therein, and may likewise pronounce judgment in any cause, matter or proceeding previously heard by him and then under consideration or reserved; and any such trial, hearing or judgment shall have the same validity and effect as if heard or pronounced during the said term or previously to the happening of the said event."]

By section 1 of ch. 27, 7-8 Ed. VII, sections 8 and 9 of *The Exchequer Court*, as enacted in ch. 140, R. S., 1906, were repealed and the foregoing section 8 substituted therefor.

9. *Repealed by ch. 27 of 7-8 Ed. VII.*

Term of Office.

10. The Judge of the Court shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons. 50-51 V., c. 16, s. 4.

For the salary, travelling allowance and superannuation of the Judge of the Exchequer Court see sections 5, 18, 19 and *seq.* of ch. 138, R. S., 1906.

Oath of Office.

11. The Judge of the Exchequer Court shall, previously to entering upon the duties of his office as such judge, take an oath in the form following:—

'I, , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Judge of the Exchequer Court of Canada. So help me God.' 50-51 V., c. 16, s. 7.

By Whom Administered.

12. Such oath shall be administered before the Governor General or the person administering the Government of Canada, or such person or persons as he appoints. 50-51 V., c. 16, s. 8.

Registrar—Other Officers—Salary of present Registrar.

[**13.** The Governor in Council may, by an instrument under the Great Seal, appoint a fit and proper person, being a barrister of at least five years' standing, to be the registrar of the Exchequer Court; and such registrar shall hold office during pleasure, shall reside and keep an office at the City of Ottawa, and shall be paid upon appointment a salary of two thousand five hundred dollars per annum, with an annual increase thereafter of one hundred dollars up to a maximum of three thousand dollars per annum.

"2. The Governor in Council may, from time to time, appoint such other clerks, stenographers and servants of the Exchequer Court as are necessary, all of whom shall hold office during pleasure and be paid such salaries as the Governor in Council determines."

2. The salary of the present registrar of the Exchequer Court, so long as he remains in office, shall be the maximum salary of the office, as authorized by the said section 13 as hereby enacted.]

By section 1 of 6-7 Ed. VII, section 13th of *The Exchequer Court Act*, as enacted in ch. 40, R. S., 1906, has been repealed and the foregoing section 13th substituted therefor. The classification and salary of the officers of the Court are now regulated by the new Civil Service Act.

R. S., cc. 16 and 17 to Apply.

14. The provisions of the Civil Service Act and of the Civil Service Superannuation and Retirement Act shall, so far as applicable, extend and apply to such registrar, clerks, stenographers and servants at the seat of Government. 50-51 V., c. 16, s. 10.

The Civil Service Act referred to in this section has been repealed and the Act 7-8 Ed. VII, ch. 15, substituted therefor.

Official Referees.

15. The Governor in Council may appoint official referees of the Exchequer Court, not exceeding three in number, who shall perform such duties as the Exchequer Court by general or special rules or orders directs, and who shall be paid such fees and travelling allowances as the Governor in Council prescribes. 50-51 V., c. 16, s. 11.

The office of "Official Arbitrator," under ch. 40, R.S.C., 1886, has become obsolete by virtue of the repeal of that Act; but the incumbents of the office, who have since all died, were, at the time of such repeal, created "Official Referees" of the Court by sec. 11 of 50-51 Vic., ch. 16 and under that section were charged with the performance of such duties as the Court, by general or special rules or orders, might direct. No such rules or orders were ever made, and the business of the Court, as at present administered, does not call for the assistance of official referees.

Barristers and Attorneys.

Barristers, Advocates and Counsel.

16. All persons who are barristers or advocates in any of the provinces, may practise as barristers, advocates and counsel in the Exchequer Court. 50-51 V., c. 16, s. 12.

Attorneys or Solicitors.

17. All persons who are attorneys or solicitors of the superior courts in any of the provinces, may practise as attorneys, solicitors and proctors in the Exchequer Court. 50-51 V., c. 16, s. 13.

To be Officers of the Court.

18. All persons who may practise as barristers, advocates, attorneys, solicitors or proctors in the Exchequer Court, shall be officers of such Court. 50-51 V., c. 16, s. 14.

Solicitor or Counsel—Witness to Deed—Evidence.—Where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties he ceases, in respect of the execution of the instrument, to be clothed with the character of a solicitor or counsel and is bound to disclose all that passed at the time relating to such execution. *Magee v. The Queen*, 3 Ex. C. R. 305.

See Rules of Court and notes thereunder, respecting the appointment of agents and election of domicile by solicitors and attorneys practising before the Exchequer Court.

The defense of all claims before the Court of Claims in the United States of America is confided by law to the Attorney-General, who assigns one of the Assistant Attorneys-General, with an adequate number of assistants, to that special duty under his own supervision; but he occasionally makes the argument himself in cases of unusual importance and magnitude. *Richardson's History of the Court of Claims*, 29.

Counsel—Foreign—Application to be heard.—Counsel residing in the United States of America wished to be heard on behalf of appellants in an appeal before the Supreme Court of Canada, but was refused. *Halifax City Ry. Co. v. The Queen*, Cas. Dig. 679.

The same practice obtains in the Exchequer Court, where two such applications were refused in the "Auer Light" and "Buster Brown" cases. However, Mr. Edward S. Dodge, of the United States Bar, has, in a recent Admiralty case, obtained the leave of the Supreme Court to appear for one of the parties. *Calvin Austin v. Lovitt*, 35 S. C. R. 616. The practice of hearing foreign Counsel before our Canadian Courts should be discouraged. If it were known that American Counsel could be so heard, the Canadian Bar would be the first to suffer, as a very large portion of the patent cases heard before the Canadian tribunals originate in the United States.

JURISDICTION.

Exclusive Original Jurisdiction of the Court.

19. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown. 50-51 V., c. 16, s. 15.

The practice and procedure relating to petition of right in England is now regulated by *The Petitions of Right Act*, 1860, (23-24 Vict. (U.K.) ch. 34). Section 18 thereof provides, however, that nothing contained in that Act shall prevent a suppliant from proceeding as before the passing of the same. The Act regulates the practice, but not the law; and therefore the jurisprudence established prior to the passing of that statute has not been interfered with by this new legislation.

In view of the above section (sec. 19 of ch. 140 R. S., 1906), giving the court exclusive original jurisdiction in all cases in which demand is made or *relief* sought in respect of any matter which might in England be the

subject of a petition of right, it would be well to give here the interpretation of the word *relief* as understood in England. Section 16 of the English petition of right Act gives us the following definition:—"The "word *relief* shall comprehend every species of relief claimed or prayed "for in any such petition of right, whether a restitution of any incorporeal "right, or a return of lands or chattels, or a payment of money or damages "or otherwise."

By reference to subsection (c) of sec. 2 of *The Petition of Right Act*, (R.S., 1906, ch. 142), it will be found that the definition of the word "relief" in the Canadian Act has been taken from the Imperial statute.

At page 66 of Mr. Clode's valuable work on *Petition of Right* will be found an enumeration of the classes of cases in which a petition of right will lie in England. He divides these cases into four classes, viz.:—

(1). "Claims for the restitution of property wrongfully taken and "detained by the Crown; (2). Claims arising out of some contract made "between the Crown and a subject; (3). those in which certain equitable "claims have been sought to be enforced against the Crown; and (4), "lastly, those in which certain claims, made enforceable by this means, "by statute, were prosecuted."

At pages 62-63 of the same work, he further says that:—"The injury "upon which a suppliant bases his claim must be a legal one, and further "that a petition of right will not lie for a claim in the nature of a tort. "The true test by which it can be decided whether any particular claim "of a subject against the Crown can be maintained is not its legal "sufficiency considered as a claim against a subject, but the foundation in "precedent which it has, considered as a claim against the Crown."

For the origin of the remedy by petition of right, the liability of the Crown thereunder from the earliest times and a brief discussion of some of the leading cases on the subject, *see* Introduction to this book, *ante p. 70 et seq.*

JURISPRUDENCE:—

1. A petition of right has been held by the courts to lie against the Crown in the following cases:—

(*a*). For the restitution of real property in the possession of the Crown. *Feather v. The Queen*, 6 B & S. 294.

(*b*). For the recovery of an incorporeal hereditament from the Crown. *James v. The Queen*, L. R., 17 Eq. 502.

(*c*). For the recovery of specific chattel, or the value thereof, if it had been converted to the King's use. *Tobin v. The Queen*, 16 C. B. N. S. 358; *Feather v. The Queen*, 6 B & S. 257.

(*d*). For the recovery of money due upon a legacy under the will of a former sovereign, where the personal estate of the latter is in the present King's hands. *Ryves v. The Duke of Wellington*, 9 Beav. 579; *Ellis v. Earl Gray*, 6 Sim. 220.

(*e*). For the recovery of money paid by mistake for stamp duty on the probate of a will. *Executors of Percival v. The Queen*, 38 L. J. (Ex.) 289.

(*f*). For the recovery of accumulated rents of property which in default of next of kin had passed into the hands of the Crown. *In re Gosman*, L. R. 15, Ch. D. 67; this case also dealt with the question of interest against the Crown. See Introduction p. 87.

(*g*). For the recovery of a civil servant's salary. *Birke v. The Queen, Times*, 29th May, 1869.

(*h*). For breach of contract resulting in unliquidated damages. *Thomas v. The Queen*, L. R. 10 Q. B. 31.

(*i*). Generally, for damages for breach of contract. *Feather v. The Queen*, 6 B & S 294; *Windsor & Annapolis Ry. Co. v. The Queen, and The Western Counties Ry. Co.*, L. R. 11 App. Cas. 607; *Churchward v. The Queen*, L. R. 1 Q. B. 186; *Tobin v. The Queen*, 16 C. B., (N.S.) 310; *Kinlock v. The Queen, Times*, March 22nd, 1885; *De Dohsé v. The Queen, Times*, Nov. 25th, 1886; *Eyre v. The Queen, Times*, June 8th, 1886; *Thomas v. The Queen*, L. R. 10 Q. B. 31; *Farnell v. Bowman*, 12 App. Cas. 649; *The Attorney-General of Straits Settlement v. Wemyss*, 13 App. Cas. 192. This last case is also authority for the recovery of damages arising upon torts, under the laws of that Colony.

(*j*). For the recovery of counsel fees. *Doutre v. The Queen*, 6 S. C. R. 342.

(*k*). For breach of contract, and for the amount of extra work done under a contract. *Isbester v. The Queen*, 7 S. C. R. 696.

(*l*). For breach of a contract respecting parliamentary and departmental printing. *McLean v. The Queen*, 8 S. C. R. 210.

(*m*). For the loss of fishing privileges in a river under a license from the Minister of Marine and Fisheries. *Robertson v. The Queen*, 6 S. C. R. 52.

(*n*). For the restitution of lands and accumulated rents and profits thereof while in the hands of the Crown. *Tylee v. The Queen*, 7 S. C. R. 651.

(*o*). For the restitution of goods improperly seized by officers of the Crown for alleged non-payment of inland revenue tolls. *Merchants Bank v. The Queen*, 1 Ex. C. R. 1.

(*p*). For the breach of contract whether such breach is occasioned by the acts or omissions of the Crown officials. *Windsor & Annapolis Ry. Co. v. The Queen*, 11 App. Cas. 607.

(*q*). For the assertion of any title under sec. 29 of 7 Vict. ch. 2. *McQueen v. The Queen*, 16 S. C. R. 1.

2. *Petition of Right—Damages or loss from injury to property.*—Since 1887, when *The Exchequer Court Act* was passed, a petition of right will lie for damages or loss resulting from an injury to property on a public work resulting from the negligence of an officer of the Crown acting within the scope of his duty; the subject's remedy being before that date limited to a submission of his claim to the Official Arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court, and thence to the Supreme Court of Canada. *City of Quebec v. The Queen*, 3 Ex. C. R. 164; 24 S. C. R. 420.

3. *Injury to Person—Negligence—Liability.*—A petition of right will lie against the Crown, under sec. 16 of 50-51 Vict. ch. 16, for the death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. *Filion v. The Queen*, 4 Ex. C. R. 134; *City of Quebec v. The Queen*, 2 Ex. C. R. 252; 24 S. C. R. 482, both judgments were affirmed on appeal to the Supreme Court of Canada. *Martial v. The Queen*, 3 Ex. C. R. 118.

4. *Petition of Right—Breach of Warranty—Sale of Personal Chattels.*—*Quære*: Will an action by petition or on reference lie in the Exchequer

Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels? *Saint Catharines Milling & Lumber Co. v. The Queen*, 2 Ex. C. R. 202.

5. *Petition of Right—Injury to Goods or Animals on Government Railway.*—A petition of right will lie for the recovery of damages resulting from the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train. *Lavoie v. The Queen*, 3 Ex. C. R. 96.

6. *Petition of Right—Animal killed on I. C. Ry.—Liability of Crown.*—A petition of right will lie against the Crown, under R. S. C. ch. 38, sec. 23 and 50-51 Vict., ch. 16, sec. 16 (*c*), for the recovery of damages resulting from the loss of an animal killed on the I. C. Ry., occasioned by the negligence of the engineer of the train. *Gilchrist v. The Queen*, 2 Ex. C. R. 300.

7. *Injurious affection of land—Erosion—Acceleration by public work—Damages—Jurisdiction of official arbitrators—Transference to Exchequer Court.*—Such jurisdiction as the official arbitrators were empowered to exercise in respect of any claim for alleged direct or consequent damages to property arising out of anything done by the Government of Canada, under section 1 of 33 Vict., c. 23, and also in respect of any claim for alleged direct or consequent damage to property arising from the construction or connected with the execution of any public work under sec. 34 of 31 Vict., c. 12, was, in substance, transferred to the Exchequer Court by the provisions of sections 16, 58 and 59 of 50-51 Vict., c. 16. Where the erosion of land arising from the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein, by the Crown,—it was held that a Petition of Right would lie for damages for the acceleration and increase of such erosion. *Graham v. The King*, 8 Ex. C. R. 331.

8. *Petition of Right—Contract.*—A petition of right will lie for a breach of contract resulting in unliquidated damages. *Thomas v. The Queen*, L. R. 10 Q. B. 31; *Banker's Case*, 14 How. St. Tr. 1.

9. *Damages—Unsafe crossing.*—A petition of right will lie against the Crown under sec. 16 of *The Exchequer Court Act* for the loss of a horse caused by the unsafe condition of the crossing over the P. E. I. Ry. tracks in the Town of Georgetown, resulting from the negligence of the officers and servants of the Crown while acting within the scope of their duties and employment. *Byrne v. The King.* January 9th, 1906.

10. *Petition of Right—International Law—Annexation—Liabilities of Conquered State—Creditor's Rights against Conqueror, Act of State—Jurisdiction of Municipal Courts.*—A petition of right alleged that, before the outbreak of war between the late South African Republic and Great Britain, gold, the produce of a mine in the Republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the Government of the Republic; that the Government by the laws of the Republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territories of the Republic by Her late Majesty the obligation of the Government of the Republic towards the suppliants in respect of the gold was now binding upon His Majesty the King. And it was held on demurrer, that the petition disclosed no right on the part of the suppliants which could be enforced against His Majesty in any municipal court.

There is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war. *West Rand Central Gold Mining Co. v. The King*, (1905), 2 K. B. 391.

11. A petition of right will not lie against the Crown in the following cases:—

(*a*). To enforce a contract between the Crown and an officer of its military service. *Mitchell v. The Queen*, 6 Times L. R. 181; (1896) 1 Q. B. 121.

(*b*). To recover a pension from the Government after the Commissioners of the Treasury have, under the Acts regulating the superannuation allowances of the civil service, decided adversely to such action. *Cooper v. The Queen*, 14 Ch. D. 311; 49 L. J. Ch. 490.

(*c*). For an inquiry into the circumstances attending the dismissal of an officer from the army. *In re Tufnell*, 3 Ch. D. 164; 45 L. J. Ch. 731.

(*d*). To compel the Crown to grant a patent of lands. *Clarke v. The Queen*, 1 Ex. C. R. 182.

(*e*). For tort or for a claim based upon an alleged fraud importing to the Crown fraudulent misconduct of its servants. *Jones v. The Queen*, 7 S. C. R. 570.

(*f*). For damages occasioned by the negligence of the Crown's servant to the property of an individual using a public work. *McFarlane v. The Queen*, 7 S. C. R. 216; *Tobin v. The Queen*, 16 C. B. (N.S.) 310; but now see *City of Quebec v. The Queen*, 2 Ex. C. R. 252 and *Filion v. The Queen*, 4 Ex. C. R. 134; 24 S. C. R. 482.

(*g*). For damages resulting from the negligence of the Crown's servants on a Government railway. *McLeod v. The Queen*, 8 S. C. R. 1; but now see *Gilchrist v. The Queen*, 2 Ex. C. R. 300, and *Lavoie v. The Queen*, 3 Ex. C. R. 96.

(*h*). For the breach of an executory contract which is not made in conformity with statutory requirements. *Wood v. The Queen*, 7 S. C. R. 634.

(*i*). For damages for the destruction of a house by fire arising from the negligence of the servants of the Crown. *Lord Canterbury v. The Queen*, 12 L. J., Ch. 281.

(*j*). For the wrongful acts of a naval officer employed in the suppression of the Slave Trade. *Tobin v. The Queen*, 33 L. J., C. P. 199.

(*k*). For damages for an alleged infringement by the Lords of the Admiralty of a patent of invention granted to the suppliant by the Crown. *Feather v. The Queen*, 6 B. & S. 257.

(*l*). For damages arising upon torts in general. See cases *supra* and *The Queen v. McFarlane*, 7 Can. S. C. R. 216; *McLeod v. The Queen*, 8 S. C. R. 1; *City of Quebec v. The Queen*, 2 Ex. C. R. 252. For American cases see *Langford v. The United States*, 101 U. S. R. 341.

(*m*). For injuries sustained by one who falls upon a step of a public building (Post Office) by reason of ice which had formed there and which the caretaker of the building, employed by the Minister of Public Works, had failed to remove or to cover with sand or ashes. *Leprohon v. The Queen*, 4 Ex. C. R. 100.

(*n*). For salvage services rendered to a steamship belonging to the Dominion Government. *Couette v. The Queen*, 3 Ex. C. R. 82; see Nos. 31 and 33 hereof.

(*o*). For the recovery of the value of goods stolen while in a Custom examining warehouse; the subject has however his recourse against the officer through whose personal act or negligence the loss happens. *Corse v. The Queen*, 3 Ex. C. R. 13; see also *Bergeron v. Gélina*, Q. R. 15, S. C. 346.

(*p*). For unliquidated damages for a trespass. *Tobin v. The Queen*, 16 C. B. (N.S.) 310; 33 L. J. C. P. 199.

(*q*). For municipal taxes assessed upon real property belonging to the Dominion of Canada. *City of Quebec v. The Queen*, 2 Ex. C. R. 450; *Quirt v. The Queen*, 19 Can. S. C. R. 510.

(*r*). For interest on the amount found in favour of a suppliant for loss of profits resulting from the breach of a Government contract. *The Queen v. McLean*, Cassels' Digest p. 399.

12. *Crown—Common Carrier—Liability.*—The Crown is not a common carrier and a petition of right against it as such will not lie. *McFarlane v. The Queen*, 7 S. C. R. 216; *McLeod v. The Queen*, 8 S. C. R. 1; but see *Farnell v. Bowman*, 12 App. Cas. 649 and *Lavoie v. The Queen*, 3 Ex. C. R. 96.

13. *Petition of Right—Evidence—Omnia presumunter contra spoliatorem.*—A question having arisen as to the correctness of certain pay-lists or accounts forming the basis of the suppliant's claim and, moreover, a Commission having been appointed to inquire into the manner in which the works in connection therewith had been carried on, it being likely that the question of the correctness of such pay-lists or accounts would be brought before such Commission, the suppliant saw fit to burn his time-books and all the original papers and materials from which his accounts had been prepared and the Exchequer Court held that the fair presumption from the destruction of such books and materials was that if they had been accessible they would have shown that the accounts were not true accounts.

This decision was reversed by the Supreme Court of Canada upon the grounds that the evidence did not disclose any fraud or intention to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence and that the maxim *omnia presumunter contra spoliatorem* did not apply to the case. *St. Louis v. The Queen*, 4 Ex. C. R. 185; 25 S. C. R. 649.

14. *Action for return of moneys paid by mistake—Legal process—Recovery—Demurrer.*—The suppliant brought his petition of right to recover from the Crown the sum of $190 which he alleged he had paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500.00 for damages for the loss he alleged resulted to him on the sale of said lands by reason of the proceedings taken against him by the Crown. Upon demurrer to the petition, it was held that the suppliant's petition disclosed no right of action against the Crown, and that the demurrer should be allowed. *Moore v. The Vestry of Fulham* ([1895] 1 Q. B. 399) followed. *Paget v. The King*, 7 Ex. C. R. 50.

15. *Petition of Right—Damage to lands—Subsidence—Release of claim—Liability—Want of repairs to property by owner.*—In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N.B., the Dominion Government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and

he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair. And it was held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and as the injury complained of happened principally because the suppliant had failed to repair his wharf the Crown was not liable therefor. *Vroom v. The King*, 8 Ex. C. R. 373.

16. *Tort by Crown's servants—Diversion of flowing water—Liability.*—The suppliant, by his petition of right, alleged, in substance, that the Crown, through the Minister of Railways and Canals, and his servants, agents and employees, having no right to do so, had diverted the water of a certain brook, which flowed through his property in the parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie. And it was held that the suppliant's action was laid in tort, and a petition of right would not lie therefor. *Montgomery v. The King*, 11 Ex. C. R. 158.

17. *Petition of Right—Contract—Final certificate of Engineer.*—The suppliants are bound by the final certificate given by the engineer under the terms of the contract. *Cimon v. The Queen*, 22 S. C. R. 62.

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18. *Civil Service—Extra Salary—Additional Remuneration.*—E. had been for some time a clerk in the Department of Public Works and in the Department of Railways and Canals, respectively, when on 15th June, 1869, he was appointed Secretary to the Board of Arbitration, constituted under 31 Vict. ch. 12, at an annual salary of $1,000 and travelling expenses, and as such discharged the duties attached to the office until the 22nd November, 1880, having up to this time been paid his travelling expenses and his salary as Departmental clerk only; but having never received any part of his salary of $1,000 as secretary to the said Board of Arbitration, although Parliament had voted from year to year the necessary money to pay the same. And the Court held that E. was entitled to be paid his salary of $1,000 as such Secretary, from the 15th June, 1869, up to the 4th November, 1880, less the proportion of his annual salary as a clerk in the said Departments, which would correspond with the proportion of the time which the said E. was absent from his office as a clerk in either of the said Departments fulfilling his duties as such Secretary. And, after having caused an account to be taken of the proportion of the salary of the said E. as a clerk in either of the said Departments corresponding with the proportion of time which the said E. was absent from his duties as clerk in either of the said Departments in the discharge of his duties as such secretary, the Court found that the said account amounted to $5,169.34, or a one-third proportion of his salary as such clerk, and deducted the said sum of $5,169.34 from the sum of $11,386.07, being the total amount of the salaries of the said E. as such secretary, and allowed him the remaining balance of $6,216.73, with costs. *Ennis v. The Queen*, 8th June, 1887.

19. *Civil Service*—51 *V. c.* 12, *s.* 51—*Extra Salary—Additional Remuneration—Permanent Employees.*—Reporters employed on the Hansard staff of the House of Commons of Canada are persons subject to the operation of sec. 51 of *The Civil Service Amendment Act*, 1888 (51 Vict. ch. 12), which reads as follows:—"No extra salary or additional "remuneration of any kind whatever shall be paid to any deputy-head, "officer or employee in the Civil Service of Canada, or to any other "person permanently employed in the public service of Canada."

The words "no extra salary or additional remuneration" in the above section apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them. *The Queen v. Bradley*, 27 S. C. R. 657; 5 Ex. C. R. 409.

20. *Civil Service—Superannuation—Discretionary Power—Jurisdiction.*—Employees in the Civil Service of Canada who may be retired or removed from office under the provisions of the eleventh section of "*The Civil Service Superannuation Act*" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority. *Balderson v. The Queen*, 28 S. C. R. 261.

Salary of a Civil servant is, however, recoverable by action. *Birke v. The Queen, Times*, 29th May, 1869.

21. *Civil Servants of the Crown—Power to dismiss at pleasure—Civil Service Act*, 1884, N. S. W.—The Crown has by law, whether in England or New South Wales, power to dismiss at pleasure either its civil or military officer, a condition to that effect being an implied term of the contract of service except where it is otherwise expressly provided:—But certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the officer, are inconsistent with such a condition, and consequently restrict the power of the Crown in that respect. *Gould v. Stuart*, 1896, A. C. 575.

22. *Prerogative of the Crown—Petition of Right—Colonial Servants of the Crown hold office during pleasure.*—A Colonial Government is on the same footing as the Home Government as to the employment and dismissal of servants of the Crown; and in the absence of special contract they hold their offices during the pleasure of the Crown.

Where the respondent, having been gazetted, without any special contract, to act temporarily as medical officer during the absence on leave of the actual holder of that office, was dismissed by the Government before the leave had expired, it was *held* he had no cause of action. *Shenton v. Smith*, 1895, A. C. 229.

23. *Crown—Prerogative of—Military Service—Engagement made with Military Officer by the Crown—Petition of Right.*—No engagement made by the Crown with any of its military or naval officers in respect of services either present, past, or future, can be enforced in any court of law. *Mitchell v. The Queen*, 1896, Q. B. 121.

24. *Crown, Prerogative of—Civil Service—Tenure of Office—Power of Dismissal at Pleasure.*—Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. *Dunn v. The Queen*, 1896, Q. B. 116.

25. *Principal and Agent—Liability of Agent—Warranty of Authority —Contract made by Public Servant of Crown.*—The doctrine that an agent who makes a contract on behalf of his principal is liable to the other contracting party for a breach of an implied warranty of his authority to enter into the contract is not applicable to a contract made by a public servant acting on behalf of the Crown. *Collen v. Wright* (1857), 8 E. & B. 647, considered and distinguished; *Dunn v. Macdonald*, 1897, Q. B. Div. 401; L. J. 66, Q. B. 470.

26. *Demurrer to petition of right—Claim for services rendered as Commissioner under R. S. C. c. 115—Payment—Public office.*—A person appointed under the provisions of chapter 115, *Revised Statutes of Canada*, as a Commissioner to investigate and report upon the improper conduct in office of an officer or servant of the Crown cannot recover against the Crown payment for his services as such Commissioner, there being no provision for such payment in the said enactment or otherwise.

The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute.

The appointment partakes more of the character of a public office than of a mere employment to render a service under a contract express or implied. *Tucker v. The King* (7 Ex. C. R. 351), affirmed on appeal to the Supreme Court of Canada, 32 S. C. R. 722. See also *de Cosmos v. The Queen*, 1 B. C. R. Part 11, 26.

27. *Public officer—Assignment of salary—Public policy—Librarian of Parliament—Auditor-General—Right of, to bind Crown.*—The provisions respecting the assignments of choses in action found in R. S. O., c. 51, s. 58, ss. 5 and 6 are not binding upon the Crown as represented by the Government of Canada. On grounds of public policy the salary of a public officer is not assignable by him. Neither the Librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament. *Powell v. The King*, 9 Ex. C. R. 364.

28. *Postmaster's salary—Claim for difference between amount authorized and that paid—Interest—Civil Service Act, R. S. C. c. 17, sec. 6 and sched. B.—51 Vict. c. 12, sec. 12—Extra allowances.*—By *The Civil Service Act* (R. S. C. c. 17, sched. B.) a city Postmaster's salary, where the postage collections in his office amount to $20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor in Council or in the Postmaster-General to make the salary more or less than the amount so provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute. And it was *held* he was entitled to recover the difference between the said amounts.

The provision in the 6th section of *The Civil Service Act* to the effect that "the collective amount of the salaries of each department shall "in no case exceed that provided for by vote of Parliament for that "purpose" is no bar to the suppliant's claim, even if it could be shown that, if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded.

Such provision is in the nature of a direction to the officers of the Treasury who are entrusted with the safe-keeping and payment of the public money, and not to the courts of law. *Collins v. The United States* (15 Ct. of Clms. at p. 35) referred to. The suppliant was not entitled to interest on his claim.

The provision in the 12th section of the Civil Service Amendment Act, 1888 (51 Vict. c. 12), that "no extra salary or additional remunera-"tion of any kind whatsoever shall be paid to any deputy head, officer "or employee in the Civil Service of Canada, or to any other person per-"manently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration; and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back. *Hargrave v. The King*, 8 Ex. C. R. 62.

29. *Intercolonial railway—Contract for services—Conditional increase of salary—Impossibility of performance of condition—Promises by Crown's officers—Liability.*—H., while General Traffic Manager of the I. C. Ry., offered to secure the appointment of R. to a position in H's department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum wrote to him: "I would be prepared to alter the terms of my letter to "read $2,100, with the assurance that should you, as I feel confident you "can, develop the traffic on your division to my satisfaction, your salary "should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely in September, 1898, the department offered to appoint R. as General Travelling Freight Agent of the Railway, with headquarters at Toronto; and R. accepted the new office on the assurance contained in a letter from W., the then General Freight Agent of the railway, that "there is to be no change in the salary "of the present position and the one in the West." R. entered upon his new duties on the 10th of October, 1898, and discharged the same until April, 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H's letter of the 16th December, 1898, and W's letter mentioned. And it was *held* that even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his position, and was no longer in the position to say whether R. had, or had not developed the traffic to his satisfaction; and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

The fair meaning of W.'s promise that there would be no change in the salary on R's acceptance of his new office in the traffic department

was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100.

That W. not having been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the General Freight Agent of the Railway, and as such R's immediate superior officer. *Robinson v. The King*, 9 Ex. C. R. 448.

30. *Crown—Set off—Petition of right—Railway tax.*—Set off cannot be pleaded against the Crown without having recourse to a petition of right. A railway, although rented to the Federal Government and operated by the latter, is liable for taxes under 59 Vict. ch. 15 (Q.) *Coté v. Drummond Ry.*, Q. R. 15 S. C. 561; *Fortier v. Langelier*, Q. R. 5 K. B. 107; see also *Minister of Railways and Canals in the Quebec Southern Ry.* and *The Province of Quebec*, December, 1906.

31. *Crown's ship—Salvage—Action not maintainable.*—When a ship is the property of the Crown, no action *in rem* or otherwise for salvage can be maintained. The only mode in which an application can be made to the Crown in respect of contractual rights is that which is provided by statute. *Young, Master of SS. Furnesia v. The S. S. Scotia*, 1903, A. C. 501.

32. *Assessment of damages once for all.*—All damages capable of being foreseen must be assessed once for all and a defendant cannot be twice sued for the same cause. *Anctil v. City of Quebec*, 33 S. C. R. 347.

33. *Salvage—Government ship.*—The following authorities illustrate the position of the Crown in relation to Admiralty proceedings in salvage cases for services rendered to a Government ship:—Williams & Bruce Adm. Prac. 3rd ed. p. 179, citing *The Marquis of Huntley*, 3 Hagg. 246; *The Lulan*, Mitchell's Maritime Register, 1883, p. 209; *The Comus*, cited in the *Prins Frederick*, 2 Dods. 464; *The Lord Hobart*, 2 Dods. 100; *The Athol*, 1 Wm. Rob. 374; *The Volcano*, 3 No. of Cas. 210; *Lipson v. Harrison*, 22 L. T. 83; *Wadsworth v. The Queen of Spain*, 17 Q. B. 171, 196; *The Parlement Belge*, L. R. 5 P. D. 197; *The Schooner Exchange*, 7 Cranch 116; *The Thomas A. Scott*, 10 L. T. N. S. 726; *Briggs v. Light Boat Upper Cedar Point*, 11 Allen 157; *Couette v. The Queen*, 3 Ex. C. R. 82; *Young v. The Scotia* (1903) A. C. 501.

34. *Married woman—Community—Personal injuries—Right of action.*—The right of action for damages in the Province of Quebec for personal injuries sustained by a married woman, *commune en biens*, belongs exclusively to her husband and she cannot sue for the recovery of such damages in her own name even with the authorization of her husband. *McFarran v. The Montreal Park and Island Ry. Co.*, 30 S. C. R. 410.

35. *Petition of right or reference.—Quære*: Will an action by petition or on reference lie in the Exchequer Court against the Crown for unliquidated damages for breach of warranty implied in a sale of personal chattels? *The Saint Catharines Milling, etc., Co. v. The Queen*, 2 Ex. C. R. 202.

36. *Navigation in St. Lawrence—On a public work*—50-51 *Vict. ch. 16, sec. 16—Government ship.*—No action will lie against the Crown for damages suffered by a steam barge coming in collision, in the River St. Lawrence, with a Government tug engaged in towing mud scows, at some distance from where dredging was being carried on by the Crown,—as

the injury had not been sustained on a public work within the meaning of 16th sec. of *The Exchequer Court Act* 50-51 Vict. ch. 16. *Paul v. The King*, 38 S. C. R. 126. See also *Chambers v. Whitehaven Harbour Commissioners* (1899) 2 Q. B. 132; *Hall v. Snowdon, Hubbard & Co.* (1899) 2 Q. B. 136; *Lowth v. Ibbotson* (1899) 1 Q. B. 1003; *Farnell v. Bowman* (12 App. Cas. 643), and *The Attorney-General of the Straits Settlement v. Wemyss*, (13 App. Cas. 192), referred to.

37. *Railway subsidy—Petition of right.*—Where money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right. *Hereford Ry. Co. v. The Queen*, 24 S. C. R. 1.

38. *Petition of Right—Debt against the Crown.*—Where moneys had been voted by Parliament to pay a claim and an order-in-council passed authorizing the payment of the same to J., it was held that on the date of the order-in-council there existed a debt due by the Crown to J., arising out of contract and recoverable by petition of right. *Stewart v. Jones*, 19 Ont. P. R. 227.

39. *Petition of Right for services rendered to a Parliamentary Committee—Liability.*—The Crown is not liable upon a claim for the services rendered by anyone to a Committee of the House of Commons at the instance of such Committee. *Kimmitt v. The Queen*, 5 Ex. C. R. 130.

40. *Minister of Public Works—Authority to bind the Crown—1 Edw. VII, Ch.* 9.—Under the provisions of 1 Edw. VII, ch. 9, the Governor-in-Council is authorized to advance and pay, from time to time, to the Harbour Commissioners of Montreal, sums of money not exceeding in all $1,000,000.00 for the erection of grain elevators, and to provide for terminal facilities as are necessary to properly equip the port of Montreal. These advances are, however, to be made only subject to the approval, by the Minister of Public Works, of the plans for such work. The Harbour Commissioners having submitted plans for sheds, the Minister, not being satisfied with the same, before passing upon such plans, called in V., the suppliant, to prepare plans for steel sheds. V. prepared elaborate plans, and for such service filed his account with the Department of Public Works. The account remaining unpaid, he thereupon filed his petition of right claiming the sum of $49,343.40.

Held, that under the circumstances the Minister of Public Works was acting as a *persona designata* for the approval of such plans and not as the Minister of Public Works as a member of the Executive, and that accordingly he could not, in the performance of the duties assigned to him under 1 Edw. VII, ch. 9, bind the Government of Canada, and the petition of right was dismissed. *Vautelet v. The King*, 7th January, 1908.

Exclusive original jurisdiction of the Court.

20. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work,

resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

(*e*) Every set-off, counter-claim, claim for damages whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown. 50-51 V., c. 16, s. 16.

1. *Claim against Crown—On public work—Negligence.*—With respect to the place where the injury to property *on a public work* occurs, it is sufficient to bring the case within the statute if the cause of the injury is or arises on the public work. It would be no answer to those entitled to bring an action for the death of any one on a public work to say that the death did not occur there, if the injury causing death was received on the work: and so it seems that the intention of the statute was to give a remedy to persons whose property is injured by the negligence of the Crown's officers in the discharge of their duties or employment on public works, whether such property is actually on the public work, or being near enough thereto to be injured by such negligence is actually injured thereby. The foregoing is the view expressed by Burbidge, J. in re *Letourneux v. The Queen* (7 Ex. C. R. 7) which, however, he thought he could not hold in view of the contrary opinion of four learned judges in re *The City of Quebec v. The Queen* (24 S. C. R. 420). However, on appeal to the Supreme Court of Canada, Taschereau, C.J., who gave the judgment of the Court, at p. 339 (33 S. C. R.) said that "the Court did not see any-"thing in the case of *City of Quebec v. The Queen* (*supra*) that militated "against the right to recover damages under the circumstances," restoring thus the view of Burbidge, J. as above set forth. But in the case of *Price v. The King* (10 Ex. C. R. 105) it was distinctly held that "it is "sufficient to bring a case within the statute if the cause of the injury "is or arises on a public work."

2. *Art.* 1056 *C. C. P. Q.—Contract that deceased shall have no claim—Insurance Society.*—The right of action conferred by Art. 1056, C. C. P.Q. is an independent and personal right not derived from the deceased or his representative and is essentially different from the right of action derived under Lord Campbell's Act. *Robinson v. C. P. Ry.* (1892) A. C. 481 followed; *Miller v. G. T. Ry. Co.* (1906) A. C. 187.

Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance. And it was *held*, that assuming this by-law to be valid, the deceased had not obtained satisfaction within the meaning of art. 1056. The insurance money did not proceed from the respondents, had no relation to its offence, and was equally payable in case of natural death. (*Reg. v. Grenier* (1899), 30 S. C. R., overruled). *Miller v. G. T. Ry. Co.* 1906, A. C. 187.

See Grand Trunk Ry. Co. v. Vogel, 11 S. C. R. 612, which had been disapproved by the Supreme Court of Canada itself in the *Grenier case*.

See 4 Edw. VII, ch. 31, *An Act to amend the Railway Act*, 1903, which enacts that no agreement with employees will relieve a company from any liability for personal injury. The question of the competency of Parliament to enact such provision was submitted to the Supreme Court of Canada, in compliance with the Act itself and the Supreme Court of Canada declared it *intra vires*, 36 S. C. R. 136. The appeal from this judgment to the Judicial Committee of the Privy Council was dismissed on the 5th November, 1906 (48 Can. Gaz. 159). This Act came into force on the 1st day of April, 1907, by proclamation published in the Canada Gazette 19th January, 1907.

See now 6-7 Edw. VII, ch. 22, sec. 26, the *Intercolonial & P. E. I. Rys. Employees' Fund Act*.

3. *Damages—Renouncement to action by employee—Widow's rights.*—The renouncement by the employee to any action for damages against his employer is not a bar to the action given by Art. 1056 C. C. to his widow and children. *Laplante v. Grand Trunk*, Q. R. 27, S. C. 457.

4. *Railway—Negligence—Condition limiting liability.*—Conditions printed upon a transportation ticket limiting a Railway Company's liability for baggage to wearing apparels not exceeding $100 in value will not prevent the purchaser of such ticket from recovering damages for the loss of his baggage caused by the Company's negligence. *Bate v. C. P. Ry. Co. Cameron's* S. C. cases 10.

5. *Government railway—Death resulting from negligence of fellow servant—Common employment*—50-51 *Vict. c.* 16, *s.* 16 (*c.*)—*Art.* 1056 *C. C. L. C.—Widow and children—Right of action—Bar—Liability—Contract limiting—Measure of damages.*—The doctrine of common employment is no part of the law of the Province of Quebec. *Robinson v. Canadian Pacific Railway Co.* ([1892] A. C. 481); and *Filion v. The Queen* (4 Ex. C. R. 134; and 24 S. C. R. 482) followed.

The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow servant of the deceased.

The right of action in such case arises under 50-51 Vict. c. 16 (*c.*) and Art. 1056 C. C. L. C., and is an independent one in behalf of the widow and children. It is not under the control or disposition of the husband in his life-time, and nothing he may do in respect of it will bar the action.

Under the provisions of section 50 of *The Government Railways Act*, while the Crown may limit the amount for which in cases of negligence it will be liable, it cannot contract itself out of all liability for negligence. *The Grand Trunk Railway v. Vogel* (11 S. C. R. 612); and *Robertson v. The Grand Trunk Railway Co.* (24 S. C. R. 611) applied.

In cases such as this it is the duty of the court to give the widow and children such damages as will compensate them for the pecuniary loss sustained by them in the death of the husband and father. In doing that the court should take into consideration the age of the deceased, his state of health, the expectation of life, the character of his employment, the wages he was earning and his prospects; on the other hand the court should not overlook the fact that out of his earnings he would have been obliged to support himself as well as his wife and children, nor the contingencies of illness or being thrown out of employment, to

which in common with other men he would be exposed. *Grenier v. The Queen*, 7 Ex. C. R. 276. The foregoing judgment was reversed on appeal to the Supreme Court of Canada (30 S. C. R. 42) but was not taken to the Judicial Committee of Her Majesty's Privy Council. The judgment of the Judicial Committee in the case of *Miller v. The G. T. Ry.* (1906, A.C. 187) overruled the *Grenier case* as pronounced upon by the Supreme Court of Canada, but in effect affirmed the principle laid down by the judgment of the Exchequer Court as above set forth.

6. *Jurisdiction—Negligence of fellow-servant—Defective switch—Liability of Crown—Exchequer Court Act, s.* 16 (*c.*)—*Lord Campbell's Act—Art.* 1056 *C. C.*—In consequence of a broken switch at a siding on the Intercolonial Railway (a public work of Canada) failing to work properly although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under Article 1056 of the Civil Code of Lower Canada: It was *held*, affirming the judgment appealed from (11 Ex. C. R. 119), that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that *The Exchequer Court Act*, 50 and 51 Vict. ch. 16, sec. 16 (c), imposed liability upon the Crown, in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of Article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards The Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller v. The Grand Trunk Railway Co.* ([1906], A. C. 187) followed. *The King v. Armstrong*, 40 S. C. R. 229. (*Leave to appeal to His Majesty's Privy Council refused*).

7. *Negligence—Fault of fellow servant—Employer's liability—Arts.* 1053 *and* 1056 *C. C.*—Where it appeared under the circumstances of the case, that the cause of the accident was either unknown or else it could fairly be presumed to have been caused by the negligence of the person injured and whose personal representative brought the action, there cannot be any such fault imputed to the defendants as would render them liable in damages. *Dominion Cartridge Co. v. Cairns*, 28 S. C. R. 362. (*Leave to appeal to Privy Council refused*).

8. *Negligence—Common employment—Fellow servant.*—As the doctrine of common employment does not obtain in the Province of Quebec, acts or omissions by fellow servants of the deceased do not exonerate employers from liability for the negligence of a servant which may have led to injury. *The Queen v. Filion* (24 S. C. R. 482) and *The Queen v. Grenier* (30 S. C. R. 42) followed. *The Asbestos & Asbestic Co. v. Durand*, 30 S. C. R. 285.

9. *Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.*—The Manitoba Workmen's Compensation Act does not apply to the Crown. In Manitoba the Crown as represented by the Government of Canada may, in an action for damages for injuries to an employee, rely on the defence of common employment. *Ryder v. The King*, 36 S. C. R. 462; 9 Ex. C. R. 330.

10. *Negligence—Fellow servant.*—Where an accident occurred in British Columbia, in consequence of the negligence of a fellow-servant,

the Supreme Court of Canada held that the defendant was excused from liability on the ground of common employment. *Hastings v. Le Roi No. 2, Ltd.*, 34 S. C. R. 177. See also *Horking v. Le Roi No. 2, Ltd.*, 34 S. C. R. 245.

11. *Negligence—Railway—Breach of statutory duty—Common Employment—Nova Scotia Ry. Act, R. S. N. S.* (1900) *c.* 99, *s.* 251—*Employers' Liability Act—Fatal Injuries Act.*—Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach and provides a penalty for violation of such provision.

Held that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal car to work the brakes, but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine. And it was *held*, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was therefore, not open to them. *Groves v. Wimborne* (1898) 2 Q. B. 402, followed (a).

Held, per Idington, J., that the evidence showed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow-servants of deceased; that the company, therefore, could not be held liable for the consequences under the "Fatal Injuries Act"; that it is, therefore, unnecessary to determine the applicability of the said section of the "Railway Act," as the fellow-servants were guilty of common law negligence which rendered the company liable but only by virtue of and within the limits of the "Employers' Liability Act." *McMullin v. Nova Scotia Steel & Coal Co.*, 39 S. C. R. 593.

12. *Liability of Crown for injury to property—Negligence of servant of the Crown.*—Under section 16 (c) of 50-51 Vict. ch. 16, the Crown is liable in damages for any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. *City of Quebec v. The Queen*, 2 Ex. C. R. 252; 24 Can. S. C. R. 420.

13. *Crown's immunity for personal negligence.*—The Crown's immunity from liability for personal negligence is in no way altered by section 16 (c) of 50-51 Vict. ch. 16. *Ibid.*

14. *Negligence of Crown's servant, liability.*—A. alleged in his petition that while driving slowly along a road in the Rocky Mountain Park N. W. T., his buggy came in contact with a wire stretched across the road, whereby he was thrown from the buggy to the ground and sustained severe bodily injury. He further alleged that the Rocky Mountain Park is a public work of Canada, under the control of the Minister of the Interior and the Governor in Council, who had appointed one S. superin-

tendent thereof; that S. had notice of the obstruction to travel caused by the wire and had negligently failed to remove it, contrary to his duty in that behalf; and that the Crown was liable in damages for the injuries so received by him. And the court held that the petition disclosed a claim against the Crown arising out of an injury to the person on a public work resulting from the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment, and therefore came within the meaning of 50-51 Vict. c. 16, s. 16 (c), which provides a remedy in such cases. *Brady v. The Queen*, 2 Ex. C. R. 273.

15. *Injury to property on Government railway—Negligence of servant of the Crown.*—A filly, belonging to G., was run over and killed by a train upon the Intercolonial Railway. It was shown on the trial that at the time of the accident the train was being run faster than usual in order to make up time, that it had just passed a station without being slowed, and was approaching a crossing on the public highway at full speed. The engineer admitted that he saw something on the track, which he did not recognize as a horse. He, however, paid no attention to it, and made no attempt to stop his train until after it was struck. And it was held that the engineer, as a servant of the Crown, was guilty of negligence, for which the Crown was liable under R. S. C. c. 38 s. 23 and 50-51 Vict. c. 16 s. 16 (c). (*The City of Quebec v. The Queen*, 2 Ex. C. R. 252, referred to). *Gilchrist v. The Queen*, 2 Ex. C. R. 300.

16. *Injury to person—Negligence of servant of the Crown—Retroactive operation of* 50-51 *Vict. ch.* 16—*Prescription.*—The Crown is liable for an injury to the person received on a public work resulting from the negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty. *City of Quebec v. The Queen* (2 Ex. C. R. 252) referred to. And a brakesman who forces a child to jump off a railway carriage while it is in motion is guilty of negligence. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence. *Martin v. The Queen*, 2 Ex. C. R. 328. On appeal to the Supreme Court of Canada, it was *held*, reversing the judgment of the Exchequer Court, that even assuming 50-51 Vict. ch. 16, gives an action against the Crown for an injury to the person received on a public work resulting from negligence of which its officer or servant is guilty (upon which point the Court expresses no opinion), such Act is not retroactive in its effect and gives no right of action for injuries received prior to the passing of the Act and further that the injury complained of in this case having been received more than a year before the filing of the petition, the right of action is prescribed under Arts. 2262 and 2267 C. C. L. C. *The Queen v. Martin*, 20 S. C. R. 240.

Note.—The plea of prescription was not raised in the Court below. On the contrary the Crown intentionally refrained from raising it, although an application had been made in Chambers to amend the pleadings and set up such a defence. But because the suppliant had persistently pressed his claim upon the Government, the Crown eventually decided not to take advantage of it. This was known at the time of the trial and the case proceeded as though prescription had been renounced, but the facts did not get upon the record, and so when the case came before the Supreme Court, there was nothing to show what had happened.

17. *Government fish-way—Public work—Crown's liability.*—B. complained that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for

running certain mills owned by him, that such mills and premises were injuriously affected and greatly depreciated in value. And it was held that the fish-way was not a public work within the meaning of 50-51 Vict. c. 16, s. 16 (c), and that the Crown was not liable. *Brown v. The Queen*, 3 Ex. C. R. 79.

18. *Liability of Crown as common carrier.*—Apart from statute the Crown is not liable for the loss or injury to goods or animals, carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped. *Lavoie v. The Queen*, 3 Ex. C. R. 96. (See *Hall v. McFadden, Cassels' Digest*, 724).

19. *Crown's liability as common carrier.*—By virtue of the several Acts of the Parliament of Canada relating to Government railways and other public works, the Crown is liable for the loss or injury to goods or animals carried by a Government railway occasioned by the negligence of the persons in charge of the train, and, under the Act 50-51 Vict., c. 16, a petition of right will lie for the recovery of damages resulting from such loss or injury. (*The Queen v. McLeod*, 8 S. C. R. 1; and *The Queen v. McFarlane*, 7 S. C. R. 216, distinguished.) *Ibid.*

20. *Regulations for carriage of freight—Notice thereof—Government Railway.*—The publication in the Canada Gazette, in accordance with the provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is a notice thereof to all persons having occasion to ship goods or animals by such railway. *Ibid.*

21. *Effect of notice of regulations for carriage of freight where there is negligence of the servant of the Crown.* —Under and by virtue of R. S. C. c. 38, certain regulations were made by the Governor in Council whereby it was provided that all live stock carried over the Intercolonial Railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading and transportation of the same. The regulations were, by section 44, to be read as part of the Act, and by section 50 it was enacted that the Crown should not be relieved from liability by any notice, condition or declaration where damage arose from the negligence, omission or default of any of its officers, employees or servants. And the court held that the regulations did not relieve the Crown from liability where such negligence was shown. *Ibid.*

22. *Duty of conductor of train carrying live stock in box cars.* —The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started. *Ibid.*

23. *Tort—Remedy therefor.—Semble:*—That the Crown's liability for the negligence of its servants rests upon statutes passed prior to *The Exchequer Court Act*, (50-51 Vict. c. 16), and that the latter substituted a remedy by petition of right or by a reference to the Court for one formerly existing by a submission of the claim to the Official Arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court of Canada. *Martial v. The Queen*, 3 Ex. C. R. 118.

24. *Accident—Negligence—Burden of proof.*—The immediate cause of an accident on a Government railway was the breaking of an axle that was defective. It was shown, however, that great care had been taken in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The

train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule that the burden is upon the suppliant to establish the negligence of the persons in charge of the train, the court held that a case of negligence had not been made out. *Dubé v. The Queen*, 3 Ex. C. R. 147.

25. *Government Railway—Carriage of Goods—Breach of contract—Damages—Negligence.*—The suppliant sought to recover the loss on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I. to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steam-ship thence for England on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steam-boat by which connections are made between the Summerside terminus of the P.E.I. Railway and Pointe du Chene, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the P. E. Island Railway, at Charlottetown, represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston on time. And it was held that even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority. Further that the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of section 16 (c) of *The Exchequer Court Act*. *Wheatley v. The King*, 9 Ex. C. R. 222.

26. *Liability of Crown as common carrier—Burden of proof—Loss of acid in tank-car during transportation—Contract—Negligence—Liability of Crown—Interest.*—The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict., ch. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

By an arrangement between the consignee of the acid in question and the Intercolonial Railway freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid, amounting to $135.00, no refund being made by the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence showed that by the arrangement above mentioned the freight was not payable on the transportation of the tank-car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid. And it was *held* that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should

be repaid to the suppliant, with interest. *Nicholls Chemical Co. v. The King*, 9 Ex. C. R. 272.

27. *Railway Company—Railway ticket—Right to stop over.*—By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. *Craig v. Great Western Railway Co.* (24 U. C. Q. B. 509); *Briggs v. The Grand Trunk Railway Co.* (24 U. C. Q. B. 516); and *Cunningham v. The Grand Trunk Railway Co.* (9 L. C. Jur. 57; 11 L. C. Jur. 107) approved and followed. *Coombs v. The Queen*, 26 S. C. R. 13.

28. *Intercolonial Railway—Freight rates—Regular and special rate—Agent's mistake—Estoppel.*—A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay, between a certain point on another railway and one on the Intercolonial, the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate he filed a petition of right to recover the difference between the amount paid and that due under the special rate. And it was held that as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed. *Gunn & Co., Ltd., v. The King*, 10 Ex. C. R. 343.

29. *Crown's liability for negligence of its servant.*—The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in *The Exchequer Court Act*, s. 16 (c), but had its origin in the earlier statute, 33 Vict. c. 23. *City of Quebec v. The Queen*, 3 Ex. C. R. 164. *On Appeal to the Supreme Court of Canada this judgment was affirmed.*

30. *Duty of officer of the Crown in charge of a public work.*—It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof. (*The Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400 referred to). *Ibid.*

31. *Injury to property—Negligence of Crown's officer.*—The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec, in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful inquiry was made. In the year 1880 an examination of the premises had been

made by careful and capable men, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself. The court held that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and of the defect in it. *Ibid.*

32. *Liability of Crown—Property injuriously affected by construction of public work.*—The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of *The Exchequer Court Act*, (50-51 Vict. c. 16) which gives the court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. *Archibald v. The Queen*, 3 Ex. C. R. 251, and 23 S. C. R. 147.

33. *Public work—Definition of.*—The expression "public work" occurring in the 16th section of *The Exchequer Court Act* includes not only railways and canals and such other public undertakings in Canada as in older countries are usually left to private enterprise, but also all public works mentioned in *The Public Works Act*, R. S. C. c. 36, (see now sec. 3, ch. 39, R. S., 1906), and other Acts in which such expression is defined. *Leprohon v. The Queen*, 4 Ex. C. R. 100. See also *Rogers v. Toronto Public School Board*, 27 S. C. R. 448.

34. *Liability of Crown—Post Office—Danger, warning.*—A person who goes to a post office to get his letters goes of his own choice and on his own business; and the duty of the Crown as owner of the building, if such a duty were assumed to exist, would be to warn or otherwise secure him from any danger in the nature of a trap known to the owner and not open to ordinary observation. *Ibid.*

35. *Liability of Crown with regard to approach to a Post Office.*—The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks and steps leading to such building *Ibid.*

36. *Responsibility of Crown's servant acting without authority of law.*—For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, an officer of the Crown is personally responsible to any one who sustains damage thereby. *Boyd v. The Queen*, 4 Ex. C. R. 116.

37. *Negligence of Crown's servant, liability.*—Under section 16, clause (c), of *The Exchequer Court Act* (50-51 Vict. ch. 16) the Crown is liable for the death of any person on a public work resulting from the negligence of any of its officers or servants while acting within the scope of their duty or employment. *Filion v. The Queen*, 4 Ex. C. R. 134. This judgment was affirmed on appeal to the Supreme Court of Canada.

38. *Liability of Crown for injuries resulting from negligence of its servants.*—Within the limitation prescribed in sec. 16 of *The Exchequer Court Act* (50-51 Vict. c. 16) the Crown is liable for injuries resulting from the negligence of its officers and servants in any case in which a subject would, under like circumstances, be liable. *Ibid.*

39. *Highway—Agreement between Crown and city to maintain same—Negligence—Accident from ice—Liability—Public work*—50-51 *Vict. ch.* 16, *sec.* 16 (*c*).—Under an agreement between the City of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an addition to the Sappers' Bridge over the Rideau Canal, built by the city and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the said addition was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50-51 Vict. ch. 16, sec. 16 (*c*). And it was held that while it was the duty of certain employees of the Crown to go and see that the bridge was in a safe condition for pedestrians every morning, between six and seven o'clock, the suppliant upon whom the burden of proof of negligence rested, had not shown that they had failed in their duty on the morning of the accident.

In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition. *Davies v. The Queen*, 6 Ex. C. R. 344.

40. *Public work—Bridge—Injury to person—Maintenance—Minister of Public Works—R. S. C. c.* 36—50-51 *Vict. c.* 16, *s.* 16. (*c*).—There is nothing in *The Public Works Act* (R. S. C. c. 36) in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-sec. (*c*) of sec. 16 of *The Exchequer Court Act*. *McHugh v. The Queen*, 6 Ex. C. R. 374.

41. *Railways—Negligence—Evidence of—Settlement—Release.*—A settlement of a pending action, agreed to by an illiterate plaintiff without communication with her solicitor and without fair disclosure of facts cannot stand, and its validity may be tried in the pending action if pleaded in bar. There is evidence amounting to negligence when it is shewn that the deceased was seen approaching the railway track in a vehicle just before the passing of a train, and that immediately after the train passed the deceased and the horses were found dead at the crossing, and that the statutory signals of the approach of the train were not given. *Johnson v. Grand Trunk Ry. Co.*, 25 Ont. R. 64 and 21 Ont. A. R. 408.

42. *Railway—Accident to the person*—50-51 *Vict. c.* 16, *sec.* 16 (*c*) (*now R. S.* 1906, *c.* 140, *sec.* 20 (*c*))—*Brakesman—Negligence of section foreman—Liability.*—Suppliant's husband while engaged in coupling cars as a brakesman on the Intercolonial Railway, at Sayabec Station, P.Q., caught his heel between the rail and the guard rail and being unable to get clear was run over by the cars and killed. It was shown to be the duty of the section foreman to see that the space between the rail and guard rail was properly filled or packed, and that he had been guilty of negligence in respect of such duty. *Held*, that the Crown was liable for such negligence. *Desrosiers v. The King*, 11. Ex. C. R. 128. Affirmed by S. C.—41 S. C. R.

43. *Tort—Injury to the person on a railway—Undue rate of speed of train at crossing—Liability of Crown*—50-51 *Vict. c.* 16, *sec.* 16 (*c*).—Where a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of

negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight. And where such negligence occurs on a Government railway the Crown is liable therefor under 50-51 Vict. c. 16 sec. 16, (c). *Connell v. The Queen*, 5 Ex. C. R. 74.

44. *Public work—Government railway—Injury to the person—Negligence of Crown's servant—Liability.*—The suppliant, while waiting on the platform of the Intercolonial Railway Station at Stellarton, N.S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage-master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage-master. And it was held that as the injuries of which the suppliant complained were received on a public work, and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor. *Sedgewick v. The King*, 11. Ex. C. R. 84.

45. *Railways—Station buildings—Dangerous way—Invitation or license—Own negligence.*—The approach to a station from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped the walk, making it necessary to pass around the rear of the train to reach the platform. J., intending to take a train at the station before daylight, went along the walk as the train was pulling in, and seeing, apparently, that it would overlap, started to go around the rear when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly and the bell was kept ringing. There was room between the two tracks for a person to stand in safely. The action was dismissed and it was held that the company had neglected no duty which it owed to the deceased as one of the public. *Jones v. G. T. Ry. Co., Cameron's S. C. Cases* 262.

46. *Public work—Negligence—Freight elevator—Use of by employees—City by-law—Liability of Crown.*—The suppliant, an employee of the Post Office in the City of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the Post Office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that as the lift was allowed to be used by certain employees in going from one floor to another it should have been provided with guards or something to prevent anyone from falling from it, as the suppliant did while passing from the first floor to the basement. And it was *held* that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.

In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.

The by-law of the City of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the Post Office at Montreal, which building constitutes part of the public property of the

Dominion, and so was within the exclusive legislative authority of the Parliament of Canada. *Finigan v. The King*, 9 Ex. C. R. 472.

47. *Railway—Public work—Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—The Government Railways Act (R. S. C. c. 38) sec. 29—Discretion of minister or subordinate officer as to precautionary measures against accident.*—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour. And it was *held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances.

Where the Minister of Railways, or the Crown's officer under him, whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the court to say that the minister or the officer was guilty of negligence because the facts show that the crossing in question was a very dangerous one. *Harris v. The King*, 9 Ex. C. R. 206.

48. *Government railway—Accident to the person—Negligence of Crown's servants—Action by parent of deceased—Pecuniary benefit—Damages—Compensation for pain, medical treatment, burial and mourning expenses.*—In the case of death resulting from negligence, and an action taken by the party entitled to bring the same under the provisions of *Revised Statutes of Nova Scotia*, 1900, c. 178, s. 5, the damages should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

Such party is not to be compensated for any pain or suffering arising from the loss of the deceased, or for the expenses of medical treatment of the deceased, or for his burial expenses, or for family mourning. *Osborn v. Gillet* (L. R. 8 Ex. 88) distinguished. *McDonald v. The King*, 7 Ex. C. R. 216.

49. *Government rifle range—Public Work—Officers and servants of the Crown.*—A rifle range under the control of the Department of Militia and Defence is not a "public work" within the *meaning of the Exchequer Court Act*, 50 *and* 51 *Vict. ch.* 16, sec. 16 (c). The words "any officer or "servant of the Crown" in the section referred to, do not include officers and men of the Militia. *Larose v. The King*, 31 S. C. R. 206; 6 Ex. C. R. 425.

50. *Petition of right—Government railway—Accident to the person—Liability of Crown—Negligence*—50-51 *Vict. c.* 16, *s.* 16—*Undue speed.*—It is not negligence *per se* for the engineer or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety at any given point, then it would be negligence to exceed it; but *aliter*, if it is fixed from considerations of convenience and not with reference to what is safe or prudent.

In an action against the Crown for an injury received in an accident upon a Government railway, the suppliant cannot succeed unless he establish that the injury resulted from the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment upon such railway. The Crown's liability in such a case rests upon the provisions of 50-51 Vict. c. 16, s. 16 (c).

Semble:—In actions against railway companies the obligation of the company is to carry its passengers with reasonable care for their safety; and the company is responsible only for accidents arising from negligence. *Colpitts v. The Queen*, 6 Ex. C. R. 254.

51. *Railway—Negligence—Boarding moving trains.*—It is the duty of a railway conductor to have the first-class car brought up in front of the platform, before starting from the station, to allow passengers to get on board in safety and his failure to do so is negligence for which the plaintiff is entitled to recover the damages resulting from the injury he suffered in attempting to board the car as it passed the platform. *McFadden v. Wealthy, Cameron's S. C. Cases*, 589.

52. *Negligence—Railway Company—Findings of jury—"Look and "listen."*—M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Courts of Appeal (12 Ont. L. R. 71) and the Supreme Court which *held*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. *Misener v. Wabash Railroad Co.*, 38 S. C. R. 94.

53. *Negligence—Use of dangerous materials—Proximate cause of accident—Evidence—Employer's liability—Presumptions.*—As there can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise and consistent, that the employer is chargeable with negligence which was the immediate, necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate court to relieve the employer of liability in a case where there is no evidence as to the immediate cause of an explo-

sion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff, not assented to by the trial jury have been sustained by two courts below. *The Dominion Cartridge Co. v. McArthur*, 31 S. C. R. 392.

54. *Railways—Negligence—Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.*—In constructing a road-bed, without sufficient examination, upon treacherous soil and failing to maintain it in a safe and proper condition, a railway company is *primâ facie* guilty of negligence which cast upon it the *onus* of showing when an accident happened, that it was due to some undiscoverable cause; further, that this *onus* was not discharged by the evidence adduced from which inferences merely could be drawn and which failed to negative the possibiqty of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company is liable in damages. Judgment appealed from affirmed, (following *The Great Western Railway Co. of Canada v. Braid* 1 Moo. P. C. (N. S.) 101). *Quebec & Lake St. John Ry. Co. v. Julien*, 37 S. C. R. 632.

55. *Railway—Imprudence—Negligence—Proximate cause.*—The imprudence of a conductor in alighting from his train in motion and causing him to be struck and killed by an engine moving slowly in a contrary direction will deprive him from the right to recover. *Grand Trunk Ry. Co. v. Birkett*, 35 S. C. R. 296.

56. *Railway—Default in construction—Road-way subsiding.*—The subsiding of the road-bed of a railway gives rise to the presumption of imperfect or defective construction and the *onus* is on the railway company to dispel any responsibility. *Duquet v. Quebec & Lake St. John Ry. Co.*, Q. R. 14, K. B. 482.

57. *Negligence—Employer and employee—Disobedience of orders—Dangerous way, works and appliances.*—Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, an employee who disobeys such orders and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see that the orders were not disobeyed. (*Lamoureux v. Fournier dit Larose*, 33 S. C. R. 675) discussed and distinguished. *Royal Electric Co. v. Paquette*, 35 S. C. R. 202. See also *Canada Woollen Mills v. Traplin*, 35 S. C. R. 424; *The Citizens' Light and Power Co. v. Lepitre*, 29 S. C. R. 1.

58. *Negligence—Proximate cause—Finding of jury—Evidence.*—T., an engineer, was scalded by steam escaping when the front of a valve was blown out by the pressure on it. In an action for damages against his employers the jury found that the bursting was caused by strain on the valve, and the employers were guilty of negligence in allowing the engine to run on an improper bed and that they did not supply proper appliances and keep them in proper condition for the work to be done by T., the engine bed and room all being in bad condition; they also found that the valve was not defective. And it was *held*, that in the absence of a finding that the negligence imputed to the employers was the proximate cause of the injury to T., and of evidence to justify such a finding, the action must fail. *Thompson v. Ontario Sewer Pipe Co.*, 40 S. C. R. 396.

59. *Negligence—Evidence—Probable cause of accident*—Evidence which merely supports a theory propounded as to the probable cause of

the injuries received through an unexplained accident is insufficient to support a verdict for damages, where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture. *The Canada Paint Co. v. Trainor*, 28 S. C. R. 352.

60. *Responsibility—Tools—Old or modern—Negligence.*—An employer is not absolutely bound to make use of the most modern tools or machineries; but if inferior, dangerous and out-of-date tools and machineries are used by him it constitutes negligence and he is bound to overcome any liability to use greater care. *Quebec & Lake St. John Railway v. Lemay*, Q. R., 14 K. B. 35.

61. *Public work—Siphon-culvert—Flooding of premises.*—In this case the suppliant charged in its petition that its stock in trade had been damaged by the flooding of its premises near the River St. Pierre, in the Town of St. Henri, district of Montreal, caused by an alleged defective siphon-culvert constructed by the Dominion Government to carry the waters of the river under the Lachine Canal. The facts showed that the siphon-culvert was not defective in its construction, and that there was no negligence on the part of the officers or servants of the Crown with respect to it within the meaning of sec. 16 (c) of *The Exchequer Court Act*; while on the other hand the evidence established that the lands adjacent to the suppliant's premises were of a porous character, and that the basement of its buildings had been connected by a drain with the River St. Pierre, which permitted the water to back up and flood the suppliant's premises when the river rose to a certain height. And it was *held* that the allegations in the petition were not supported by the evidence, and that the petition must be dismissed with costs. *Alaska Feather & Down Co. v. The King*, 11 Ex. C. R. 204.

62. *Public Work—Injury to property—Barge wintering in Lachine Canal—Lowering level of water—Omission to notify owner—Negligence—*50-51 *Vict. ch.* 16, *s.* 16 (*c*).—In the autumn of 1900, the suppliant placed his barge for winter-quarters at a place in the Lachine Canal which he had before used for a similar purpose. Some time after the suppliant had so placed his barge in the canal, the Superintendent of the Lachine Canal, under instruction from the Superintending Engineer, directed one of the employees of the canal to notify the barge owners that the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the water that she became a total loss. And it was *held*, confirming the report of the Registrar, that as the canal was a public work a case of negligence was established for which the Crown was liable under the provisions of section 16 (*c*) of *The Exchequer Court Act*, 50-51 Vict. ch. 16. *Gagnon v. The King*, 9 Ex. C. R. 189.

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

64. *Public work—Negligence of Crown officials—Right of action—Liability of the Crown—*50 *and* 51 *Vict. c.* 16, *ss.* 16, 23, 58—*Jurisdiction of the Exchequer Court.*—Lands in the vicinity of the Lachine Canal were

injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal and also by part of the lands being spoiled by dumping excavations upon it. And it was *held* that the owner had a right of action and was entitled to recover damages for the injuries sustained within the two years preceding his action, and that the Exchequer Court of Canada had exclusive original jurisdiction in the matter under the provisions of the 16th, 23rd and 58th sections of *The Exchequer Court Act*. *The Queen v. Filion* (24 S. C. R. 482) approved; *The City of Quebec v. The Queen* (24 S. C. R. 430) referred to. *Letourneux v. The King*, 33 S. C. R. 335.

65. *Public Work—Negligence—Canals—Natural channels of rivers—Distinction between public property and public works.*—The natural channels of the St. Lawrence River, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.

By the 1st clause of the 3rd Schedule of *The British North America Act*, 1867, "Canals with land and water power connected therewith" (of which the Cornwall Canal is one) are enumerated as part of the "Provincial Public Works and Property," that in virtue of the 108th section of the Act became "the property of Canada." And it was *held* that this does not give the Dominion any proprietary rights in the River St. Lawrence from which the water is taken for the Cornwall Canal, beyond the right to take the water, nor make the river itself a public work of Canada.

By an order of His Excellency in Council of the 22nd March, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain are declared to be under the control of the Dominion Government. And it was *held* that this Order in Council did not have the effect of altering in any way the proprietary rights, if any, that the Government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them public works of Canada. *MacDonald v. The King*, 10 Ex. C. R. 394.

66. *Petition of Right—Damages from public work—Liability of Crown—Assessment of damages once for all*—50-51 *Vict. c.* 16, *s.* 16 (*b*).—The Dominion Government constructed a collecting drain along a portion of the Lachine Canal. This drain discharged its contents into a stream and syphon-culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times, the suppliant's farm was flooded and the crops thereby injured. The flooding was not regular and inevitable, but depended upon certain natural conditions which might or might not occur in any given time And it was *held* that the Crown was liable in damages; that the case was one which the Court had jurisdiction under clause (b) of section 16 of *The Exchequer Court Act*, and that in assessing the damages in such a case the proper mode was to assess them once for all.—*Davidson v. The Queen*, 6 Ex. C. R. 51.

67. *Negligence of Crown's Servant—The Exchequer Court Act, sec.* 16 (*c*)—*Accident occurring on a public work—Fire.*—A suppliant seeking relief under clause (c) of section 16 of *The Exchequer Court Act* must establish that the injury complained of resulted from something neg-

ligently done or negligently omitted to be done on a public work by an officer or servant of the Crown while acting within the scope of his duties or employment.

Quære, whether the words "on any public work" as used in clause (*c*) of section 16 of *The Exchequer Court Act* may be taken to indicate the place where the act or omission that occasioned the injury occurred, and not in every case the place where the injury was actually sustained? *The City of Quebec v. The Queen* (24 S. C. R. 420), referred to. *The Alliance Assurance Co. v. The Queen*, 6. Ex. C. R. 76.

68. *Public work—Collision with entrance pier to canal—Negligence in construction—Liability of Crown.*—One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier. And it was *held* that upon the facts proved the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.

That as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision. *British and Foreign Marine Ins. Co. et al, v. The King*, 9 Ex. C. R. 478.

69. *Railways—Negligence—Fire started by sparks from locomotive—Evidence of cause of fire.*—In an action for damages for loss of hay destroyed by a prairie fire alleged to have been started by sparks from a locomotive running on defendants' railway; the fire having started during, or immediately after, the passing of a locomotive and as there was no other possible cause for the starting of the fire, it was *held* that the proper conclusion to be drawn was that the defendants were liable, notwithstanding that the sparks must have carried the fire a distance of 127 feet and that there was no evidence as to the condition of the smokestack and netting at the time. *Tait v. C. P. Ry. Co.*, 16 Man. R. 391, and 42 C. L. J. 399.

70. *Negligence—Fire—Sparks from Engine.*—In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company, the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the company's premises and spreading to plaintiffs' property. A verdict against the company was sustained by the Court of Appeal. And the Supreme Court of Canada affirmed the latter (25 Ont. R. 242 following *Senesac v. Central Vermont Railway Co.* (26 S. C. R. 641); *George Matthews Co. v. Bouchard* (28 S. C. R. 580); *The Grand Trunk Ry. Co. of Canada v. Rainville*, 29 S. C. R. 201.

71. *Public work—Injury to adjoining property by fire—Liability of Crown under sec.* 16 (*c*) *of The Exchequer Court Act—Injury not actually*

happening on the public work.—It is sufficient to bring a case within the provisions of sec. 16 (*c*) of *The Exchequer Court Act* to show that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to show that the injury was actually done or suffered upon the public work itself. *Letourneaux v. The Queen* (7 Ex. C. R. 1; 33 S. C. R. 335) followed. *Price v. The King*, 10 Ex. C. R. 105. An appeal to the Supreme Court of Canada was taken from the above judgment but was afterwards abandoned.

72. *Injurious affection of property by construction of public work—Petition of Right—Defence of statute of limitations*—50-51 *Vict. c.* 16 (*The Exchequer Court Act*, 1887)—*Retroactive effect.*—The court has no jurisdiction under the provisions of 50-51 Vict. c. 16 to give relief in respect of any claim which, prior to the passing of that Act, was not cognizable in the court, and which, at the time of the passing of that Act, was barred by any statute of limitations. *The Queen v. Martin* (20 S. C. R. 240) followed. *Penny v. The Queen*, 4 Ex. C. R. 428.

73. *Liability of Crown—Government canal—Accident to vessel using same—Negligence of Crown servant—Petition of right.*—Under the provisions of *The Exchequer Court Act*, sec. 16 (c), the Crown is liable in damages for an accident to a steamer and cargo while in a Government canal, where such accident results from the negligence of the persons in charge of the said canal. *McKay's Sons v. The Queen*, and *St. Lawrence Sugar Refining Co. v. The Queen, The Acadia*, 6 Ex. C. R. 1.

74. *Employer and Workman—Workman's compensation—Partner working at wages—Workman's Compensation Act*, 1897, (60 *and* 61 *Vict. c.* 37), *s.* 1, *sub-sec.* 1 *and s.* 7, *sub-sec.* 2.—A member of a partnership formed for the purpose of working a mine, by arrangement with his co-partners, worked in the mine as a working foreman, and received weekly wages out of the profits of the business. While working in the mine, he met with an accident which caused his death, and his widow thereupon claimed compensation under *The Workmen's Compensation Act*, 1897, from the surviving partners. And it was *held*, that the case contemplated by *The Workmen's Compensation Act*, 1897, was that of a workman employed by some other person or persons; that, the deceased having been himself one of the partners in the firm for which he was working, he could not be said to have been employed by them; and, therefore, that the case was not within the Act, and the applicant was not entitled to compensation. *Ellis v. Ellis* (1905), 1 K. B. 324.

75. *Negligence—Dangerous works—Ordinary precautions—Employer and employee—Knowledge of risk—Contributory negligence—Voluntary exposure to danger.*—An employer carrying on hazardous works is obliged to take all reasonable precautions, commensurate with the danger of the employment, for the protection of employees and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. *Lepitre v. The Citizens Light and Power Company* (29 S. C. R. 1) referred to.

In such a case it is not sufficient defence to shew that the person injured had knowledge of the risks of his employment, but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred and this must be found as a fact. *Montreal Park and Ry. Co. v. McDougall*, 36 S. C. R. 1. See also *Sault Ste. Marie Pulp and Paper Co. v. Myers*, 33 S. C. R. 23; *G. T. Ry. Co. v. McKay*, 34 S. C. R. 81; *G. T. Ry. Co. v. Haines et al*, 36 S. C. R. 100.

76. *Contributory negligence—Employer and workman—Defect in system—"Volenti non fit injuria"—Employers Liability Act*, 1880, (43 & 44) *Vict. c.* 42.—When a workman engaged in an employment not in itself dangerous is exposed to danger arising from an operation in another department over which he has no control, the danger being created or enhanced by the negligence of the employer, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to shew that he has undertaken the risk so as to make the maxim "*Volenti non fit injuria*" applicable in case of injury. The question whether he has so undertaken the risk is one of fact and not of law. And this is so both at common law and in cases arising under *The Employers' Liability Act*, 1880. *Sword v. Cameron* (91 Sc. Sess. Cas. 2nd Series, 493) approved, and *Thomas v. Quartermaine* (18 Q. B. D. 685) commented on. *Smith v. Baker*, 1891, A. C. 325. See also *Mulvaney et al v. Toronto Ry. Co.* 38, S. C. R. 327.

77. *Common fault—Volunteer—Division of damages.*—When in the Province of Quebec, the employer and the injured employee are both at fault, damages should be divided. *Price v. Roy.* 29 S. C. R. 494.

78. *Railway—Brakesman on top of car killed—Contributory negligence.*—Contributory negligence may be a defence even to an action founded on a breach of a statutory duty. *Deyo v. Kingston & Pembroke R. W. Co.*, 41 Can. L. J. 39.

79. *Public work—Injury to the person—Negligence—Aggravation of injury by unskilful treatment—Damages.*—Where a person who is injured through the negligence of a servant of the Crown on a public work voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to. *Vinet v. The King*, 9 Ex. C. R. 352.

80. *Accident—Negligence of person hurt.*—When any injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, the employer is not liable. *Burland v. Lee*, 28 S. C. R. 348.

81. *Railway—Contributory negligence*—It is one's duty when travelling upon a highway crossed by a railroad track, before attempting to cross such track to look and see whether a train is approaching and where his failure so to do is the cause of an accident he will be held guilty of contributory negligence. *G. T. Ry. Co. v. Beckett, Cameron's S. C. Cases* 228.

82. *Contributory negligence—Non-suit.*—A conductor and brakesman in the employ of the defendant company while attending to the brakes and turning the brake wheel fell from the train with the wheel which gave way and was killed. The nut which fastens the brake wheel to the brake mast was off. It was his duty to examine the cars of the train and see that they were in good order before leaving the station which the train had just left, and it was held that no damage could be recovered as it was his own neglect in not seeing that the brake wheel was in a secure condition that caused the accident. *Fawcett v. C. P. Ry. Co.*, 8 B. C. R. 393; 32 S. C. R. 721.

83. *Negligence—Dangerous operations—Defective system—Findings of fact—Common fault.—Contributory negligence.*—The Supreme Court of Canada affirmed the unanimous judgments of the courts below, whereby

it was held that defendant was liable in damages for injuries, sustained by the plaintiff, through an accident which occurred in consequence of a defective system of blasting rocks with dynamite permitted by his foreman on works where the plaintiff was engaged by him in a dangerous operation. *The Montreal Rolling Mills Co. v. Corcoran*, (26 S. C. R. 595), and *Tooke v. Bergeron*, (27 S. C. R. 567) distinguished.

The plaintiff had been guilty of contributory negligence and damages apportioned according to the practice in the Province of Quebec. *Paquet v. Dufour*, 39 S. C. R. 332.

84. *Insurance money paid widow taken into account in assessing damages.*—We find in the case of *Grenier v. The King* (6 Ex. C. R. 303-04) the following *obiter dictum* of Burbidge, J., in support of the above proposition, viz.:—"Then in regard to the damages, it seems clear that the "insurance money paid to the widow should be taken into consideration "in assessing the damages to which she is entitled."

85. *Insurance—Deduction from damages.*—The amount of the policy of insurance should not be deducted from the damages allowed. *Becket v. G. T. Ry., Cameron's S. C. Cases* 228; *G. T. Ry. v. Jennings*, 13 App. Cas. 800.

86. *Insurance money—Damages.*—The insurance money to which a widow may be entitled from the Intercolonial Employees' Relief and Insurance Association, as resulting from the death of her husband killed in an accident on the I. C. Ry., does not proceed from the company and had no relation to its offence and is equally payable in case of death; and the deceased could not, by reason thereof, be said to have obtained indemnity or satisfaction, within the meaning of Art. 1056 of the Civil Code. The insurance money was not taken into consideration in assessing damages. *Armstrong v. The King*, 11 Ex. C. R. 127.

87. *Negligence of Crown's foreman—Want of warning to fellow servant* —While certain repairs were being made to the Lachine Canal, the superintendent of the canal had occasion to use a derrick for the purpose of such repairs. The suppliant's son was, together with other labourers, working at the bottom of the canal under the derrick, but not in connection with it, while it was being erected by another gang of workmen under the immediate direction of the superintendent and his foreman. The work of setting it up was begun in the afternoon of the day of the accident and finished by electric light in the evening. The suppliant's son and the other men working with him were allowed to continue their labours at the bottom of the canal after the derrick was set up, and no notice was given to them by the superintendent or his foreman when they were about to put the derrick into operation. While the first load was being lifted (in weight much under the supposed capacity of the derrick) a portion of the derrick broke at a place where it had been cracked before and fell upon the men working at the bottom of the canal, injuring the suppliant's son so severely that he died a few days afterwards. It was *held* that the superintendent and foreman, in failing to give notice to the men working beneath the derrick when they started to operate it, were guilty of negligence for which the Crown is liable. ***Filion v. The Queen***, 4 Ex. C. R. 134, affirmed on Appeal,

88. *Ratification by the Crown of a tortious act of its officer.*—The ratification by the Crown of a tortious act committed by one of its officers whereby a foreigner has suffered injury is equivalent to a prior command and renders it an act of state for which the Crown is alone responsible and

such defence is open under the general issue. *Buron v. Denman*, 2 Ex. 167. This case has, however, been limited and explained as applying only to cases where the tortious act has affected foreigners and does not apply to similar injury suffered by British subjects. See *Doss v. Secretary of State for India*, L. R. 19 Eq. 532; *Mayor of London v. Cox*, L. R. 2 H. L. 262; *Phillips v. Eyre*, L. R. 6 Q. B. 24; *Mill v. Hawker*, L. R. 9 Ex. 326 and *Dixon v. Farrer*, 17 Q. B. D. 663; 18 Q. B. D. 49.

89. *Crown—Prerogative—How far bound by Statute—Crown not named in Statute.*—The Crown is not bound by a Statute, unless it appears on the face of the Act that the Crown should be bound by it. But the Crown may claim the benefit of the provisions of any Act of Parliament. *Rex v. Davies*, 5 T. R. 626-629; *Campbell Rg. C.* 201.

90. *Common employment—Fellow servant.*—The doctrine of common employment does not obtain in the Province of Quebec. *The Queen v. Filion* 24 S. C. R. 482 followed; *The Queen v. Grenier*, 30 S. C. R. 42; *Desrosiers v. The King*, 11 Ex. C. R. 128, affirmed on appeal to the Supreme Court of Canada 1st Dec., 1908.

Exclusive original jurisdiction as to claims of heirs, etc., to lands—May declare to whom patent shall issue—Court to report decision to Governor in Council.

21. The Exchequer Court shall have exclusive original jurisdiction at the suit or upon the application of any person claiming to be entitled to public lands for which no patent has issued, as being the heir, devisee, representative or assignee of the original claimant, or as having derived a title or claim from or through any such heir, devisee, representative or assignee, or at the suit or upon the application of the Attorney General of Canada, in any case in which public lands are claimed by any such person, to ascertain, determine and declare who is the person to whom the patent for such lands ought to issue.

2. The Court shall decide all such cases as in its judgment the justice and equity of the case demand, and shall report its decision to the Governor in Council; and letters patent may issue granting the lands in question in accordance with such decision. 54–55 V., c. 26, s. 5.

Effect of such letters patent—Saving.

22. The Letters patent so issued shall have the same and no other effect and operation, in regard to any charge, encumbrance, lien, matter or thing upon or affecting the lands so granted, as or than letters patent therefor in favour of the original claimant would have had, save only as establishing the claim of the party in whose favour they are issued to the lands to which they relate as the heir, devisee, representative, or assignee of, or as otherwise representing the original claimant.

2. Neither the decision of the Court nor the issuing of the letters patent on such decision shall extend to or in any way affect any claim of the party in whose favour such decision is given or such letters patent are issued, or of any other party, to any lands other than those to which such decision expressly relates, and

which are mentioned and described in the report and letters patent; but such claims to other lands shall continue and remain as if such decision and report had not been made and such letters patent had not been issued. 54-55 V., c. 26, s. 5.

Jurisdiction in Cases of Patents, Copyrights, and Trade Marks.

23. The Exchequer Court shall have jurisdiction as well between subject and subject as otherwise,—

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade mark or industrial design;

(*b*) in all cases in which it is sought to impeach or annul any patent of invention, or to have any entry in any register of copyrights, trade marks or industrial designs made, expunged, varied or rectified; and,

(*c*) in all other cases in which a remedy is sought respecting the infringement of any patent of invention, copyright, trade mark or industrial design. 54-55 V., c. 26, s, 4.

See annotation under the respective Acts relating to Patent of Invention, copyright, trade mark or industrial designs printed herein.

Jurisdiction of the Court in cases of Interpleader.

24. The Exchequer Court shall have jurisdiction, upon application of the Attorney General of Canada, to entertain suits for relief by way of interpleader in all cases where the Crown or any officer or servant of the Crown as such is under liability for any debt, money, goods or chattels for or in respect of which the Attorney General expects that the Crown or its officers or servant will be sued or proceeded against by two or more persons making adverse claims thereto, and where His Majesty's High Court of Justice in England could, on the thirtieth day of September, one thousand eight hundred and ninety-one, grant such relief to any person applying therefor in like circumstances. 54-55 V., c. 26, s. 6.

For observations upon Interpleader issues, see the *King v. Connor*, 10 Ex. C. R. 183.

Exchequer Court substituted for Official Arbitrators.

25. Whenever in any Act of the Parliament of Canada, or in any order of the Governor in Council, or in any document it is provided or declared that any matter may be referred to the official arbitrators acting under the *Act respecting the Official Arbitrators*, or that any powers shall be vested in, or duty performed by such arbitrators, such matters shall be referred to the Exchequer Court, and such powers shall be vested in and such duties performed by the Court; and whenever the expression 'official arbitrators' or 'official arbitrator' occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court. 50-51 V., c. 16, s. 58.

The following decision of this Court was made under the provisions of sec. 50 of 50-51 Vic. ch. 16. The section, however, having become effete was repealed by *The Revised Statutes of Canada* 1906 and the decision made thereunder has thus become obsolete.

Where a petition of right has been demurred to and judgment obtained on such demurrer before a Judge of the Supreme Court, acting as Judge of the Exchequer Court, prior to the passage of 50-51 Vict. c. 16, it was held to be a case fully heard and determined and not one coming within the class of cases referred to as being "partly heard" in section 50 of that statute; and the judge who heard the demurrer refused a motion to amend the petition, made after the passage of such Act, on the ground of want of jurisdiction. *Dunn v. the Queen*, 4 Ex. C. R. 68.

Semble: that the provision in section 50 of *The Exchequer Court Act*, that "any matter which has been heard or partly heard or fixed or set down for hearing before any Judge of the Supreme Court, acting as a Judge of the Exchequer Court, may be continued before such judge to final judgment, who for that purpose may exercise all the powers of the Judge of the Exchequer Court," is not to be construed as an imperative enactment, and does not impose the duty upon a judge before whom a case was instituted before the Act was passed to continue to entertain the case until final judgment, nor does such provision oust the jurisdiction of the judge of the Exchequer Court in respect of such matter. *Ibid.*

Jurisdiction of Court as to Railway Debts—Sale—Foreclosure—Concurrent jurisdiction of provincial Courts—Powers of Court as to appointment of Receiver—Duties of Receiver—May be directed by Court to complete railway—Remuneration of Receiver.

26. The Exchequer Court shall have jurisdiction as regards any railway, or section of a railway, not wholly within one province, and as regards any railway otherwise subject to the legislative authority of the Parliament of Canada, to order and decree in such manner as it may prescribe,—

Sale.

(*a*) the sale of such railway or section of railway, and of all the rolling stock, equipment and other accessories thereof,

(i) at the instance of the Minister of Railways and Canals, or, with the approval of the Board of Railway Commissioners for Canada, at the instance of any creditor of any person or company owning or operating such railway or section, whenever such company has become insolvent, or has for more than thirty days failed to efficiently continue the working or operating of such railway or section or any part thereof, or has become unable so to do,

(ii) at the instance of a creditor of such person or company having a first lien or charge upon the railway or section, or

(iii) at the instance of a holder of a first mortgage of such railway or section; or,

Foreclosure.

(*b*) the foreclosure, at the instance of a mortgagee of such railway or section, of the interest of the person or company owning or entitled to such railway or section, with the rolling stock, equipment and other accessories thereof, or the equity of redemption therein, whenever in like circumstances of default the High Court of Justice in England can so order or decree with respect to mortgaged lands situate in England.

Concurrent jurisdiction of provincial Courts.

2. Nothing in this section contained shall in any way affect the provisions of the Railway Act as respects the power of a company to secure its bonds, debentures or other securities by a mortgage upon its property, assets, rents, and revenues, or as respects the powers, privileges, preferences, priorities and restrictions by the said Act authorized to be granted or imposed upon the holders of said bonds, debentures or other securities.

Powers of Court as to appointment of Receiver.

3. The Exchequer Court, in any of the cases in this section mentioned, shall have all the powers for the appointment of a receiver either before or after default, the interim preservation of the property, the delivery of possession, the making of all necessary inquiries, the taking of accounts, the settling and determining of claims and priorities of creditors, the taxation and payment of costs, and generally the taking and directing of all such proceedings requisite and necessary to enforce its order or decree and render it effective, as in mortgage actions the High Court of Justice in England, or any division, judge or officer thereof, may exercise.

Duties of Receiver.

4. A receiver so appointed shall take possession of such railway, or of such section, and of all the railway stock, equipment and other accessories thereof, and shall, under the direction of the Court, carry on the working and operating of the railway or section or any part thereof, and shall keep and maintain the road, rolling stock, equipment and other accessories thereof in good condition, and renew the same or any part thereof, and, generally shall do all acts necessary for the preservation, working, maintenance, administration and operation of the railway or section, and shall, in the name of the company, institute or defend any suits or actions on its behalf.

May be directed by Court to complete railway.

5. The receiver may also, if the Court, either upon his appointment or subquently, so directs, do all acts necessary for the completion of the construction or equipment of the railway or section.

Remuneration of Receiver.

6. The remuneration of the receiver shall be fixed by the Court, and shall, as also shall the expenses lawfully incurred by him as receiver, including the expenses of working, operation.

maintenance, renewal and completion, and of the institution and defence of actions aforesaid, be a debt of the company and be the first charge upon the railway or section, and upon the rolling stock, equipment, accessories and earnings thereof. 3 E. VII., c. 21, ss. 1, 2, 3, 4 and 5.

1. Proceedings taken in this Court, at the instance of the Minister of Railways and Canals under the provisions of sec. 1 ch. 21, 3Ed. VII, (Now secs. 26-30 ch. 140 R. S., 1906), should originate with the production of a written authority from the Minister to take, in his name, legal proceedings in the Exchequer Court as therein mentioned.—*The Quebec Southern Ry. Co.*, March, 1904.

2. ***The following form may be used for such authority:***

FORM OF AUTHORITY OF THE MINISTER OF RAILWAYS AND CANALS.

IN THE EXCHEQUER COURT OF CANADA.

Between,

THE MINISTER OF RAILWAYS & CANALS, for the Dominion of Canada,

Plaintiff,

and

A. B.

Defendant.

By Virtue of the powers vested in me in this behalf, under sections 26-30 of *The Exchequer Court Act* (ch. 140 R.S., 1906)., I hereby authorize C. D., of to take, in my name as Minister of Railways & Canals, legal proceedings before the Exchequer Court of Canada, under the provisions of the above mentioned Act, against . . . . . to obtain an order or decree for the sale of such railway (or section of railway, *as the case may be*) and of all the rolling stock, equipment and other accessories thereof and the appointment of a receiver and such other proceedings authorized by the said Act.

Dated at Ottawa, this.....day of.....A. D. 19..

Minister of Railways and Canals.

3. Then the party so authorized should file, with the above written authority, a statement of claim alleging such authority and setting forth the facts leading to his demand, concluding with a prayer for an *interim* order for the appointment of a Receiver and the sale of the railway in the terms of the Act, and costs.

4. Form of Judgment Appointing Receiver.

IN THE EXCHEQUER COURT OF CANADA.

Monday, the .....day of .....A.D.19...

Present,

The Honourable Mr. Justice .....

Between,

E. F.

Plaintiff,

vs.

G. H.

Defendant.

This matter coming on before this Court, at Ottawa, on the.... day of .....A. D. 19.... upon motion made on behalf of the aboved named plaintiff by I. J., of Counsel for the Minister of Railways

and Canals, for the appointment of a Receiver to the Company defendant herein to take immediate possession of the said Railway, with all its rolling stock, equipment and other accessories thereof, and to carry on, under the direction of this Court, the working and operating of the said railway and to keep and maintain the same its rolling stock, equipment and accessories thereof in good condition, and renew the same or any part thereof and do generally all acts necessary for the preservation, working, maintenance, administration, and operation of the said railway, the whole under the provisions of *The Exchequer Court*, (*State here who appeared for the defendants and other parties, if any.*).....
upon hearing read the pleadings herein, the affidavits of.....
.....in support of the said motion and filed herein on the .....
day of.....A. D. 19..., and the several exhibits also filed of record, and upon hearing what was alleged by Counsel aforesaid, respectively.

This Court doth order, adjudge and decree that.....
.....be, and he is hereby appointed Receiver, of all and singular the property, assets, rights and franchises of the said above mentioned railway company, described in the Statement of Claim herein, wherever situated, including all the railroad track, terminal facilities, real estate, warehouses, offices, stations, and all other buildings and property of every kind owned, held, possessed, or controlled by the said company, together with all other property in connection therewith, and all monies, *choses* in action, credits, bonds, stocks, leasehold interests, operating contracts and other assets of every kind, and all other property, real, personal and mixed, held or possessed by the Company to have and to hold the same as the officers of and under the orders and directions of this Court.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DECREE that the said Receiver be, and the same is, hereby authorized and directed to take immediate possession of all and singular the property above described wherever situated or found, and to continue the operation of the said railroad of the said company, and to conduct systematically the business and occupation of carrying passengers and freight, and the discharge of all duties obligatory on the said company.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DECREE that the said railroad company and each and every of its officers, directors, agents and employees be, and are hereby required and commanded forthwith to turn over and deliver to the said Receiver, or his duly constituted representatives, any and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, money, or other property in his or their hands, or under his or their control, and they are hereby commanded and required to obey and conform to such orders as may be given them from time to time by the said Receiver, or his duly constituted representative, in conducting the said railway and business and in discharging his duty as such Receiver. And they, and all of them, are hereby enjoined from interfering in any way whatsoever with the possession or management of any part of the business or property over which said Receiver is so appointed, or from in any way preventing or seeking to prevent, the discharge of his duties as such Receiver. The said Receiver is hereby fully authorized to continue the business of the said Railway company, operate and maintain the said railway, its rolling stock, equipment and other accessories in good condition, and manage all its property at his discretion in such manner as will in his judgment produce the most satisfactory results, consistent with the discharge of the public duty

imposed on the said company, and for the preservation of the said railway and to collect and receive all income therefrom and all debts due the said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, Counsel, managers, agents and employees as may be required for the proper discharge of the duties of his trust.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DECREE that the said Receiver deposit the moneys coming into his hands in a Canadian Chartered Bank, and report his selection to this Court.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DECREE that the said Receiver be, and the same is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trust hereby vested in him, and likewise defend all actions instituted against him as Receiver, and also to appear in and conduct the prosecution and defence of any or all suits or proceedings now pending in any court against the said company, the prosecution or defence of which will in the judgment of the said Receiver be necessary and proper for the protection of the property and rights placed in his charge and for the interest of the creditors and stockholders of the said company, the said Receiver is hereby required to give bond in the sum of(1).....,with security satisfactory to this Court for the faithful discharge of his duties within eight days hereof, and he is also required to keep (separate, *as the case may be*, if more than one railway) accounts of the said railroad and to make monthly returns or statements of receipts and expenditure for (each, *as the case may be*, if more than one railway) of the said railway, and to file the same with the Registrar of the Exchequer Court of Canada, the said returns or statements to be kept by the said Registrar and to be at all reasonable times open to the inspection of any person or persons having any interest therein.

AND THIS COURT DOTH FURTHER ORDER, ADJUDGE AND DIRECT the said Receiver to appoint (Three persons, *as the case may be*, or, *if committee is required*), * * * * * * * * * * * * a Committee of Inspection to act gratuitously in the premises, and such persons and each of them shall from time to time have free transportation over the said railway, and reasonable access to all books, books of account, pay-rolls, pay-sheets, and papers which the Receiver shall in the operation of the said railway keep or cause to be kept, and shall each be furnished with a copy of the said monthly returns or statements of receipts and expenditure. (*This clause would be necessary only in special cases*).

AND THIS COURT DOTH HEREBY RESERVE the right, by orders hereafter to be made, to direct and control the payment for all supplies, materials, and other claims and to in all respects regulate and control the conduct of the said Receiver.

BY THE COURT,

L. A. A.

Registrar.

And thereupon came before a Judge of this Court on the..... day of.....A.D. 19 . .....who accepted such appointment, and was thereupon sworn according to law, and tendered his bond as required by the above judgment.

(1) Bond given in Quebec Southern Ry. was for $50,000.00 and in the Père Marquette Ry. $100,000.00.

5. Form of Oath of Receiver.

(*Heading as in previous Form*).

I, the undersigned,....., of the City of....., do solemnly and sincerely promise and swear that I will duly and faithfully and to the best of my skill and ability execute the powers and trusts reposed in me as receiver appointed herein by an Order of this Court bearing date the.....day of.....

SWORN before me at the City of So help me God.
.....this
.....day of.....A.D. 19 .

L. A. A.,
Registrar Exchequer Court of Canada.

6. Form of Bond to be Given by Receiver.

(*Heading as in previous Form*).

KNOW ALL MEN by these presents that we, A. B., of..... principal, (*the party giving security*) and C. D. & E. F., of..... as sureties, are jointly and severally held and firmly bound unto His Majesty The King as representing the Dominion of Canada, in the sum of ($50,000 or $100,000 *as the case may be*) lawful money of Canada, to be paid to His Majesty the King as above mentioned for which payment, well and truly to be made, we bind ourselves and each of us by himself, our, and each of our heirs, executors, administrators and assigns respectively and jointly and severally and firmly, by these presents.

Sealed with our hand and seal and dated this.....day of .....A.D. 19 .

Whereas by a judgment or order of this Court bearing date the .....day of.....A.D. 19 , in an action wherein .....was plaintiff and.....was defendant, the above bounden.....was appointed Receiver of all the properties, franchises and assets of the said defendants, and it was ordered that the said A. B. should, within eight days from the date of the said order give security to His Majesty the King in the penal sum of $.....for the faithful discharge of his duties as such Receiver. Now the condition of the above obligation is such that if the said A. B. ..... shall faithfully discharge his duties as Receiver herein, obey each and all of the orders of this Court touching his duties and administration of the said estate, property, franchise and assets and duly account for what he shall receive or have in charge as such Receiver and pay over and apply the same according to law and as directed by the Court, and perform the duties of his office of Receiver in all things according to the true intent and meaning of the said judgment, decree or order, then this objection shall be void, otherwise to remain in full force and effect.

(SEAL).
(SEAL).

This bond, under the direction of the order appointing the Receiver, is subject to the approval of a Judge of this Court.

7. *Railway—Seizure—Description.*—The designation, in a notice of sale published by a sheriff, of a railway under its corporate name, by its starting point and its terminus and by the numbers of the several

lots of which it is composed is sufficient, and much more so when the seizing creditors obtain an order of sale *en bloc* under Art. 754 C. C. P. *Begin v. Levis County Railway Co.*, Q. R. 27, S. C. 181.

8. *Laws of Ontario—Sale of Railway by Mortgagee.*—A railway incorporated under an Ontario Statute and declared by a Dominion Statute in 1884 to be a work for the general advantage of Canada, (thereupon becoming subject to the Legislation of the Dominion) can, in a suit by the trustees for the bondholders to enforce a mortgage thereon, be sold by virtue of the provisions contained in Dominion Act, 46 Vic., v. 24, ss. 14, 15 and 16, re-enacted by the Dominion Railway Act, 1888 (51 Vic., ch. 29). *Trusts and Guarantee Co., Ltd. v. Central Ontario Ry.* (1905), A. C. 576; 6 Ont. R. 1; 8 O. A. R. 342.

9. *Laws of Quebec—Sale of Railway.*—A railway can be seized and sold in the Province of Quebec. *Redfield v. Corporation of Wickham* (1888). 13 A. C. 467.

10. *Judicial sale of railways—Capacity of solicitor of party to purchase—Art.* 1484 *C. C.—Special statute—Discretionary Order.*—Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by Art. 1484 C. C.

The Act 4 and 5 Edw. VII, c. 158 directed the sale of certain railways separately or together, as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immoveables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc* or for the purchase of each or any two of the lines of which they were constituted, and it was held that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system in preference to two separate tenders for the several lines at a slightly larger amount, and that his decision should not be disturbed on appeal. *Rutland R. R. Co. v. Béique*, 37 S. C. R. 303. Leave to appeal from this judgment to the Privy Council was refused, 25th July, 1905.

11. *Company—Debenture holders' action—Receiver and manager—Advances to Receiver—Receiver's remuneration—Priority of claim of Receiver.—In re Gladsir Copper Mines Co., English E. M. Co. v. Gladsir Copper Mines Co.* (1906), 1 ch. 365; 42 C. L. J. 341 was a debenture holders' action in which a receiver and manager had been appointed to carry on the business. For the purpose of carrying it on the receiver was from time to time authorized to borrow money which was secured by first charges on the assets. The money was advanced by the plaintiffs, and nothing was said in the orders authorizing such loans as to any reservation of the receiver's claim for remuneration and costs, but they expressly provided that the receiver was not to be personally liable for such loans. The receiver continued the business, which ultimately proved a failure and the assets of the concern were realized and proved insufficient to pay in full the receiver's remuneration and costs, and also the advances of the plaintiffs. Joyce, J., held in these circumstances, that the receiver was entitled to priority of payment, though he questioned if the same rule would apply in a case where the advances had been made by a stranger to the litigation. The Court of Appeal affirmed his decision.

12. *Adding trustee as party—Receiver—Bondholders.*—Where, under sec. 26, ch. 140, R. S., 1906, a Receiver had been appointed to an in-

solvent railway which had been sold and where, among the creditors, bondholders of several issues were claiming, a bondholder of one of the issues made an application to have the trustee of that issue added as a party to his contestation of the Registrar's Provisional Report. *Held*, that inasmuch as the Court had no jurisdiction to make an order against the said trustee, he ought not to be made a party to the action. Application refused. *Per Burbidge, J., Re The Minister of Rys. and Canals v. The Quebec Southern Ry. Co., et al.*, June 19th, 1907.

13. *Railways—Appointment of Receiver.*—The High Court of Justice, at the instance of the creditor of a railway company, has power to appoint a receiver both where the company being situate within the province, is under provincial legislative jurisdiction and where it is under federal legislative jurisdiction, if there is no federal legislation providing otherwise. *Wile v. Bruce Mines & Algoma Ry. Co.*, 11 Ont. R. 200.

14. *Receiver—Foreigner.*—A foreigner, resident out of the jurisdiction, may be appointed Receiver to a railway partly in the United States and partly in Canada. *Per Burbidge, J. Horn v. Père Marquette Railway Co.*, 12th Dec., 1905.

15. *Receiver—Comity of Court—Appointment of—Railway wholly within one province—Railway for general advantage of Canada.*—An application by plaintiff, a creditor and bondholder of the defendant company, was made for the appointment of a Receiver to the defendant, an insolvent company which, by solicitor, consented to such appointment. The railway was wholly within the Province of Ontario, constructed and in operation between Bruce Mines and Rock Bay, a distance of some thirteen miles, with power to construct a line as far north as James' Bay. It was contended as it crossed the C. P. R., *quoad* that fact, it was a railway for the general advantage of Canada. That although the Act of 1888, which contained the clause making this railway as to the fact of the crossing fall within the class of railways declared to be for the general advantage of Canada, was repealed, yet the repealing Act had no retroactive effect, and as the railway became affected beneficially by the provision of the former Act, such benefit could not be taken away by the subsequent repeal of the Act without express provision therefor.

Burbidge, J.—As the railway is wholly within the Province of Ontario, and as I think that the clause of *The Railway Act*, 1903, ought to be taken by me as being within the competency of Parliament at the time, I think I should send you to Osgoode Hall with your application. But I would say this, that if you do go there and they are of opinion that they have no jurisdiction, you may come back and make a further application here. *Wile v. Bruce Mines & Algoma Ry. Co.*, 22nd January, 1906.

16. *Receiver—Management—Receiver's Certificate—Wages for labour and clerical works.*—Upon taking over the management of the railway and upon being shown by affidavit, the necessity therefor, the Receiver was allowed to borrow $20,000 and to issue a Receiver's Certificate for that amount. (25th March, 1904).

It appearing exceedingly difficult, if not impossible, when the Receiver took possession of the Railway to retain or replace the employees of the Railway Company without paying them the arrears of wages due for the preceding two months, the Receiver, upon application, was authorized by the Court to pay any sum of money due for such wages

only which came within the meaning of paragraphs 9, respectively, of Articles 1994 and 2009 of the Civil Code, P. Q. (30th March, 1904).

A further application was made at the same time for authority to the Receiver to pay the arrears of wages due to the office employees, and to reimburse one *T.*, an office employee, the wages of some labourers which he had advanced to them and for which he held transfers. This application was opposed upon the grounds, *inter alia*, that the claim was one for clerical work as distinguished from manual labour and that while the case of wages for labour was covered by the Article of the Civil Code there was great doubt as to whether the provisions of Section 112 of *The Railway Act*, 1903 (citing also Sec. 2, sub-sec. C. C.), which say that the bonds will take rank next to the payment of the working expenditure of the railway, were sufficient to create a lien in the absence of any other provision. The Court refused to entertain the application. (4th June, 1904). Re *The Minister of Railways and Canals v. The Quebec Southern Railway Company.*

17. *Receiver and manager—Receiver borrowing without authority—Indemnity.—In re British P. T., & Co. Halifax Banking Co. v. British P. T. & Co.*(1906) 1. Ch. 497; 42 C. L. J. 348 was a debenture holder's action in which a receiver and manager had been appointed. Authority had been given to the receiver to borrow, for the purpose of carrying on the business, a certain amount; he had exceeded the limit and borrowed additional sums without any authority from the Court. He had retired from his office and the plaintiffs in the action applied for a declaration that he was not entitled to any indemnity out of the assets in respect of moneys borrowed in excess of the amount authorized. Warrington, J., however, held that the receiver had not necessarily forfeited his right to indemnity by borrowing without authority, but that if he sought indemnity in respect of the excess it would be necessary for him to show that having regard to all the circumstances he was justified in contracting the further loan or loans, but that it would not be enough for him to show that such loan or loans had been contracted *bonâ fide* and in the ordinary course of business.

18. *Receiver—Management of business—Supervision and control—Laches.*—The receiver of a partnership who is directed by the court to manage the business until it can be sold should exercise the same reasonable care, oversight and control over it as an ordinary man would give to his own business and if he fails to do so he must make good any loss resulting from his negligence.

The fact that the receiver is the sheriff of the district does not absolve him from this obligation though the parties consented to his appointment knowing that he would not be able to manage the business in person. *Plisson v. Duncan*, 36, S. C. R. 647.

19. *Railways—Receiver—Authority to construct portion of line—Objection of bondholders—Order for sale of road.*—The Court will not grant to the receiver and manager of a railway authority to proceed with the construction of a small portion of the incomplete part of the line of railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of those of the bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road. *Ritchie vs. Central Ontario R. W. Co.*, 7 Ont. L. R. 727

20. *Purchase of ties by Receiver.*—Upon showing urgency to purchase railway ties, and it being shewn that ties were partly required to replace

some out of place and partly to renew old ones and further that the purchase could be made out of revenue without borrowing, authority was given the Receiver to purchase 30,000 ties as prayed.—*Semble*: These ties could have been purchased by the Receiver without coming to the Court for authority; however, his coming only shows greater carefulness on his part.—(17th May, 1904). *Minister of Rys. & Canals v. Quebec Southern Ry.*

21. *Authority to build portion of line of Railway by Receiver.*—An application was made by the Receiver for authority to build about half a mile of track to get access to a point on the other side of a river over which a bridge had just been built out of Government subsidies, and to also build at that place a very small station. It being shewn that the extension would not cost more than $1,545 in all, with the estimate that with the supplies already in hand, the cost would be reduced to $792.50 and furthermore, that the revenues from such extension were estimated at $500 a month,—the application was granted and authority was given to the Receiver to make the extension, the total cost of which should not exceed $2500. (17th May, 1904.) (*Idem*).

22. *Purchase of freight cars by Receiver.*—The Receiver applied to the Court for authority to borrow the necessary monies to purchase 200 freight cars, alleging, that through the lack of such cars he was unable to carry large quantities of freight, which otherwise he would be able to carry at profitable rates, being thus deprived of a considerable and remunerative business. Pending the application, the number of cars asked to be purchased was reduced to 100 only and conditional upon using subsidies to pay 25% of the purchase price and further that the cars would be purchased on trust-certificates and that the liability would be limited to the cars alone. This application was opposed upon the grounds, *inter alia*, that it was more profitable for a small company to rent cars and that it was not advisable to incur any expenditure in view of the fact that the railway would be sold at an early date and further that this purchase would hardly add any value to the Railway as a whole to any purchaser. The application was refused. (3rd March, 1905). *Re. The Minister of Railways and Canals v. The Quebec Southern Railway Company.*

23. *Receiver—No action taken against without leave of court.*—In the case of *Horn v. The Père Marquette Railway Company* an order was made by the Exchequer Court of Canada that no action be taken or continued against the Receiver without the leave of the Court being first obtained. —January 5th, 1906.

The jurisdiction of the Exchequer Court to make such orders appears to have been taken under the powers vested in it by the provision of sec. 2 of 3 Ed. VII, chap. 21 and following the old Chancery practice. *Kerr on Receivers*, 5th Ed. 172; *Astor v. Heron* 2 *M. & K.* 392.

Much wider powers are given Receiver in the United States than in England. *Smith on Receivership* 153, 155, 187, 188, 500, 504.—*Kerr on Receivers*, 5th Ed. 211, 212, 268, 273.

24. *Receiver—Claim before appointment.*—An application having been made on behalf of the Receiver, for authority to settle for $700 a certain action for damages against the defendant Company pending in a provincial Court, and to borrow the necessary moneys to pay the same; the application was refused on the ground that the claim for damages was one which originated before the appointment of the Receiver. *Horn v. The Père Marquette Ry. Co.* (16th February, 1906).

25. *Receiver—Power given to settle certain class of claims below* $500.—Authority was given the Receiver under a special order to settle and pay, in his discretion and without a special leave from the Court, all claims for general injuries, losses by fire, injury to stock or goods, or any other claims arising out of the operation of the road, including the payment of all accounts for surgical and medical aid to the injured and other expenses incident to such claims in the settlement thereof, when the amount paid in such settlement does not exceed the sum of $500 or in any one case, provided such settlement and payment shall first receive the approval of the General Solicitor of the Receiver in such matters for such purpose. *Horn v. Père Marquette Ry. Co.*, (5th January, 1906).

26. *Bonds pledged as collateral security—Rights of pledgee—Rights of bondholders under Railway Act.*, 3 *Ed.* VII., *ch.* 58, *Art.* 1974 *C. C.*—The pledgee of the bonds of a railway Company, deposited with him as security for the payment of advances to the Company, cannot use them as if he were a holder for value, and is not a bondholder within the meaning of *The Railway Act*, 3 Ed. VII., cap. 58, ss.111, 116. He cannot, therefore, cause them to be registered in his name, nor in that of parties to whom he has transferred them; nor deal with them as if they were his property, v.g., by detaching coupons therefrom, so as to change their appearance and reduce the extent of their nominal value. *DeGalindez vs. The Atlantic & Lake Superior Ry. Co.* Q. R. 14 K. B. 161.

27. *Bondholders—Bonâ fide holders—Stolen bonds—Enquiry.*—A railway company created an issue of bonds under the usual deed of trust. N.T., the original trustee, after having signed such deed, for reason, resigned the trust, and another trustee was appointed who signed and issued a number of these bonds a few days before the company passed into the hands of a Receiver. The bonds, on their face, recited that "it shall not be obligatory until certified by the N. T. trustee". D., the second trustee, signed the bonds in the name of the first trustee, adding after the same "succeeded by D." and signed his name. The bonds were also signed by the President and Secretary of the Company, and it was held that such bonds were on their face, to a third *bonâ fide* party purchasing the same, complete, good and valid and that the the apparent irregularity was not sufficient to put a *bonâ fide* purchaser upon enquiry.

A certain number of these bonds having been handed to H., the President of the company, by the trustee D. after having been signed by him. H. borrowed money for his own use from R., and gave some of these bonds as collateral security, while he also deposited sixteen of them with R. for safe keeping, who in turn used them all as collateral on a loan made for his own use. The holders of these bonds made claim, and they were allowed to recover against the company, as where one of two innocent persons must suffer, the one who does the act from which the loss results must bear it. In this case the company was negligent in allowing H. to have these bonds under his control, as it was by that means that the fraud was committed. *Pilling et al. v.* The *Quebec Southern Ry. Co.*, (31st October 1908.)

28. *Salary of directors.*—Directors of a company cannot take salary unless authorized by a resolution of the shareholders. *Hodge & White v. The Quebec Southern Ry. Co.*, (31st Oct., 1908.)

29. *Claims—Railway Sale—Priority—Fiduciary capacity—Promoters.*—Where promoters bought with the moneys of a company incorporated by themselves, to whom they turned over the property, it was held that as

they were then acting in a fiduciary capacity they could not take profits.—*Hodge & White v. The Quebec Southern Ry. Co.*, (31st Oct., 1908).

30. *Promoters—Fiduciary capacity—Profits.*—Where the purchasers of a railway organized a company to operate it in compliance with the requirements of the Railway Act, and turned over the property to that company at an enhanced price, it was held that they were entitled to their profit, provided they purchased with their own money and were not acting in a fiduciary capacity for the company.—*Standard Trust Co. of New York v. The Quebec Southern Ry. Co.*, (31st Oct., 1908).

31. *Vendor's lien.*—Where the vendor of a railway accepted, by deed of agreement, bonds as part payment of the purchase price which was thereby made payable part in cash, and part in bonds, he *pro tanto* waived and abandoned his vendor's lien for that part of the purchase price payable in bonds. *Semble*, a railway being a public utility, a creature of statute with power to create charges as the statutes may permit, no such equity as vendor's lien can be held to exist. *Semble* even further, following the decision in *Anderson v. Scott* (19 *Gr.*620), that the acceptance of bonds under the circumstances, disentitled the vendor to his lien for the part payable in cash.—*Bank of St. Hyacinthe v. The Quebec Southern Ry. Co.*, (31st Oct., 1908).

32. *Creditors en sous ordre.*—H. had a claim guaranteed by bonds against a railway, and with the view to facilitate the sale of the same, parted with these bonds and allowed them to be used by D., the purchaser in trust for others and himself, with the understanding that D. would, after purchasing the railway from the sheriff, execute a mortgage in his favour against the railway for the amount of his claim guaranteed by such bonds. D. failed to give the mortgage; then H. obtained, rightly or wrongly, judgment against the railway company for the amount he could establish his claim to be and registered the judgment to take place of the promised mortgage. *Held* H. under the circumstances, had no status as creditor against the railway, but as the Bank of St.Hyacinthe, the vendors in the case, had guranteed the purchaser a clear title, H.'s claim was collocated upon the moneys coming to the bank. *Hanson Bros. v. The Quebec Southern Ry. Co.*, (31st Oct., 1908).

33. *Contract—Interpretation.*—Where the Bank of St. Hyacinthe had by a deed of sale contracted with H. to sell the United Counties Railway, and had by a subsequent deed, made the same day, contracted to endeavour to procure for H. the East Richelieu Valley Railway at an agreed price to be paid by H. in bonds, and subsequently the bank having failed to procure the East Richelieu Valley Railway, the latter railway was sold for cash to one B., in trust for the Quebec Southern Railway Co. organized by H., and the deed of sale for such cash sale having been duly registered in the Registry Office by H. acting then as President of the said Quebec Southern Railway Co., H., contended that, in his relations with the bank all he had to do was to hand over the bonds on behalf of the Quebec Southern Ry. Co ,and that the bank was bound to pay in cash for the said railway

Held, that the bank not being a party to that deed of sale, and not being bound by the original deed to sell the East Richelieu Valley Railway, was not liable for the cash payment and not bound to take bonds in lieu thereof. *Bank of St Hyacinthe et al., v. The Quebec Southern Ry. Co.*, (31st Oct 1908).

34. *Set-off.*—Under Arts. 1031 and 1187 respectively, (C. C. P. Q.) creditors can set up the rights of their debtors and show that compensation or set off has taken place. Hence in the present case the creditors were allowed to set-off the claim of certain debtors, officers of a company, for salary paid themselves without proper authority and expenditure made by them out of the company's treasury for an enterprise foreign to its charter. *Hodge & White v. The Quebec Southern Ry. Co.*, (31st Oct., 1908.)

35. *Warrant to Sheriff—Costs.*—The Sheriff's costs of a warrant to give possession to land, incurred after payment of the purchase money into the Court by the promoters of an undertaking, were ordered to be paid out of the fund in Court. In re *Schmarr*, (1902) 1 Ch. 326.

36. *Preference of Crown over Subject—R. S. O.* (1887) *c.* 94.—The principle that when the right of the Crown and the subject come into competition that of the Crown is to be preferred in any case has now no existence in Ontario, because the effect of R. S. O. (1887) c. 94 is to do away with any distinction between debts due from the subject to the Crown and debts due from the subject to the subject, and to place them all upon the same footing.

Such principle, although it has been applied to winding-up proceedings instituted under statutes by which the Crown is not bound, and where the property was not divested out of the Crown debtor, is not applicable to estates in bankruptcy or assigned in trust for creditors.—*Clarkson v. The Attorney-General of Canada.* 15 Ont. R. 632.

When railway company is insolvent—When unable to pay its debts.

27. A railway company is insolvent within the meaning of the last preceding section,—

(*a*) if it is unable to pay its debts as they become due;

(*b*) if it calls a meeting of its creditors for the purpose of compounding with them;

(*c*) if it exhibits a statement showing its inability to meet its liabilities;

(*d*) if it has otherwise acknowledged its insolvency;

(*e*) if it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(*f*) if, with such intent, it has procured its money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution;

(g) if it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims: Provided that the taking possession of any railway or section thereof by trustees for bondholders, by virtue of the powers contained in any mortgage deed made to secure the bondholders under the provisions in that behalf of the Railway Act, shall not be

deemed a general conveyance or assignment, or a sale or conveyance, within the meaning of this paragraph; or,

(*h*) if it permits any execution issued against it, under which any of its goods, chattels, land or property, is seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure.

When unable to pay its debts.

2. A company is deemed unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for fifteen days next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. 3 E. VII., c. 21, s. 6.

Concurrent jurisdiction of provincial Courts.

28. Nothing in the two last preceding sections contained shall affect the present jurisdiction of any court of a province in any such matters as aforesaid affecting railways, or sections thereof, wholly within the province, and the superior courts of a province now possessing such jurisdiction shall continue as regards such railways and sections of railways to have concurrent jurisdiction with the Exchequer Court in all matters within the purview of this Act. 3 E. VII., c. 21, s. 1.

Proceedings against Central Ontario Railway not affected.

29. Nothing in the three last preceding sections shall apply to or authorize proceedings against the Central Ontario Railway, nor shall it apply to or affect any action or proceeding pending on the twenty-fourth day of October, one thousand nine hundred and three, in any court on behalf of or against the Central Ontario Railway Company, or any judgment against the said Company, which was appealed against on or before the said date. 3 E. VII., c. 21, s. 8.

1899, c. 44, repealed—Pending proceedings.

30. Notwithstanding the repeal of the Act passed in the session held in the sixty-second and sixty-third years of the reign of Her late Majesty Queen Victoria, chapter forty-four, intituled *An Act respecting the jurisdiction of the Exchequer Court as to Railway Debts*, all proceedings begun under the provisions of the said Act shall be continued and terminated as if the said repeal had not taken place. 3 E. VII., c. 21, s. 7.

Concurrent original jurisdiction—In cases relating to Revenue—Patents of Invention, instrument respecting lands—Relief against officer of the Crown—In all civil cases where Crown is a party.

31. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada,—

(*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem*, and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone;

(*b*) in all cases in which it is sought at the instance of the Attorney General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands;

(*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and,

(*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. 50-51 V., c. 16, s. 17.

Qui tam actions are instituted by filing a statement of claim as provided for by the Rules and Orders of this Court.

1. *Comity of court—Crown can choose its forum.*—While recognizing it as a settled principle of law that the King can choose any of his courts for the purpose of obtaining relief, the Exchequer Court, out of comity, declined to enjoin an officer of a provincial court, with which it had concurrent original jurisdiction to give the relief asked, from executing process of such court. (See illustration of this rule in *Cawthorne v. Campbell*, per Eyre, C. B., 1 Anstr. 205, in note). 2. The fact that the concurrent jurisdiction of the Exchequer Court with the court of a province, under sec. 17 of 50-51 Vict. ch. 16, was attacked in a former case standing for judgment on appeal to the Supreme Court of Canada (*a*), was regarded by the judge of the Exchequer Court as another reason why he should stay his hands in respect of the injunction asked. *The Queen v. Hurteau*, October 27th, 1892.

2. *Comity of Court.*—We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and therefore of the *res*, is entitled to retain it until the litigation is settled. *Gaylord v. Fort Wayne*, 6 Biss. 286-291; *Sharon v. Terry*, 13 Sawy. 416.

3. *Comity of Court—Deference to Exchequer Court.*—Although the High Court of Ontario may be a final Court of Appeal, it will defer to the decision of previous cases, affirming the validity of a patent of invention, and follow the Court of Appeal in refusing to disturb a decision in the Exchequer Court of Canada. *Toronto Auer Light Co. v. Colling*, 31 Ont. R. 18, 19 and 27.

(*a*) Since the above, the jurisdiction of the Court has been affirmed in *Farwell re The Queen*, 22 S.C.R. 554.

4. *Comity of nations—Decree by foreign tribunal.*—Upon the principle of the comity of nations, a decree for divorce obtained, without fraud or collusion, by the Supreme Court of New York will be recognized as valid in the Canadian courts. *Stevens v. Fisk, Cameron's S. C. Cases*, 392.

5. *Jurisdiction of Exchequer Court.—In Farwell v. The Queen*, 22 Can. S. C. R. p. 554, it was held that the Parliament of Canada had the right to enact that all actions and suits of a civil nature at common law or equity, in which the Crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court.

6. *The King can choose his court.*—King, J., who delivered the judgment of the court in *Farwell v. The Queen* (supra) said, citing *Chitty* on *Prerogatives* (page 244), that "the King has the undoubted privilege "of suing in any court he pleases. And where the matter in suit in "another court concerns the revenue, or touches the profit of the King, he "has the right to remove the suit into the Exchequer. (See the illustra-"tions given of this in *Cawthorne v. Campbell*, 1 Anstr. 205, 218, in note). "This privilege is said to be without the least mixture of prerogative "process; or whether it is a proper subject for prerogative process only to "act upon or not, that is not an ingredient."

The case of *The Attorney-General and Humber Conservancy Commissioners v. Constable*, L. R. 4 Ex. D. 172, and *The Attorney-General v. Walker*, 25 Grant, 233, are authorities in support of the above contention.

7. *Venue.*—In an information of intrusion the venue may be laid in any district. *Attorney-General v. Dockstader*, 5 U. C. K. B. (O.S.) 341.

8. *Jurisdiction—Injunction.*—An information at the suit of the Attorney-General to obtain an injunction to restrain a defendant from doing acts that interfere with and tend to destroy the navigation of a public harbour, is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict. ch. 16, sec. 17 (*d*). *The Queen v. Fisher*, 2 Ex. C. R. 365.

9. *Jurisdiction of Exchequer Court—Conditional gift, breach of condition—Discovery against the Crown—Power to restrain Crown.*—The Crown held certain lands at Ottawa for the purposes of the Rideau Canal. To its title to a portion of the lands, which was freely granted by S. to the Crown for the purposes of the said canal, was attached a condition that no buildings should be erected thereon. It was *held* that such condition or proviso did not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs of S., nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.—Further that the Court has no power to restrain the Crown from making any unauthorized use of the land or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant, and the heirs are not entitled to discovery or to an inquiry as to the particular uses to which the Crown has put the lands in question or as to what buildings have been erected thereon. But *semble* that such a declaration and inquiry might be made in a case in which the court had jurisdiction to grant relief. *Magee v. The Queen*, 3 Ex. C. R. 304 and 4 Ex. C. R. 63.

10. *Rights of the Crown under Civil Code Lower Canada.*—The Crown is bound by the two codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors. *Exchange Bank of Canada v. The Queen*, 11 App. Cas. 157. (But see now *The Bank Act*, 53 Vict. ch. 31, sec. 53).

11. *Priority of payment in respect of Crown's "comptables" in P. Q. before the Codes.*—Prior to the Codes, the law relating to property in the Province of Quebec was, except in special cases, the French law, which only gave the King priority in respect of debts due from "comptables," that is, officers who received and were accountable for the King's revenues. *Ibid.* (See 53 Vict. ch. 31, sec. 53).

Same officers as "tallager" (Sheriff, gerêfa) in early English fiscal system. See *Gniest, History of English Contribution* and *Dr. C. Morse's Apices Juris*, under title "King and the Law."

12. *Crown's preference over chirographic creditors.*—Article 1994 of the Civil Code L. C. must be construed according to the technical sense of "comptables." And Article 611 of the Code of Civil Procedure L. C., giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the legislature was that "in the absence of any special privilege, "the Crown has a preference over unprivileged chirographic creditors for "sums due to it by a defendant being a person accountable for its money." *Ibid.* (See 53 Vict. ch. 31, sec. 53).

13. *Land patent, cancellation of—Improvidence in granting same.*—T., a half breed, was, on the 15th July, 1870, in actual peaceable possession of a lot of land in the Province of Manitoba, previously purchased by him, and of which he had been for some years in undisturbed occupancy. On the 3rd of August, 1871, he shared in the gratuity given to certain Chippewa and Swampy Cree Indians under a treaty then concluded with them, and in the years 1871, 1872, 1873 and 1874 he participated in the annuities payable thereunder. But before taking any moneys under the treaty he enquired of the commissioner who acted for Her Majesty in its negotiation, whether by accepting such money he would prejudice his rights to his private property, and was informed that he would not; and when in 1874 he learned for the first time that by reason of his sharing in such annuities he was liable to be accounted an Indian and to lose his rights as a half-breed, he returned the money paid to him in that year. Subsequently his status as a half-breed was recognized by the issue to him in 1876 of half-breed scrip. *Held* that under *The Manitoba Act*, and amendments (33 Vict. ch. 3, s. 32, sub-sec. 4, and 38 Vict. ch. 52, s. 1), he was entitled to letters patent for the lot mentioned. *The Queen v. Thomas*, 2 Ex. C. R. 246.

14. *Relations between Crown and Provinces—B. N. A. A.* 1867.—*The British North America Act*, 1867, has not severed the connection between the Crown and the provinces; the relation between them is the same as that which subsists between the Crown and the Dominion in respect of the powers executive and legislative, public property and revenues, as are vested in them respectively. In particular, all property and revenues reserved to the provinces by secs. 109 and 126 are vested in Her Majesty as sovereign head of the province. *Maritime Bank v. The Receiver-General for New Brunswick* (1892), A. C. 437.

15. *Priority of Provincial Government over simple contract creditors—Prerogative of the Crown.*—The provincial Government of New Brunswick, being a simple contract creditor of the Maritime Bank of the Dominion of Canada in respect of public moneys of the province deposited in the name of the Receiver-General of the province, is entitled to payment in full over the other depositors and simple contract creditors of the bank, its claim being for a Crown debt to which the prerogative attaches. *Ibid.* (See 53 Vict. ch. 31, sec. 53).

16. *Prerogative of the Crown in Colonies.*—The prerogative of the Crown exists in British Colonies to the same extent as in the United Kingdom. *The Queen v. The Bank of Nova Scotia*, 11 S. C. R. 1, followed. *Maritime Bank v. The Queen*, 17 S. C. R. 657. But see opinion of Sir Barnes Peacock, in *Farwell v. Bowman* (12 App. Cas. 649) as to the effect of the Crown's prerogative of immunity from actions in tort where Colonial Government embark in undertakings which in other countries are left to private enterprise, such as, for instance, the construction of railways, canals, etc.

17. *Prerogatives exercised by Dominion at large.*—The Queen is the head of the Constitutional Government of Canada, and in matters affecting the Dominion at large Her prerogatives are exercised by the Dominion Government. *Ibid.*

18. *Priority of payment—How prerogatives taken away.*—The Crown's prerogatives can only be taken away by express statutory enactment. Therefore Her Majesty's right to payment in full of a claim against the assets of an insolvent bank in priority to all other creditors is not interfered with by the provision of *The Bank Act* (R. S. C. c. 120, s. 79), giving note-holders a first lien on such assets, the Crown not being named in such enactment. *Ibid.* (See now 53 Vict. ch. 31, sec. 53).

19. *Crown's prerogatives—Priority of payment as simple contract creditors.*—The Crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vict. ch. 23. *The Queen v. The Bank of Nova Scotia*, 11 S. C. R. 1. (But see now 53 Vict. ch. 31, sec. 53).

20. *Deposit by Insurance Company—Insolvent bank—Priority of payment.*—An insurance company, in order to deposit $50,000 with the Minister of Finance and receive a license to do business in Canada according to the provisions of *The Insurance Act* (R. S. C. c. 124), deposited the money in a bank and forwarded the deposit receipt to the Minister. The money in the bank drew interest which, by arrangement, was received by the company. The bank having failed, the Government claimed payment in full of this money as money deposited by the Crown. And the Court decided that it was not the money of the Crown, but it was held by the Finance Minister in trust for the company, and it was not, therefore, subject to the prerogative of payment in full in priority to other creditors. *Maritime Bank v. The Queen*, 17 S. C. R. 657. (See now 53 Vict. ch. 31, sec. 53).

21. *Prerogative—Exercise of by local Government—Provincial rights.*—The Government of each province of Canada represents the Queen in the exercise of Her prerogative as to all matters affecting the rights of the province. *The Queen v. The Bank of Nova Scotia*, 11 S. C. R. 1, followed.

Under sec. 79 of *The Bank Act* (R. S. C. c. 120) the note-holders have the first lien on the assets of an insolvent bank in priority to the Crown But see the new Bank Act (53 Vict. c. 31, s. 53) passed since this decision. *Maritime Bank of the Dominion v. The Receiver-General of N. B.*, 20 S. C. R. 695.

22. *Lands—Information of intrusion—Res judicata.*—In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against F. it had been adjudged that F., who claimed title under a grant from the Crown under the Great Seal of British Columbia, should

deliver up possession of certain lands situate within the railway belt in that province. *The Queen v. Farwell*, 14 S. C. R. 392. F. having registered his grant and taken steps to procure an indefeasible title from the registrar of titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct F. to execute to the Crown in right of Canada a surrender or conveyance of the said lands. The court *held*, dismissing the appeal from the judgment of the Exchequer Court, that the judgment in intrusion was conclusive against F. as to title. *The Queen v. Farwell*, 14 S. C. R. 392, and *Attorney-General of British Columbia v. Attorney-General of Canada*, 14App. Cas. 295, commented on and distinguished. And further that the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed. *The Queen v. Farwell*, 22 S. C. R. 553; 3 Ex. C. R. 271.

23. *Crown's right—Beneficial interest in land.*—The Crown in right of the Dominion has a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights. And further the rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province (as the case may be) in which is vested the beneficial interest therein. Ibid.

24. *Crown—Prerogative—Chattels belonging to Crown—Distress for rent—Property exempt from distress—Landlord and tenant.—Secretary of State for War v. Wynne*, (1905) 2 K. B. 845, was an action for illegally distraining a horse for rent, such horse being the property of the Crown. The County Court judge dismissed the action on the ground that the property of the Crown was not by law exempt from distress for rent. On the appeal of the plaintiff this decision was reversed by the Divisional Court (Lord Alverstone, C. J., and Wills and Darling, JJ.,) that Court holding that no distress for rent can be levied against the Crown and no property of the Crown can be taken under a distress against a subject, although strange to say no direct authority could be found on the point. 42, C. L. J. 64.

25. *Crown—Prerogative of—Action between Subjects involving Rights of the Crown—Transfer to Revenue Side—Information by Attorney-General—Stay of Proceedings.*—In an action of trespass in a county court against tenants of the Crown, a question affecting the rights of the Crown over certain land was involved. Judgment was given in the county court for the plaintiff for damages and an injunction, against which the defendants appealed. The Attorney-General then filed an information against the plaintiff praying for a declaration of the rights of the Crown in the matter: and it was *Held*, that the Crown was entitled to an order for the transfer of the county court appeal to the revenue side of the Queen's Bench Division and for a stay of proceedings therein until after the hearing of the information. *Stanley v. Wild & Son*, 1900 L. R. 1 Q. B. Div. 256.

26. *Crown, Prerogative of—Right of Attorney-General to injunction to restrain action—Public harbour.*—It is a prerogative right of the Crown to stop a suit between subjects, in the subject matter of which it is alleged that the Crown is or may be interested and in respect of which suit has been brought in behalf of the Crown to have its interest declared.

If the Crown right alleged is a right in behalf of the Province then the Attorney-General of the Province is the proper officer to exercise the prerogative. *Attorney-General v. E. & N. Ry. Co.*, 7 *B. C. L. R.* 221.

27. *British North America Act*, 1867, *s.* 91, *sub-s.* 29, *and s.* 92, *sub-s.* 10—*Municipal Code of Quebec—Powers of Provincial Legislature—Municipal Legislation affecting Dominion Railway.*—By the true construction of the *British North America Act*, 1867, s. 91, sub-s. 29, and s. 92, sub-s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair, and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works. However, the provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which has caused inundation on neighbouring land, are *intra vires* of the provincial legislature. *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours.* 1899 L. R., A. C. 367.

28. *Claim arising under any law of Canada.*—A claim against the Crown based upon the 111th section of *The British North American Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim arising under any law of Canada within the meaning of clause (d) of sec. 16 of *The Exchequer Court Act. Yule v. The Queen* (6 Ex. C. R. 123; 30 S. C. R. 35) referred to.—*Henry v. The King*, 9 Ex. C. R. 417.

29. *Privilege upon immoveables—Railway employee—Manual labour—Three months arrears—Articles* 1994, 2006, 2009 C. C.—A person employed by a Railway Company at work to keep its track open is a Railway employee engaged in manual labour within the meaning of Art. 2009, no. 9, C. C. The privilege given upon immoveables in the above articles is for arrears not exceeding three months, as specified in regard to the like privilege on moveables in Art. 2006. The term of three months aforesaid is computed and runs back from the date of the seizure of the immoveables. *Morse v. The Levis County Railway Co.*, Q. R. 28 S. C. 178.

30. *Statute—Interpretation—Labourer.*—A person engaged to perform manuel work at a daily wage, and who is actually occupied in doing such work, is a "labourer" within the meaning of sec. 71. 2 Ed. VII, Can. ch. 15, although being a workman of superior capacity, he is also entrusted with the supervision of other workmen, and to that extent fills the position of a "boss" or foreman. *Fee v. Turner* Q. R. 13 K. B. 435.

31. *Trespass—Action against Public Officers in their Official Capacity—Agent of Executive Government—Liability of Servants of the Crown—Prerogative—Jurisdiction—Amendment.*—Alleged authority of an executive Department is no justification for a trespass, but only those who commit or in fact authorize the trespass are liable.

The head of a Government Department is not liable for wrongful acts of officials in the Department, unless it can be shewn that the act complained of was substantially the act of the head of the Department himself.

The plaintiffs commenced an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass:—and the Court *held* that though the plaintiffs could sue any of the defendants individually for trespass committed or threatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie;

leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land was also refused, and the action was dismissed with costs. *Raleigh v. Goschen.* 1898 L. R., 1 Ch. D. 73.

32. *Inland Revenue Act—Officer acting under—Search—Private residence—Writ of Assistance—Inquiries—Privilege.*—An officer of Inland Revenue, acting in good faith in the execution of his duty, and under competent authority, is not responsible in damages for entering a private house and making a search therein.—A writ of assistance, signed by a Judge of the Exchequer Court of Canada, as provided by *The Inland Revenue Act,* R. S. C. c. 34, s. 74, constitutes legal and sufficient authority for a search in a private residence.—Inquiries of, or consultations with, official or other persons in the neighbourhood, by a revenue officer, with a view to obtaining information, are privileged.—The words "any building or other place," in *The Inland Revenue Act,* s. 75, include a private residence. *Duquenne v. Brabant,* Q. R. 25 S. C. 451.

33. *Officers of Crown—Power of—Compromise and part payment of subsidy under wrong interpretation of statute.*—A wrong construction of a statute by the officers of the Crown, the effecting of a compromise in consequence thereof and even the payment in part of a subsidy thereunder, will afford no grounds to recover the balance from the Crown by Petition of Right.—*De Galindez v. The King,* Q. R. 15 K. B. 320:—Affirmed on appeal to Supreme Court of Canada. 39 S. C. R. 682.

34. *Acts done under Statutory Authority—Non-liability for Damage—Civil Code of Lower Canada, art 356—Dominion Railway Act, ss.* 92, 288.—A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or in other words, by the proper execution of the power conferred by the statute. *Geddis v. Proprietors of Bann Reservoir,* (1878) 3 App. Cas. 430, 438 and *Hammersmith Ry. Co. v. Brand,* (1869) L. R. 4 H. L. 215, followed.

The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction contemplates the liability of a railway company acting within its statutory powers:—So *held,* where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway. *Canadian Pacific Railway v. Roy,* 1902 A. C. 220.

35. *Power of Minister of the Crown—Undertaking to promote legislation—Letter of credit—Negotiable instrument.*—The Provincial Secretary of Quebec wrote to D., with the assent of his colleagues, but without the authority of an order in council, that the Government would promote, in the supplementary budget for 1891-92, a vote of $6,000 which would be paid D. immediately after the session on account of certain printing already given him—adding further that the $6,000 would be payable to the bearer of the letter, duly endorsed by him.

D. indorsed the letter to a bank as security for advances to enable him to do the work.

The letter, under the circumstances, constituted no contract between D. and the Government; the Prov. Sec. had no power to bind the Crown by his signature to such a document; and a subsequent vote of the legis-

lature of a sum of money for such printing was not a ratification of the agreement with D. The Government was not, under the circumstances, obliged to expend the money though authorized to do so, as the vote contained no reference to the contract with D. nor to the said letter of credit.

A bank cannot deal in such securities, as the letter of credit was dependent on the vote of the Legislature and therefore was not a negotiable instrument within *The Bills of Exchange Act* of 1890 or *The Bank Act*, R. S. C. ch. 120 secs. 45 and 60. *Jacques Cartier Bank v. The Queen.*, 25 S. C. R. 84.

36. *Minister of Crown—Admission by*—The Crown is not bound by the admission made by one of its ministers in an answer or an address in the House and leave will be given allowing to prove that such admission was so made in error. *Regina v. Fraser*, Q. R. 25 S. C. 104.

37. *Crown—Postmaster's bond—Penal clause—Lex loci contractus-Laches of the Crown officials—Release of sureties—Arts.* 1053, 1054, 1131, 1135, 1927, 1929, 1965 C. C.—In an action by the Crown upon a bond executed in the Province of Quebec in the form provided by the "*Act respecting the security to be given by the officers of Canada*" (31 Vict. ch. 37; 35 Vict. ch. 19) and *The Post Office Act* (38 Vict. ch. 7). It was held that the right of action under the bond was governed by the law of the Province of Quebec; that such a bond was not an obligation with a penal clause within the application of articles 1131 and 1135 of the Civil Code of Lower Canada,—and that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. *Black v. The Queen*, 29 S. C. R. 693.

38. *Crown—Breach of trust—Knowledge of misapplication of moneys—Statutory prohibition—Evasion of statute—Estoppel against the Crown.*—In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds payment of interest upon other debentures due by them in violation of a statutory prohibition, and it was *held*, affirming the judgment appealed from (8Ex. C. R. 330) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action. *The King v. The Quebec N. S. T. Road Trustees*, 38 S. C. R. 62.

39. *Crown—Officers—Laches.*—The rule of law that the Crown is not liable for laches or negligence of its officers obtains in the Province of Quebec, except when altered by statute. *Black v. The Queen*, 29 S. C. R. 693.

40. *Tort—Railway—Joint ownership of Crown and private Company.*—Where the trains of two railways run over the section of the line of one of them, under an agreement which provides, *inter alia*, that the servants employed on the section in common use, shall be considered and shall be in fact in the joint employ of the owners of the two railways, the latter are both jointly and severally liable for the consequences of a collision of two trains belonging to one of them, caused by the fault or neglect of a servant so employed. If, therefore, one of the railways is the property of the Crown

and the other of a private company the latter is liable in damages as sole tortfeasor. *Atkinson v. G. T. Ry. Co.* Q. R. 27 S. C. 227;—*Huard v. G. T. Ry. Co.* 37 S. C. R. 655.

41. *Government railway—Operation over other lines*—The agreement between the Government of Canada and the Grand Trunk Railway Company, made under the provisions of the Dominion statute, 43 Vict. ch. 8, giving the Government running rights and powers over a portion of the Grand Trunk Railway, from Levis to Chaudiere, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Railway a part of the Intercolonial Railway, under the provisions of *The Government Railways Act*, as amended by 54 & 55 Vict. ch. 50. (D), and consequently, a public work within the meaning of *The Exchequer Court Act*, 50 & 51 Vict. ch. 16, sec. 16 (c), (D); (R. S. C. 1906, ch. 140, sec. 20 (c).). *The King v. Lefrancois*, 40 S. C. R. 431; 11 Ex. C. R. 252 (*Leave to appeal to P. C. refused.*)

42. *Voting moneys—Estimates—Liability.*—A vote of moneys by the Parliament of Canada does not create a liability; but the moneys are to satisfy a liability if any exist. Per *Burbidge, J.—re Goodwin v. The Queen*, 20 June 1896. See also *Todd* 43; and *Banque Jacques Cartier v. The Queen*, Q. R. 2 S. C. 346.

43. *Appropriation of money—Condition precedent.*—Is the appropriation of moneys by Parliament necessary before claimant can recover? The following *obiter dictum* upon that question is to be found in the case of *Tucker v. The King* (7 Ex. C. R., p. 361) where Burbidge, J., says:—"It was contended for the Crown that the suppliant could not recover anything for his services even if there had been a promise to pay unless money had been appropriated by Parliament for the service. I am not satisfied that the contention could be supported, but as it is not necessary at present to determine the question I content myself with referring to the case of *Collins* v. *United States* (15 Ct. of Cls. 22), in which it was held that the provision of the United States Constitution Art. 1, s. 9, cl. 7, that 'no money shall be drawn from the treasury but in consequence of appropriations made by law' is exclusively a direction to the officers of the treasury and that it neither controls courts, nor prohibits the creation of legal liabilities. (19 *Am. & Eng. Enc. of Law.* 534)."

44. *Accident on a public work—Non-repair—Money voted by Parliament—Discretion of Minister—Jurisdiction of court—Improvement of navigation.*—There is no law in Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failure to use in its repair money voted by Parliament for the purposes of such public work.

In such case whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the courts.

Semble.—Although the channel of a river may be considered a public work under the management, charge and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of section 7 of *The Public Works Act* (R. S. C. c. 36), it does not follow that once the Minister has expended public money for such purpose the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do

so it must answer in damages. *Hamburg American Packet Co. v. The King*, 7 Ex. C. R. 150, affirmed on appeal to the Supreme Court of Canada, 33 S. C. R. 252.

The order granting special leave to appeal to the Privy Council (22 July, 1903), was rescinded and the appeal dismissed. (28 July, 1906).

45. *Debates House of Commons—Reference to—Interpretation of Statute.*—The reports of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in the statute. *Gosselin v. The King*, 33 S. C. R. 255.

46. *International Law—Action by Foreign Sovereign—Cross Proceedings.*—A foreign Sovereign suing in the courts of this country submits to the jurisdiction to the extent only that (1) he must give discovery; (2) cross proceedings in mitigation of the relief claimed by him can be taken against him.

A foreign State sued to restrain dealing with, and for the appointment of a new trustee of funds lodged in England in the names of a trustee for the plaintiffs and a trustee for the defendants who held a concession from the plaintiffs for the construction of a railway in their territory. A counter-claim for damages in respect of alleged breaches of the terms of the concession was struck out. *South African Republic v. La Compagnie Franco Belge du Chemin de fer du Nord.* 1898 L. R., 1 Ch. D. 190.

47. *Evidence—Provincial laws in Canada—Judicial notice—Conflict of laws—Negligence—Common employment—Construction of statute—3 Edw. VII, c. 11. s. 2, ss. 3, (N.B.)—"Longshoreman"—"Workman."*—As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the courts below, or although the opinion of the judges of the Supreme Court of Canada may differ from the evidence adduced upon those points in the courts below. *Cooper v. Cooper*, (13 App. Cas. 88) followed, Cf. R. S. C. (1906), ch. 145, sec. 17. The plaintiff, a longshoreman, was engaged by the defendant, in Montreal, to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway where he was injured by a heavy weight falling upon him on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court, at Montreal, the court *held* that the plaintiff was entitled to recover either under the law of the Province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII, ch. 11, as he came within the class of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not apply. *Logan v. Lee*, 39 S. C. R. 311.

48. *Procedure—Superintending or reforming power of the Superior Court—Exchequer Court of Canada—Action to have proceedings and judgments declared void by provincial court.*—The Exchequer Court of Canada is not a Court subject to the superintending and reforming power of the Superior Court of the Province of Quebec. No action will lie before the

latter to have proceedings and judgments had before and rendered by the former declared null and void for want of jurisdiction. *Hodge v. Béique*, Q. R. 33, S. C. 90.

49. *Subrogation—Essentials of—Volunteer—Law of evidence.*—The doctrine of subrogation is part of the law of the Province of Nova Scotia.

Subrogation arises either upon convention or by law, but in the Province of Nova Scotia the creditor must be a party to the convention. It is not sufficient that it be with the debtor only.

Subrogation by operation of law is recognized not only by the civil law, but it has been adopted and followed by courts administering the law of England.

It is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit.

Where one is entitled to be subrogated to the rights of a judgment-creditor he is to be subrogated to all and not to part only of the latter's rights in such judgment.

In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail.

Semble, a mere stranger, or volunteer, who pays the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own, cannot invoke the benefit of the doctrine of subrogation. *The Queen v. O'Bryan et al*, 7 Ex. C. R. 19.

50. *Subrogation—Partnership debt—Right of one partner paying same.*—Under the principles of the Common Law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner. (The law as applied in similar cases by the Courts of Quebec and of the United States discussed). *The King v. Connor et al*, 10 Ex. C. R. 183.

51. *Practice—Submission to Arbitration—Award—Rule of Court—Judgment.*—The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent in a matter *ex foro*, a judgment of the court. *Dominion Atlantic Railway Co. v. The Queen*, 5 Ex. C. R. 420.

52. *Public officer—Judge of Yukon Court—Living expenses—"Appointee of Dominion"—Ratification of payments—Recovery of money paid.*—The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on September 12th, 1898. By sec. 5 of *The Yukon Territorial Act*, 1898, (61 Vict., ch. 6, sec. 5 (3)), as such Judge he became a member of the council constituted to aid the Commissioner in his administration of the Territory. An order in council was passed on the 7th October, 1898, appointing him "to aid the Commissioner in the administration of the Territory," and since that time up to action brought he had continued to act as a member of the council. In addition to the salary paid to him as such judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of 7th of July, 1898, and of the 5th of September, 1899, relating to officers for the administration of the Yukon district, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters" and "such living allowance as may from time to time be fixed by the Minister of the

Interior," and it was further provided therein that the provision mentioned should apply to "all appointees of the Dominion who had been or might be appointed to the staff for the administration of the Yukon Territory."

From the 19th of October, 1900, until the 30th of June, 1902, the defendant was furnished with a residence at Dawson City, and supplied with light and fuel, the bills for rent and for light and fuel, and for certain other domestic requirements, being paid by or under the authority of the Commissioner of the Yukon Territory. The payments so made were fully reported to the Minister of Public Works, who was responsible for the administration of the appropriation, and vouchers, showing on the face of them the service for which the moneys were expended, and giving full particulars, were forwarded to the Department of Public Works at Ottawa, and no objection was taken thereto at the time by any one in that department. The Commissioner, whose duty it was to administer the government of the Territory under instructions from the Governor in Council or the Minister of the Interior, stated he had directions from the latter that in addition to payment for the services of the officers employed in the administration of public affairs "all the public employees were to be sheltered and fed," and that it was in pursuance of these instructions that he made the arrangements and provisions mentioned on behalf of the defendant. Furthermore, a letter was produced in evidence written by the Deputy Minister of Justice to the Deputy Minister of Public Works by which it appeared that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the Judges of the Territory. And it was *held* that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order in council of 5th September, 1899, and so entitled to the quarters and a living allowance provided thereunder.

That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant. *The King v. Dugas*, 10 Ex. C. R. 68.

53. *Fishery bounty—R. S.* 1906, *c.* 46—*Regulations of December* 10*th*, 1897—*Fishermen required to serve three months on fishing vessel.*—To entitle a fishing vessel to bounty under the regulations of December 10th, 1897, the fishermen employed on board of her must serve the full time of three months on such vessel during the season; service for such time partly on one vessel and partly on another will not suffice. *Snow v. The King*, 11 Ex. C. R. 164.

54. *Fishing Bounty—R. S. C. c.* 95—*Fishing by traps and wears—Right to bounty in courts.*—Defendants prosecuted fishing by means of brush wears and traps. The wears were formed by brush leaders from the shore with a pound at the extreme end. At low water the wears were dry, and at neap-tide there would be some four feet of water therein. The traps were constructed by means of a leader from the shore and a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water. Boats were sometimes, but not always, used to take the fish from the wears and traps. And it was held that fishing by such means was not "deep-sea fishing" within the meaning of R. S. C. c. 95, and the Regulations made thereunder by the Governor-General in Council and the instructions issued by the Minister of Marine

and Fisheries in the year 1891; and that the defendants were not entitled to bounty as provided by the said Act. *The Queen v. Eldridge*, 5 Ex. C. R. 38.

55. *Bounties on the manufacture of "pig-iron" and steel ingots*–60-61 *Vict. c.* 6—62-63 *Vict. c.* 8—*Interpretation.*—It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel, the term "pig-iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether iron when used in a liquid or molten form for the manufacture of steel was "pig-iron" within the meaning of the term as employed in the Acts 60-61 Vict. c. 6 and 62-63 Vict. c. 8. And the Court decided that it was, and that a manufacturer of steel ingots therefrom was entitled to the bounties provided by the said Acts in respect of the manufacture of pig-iron and of steel ingots. *Dominion Iron and Steel Co. v. The King*, 8 Ex. C. R. 107.

56. *Crown—Banks and banking—Forged cheques—Payment—Representation by drawee—Implied guarantee—Estoppel—Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.*—A clerk, in a department of the Government of Canada, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept, and it was held, affirming the judgment appealed from (11 Ont. L. R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery, and that estoppel could not be invoked against the Crown. *Bank of Montreal v. The King*, 38 S. C. R. 258. This judgment was confirmed on appeal to the Judicial Committee of His Majesty's Privy Council.

57. *Claim for possession of head-gates and waters of canal—Public work—Interruption of possession—Water-power—Public and private rights—Estoppel by admission of Crown's officer—Departmental report.*—Where the suppliant's *auteurs* were not in possession of certain feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for a period.

The suppliant while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown.

The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants. *Robert v. The King*, 9 Ex. C. R. 21.

58. *Indians—Mississaugas' claim for restitution of moneys to trust fund*—50-51 *Vict. ch.* 16, *sec.* 16 (*d*)—*Declarations of right—Discretion of Superintendent General—Jurisdiction to interfere—Crown as Trustee—Effect of treaties.*—Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law. *Barraclough v. Brown* (1897), A. C. 623 referred to.

It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which gives the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust.

While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indian Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz.: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers.

Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.

Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. *Henry v. The King*, 9 Ex. C. R. 417.

59. *Discretion of Governor in Council—Stated case—Railway subsidies—Construction of statute—Estimating cost of constructing line of railway—Rolling stock and equipment.*—The provisions of the Act, 3 Edw. VII, c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned.

On a proper construction of the said Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done

in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy. *Canadian Pacific Ry. Co. v. The King*, 38 S. C. R. 137.

60. *Insolvent bank—Winding-up Act—Sale of unrealized assets—Set-off—Funds in hands of Receiver-General—Estoppel—Classes of Creditors.*—Where moneys belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General as unadministered assets in the case of the insolvency of a Bank in proceedings under *The Winding-Up Act* (R. S. C. c. 129), and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund. And it was *held* that if it was clear that the matter had been really determined, effect should be given to the estoppel; but that where to give effect to it would work injustice, the court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision.

In this case there was no estoppel, and a reference to the registrar was directed to ascertain what proportion of the fund in the hands of the minister properly belonged to the suppliants. The rule as to estoppel stated by King, J., in *Farwell v. The Queen* (22 S. C. R. 558), referred to.

One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the Bank at the date of its insolvency. It appeared that at the time of the Bank's insolvency certain of its debtors had at their credit in the Bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General. And it was *held* that the suppliants were not entitled to such indemnity. *Hogaboom v. The King*, 7 Ex. C. R. 292.

61. *Debtor and creditor—Appropriation or imputation of payments—Error in appropriation—Arts.* 1160, 1161 *C. C.—Crown.*—A bank borrowed from the Dominion Government two sums of $100,000 each, giving deposit receipts therefor respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of $50,000 on account, that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stated that this had been done, enclosed another receipt numbered 358 for $50,000 on special deposit, and concluded, "Please return deposit receipt No. 323—$100,000 now in your "possession." Subsequently $50,000 more was paid and a return of receipt No. 358 requested. The bank having failed, the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O. that any payments made on account of the borrowed money should be first applied to the guaranteed loan and that the president had instructed the accountant so to apply the two sums of $50,000 paid, but he had omitted to do so. The trial judge gave effect to this objection and dismissed the information of the Crown. And it was *held*, reversing the judgment of the Exchequer Court (6 Ex. C. R. 21), Taschereau and

Girouard, JJ., dissenting, that as the evidence showed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C. C., no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made which was impossible as the Government would then have had an option which could not now be exercised. *The Queen v. Ogilvie*, 29 S. C. R. 299.

62. *Sale of Dominion lands—Mines and minerals.*—Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands and there is no stipulation to the contrary express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. *Canadian Coal and Colonization Co. v. The Queen*, 3 Ex. C. R. 157. Affirmed on appeal to the Supreme Court, 24 S. C. R. 713.

63. *Crown lands—Letters-patent for—Setting aside.*—Letters-patent having been issued to F. of certain lands claimed by him under *The Manitoba Act* (33 Vict. ch. 3, as amended by 38 Vict. ch. 52), and an information having been filed under R. S. C. ch. 54, s. 57 at the instance of a relator claiming part of said lands to set aside said letters patent as issued in error or improvidence, the court *held* that a judgment avoiding letters patent upon such an information could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*. *Fonseca v. Attorney-General of Canada*, 17 S. C. R. 612.

64. *Letters-patent—Error and improvidence—Superior title.*—The term "improvidence" as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters-patent; and F.'s title having been recognized by the Government as good and valid under *The Manitoba Act*, and the lands granted to him in recognition of that right, the letters-patent could not be set aside as having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act. *Ibid.*

65. *Letters-patent—Trespasser—Error and improvidence—Evidence—Estoppel.*—Letters-patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no color of right in law, has entered and was in possession without the knowledge of the Government officials upon whom rests the duty of executing and issuing the letters-patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters-patent; or when such an application has been made and refused without any express determination of the official refusing the application, or any record having been made of the application having been made and rejected. *Ibid.*

66. *Crown domain—Disputed territory—License to cut timber.*—The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that

Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged the mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under sections 49 and 50 of 46 Vict. ch. 17, and the regulations made under the Act of 1879 provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor, as may be fixed by the Governor in Council." Upon a claim for damages by the licensee, the court *held*, dismissing the appeal from the judgment of the Exchequer Court (3 Ex. C. R. 184), that the orders in council issued pursuant to 46 Vict. ch. 17, secs. 49 and 50 authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the Crown and intending licensees, such orders in council being revocable by the Crown until acted upon by the granting of licenses under them. And that the right of renewal of the licenses was optional with the Crown and the claimant was entitled to recover from the Government only the moneys paid to them for ground-rents and bonuses. *Bulmer v. The Queen*, 23 S. C. R. 488.

67. *Crown domain—Implied warranty of title.*—The licenses which were granted and were actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands, except as thereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer." *Quære*:—Though this was in law a lease for one year of the lands comprised in the license, was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment? *Ibid.*

68. *License to cut timber—Interest in land.*—An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely a sale of goods. *Bulmer v. The Queen*, 3 Ex. C. R. 184; 23 S. C. R. 488.

69. *Federal and Provincial rights—Title to lands in railway belt B. C.*—Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled all lands held thereunder become the property of the Crown in the right of the province and not in the right of the Dominion. *The Queen v. Demers*, 3 Ex. C. R. 293.

(On appeal to the Supreme Court of Canada this judgment was affirmed, 22 S. C. C. 482).

70. *Unsurveyed lands held under pre-emption record at the time grant of railway lands came into operation.*—Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the Terms of Union between the Province of British Columbia and the Dominion of Canada. (See Statutes of Canada, 1872, p. XCVII). *Ibid.*

On the question of title to land see also *The St. Lawrence Terminal Co. v. Hallé*, 39 S. C. R. 49, and *The Chicoutimi Pulp Mill Co. v. Price*, 39 S. C. R. 81.

71. *Mining regulations—Hydraulic lease—Breach of conditions—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.*—Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of 3rd December, 1898, a provision that the Minister of the Interior is to be the "sole and final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease and re-enter until the fact of such default has been determined by the Minister in the exercise of the functions vested in him, after an inquiry of a judicial nature, in which an opportunity has been afforded to all parties interested of knowing and being heard in respect to the matters alleged against them in such investigation.

Quære, per Idington, J.:—Was there not sufficient evidence in the case to show that there had been no such breach of the conditions as could work a forfeiture of the lease? *Bonanza Creek Hydraulic Concession v. The King*, 40 S. C. R. 281. (*Leave to appeal to P. C. refused*).

72. *Mining regulations—Hydraulic lease—Breach of conditions—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.*—Under circumstances similar to those involved on the appeal in the case of *The Bonanza Creek Hydraulic Concession v. The King* (40 S. C. R. 281) this appeal was allowed with costs for the reason that there could be no right of cancellation of the lease or re-entry by the Crown until default by the lessees had been established, upon an investigation of a judicial nature, by the Minister of the Interior in the exercise of the functions vested in him by the hydraulic regulations and the terms of the lease.

Per Idington, J.—The facts disclosed by the evidence could not justify the cancellation of the lease or re-entry or breach of the conditions thereof. *The Klondyke Government Concession v. The King*, 40 S. C. R. 294. (*Leave to appeal to P. C. refused*).

73. *Mines and minerals—Hydraulic regulations—Duties imposed on Minister of the Interior—Status of applicant—Vested rights—Contract binding on the Crown.*—Under the hydraulic regulations for the disposal of mining locations in the Yukon Territory, enacted by the Governor General in Council on 3rd December, 1898, as amended by subsequent regulations and by the order in council of 2nd February, 1904, the Minister of the Interior is charged with the duty, not only of pronouncing on the question, whether or not the locations applied for should be reserved for disposal under such hydraulic regulations, but also of determining the priority of rival claimants, the extent of the locations and the conditions of any lease to be granted.

Until the Minister has given a decision favourable to an applicant, there can be no implied contract binding upon the Crown in respect to the location applied for, and the mere filing of an application for an hydraulic lease confers no status or prior rights on the applicant in respect to the ground therein described. *Smith v. The King*; *Frooks v. The King*, 40 S. C. R. 258.

74. *Dominion Lands Act* (*Revised Statutes of Canada, c. 54*), *s. 47—Mining Regulations of 1889. s. 17—Rights of Placer Miner as to Renewal of his Grant—Construction—Royalty—Tax.*—Sec. 17 of the Mining Regu-

lations passed under the Dominion Lands Act (Revised Statutes of Canada, c. 54) does not on its true construction extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are accorded to the holder of a quartz mining grant.

The placer miner on renewal (to which he has no absolute, but only a preferential, right) holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewal grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant.

The Governor in Council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant. *Chappelle v. The King* (1904), A. C. 127.

75. *Dominion mining regulations—Hydraulic mining—Placer mining Lease—Water-grant—Conditions of grant—User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.*—An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then existing rights for working his placer mining claims adjacent thereto. And it was *held*, that, under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges. *The Klondyke Government Concession v. McDonald*, 38 S. C. R. 79.

76. *Petition of right—Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Cause of action.*—A petition of right which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants. *McLean v. The King*, 38 S. C. R. 542; 10 Ex. C. R. 390. Appeal to Privy Council confirmed judgment of the Supreme Court, 40 S. C. R. VII.

77. *Placer mining—Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Standing by—Acquiescence.*—After a favourable judgment by the Gold Commissioner in respect of the boundary between contiguous placer

mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass.

In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold. And it was *held*, affirming the judgment appealed, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

Quære:—Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? *Lamb v. Kincaid*, 38 S. C. R. 516.

78. *Construction of statute—Special Act—Repeal of by general Act—Repeal by implication.*—A general later statute (and a fortiori a statute passed at the same time), does not abrogate an earlier special Act by mere implication.

The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation. *City of Vancouver v. Bailey*, 25 S. C. R. 62.

79. *Publication of Regulations—Dominion Lands Act.*—When Regulations made under the Dominion Lands Act are to be published during four consecutive weeks in the Canada Gazette, the period of such four weeks from the date of the first issue must have expired before such regulations come into force. *Chapelle v. The King* (1904), A. C. 136.

80. *Canadian Act* (53 *Vict. c.* 4)*—Orders in Council thereunder—Construction—Grants thereunder include Mines and Minerals.*—The appellant railway company, being entitled, under the Canadian Act, 53 Vict. c. 4 and an Order in Council made in pursuance thereof, to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals, except gold and silver. *The Dominion Lands Act*, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply; they relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale. *Calgary & Edmonton Ry. Co. v. The King* (1904), A. C. 765. (The judgment of the Exchequer Court [8 Ex. C. R. 83] was affirmed by the Supreme Court of Canada [33 S. C. R. 673] and reversed by the Judicial Committee of His Majesty's Privy Council).

81. *Crown lands in New Brunswick—Adverse Possession for less than sixty Years—Grant by the Crown during adverse Possession valid—Rights of Grantee—21 Jac. 1, c. 14—Construction.*—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of fifty-six years down to a date about seven years prior to date of action:—*Held*, that judgment was rightly entered for the defendant.

Occupation against the Crown for any period less than sixty years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession.

The Act 21 Jac. 1, c. 14, only regulates procedure, and its effect is that if an information of intrusion is filed and the Crown has been out of possession for twenty years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed there is nothing to prevent the Crown or its grantee from making a peaceable entry and then holding possession by virtue of title.

Decision by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, overruled. *Emmerson v. Maddison* (1906), A. C. 569.

82. *Grant of land along non-navigable and non-floatable rivers—Riparian right to fish—Interpretation of letters-patent by contract.*—Where letters-patent issue as a grant of land by the Crown, upon the application of the grantee, and after correspondence, disclosing a concluded agreement, the latter should be read into the letters-patent. Evidence of the application and correspondence is therefore admissable, to prove the extent of the grant, v.g., that a grant of land along a river was made with the right to fish in it.

Although possession cannot give a title by prescription to Crown lands, it may be relied upon and proved to establish the extent of a grant or conveyance of land by the Crown, and the intention of the contracting parties respecting an accessory right; in this case, the right to fish. *The Attorney-General of Quebec v. Lefaivre*, Q. R. 14, K. B. 115.

83. *Grant from Crown—Navigable and floatable streams—Inlet of navigable river—Land covered with water—Public law—Estoppel—Waiver.*—By the law of the Province of Quebec, as well as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable, in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact.

Where there is no reservation of the lands covered with water in an original grant by the Crown, in 1806, the bed of a creek passes to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.

The uninterrupted possession of the bed of the creek by the grantee and his representative, from the time of the grant with the assent of the Crown, was evidence of the intention of the Crown to make an unqualified

conveyance of all the lands and lands covered with water situated within the limits designated in the grant of 1806. *Attorney-General et al v. Scott*, 34 S. C. R. 603.

84. *Contract for grant of part of public domain—Breach of—Remedy—Jurisdiction—Declaration of right.*—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament. Such a claim may be prosecuted by a Petition of Right.

Where the court has jurisdiction in respect of the subject-matter of a Petition of Right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If, on the other hand, there is no jurisdiction, no such declaration should be made. *Clark v. The Queen*, (1 Ex. C. R. 182) considered. *Qu'Appelle, Long Lake and Saskatchewan R. R. and Steamboat Co. v. The King*, 7 Ex. C. R. 105.

85. *Dominion lands—R. S. C. c. 54, s. 57—Homestead entry issued through error and improvidence—Cancellation.*—Where a homestead entry receipt for Dominion lands has been issued through error and improvidence, the holder thereof is not entitled to have a patent for such lands issued to him, and the court may order his entry receipt to be delivered up to be cancelled as, outstanding, it might constitute a cloud upon the title. *The King v. Becher*, 4 Ex. C. R. 412.

86. *Title to land—Mistake—Lessor and lessee—Estoppel.*—Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case the Crown being the lessor is in no better position in respect of the doctrine of estoppel than a subject. *The Queen v. Hall, et al*, 6 Ex. C. R. 145.

87. *Dominion lands—License to cut timber—Royalties—Burnt timber—Payment by mistake—Rectification—Lapse of time—Counter-claim for damages for trespass—Estoppel.*—The suppliant held certain licenses from the Crown to cut timber on Dominion lands. Three of such licenses were issued on the 28th of January, 1892, and each provided for a royalty of 5 p. c. on the timber cut thereunder. Another license was issued on the 8th of August in the same year, and contained a provision that "if the timber be burnt then the royalty shall be 2½ p. c. instead of 5 p. c." The suppliant obtained other licenses containing similar provisions as to "burnt timber." The suppliant cut timber under such licenses, but owing, as he alleged, to mistake and inadvertence, the returns furnished by him did not show that a portion of the material cut was "burnt timber." Royalties having been paid upon the basis of there being no burned timber cut, the suppliant claimed in these proceedings a refund of one half of such royalties as a fair deduction for burnt timber. During the time that the timber was cut and returns made the suppliant was unable to read or write, and he claimed that he had not seen or been made aware of the provisions as to the royalty on burnt timber. His book-keeper and business manager testified that he had not seen any timber regulations, and that he had never taken the trouble to read the suppliant's licenses. At the trial it appeared that no person's attention, either on behalf of the Crown or the suppliant, had been directed to the matter with a view of ascertaining or even estimating the quantity of burnt timber. Further-

more, at the time of the trial, there was no opportunity for scaling the quantity of burnt timber. *Held*, that it was too late to open up the matter after action brought, and that the suppliant had not shown circumstances that would make it inequitable for the Crown to retain the dues which the suppliant himself had returned as due and payable on the timber cut.

The Crown counter-claimed in the action for damages for timber cut by the suppliant in trespass on vacant Dominion lands, in effect claiming the difference between the royalty for which he was liable under his licenses and the dues he would have been liable for had the timber in question been cut under a permit to cut the same on Dominion lands. To this suppliant answered that the timber alleged to have been cut in trespass, if any, was included in the whole quantity of timber which the suppliant had returned as cut under his licenses, and that a royalty of 5 p. c. having been paid thereon to the Crown officers and accepted by them, the Crown was estopped from setting up a larger claim. *Held*, that the Crown was not estopped by the laches of its officers from claiming as damages a larger sum than that already paid as royalties. *Genelle v. The King*, 10 Ex. C. R. 428.

88. *Statute—Construction of.*—A statute is never retroactive unless made so in express terms. *Corporation St. Joachim v. Pointe Claire Turnpike Co.*, 24 S. C. R. 486.

89. *Bond*—33 *Hen. VIII.*—The statute 33 Hen. VIII c. 39, s. 79, respecting suits upon bonds is not in force in the Province of Quebec. *The Queen v, Black, et al*, 6 Ex. C. R. 238.

90. *Railways—Constitutional law—Legislative jurisdiction—Works controlled by Parliament—Operation of Dominion Railway.*—The provisions of section 2, sub-section (2), of chapter 87, Con. Ord. N.W.T. (1898), as amended by the N. W. T. Ordinances, chapter 25 (1st sess.) and chapter 30 (2nd sess.) of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute "railway legislation," strictly so-called, and, as such, are beyond the competence of the Legislature of the North-West Territories. *The Canadian Pacific Railway Co. v. The Parish of Notre Dame de Bonsecours* (1899) A. C. 367 and *Madden v. The Nelson and Fort Sheppard Co.* (1899) A. C. 626 referred to. The judgments appealed from were reversed. *Canadian Pacific Railway Co. v. The King*, 39 S. C. R. 476.

91. *Constitutional law—Legislative Assembly—Powers of Speaker—Precincts of House—Expulsion.*—The public have access to the Legislative Chamber and precincts of the House of Assembly as a matter of privilege only, under license either tacit or express which can be revoked whenever necessary in the interest of order and decorum.

The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sittings as well as when the House is in session.

A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed. *Payson v. Hubert*, 34 S. C. R. 400.

92. *Constitutional law—B. N. A. Act*, 1867, *sec.* 111—*Debts of Province of Canada—Deferred liabilities—Reversion to Crown—Indemnity—Arbitration and award—Condition precedent—Petition of right—Remedial process.*—A toll bridge was built and maintained by Y. at C., in the Prov-

ince of Quebec, in 1845, under a franchise granted to him by an Act (8 Vict. ch. 90) of the late Province of Canada, in 1845, on the condition therein expressed that on the expiration of the term of fifty years, the works should vest in the Crown as a free bridge for public use and that Y., or his representatives, should then be compensated therefor by the Crown, provision being also made for ascertaining the value of the works by arbitration and award. And it was held, affirming the judgment of the Exchequer Court of Canada, (6 Ex. C. R. 103), that the claim of the suppliants for the value of the works at the time they vested in the Crown on the expiration of the fifty years franchise was a liability of the late Province of Canada coming within the operation of the 111th section of the British North America Act, 1867, and thereby imposed on the Dominion; that there was no lien or right of retention charged upon the property; and that the fact that the liability was not presently payable at the date of the passing of *The British North America Act*, 1867, was immaterial. *The Attorney-General of Canada v. The Attorney-General of Ontario* (1897), A. C. 199; 25 S. C. R. 434 followed. It was held also, that the arbitration provided for by the third section of the Act, 8 Vict. ch. 90, did not impose the necessity of obtaining an award as a condition precedent, but merely afforded a remedy for the recovery of the value of the works at a time when the parties interested could not have resorted to the present remedy by petition of right, and that the suppliants' claim for compensation under the provisions of that Act, (8 Vict. ch. 90) was a proper subject for petition of right within the jurisdiction of the Exchequer Court of Canada. *The Queen v. Yule*, 30 S. C. R. 24. (Leave to appeal to the Judicial Committee of the Privy Council refused, 34 Can. Gaz. 272).

93. *Constitutional law—Interprovincial and international ferries—Establishment or creation—License—Franchise—Exclusive right—Powers of Parliament.*—Chapter 97, R. S. C. "An Act respecting Ferries" as amended by 51 Vict. c. 23, is *intra vires* of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General-in-Council to, establish or create ferries between a Province and any British or foreign country, or between two Provinces.

The Governor-General-in-Council, if authorized by Parliament, may confer by license or otherwise, an exclusive right to any such ferry. Re *The International and Interprovincial Ferries*, 36 S. C. R. 206.

94. *Grant of ferry—Breach of—Subsequent lease to railway companies—Damages—Liability of Crown—R. S. C. c.* 97.—Under the provisions of R. S. C. c. 97 and amendments, the Governor in Council duly issued to the suppliant a ferry license within certain limits over the Ottawa River between the cities of Ottawa and Hull. Subsequently the Crown leased certain property to two railway companies to be used for the construction of approaches to the Interprovincial Bridge across the said river between the said cities, and also granted permission to the Ottawa Electric Railway Company to extend its tracks over certain property belonging to the Dominion Government on the Hull side of the river, to enable the latter company to make closer connection with the Hull Electric Company. The suppliant claimed that the construction of the said approaches interfered with the operation of his ferry, and enabled the said company to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable. And it was *held* that the granting of the said leases and permission did not constitute a breach of any contract arising out of the grant or license of the ferry; and that the Crown was not liable to the

suppliant in damages in respect of the matters complained of in his petition. *Windsor & Annapolis Railway Co. v. The Queen* (10 S. C. R. 335; 11 App. Cas. 607), and *Hopkins v. The Great Northern Railway Co.* (2 Q. B. D. 224) referred to.

Semble.—That if the said leases and permission prejudiced the rights acquired by the suppliant under his ferry licence, he would be entitled to a writ of *scire facias* to repeal them. *Brigham v. The Queen*, 6 Ex. C. R. 414. Affirmed on appeal to the Supreme Court of Canada, 30 S. C. R. 620.

95. *Constitutional law—Local works and undertakings—General advantage of Canada.*—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.

Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces. *Hewson v. Ontario Power Co.*, 36 S. C. R. 596.

Controversies between Dominion and a province or inter-provincial—Appeal to Supreme Court.

32. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies,—

(*a*) between the Dominion of Canada and such province;

(*b*) between such province and any other province or provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies.

2. An appeal shall lie in such cases from the Exchequer Court to the Supreme Court. R. S., c. 135, s. 72.

1. *Canadian Act* (48 & 49 *Vict. c.* 50), *s.* 1—*Construction—Transfer of Proprietary Right—Vesting at a Future Date.*—By s. 1 of the Canadian Act (48 & 49 Vict. c. 50), subsequently re-enacted by Revised Statutes of Canada, c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses: *Held*, that by its true construction the section did not operate an immediate transfer to the province of any swamp land and the profits arising therefrom, but only from the date of the Order in Council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. *Attorney-General for Manitoba v. Attorney-General of Canada.* 1904 A. C. 799; 34 S.C. R. 287; 8 Ex. C. R. 337.

2. *Dominion and Ontario—Disputed territory—Indian title—Moneys paid by Dominion for surrender of—Contribution by Ontario—Jurisdiction—* The jurisdiction that the Court has of controversies between the Dominion of Canada and a Province of Canada, or between two provinces, does not authorize the court to decide the issues in accordance only with what may to it seem fair and without regard to the principle of law applicable to the case.

At the time when the North West Angle Treaty No. 3 between Her late Majesty the Queen and the Saulteux Tribe of the Ojibeway Indians was entered into, the boundaries of the Province of Ontario were unsettled and

uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, The Dominion Government occupied a position analagous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in those lands could not with prudence be deferred until such boundaries were determined. It was necessary for the peace, order and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations of the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiations. By this treaty the burden of the Indian title was extinguished. In the case of *The St. Catherines Milling and Lumber Company v. The Queen* (14 App. Cas. 60), in which it was decided that the ceded *territory* within the Province of Ontario belonged to the province subject to the burden of the Indian title therein, Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council and dealing with the question of the liability of the province to contribute to the Dominion in respect of the obligations incurred by the Dominion in obtaining the surrender of the Indian title, expressed the following opinion:—"Seeing that the benefit accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty and which are said to have been in part fulfilled by the Dominion Government."

Held, following that expression of opinion, that the Province of Ontario is, in respect of the obligations incurred by the Crown and the Dominion under the said treaty, which involve the payment of moneys and which are referable to the extinguishment of the Indian title in the lands described therein, liable to contribute to the payments of moneys made by the Dominion thereunder in the proportion that the area of such lands within the province bears to the whole area covered by the treaty.

While the question of the true boundaries of the Province of Ontario was in course of determination, the Dominion authorities, under an agreement for a conventional boundary, administered a part of the territory in dispute and derived revenues therefrom, for which the Province in this action set up a counter-claim.

Held, that the Province could not maintain its counter-claim for the moneys so collected by the Dominion without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the obligations incurred in obtaining a surrender of the Indian title.

Semble: The fact that a part of the benefit arising from the surrender of the lands mentioned in the treaty accrued to the Province of Ontario

is not of itself, and without other considerations, sufficient to make the Province liable to contribute to the Dominion a proportionate part of the payments made in pursuance of the obligations incurred by the Crown under the treaty.

If the Parliament of Canada should appropriate, and the Government of Canada should expend, public moneys of the Dominion for either Dominion or Provincial purposes, with the result that a Province was benefited, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute to such expenditure. The principle stated would apply as well to expenditures made by a province with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary and no obligation to contribute would arise.—*The Dominion of Canada v. The Province of Ontario*, 10 Ex. C. R. 445. (*Appeal at present time pending*).

3. *British North America Act*, 1867, *ss.* 91, 92, 108—*Distribution of Legislative Power—Construction—Rivers and Lake Improvements—"Public Harbours"—Fisheries and Fishing Rights—Revised Statutes of Canada, c.* 92, *c.* 95, *s.* 4—*Revised Statutes of Ontario, c.* 24, *s.* 47—*Ontario Act of* 1892 (55 *Vict. c.* 10).—Whatever proprietary rights vested in the provinces at the date of *The British North America Act*, 1867, remained so, unless by its express enactments transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

The transfer, by sec. 108 and the 5th clause of its schedule, to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonably and probably in accordance with the intention of the Legislature:—

The transfer of "public harbours" operates on whatever is properly comprised in that term having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.

With regard to fisheries and fishing rights, (1) The Judicial Committee of His Majesty's Privy Council *held* 1st. that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enabled it to affect those rights to an unlimited extent short of transferring them to others: (2) that a tax by way of license as a condition of the right to fish is within the powers conferred by sub-ss. 4 and 12. (3) That the same power is conferred on the Provincial Parliament by s. 92. (4) That *The Revised Statutes of Canada*, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is *ultra vires* the Dominion. (5) That *The Revised Statutes of Ontario*, c. 24, s. 47, are with a specific exception *intra vires* the province.

As regards the Ontario Act, 1892, the regulations therein which control the manner of fishing are *ultra vires*. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see s. 91, sub-s. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Land":—

It was further held that the Dominion Legislature had power to pass Revised Statutes of Canada, c. 92, intituled "An Act respecting certain

Works constructed in or over Navigable Waters." *Attorney-General of Canada v. Attorney-General Province Ontario, et al.* 1898 A. C. 700.

4. *Disputed accounts—Award of arbitrators—Interest on award—Agreement as to date from which interest should be computed.*—In certain arbitration proceeding between the Dominion of Canada and the Provinces of Ontario and Quebec, the first mentioned province was found to be indebted to the Dominion in the sum $1,815,848.59 on the 31st December 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two provinces, concerning the rate per centum and the time from which interest was to run on the amount of the award, was opened by the deputy Minister of Finance for Canada in a letter to the Treasurer of Quebec, of the 21st December, 1893, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from the 1st January, 1894, simple interest at 5 per cent. upon the balances in account standing in favour of the Dominion on the 31st December, 1892. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a letter from the Assistant Treasurer of Quebec to the Deputy Minister of Finance for Canada, of the 6th July, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on the 31st December, 1892, and existing on the 1st July, 1894, should be at the rate of 4 per cent. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of the 18th August, 1894, from the acting Deputy Attorney-General of that province to the acting Deputy of the Minister of Finance for Canada stating, in effect, that Ontario accepted the same conditions as Quebec in respect of the payment of the interest. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated 26th July, 1894, as follows:—

"I understand that your Government has paid to Quebec the subsidy due July 1st instant, on the consent of the Government to pay 4 per cent. on any balance of account that might be found between the Province and the Dominion, such interest to be reckoned from and after the said 1st of July 1894. I presume this means the balance of account in respect of the items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms."

Upon a case stated to determine whether interest was payable by the province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:

Held, that the correspondence showed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned. *Dominion of Canada v. Province of Ontario* 8 Ex. C. R. 174.

5 *Constitutional law—Liabilities of province at Confederation—Special funds—Rate of interest—Trust funds or debt—Award of* 1870—*B. N. A. Act*, 1867, *ss.* 111 *and* 142.—Among the assets of the Province of Canada at Confederation were certain special funds, namely, U. C. Grammar School Fund, U. C. Building Fund and U. C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By sec. 111 of the B. N. A. Act, 1867, the Dominion of Canada succeeded to such liability and paid the Province of Ontario interest thereon at five per cent. up to 1904. In the award made in 1870

and finally established in 1878, on the arbitration, under sec. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. In 1904 the Dominion Government claimed the right to reduce the rate of interest to four per cent., or if that was not acceptable to the province to hand over the principal.

On appeal from the judgment of the Exchequer Court in an action asking for a declaration as to the rights of the province in respect to said funds, it was *held*, affirming said judgment (10 Ex. C. R. 292), that though before the said award the Dominion was obliged to hold the funds and pay the interest thereon to Ontario, after the award the Dominion had a right to pay over the same with any accrued interest to the province and thereafter be free from liability in respect thereof. And it was further *held* that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of five per cent. per annum. *Attorney-General of Ontario v. Attorney-General of Canada*, 39 S. C. R. 14; 10 Ex. C. R. 292.

6. *Law of Canada—Indian Reserves—Liability to pay Annuities in respect thereof—British North America Act*, 1867, ss. 109, 111, 112.—By treaties in 1850 the Governor of Canada, as representing the Crown and the provincial government, obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial government, together with the liability to pay to the Indians certain perpetual annuities:—

Held that, these lands being within the limits of the Province of Ontario, created by *The British North America Act*, 1867, the beneficial interest therein vested under s. 109 in that province. The perpetual annuities having been capitalized on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:—

Held, that liability for these increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario and Quebec conjointly, under ss. 111 and 112; in the same manner as the original annuities. *Attorney-General for the Dominion of Canada v. Attorney-General for Ontario* (1897), A. C. 199.

7. *Award—Jurisdiction of Arbitrators—Deed of Submission—Construction.*—By agreement of submission dated April 10th, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the Common School Fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. That fund was established by Canadian Act (12 Vict. c. 200), and consisted, *inter alia*, of the proceeds of public lands received by Ontario and paid to the Dominion:—

Held, that a claim by Quebec that Ontario should be debited with uncollected prices of lands sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in, but heterogeneous to, the matters actually specified in the submission, was not on its true construction included therein. *Attorney-General for Ontario v. Attorney-General for Quebec* (1903), A. C. 39.

8. *Law of Canada—British North America Act*, 1867, *s.* 109—*Rights of the Province to the Precious Metals—Conveyance of "Public Lands"—Construction.—Held*, that a conveyance by the Province of British Columbia to the Dominion of "Public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land but belong to the Crown, and, under sec. 109 of *The British North America Act* of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied. *The Attorney-General of British Columbia v. The Attorney-General of Canada* (1889), 14 A. C. 295.

LIMITATIONS.

Prescription and limitation of actions generally.

33. The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any Act of the Parliament of Canada, apply to any proceeding against the Crown in respect of any cause of action arising in such province. 50-51 V., c. 16, s. 18.

1. *Expropriation of land in Ontario, 20 years prescription.*—In *Essery v. The Grand Trunk Railway Co.*, 21 O. R. 224, it was *held* that the right to compensation is not barred until the expiration of twenty years from the time the land is entered upon and taken for the railway purposes. See also *Ross v. Grand Trunk Railway Co.*, 10 O. R. 447; *Radenhûrt v. Coate*, 6 Gr. 139; Re *Roden v. City of Toronto*, 25 Ont. R. 12.

2. *No prescription against the Crown.*—The Statute of Limitations does not apply to the Crown. *Rustomjee v. The Queen*, 1 Q. B. D. 487, affirmed Id., 2, 69. Under the law of the Province of Quebec, prescription does not run against the Crown. See *Civil Code L. C., Arts.* 2211 to 2216.

3. *No prescription against the Crown.*—Section 2 of *The Prescription Act*, 1832 (2-3 Will. IV, ch. 71, U. K.), does not apply to the easement of light. Sec. 3, which applies to light does not bind the Crown, and no lost grant of light could be presumed as against the Crown or its lessees. *Wheaton v. Maple & Co.* (1893), 3 Ch. 48.

4. *Short prescription C. C. L. C.—Bodily injury.*—Under the laws of the Province of Quebec the right of action against the Crown for an injury to the person is prescribed by one year under Arts. 2262, 2267 and 2188. *The Queen v. Martin*, 20 S. C. R. 240.

5. *Prescription, interruption of.*—The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow-servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance. And the court held that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Art. 2227 C. C. L. C., interrupt prescription. *Quære*:—Does Art. 2227 C. C. L. C. apply to claims for wrongs as well as to actions for debt? *Martial v. The Queen*, 3 Ex. C. R. 118.

6. *Prescription—Widow's right to action—Arts.* 1056 *and* 2262.—The Civil Code of Lower Canada does not make it a condition precedent to the right of action given by Article 1056 to the widow of a person dying as therein mentioned that the deceased's right of action should not have been extinguished in his lifetime by prescription under Art. 2262. The death is the foundation of the right given by the former article which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased. *Robinson v. The Canadian Pacific Railway Co.* (1892), A. C. 481.

7. *Prescription—Damages to land.*—The prescription of two years established by Art. 2261 of the Civil Code Lower Canada applies to damages to land. *Letourneux v. The Queen*, 33 S. C. R. 335.

8. *Prescription in Ontario—Statute of limitation—Title to land.*—A widow remaining in possession of the lands of her husband after his death for a period of ten years, acquired a prescriptive right to the fee as against the heirs at law. *Oliver v. Johnson, Cameron's S. C. Cases* 338.

9. *Statute of Limitations—Right of Crown to plead same.*—The suppliant is debarred from recovery by the Statute of Limitations which the Crown has a right to set up in defence under the 8th sec. of *The Petition of Right Act* (R. S., 1906); *McQueen v. The Queen*, 16 S. C. R. 4.

10. *Prescription—Easement.*—To establish an easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. *McGee v. The King*, 7 Ex. C. R. 309. (Law of Quebec different).

11. *Prescription—Acknowledgment of debt—Interruption—Art.* 2264 *C. C.*—As the acknowledgment of a debt does not operate novation, it also is prescribed by the same lapse of time as the debt itself, the prescription of which it has interrupted. *Charette v. Lacombe*, 7 Q. R. 17, S. C. 539.

12. *Prescription—Bodily injuries—Art.* 2262 *C. C.*—Under Article 2262 C. C. the action of a workman against his employer for the recovery of damages for bodily injuries received in the course of his employment is prescribed by one year, and the Court is bound to apply the prescription although not pleaded. *Robillard v. Ward*, Q. R. 17, S. C. 456.

13. *Prescription—Bodily injury—When beginning.*—The prescription for bodily injury, under Art. 2262 C. C., begins to run from the date of the offence or quasi-offence causing the injury. *Lavoie v. Beaudoin*, Q. R., 14 S. C. 252.

14. *Continuous damages.*—Where the injury complained of gives rise to a continuous series of torts, the action accruing therefrom is prescribed by two years from the date of the occurrence of each successive tort, under Art. 2261 C. C. *Boudreau v. Montreal St. Ry. Co.*, 36 S. C. R. 329.

15. *Prescription—Commencement—Continuing damage.*—The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time. *Kerr v. Atlantic & North West Ry. Co.*, 25 S. C. R. 197.

16. *Prescription—Arts.* 2188, 2262, 2267 *C. C.—Defence supplied by the Court of its own motion—Reservation of recourse for future damages—Damages assessed once for all.*—The prescription of actions for personal

injuries established by article 2262 of the Civil Code of Lower Canada is not waived by failure of the defendant to plead the limitation, but the court must take judicial notice of such prescription as absolutely extinguishing the right of action.

The reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code.

When in an action of this nature there is but one cause of action damages must be assessed once for all. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effects of the original injury. *City of Montreal v. McGee*, 30 S. C. R. 582.

17. *Prescription—Interruption—Reserve in judgment of plaintiff's recourse for future damages—Effect of.*—The reserve, in a judgment awarding damages for bodily injuries, of the plaintiff's recourse for damages resulting from the same accident subsequent to the judgment, has the effect of interrupting prescription, and therefore an action may be brought for the recovery of subsequent damages although more than a year has elapsed since the date of the accident. *Racicot v. Ferns*, Q. R. 17, S. C. 337. See also *Chartrand v. City of Montreal*, Q. R. 17, S. C. 143.

18. *Prescription—Interruption of.*—The leaving of a Petition of Right with the Secretary of State, as provided by for sec. 4 of *The Petition of Right Act*, will interrupt prescription within the meaning of Art. 2224 C. C. P. Q. Ruling of Registrar acting as Referee and confirmed on appeal. Re *Vinet v. The King*, 15 Oct., 1904.

As respects an officer of the Crown.

34. The Court shall not entertain any claim in respect of which the claimant has a suit or process against any person pending in any other court, if such person, at the time when the cause of action alleged in such suit or process arose, was, in respect thereof, acting under the authority of the Crown. 50-51 V., c. 16, s. 19.

Sittings of the Court.

Sittings of the Court.

35. Subject to rules of court, the judge of the Exchequer Court may sit and act at any time and at any place in Canada for the transaction of the business of the Exchequer Court, or any part thereof. 50-51 V., c. 16, s. 20.

Under the provisions of the Rules of Practice, the court may be convened, and sittings fixed, for any time and place in the Dominion of Canada, as to the judge seems fit, for the transaction of the business, upon giving notice of such sittings in the *Canada Gazette*.

It has been customary, so far, to fix a sitting of the court in each province, at least once a year, in order to offer the subject an opportunity of having his case tried and heard in his own province.

Special sittings are also from time to time fixed, upon application to that effect, for the hearing and disposal of cases at Ottawa and elsewhere. See Rule of Court No. 166 in that respect.

PROCEDURE.

Certain rules and orders continued.

36. All provisions of law and all rules and orders regulating the practice and procedure including evidence in the Exchequer Court, now existing and in force shall, so far as they are consistent with the provisions of this Act, remain in force until altered or rescinded or otherwise determined. 50-51 V., c. 16, s. 22.

Section 63, ch. 11 of 38 Vict., the original Act creating the Exchequer Court, in 1875, reads as follows: "Issues of fact in cases before the said "Court, shall be tried according to the law of the province in which the "case originated, including the laws of evidence."

A similar provision, practically in the same wording, is to be found, after the Act of 38 Vict. has been several times amended, in sec. 80 ch. 135 of *The Revised Statutes of Canada*, 1886.

Section 22 of 50-51 Vict. ch. 16, (the Act under which the Exchequer Court was reorganized) is materially different in language from the early section, and reads as follows:—

"22. All provisions of law, and all rules and orders now regulating "the practice and procedure, including evidence, in the Exchequer Court, "shall, so far as they are consistent with the provisions of this Act, con- "tinue in force until altered under this Act."

The words "this Act" in the last section, mean 50-51 Vict. ch. 16.

The wording of section 36 of ch. 140 R. S., 1906, the Act now in force, is practically the same as that of the Act 50-51 Vict. ch. 16, with few alterations of language.

In view of the above, it might be well to mention here that under subsection (a) of section 20 of *The Interpretation Act*, ch. 1 of R. S., 1906, "Whenever any Act or enactment is repealed, and other provisions are "substituted by way of amendment, revision or consolidation,—(a) all "regulations, orders, ordinances, rules and by-laws made under the "repealed Act or enactment shall continue good and valid, in so far as "they are not inconsistent with the substituted Act or enactment, until "they are annulled and others made in their stead, etc., etc."

Practice and procedure, how regulated.

37. The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and procedure in similar suits, actions and matters in His Majesty's High Court of Justice in England, on the first day of October, one thousand eight hundred and eighty-seven. 50-51 V., c. 16, s. 21.

How claim against the Crown may be proceeded with—If claim referred.

38. Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

2. If any such claim is so referred no *fiat* shall be given on any petition of right in respect thereof. 50-51 V., c. 16, s. 23.

This section is practically an enlargement of *The Petition of Right Act*. It affords the subject a simple and expeditious manner of prosecuting claims against the Crown before the court without having to go through the somewhat complicated process of obtaining a *fiat* on a petition of right.

Rule No. 204 and *seq.* provide for the practice and procedure to be followed on such references.

Departmental regulations.—All references to the court, under sec. 38 of ch. 140, R. S., 1906, by the head of any department, must be made through the Minister of Justice, in pursuance of the following order in council of the 15th day of October, 1887, viz.:—

On the recommendation of the Minister of Justice, and under the provisions of *The Revised Statutes of Canada*.

His Excellency in Council has been pleased to order as follows:—

With reference to section 23 of 50-51 Victoria, chapter 16, intituled: "An Act to amend the Supreme and Exchequer Courts Act, and to make "better provision for the trial of claims against the Crown," which provides that "any claim against the Crown may be prosecuted by petition "of right, or may be referred to the court by the head of the Department "in connection with the administration of which the claim arises, and if "any such claim is so referred no fiat shall be given on any petition of "right in respect thereof," and in order to insure regularity in such references, and in order that the Minister of Justice may be kept informed of such references with a view to advising against the granting of any fiat on a petition of right in respect of a claim so referred, all references to the court, under the authority of the section quoted, to be made by any head of a department, shall be so made through the Minister of Justice.

O. C. Oct. 15, 1887.

The following form of Reference to the Court may be used:—

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

A. B.,

Claimant;

v.

HIS MAJESTY THE KING,

Respondent.

By virtue of the powers vested in me in this behalf, under sec. 38 of ch. 140, R. S., 1906, I hereby refer the claim of the said A. B. against the above named respondent, to the Exchequer Court of Canada for adjudication thereon.

Dated at Ottawa, this.....day of.....A.D. 19 .

Minister of Railways and Canals.
(*as the case may be*).

To

The Registrar of
The Exchequer Court of Canada.

At the opening of the trial, on the 19th April, 1894, of the case of *The Toronto Railway Company v. The Queen, Burbidge J.* called the attention of Counsel to the fact that the Reference of the case to this Court had been signed and made by the Comptroller of Customs and not

by the Minister of Customs, and questioned whether the Comptroller was the Head of the Department and had as such the power to make such reference. The reference was, however, subsequently made by the Minister and filed by leave of the Court, *nunc pro tunc* as of the date of the first Reference signed by the Comptroller.

Reference to Official Referees.

39. The head of any department in connection with the administration of which any claim arises may, instead of referring such claim to the Court for adjudication thereon, refer the same to one of the official referees for examination and report, both as to the matters of fact involved and as to the amount of damages, if any, sustained; and such official referee shall make such examination upon the oath or affirmation of witnesses, and shall report his findings upon the questions of fact and upon the amount of damages, if any, sustained and the principles upon which such amount has been computed. 50-51 V., c. 16, s. 54.

There are presently no Official Referees attached to this Court, within the meaning of the above section.

No jury.

40. Issues of fact and inquisitions in the Exchequer Court shall be tried by the Judge without a jury. 50-51 V., c. 16, s. 24.

Where trial may take place and taking of evidence.

41. The trial of any issue of fact or inquisition may, by order of the Court, take place partly at one place and partly at another; and the evidence of any witness may, by like order, be taken by commission, or on examination or affidavit. 50-51 V., c. 16, s. 25.

Reference to Registrar, etc.

42. The Court may, for the purpose of taking accounts or making inquiries, or for the determination of any question or issue of fact, refer any cause, claim, matter or petition to the Registrar or any other officer of the Court, or to any official or special referee for inquiry and report, and may also, if it thinks it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause, matter or petition, wholly or partially, with the assistance of such assessor or assessors. 52 V., c. 38, s. 1.

Scope of Reference.—Where the whole cause of action is referred to a referee for trial, he will have the power to dispose as well of the costs of the reference as of the action. For authority on this subject see *Patten v. The West of England Co.* [1894] 2 Q. B. 159. This practice would seem inapplicable to Ontario where the scope of a reference is much more

limited than in England, 30 C. L. J. 562. With regard to the practice relating to references in the Province of Quebec see Code of Civil Procedure L. C., Arts. 300 *et seq.*

See Rules of Court respecting References, No. 204 et seq.

Shorthand report of evidence.

43. By direction of the Court the testimony of any witness may be taken down in shorthand by a stenographer who shall be previously sworn faithfully to take down and transcribe the testimony; and the Court may make such order for the payment of the costs thereby incurred as is just. 50-51 V., c. 16, s. 27.

Security for Costs.

Effect of failure to give security for costs.

44. If an order on any petition, reference or proceeding against the Crown, on application by or on behalf of the Attorney-General of Canada, is made for security for costs, and the suppliant, claimant or petitioner fails to give security to the satisfaction of the judge for the payment of costs, in the event of the judgment being against such suppliant, claimant or petitioner, or of its not exceeding the sum tendered by the Crown, all further proceedings on such petition, reference or proceeding shall be stayed until otherwise ordered. 50-51 V., c. 16, s. 28

See Rules of Court Nos. 291 *et seq.* upon this subject.

Tender.

Tender may be pleaded.

45. The Crown may, in the matter of any petition, reference or proceeding, plead a tender without paying the money tendered into Court. 50-51 V., c. 16, s. 29.

1. Where a tender was adequate though not liberal, no cost was allowed after the time the money was paid into court. *The Lotus*, 7 P. D. 199.

2. Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs, although the amount of the award exceeded somewhat the amount tendered. *McLeod v. The Queen*, 2 Ex. C. R. 106

No deposit necessary.

46. Every tender of a sum of money on behalf of the Crown shall be deemed to be legally made if made by a written offer to pay such sum, given under the hand of a minister of the Crown, or some person acting for him in that behalf, and notified to the person having such claim. 50-51 V., c. 16, s. 30.

Rules for Adjudicating upon Claims.

Matters to be considered in adjudicating on claims.

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned. 50-51 V., c. 16, s. 32.

The following rules in expropriation matters have been framed from Mr. Cripps' work *On Compensation*. They have been summarized and classified with a view of convenience to the practitioner:—

RULES FOR ADJUDICATING UPON CLAIMS FOR LANDS TAKEN OR INJURIOUSLY AFFECTED.

WHERE LANDS ARE INJURIOUSLY AFFECTED ONLY.

(1)—The damage or loss must result from an act made lawful by the statute.

(2)—The damage or loss must be such as would otherwise have been actionable.

(3)—The damage or loss must be an injury to lands and not a personal injury or any injury to trade.

(4)—The damage or loss must be occasioned by the construction and not by the use of the works authorized. Cripps *On Compensation*, 2nd Ed. 113.

Referring to the view expressed in this last rule, Burbidge, J., in *The Queen v. Barry*, 2 Ex. C. R. 355, said: "With reference to the amount of "compensation, it is established by the decisions under the Lands Clauses "Consolidation Acts, though possibly there is still ground for some discus- "sion, that in cases of injurious affection only, the owner is not entitled "to compensation for injury arising from the operation of the authorized "works, but only for loss arising from their construction."

It is difficult to see what proper distinction can be made in respect to the measure of damages between a case in which a part of the claimant's land is taken, which of course would sustain an action but for the statute, and a case in which some rights or interest of his in the same land are so affected that but for the statute he would equally have a right of action. If there is no actionable injury the claimant fails of course, but if he would have had his action, on what principle can different rules as to the measure of damages be adopted in the two cases? Is not the true rule in both cases that stated in *re Wadham v. The North Eastern Railway Company*, 14 Q. B. D. 747, that the measure of damages is the depreciation in the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put? And if so, will not elements of damage arising from the natural and ordinary use of the work, as well as those resulting from its construction, have to be taken into account in determining the amount of such depreciation?

WHERE LANDS ARE TAKEN AND OTHERS HELD THEREWITH INJURIOUSLY AFFECTED.

(1)—The first rule applies.

(2)—The second rule becomes immaterial.

(3)—The third rule, if applicable, has a modified application. The measure of compensation is the whole consequential loss which the owner has sustained.

(4)—The fourth rule is not applicable.

The measure of compensation is the depreciation in the value of the premises damaged, assessed not only in reference to the loss occasioned by the construction of the authorized works, but also in reference to the loss which probably may result from the nature of their user. Cripps, *On Compensation*, 2nd Ed. 121-4.

For observations upon the principles of Betterment, see 10 *Law Quarterly Review*, 115.

JURISPRUDENCE, ETC.:

1. *Expropriation—Advantages derived from a public work—Special—General.*—Section 50 of ch. 140 R. S., 1906, is the same as 54-55 Vict. c. 26 which amended sec. 31 of 50-51 Vict. ch. 16. The object of this amendment at the time appears to have been to enact the tenor of the decision in re *The Queen v. Carrier*, 2 Ex. C. R. 36, which would seem to have borne weight with the legislature, for it was there held that:—"Notwithstanding "the generality of the terms of 44 Vict. c. 25, s. 16 (re-enacted by R. S. C., "c. 40, s. 15, and 50-51 Vict. c. 16, s. 31), which provides that the Official "Arbitrators shall take into consideration the advantages accrued, or "likely to accrue, to the claimant, or his estate, as well as the injury or "damage occasioned by reason of the public work, such advantages must "be limited to those which are special and direct to such estate, and not "construed to include the general benefit shared in common with all the "neighbouring estates."

2. *Expropriation—Advantages.*—Advantages include the special and direct as well as the general benefit. The direct and peculiar benefit may be set off against damages; but the general one cannot. *Sutherland on Damages*, Vol. 3, 1st Edn., pp. 452-3-4.

3. *Advantage accruing to paper town from railway.*—The advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vict. c. 16, sec. 31. *Paint v. The Queen*, 2 Ex. C. R. 149; and 18 S. C. R. 718.

4. *Special and general damages.*—Upon the question as to whether the damage should be special and not general, see the *American Law Review*, Vol. 25, p. 935.

5. *Enhancement of future value of property.*—Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant upon an expropriation; but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the court did not consider this a sufficient ground upon which to reduce the amount of compensation to which the claimant was otherwise entitled. *McLeod v. The Queen*, 2 Ex. C. R. 106.

6. *Expropriation—Allowance for compulsory taking.*—With respect to lands taken, a percentage amounting to 50 per cent. upon the original value, ought to be given in compensation for the compulsion only, to which the seller is bound to submit, the severance and the damage being of a distinct consideration. *Sel. Com. H. L.* 1845; *Hodges on Railways* Vol. 1, 7th Edn. 208. See note No. 9.

7. *Allowance for compulsory taking.*—Mr. Cripps, at p. 98, 2nd Edn. of his work on the *Law of Compensation*, says it is customary to allow 10 per cent. to the value of the land taken under compulsory powers.

8. *Allowance for compulsory taking—Tenant for life.*—In re *Wilkes' estate*, 16 Chan. D. 600, it was held that the tenant for life is entitled to have, in addition to the amount he previously received, the income from the 10 per cent. allowed, added to the purchase money for the compulsory taking of the lands from him, for the property is compulsorily taken as much from this tenant for life as from the remainderman.

9. *Compulsory taking.*—After commenting upon the decision of the Select Committee of the House of Lords, 1845, which considered that 50 per cent. upon the original value ought to be given as compensation for the compulsion to which the vendor is bound to submit, Mr. Lloyd, in his work *On the Law of Compensation*, p. 68, adds "that recent experience "has shown that such estimate is an exaggerated one; and 10 per cent. is "considered a sufficient compensation for the compulsory sale in addition "to the assessed value in the case of house property; but in respect of "agricultural lands as much as 25 per cent. is sometimes given." He also thinks that the following would likely be the usual items of a claim in respect of leasehold premises in which a business is carried on, if the premises are taken:—"Value of lease, value of fixtures, if trade fixtures; "loss on sale of stock (about 35 per cent. on cost price); cost of removal; "value of good will; and 10 per cent upon value of lease for compulsory "sale. *Ibid*, p. 67.

10. *Expropriation of railway—Compulsory sale.*—The value of a tramway upon a compulsory sale, must be measured by what it would cost to construct it at the date of such sale, subject to a proper deduction in respect of depreciation. *The London County Council v. The London Street Tramway Co.*, (1894), L. R. 2 Q. B. 189.

11. *Expropriation of railway—Value of work done—Allowance for capital expended.*—Where the Crown was, under a special statute (50-51 Vict. ch. 27) empowered to acquire by purchase, surrender or expropriation, the works constructed and the property owned by a company which had constructed a certain line of railway, but had failed for lack of funds to complete the same, and where the Crown was to pay for such road, etc., the amount adjudged by the court "for the present value of the work done "on the said line of railway by the said company," it was *held* that the statute contemplated the taking of all the works constructed by the company and not a portion thereof; and where a portion only was taken compensation should be assessed in respect of the total value of the works.

That the words "present value of the work done" as contained in section 1 of the said Act, should, in view of the preamble and surrounding circumstances, be construed to mean the value of the works constructed and the property owned by the company at the time of the passing of the Act.

That the word "value" as used in the Act must be taken to mean the value of the property to the company and not to the Government; and that compensation for the taking should be assessed at the fair value of the property at the time contemplated by the Act.

The company were in possession of a right of way that had been acquired by proceedings taken under certain provincial statutes not applicable to the case, and for which the county councils of Cumberland and Colchester had, in aid of the company's undertaking, paid the pro-

prietors whose lands were situated in such counties; and the court held that the company was entitled to compensation therefor, and further to an allowance for the use of the capital expended in the enterprise. *The Montreal & European Short Line Ry. Co. v. The Queen*, 2 Ex. C. R. 159.

12. *Severance.*—If land has been injured by being severed, the owner will be entitled to compensation for such injury. Lloyd, *On the Law of Compensation*, p. 68.

13. *Prospective capabilities of land.*—The prospective capabilities of land may form, and very often are, a very important element in the estimation of its value. *The Mayor, etc., of the City of Montreal v. Brown*, L. R. 2 App. Cas. 185.

14. *Prospective capabilities—10% advance on value of property, etc.*—The City of Toronto was in possession of certain lands which it held under a grant from the Crown issued prior to Confederation. Under the provisions of the grant, the lands were to be held by the corporation in trust for the public purposes of the City, and no lease of the same could be made for any term exceeding fifty years. In 1889, the Crown, on behalf of the Dominion, expropriated a portion of such lands. *Held*, that in assessing compensation in expropriation matters the court should consider the value of the property arising from its prospective capabilities; that the compulsory taking is an element for indemnity and that 10% should be added to the value of the property for such compulsion. *The Queen v. City of Toronto*, January 20th, 1890.

15. *Ten per cent. advance for compulsory taking.*—The 10 per cent. advance rule for compulsory taking in expropriation cases, followed in *The Queen v. City of Toronto* (supra No. 14) is recognized in *Lock v. Furze*, 19 C. B. N. S. 96.

16. *Prospective capabilites.*—In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character. *Paint v. The Queen*, 2 Ex. C. R. 149; 18 S. C. R. 718.

17. *Siding—Potential advantage of railway to remaining property.*—Any advantage that would accrue to a property if a siding connecting the same with the railway were constructed is not to be taken into consideration in assessing compensation, as there is no legal obligation upon the Crown to give such siding, and it might never be constructed. *Charland v. The Queen*, 1 Ex. C. R. 291. On appeal to the Supreme Court of Canada this judgment was affirmed with costs. 16 S. C. R. 721.

18. *Expropriation—Canadian and English law—Similarity.*—The case of *McPherson v. The Queen*, 1 Ex. C. R. 53, is authority for the similarity between the Canadian and English laws in respect of expropriation matters.

19. *English and French law—Dedication—Similarity.*—The law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England. *Bourget v. The Queen*, 2 Ex. C. R. 2; *Gloster v. Toronto Electric Co.*, 38 S. C. R. 27: *Warmington v. Heaton*, Q. R. 7, Q. B. 234; *Winslow v. Dalling*, 35 L. C. J. 396; *Moore v. Woodstock*, 35 L. C. J. 534.

20. *Waiver by the Crown.*—Where A. B. had put of record with the Crown Lands Department that by arrangement with the Crown Lands Agent, he had performed settlement duties in respect of a lot of land purchased by him, and subsequently had transferred his rights in the same to C. D., paid all moneys due with interest on the said lot, registered the

transfer under 32 Vict. ch. 11, sec. 18 (Q) and the Crown accepted the fees for registering the transfer and for the issuing of the patent,—it was held that the registration of the transfer was a waiver of the right of the Crown to cancel the location ticket for default of performing settlement duties and that no cancellation could be effected by the Crown under such circumstances. *Holland v. Ross*, 19 S. C. R. 566.

21. *Waiver by the Crown.*—The neglect of an importer, whose goods have been seized, to make claim to such goods, by notice in writing as provided for by section 198 of *The Customs Act*, 1883, may be waived by the act of the Minister of Customs in dealing with the goods in a manner inconsistent with an intention on his part to treat them as condemned for want of notice. *Quære*: Does section 198 apply to a case where money is deposited in lieu of goods seized? *The Vacuum Oil Co. v. The Queen*, 2 Ex. C. R. 234.

22. *Waiver by the Crown.*—A. B. purchased from the Crown a parcel of land subject to the condition of erecting a certain building thereon within a certain time, paid, on the same occasion, portion of the purchase money, and the balance some time after the expiry wherein he was bound to erect the building and before complying with such condition. Such balance was accepted and the officer on receiving it stated, however, that the sale would not be completed until the condition upon which it was made was complied with. On petition praying for a declaration by the court that he was entitled to letters patent for said land: *Held* that the acceptance of this balance, under the circumstances, constituted a waiver of the condition in respect of the time within which it was to be performed, but not of the condition itself, and that inasmuch as the suppliant had not performed such condition, he was not entitled to the relief prayed. *Clarke v. The Queen*, 1 Ex. C. R. 182; and *Canada Central Ry. Co. v. The Queen*, 20 Grant, 273, referred to.

And while the law is that the Crown is not bound by estoppels and no laches can be imputed to it, and there is no reason why it should suffer by the negligence of its officers, yet forfeitures such as accrued in this case may be waived by the acts of Ministers and officers of the Crown. *Attorney-General of Victoria v. Ettershanks*, L. R. 6, P. C. 354; and *Davenport v. The Queen*, 3 App. Cas. 115, referred to. *Peterson v. The Queen*, 2 Ex. C. R. 67.

23. *Farm Crossing.*—The right to have a farm crossing over one of the Government railways is not a statutory right and in awarding damages full compensation for the future as well as for the past should be granted for the want of a farm crossing. *Vezina v. The Queen*, 17 S. C. R. 1.

24. *Farm crossing.*—Where lands expropriated for Government railway purposes severed a farm, the owner although not entitled to a farm crossing apart from contract is entitled to full compensation for both future and past damages resulting from the depreciation of his lands by want of such crossing. *Guay v. The Queen*, 2 Ex. C. R. 18; 17 S. C. R. 30.

25. *Farm crossing.*—In expropriation of lands for railway purposes compensation should be assessed both in view of the past and future damages resulting, or which might result, from the want of a crossing. *Kearney v. The Queen*, 2 Ex. C. R. 21; Cassels' Digest, 313.

26. *Farm crossing.*—There is no legal liability upon the Crown to give claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the

court assessed damages in view of the fact that there was no means of enforcing the performance of such undertaking. (See now 52 Vict. c. 38, s. 3), *Falconer v. The Queen*, 2 Ex. C. R. 82.

27. *Railways—Farm crossings—Board of Railway Commissioners—Jurisdiction.*—Orders directing the establishment of farm crossings over railways subject to *The Railway Act*, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada. The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of 16 Vict. c. 37 (D), incorporating the company. *Perrault v. G. T. Co.*, 36, S. C. R. 671.

28. *Crossings—Constitutional law—Power to legislate—Railway Act*, 1888, *ss.* 187, 188—*Protection of crossings—Party interested.*—Secs. 187 and 188 of *The Railway Act*, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada. (Secs. 186 and 187 of The Railway Act, 1903, confer similar powers on the Board of Railway Commissioners).

These sections also authorize the committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested."

Held that the municipality in which the highway crossed by the railway is situate is a "person interested" under said sections. *City of Toronto v. Grand Trunk Ry. Co.*, 37 S. C. R. 232.

29. *Market value.*—In determining the value of lands expropriated for public purposes, the same considerations are to be regarded as in a sale between private parties, the enquiry in such cases being, what from their availability for valuable uses, are the lands worth in the market. As a general rule, compensation to the owner is to be estimated by reference to the use for which the appropriated lands are suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. *Boom Co. v. Patterson*, 98 U. S. R. 408.

30. *Value to owner of estate.*—In awarding compensation for property expropriated, the court should consider the value thereof to the owner and not to the authority expropriating the same. *Stebbing v. The Metropolitan Board of Works*, L. R. 6, Q. B. 37, followed. *Paint v. The Queen*, 2 Ex. C. R. 149; 18 S. C. R. 718.

31. *Expropriation—Lands injuriously affected.*—Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under *The Government Railways Act*, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised; (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade. *The Queen v. Barry*, 2 Ex. C. R. 333. See notes under section 22 of *The Expropriation Act, post.*

32. *Construction of public work—Interference with right common to the public.*—Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the

Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown. *Archibald v. The Queen*, 3 Ex. C. R. 251.

33. *Expropriation—Damages—Nature of user.* — Where lands are taken and others held therewith injuriously affected the measure of compensation is the depreciation in value of the premises damaged assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. *The Straits of Canseau Marine Ry. Co. v. The Queen*, 2 Ex. C. R. 113.

34. *Expropriation—Minerals—Tests or experiments.*—In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. *Brown v. The Commissioner for Railways*, 15 App. Cas. 240, referred to. Where, however, such tests or experiments have not been resorted to the court or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence. *The Queen v. McCurdy*, 2 Ex. C. R. 311.

35. *Compensation paid to grantor.*—Where compensation for all future damages had been paid to J.'s grantor (*auteur*) while he was in possession, no right of action for such damages can accrue to J., unless another expropriation had been made or some new work performed, causing damages of a character not falling within the limits of those arising from the first expropriation. J. must further abide by the easements and servitudes, over and upon the property, created by his grantor (*auteur*). *Jackson v. The Queen*, 1 Ex. C. R. 145.

36. *Expropriation—Lands held together.*—Lord Watson, in the case of *Cowper Essex v. The Local Board of Acton*, L. R. 14 App. Cas. 167, held that where several pieces of land owned by the same person are, though not adjoining, so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of *The Lands Clauses Consolidation Act*, 1845, ss. 49 and 63 (8-9 Vict. ch. 18 U. K.); so that if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation for the depreciation.

37. *Loss of Light.*—Damages were allowed to a claimant for loss of light, although he had a legal right to part of it only. In re *London Tilbury and Southend Ry. Co. v. Trustees of the Gowers' Walk School*, L. R. 24, Q. B. D. 40.

38. *Damages—Expropriation.*—For American authorities where property is damaged for public uses from the establishment and changes of grade, from a railroad changing the surface of a street, construction of viaducts, railroads in street, street railways, etc., etc., see the *American Law Review*, Vol. 25, at pp. 926-939. The article which appears in that publication is from the pen of Mr. F. Hagerman. and concludes with the following remarks, viz.:—"The word "damaged" in the constitution gives "a right of recovery whenever, by a public work, a damage is done to "property, produced by an interference with a right which the owner or "occupier is entitled to make use of in connection with it, and the loss or "impairment of which renders the property less valuable and where, but "for the legislative authority to do the act, there would be liability under "the general principles of the law in existence at the time, provided that "compensation has neither been made nor waived."

39. *Damage by operation of railway.*—A portion of the claimant's property, although not damaged by the construction of the railway, was injuriously affected by its operation, inasmuch as near a certain point thereon trains emerged suddenly and without warning from a snow-shed, frightening the claimant's horses, and thereby interfering with the prosecution of his work,—it was *held* that this was a proper subject for compensation. *Vezina v. The Queen*, 2 Ex. C. R. 11.

On appeal to the Supreme Court of Canada the amount of compensation was increased on the assumption (for which the factums filed were responsible) that the Judge of the Exchequer Court had excluded as an element for compensation the damages resulting from the operation of the railway. 17 S. C. R. 1.

40. *Increased rate of insurance.*—The damage resulting from the increased risk from fire by the operation of a railway is a proper subject for compensation. *The Straits of Canseau Marine Ry. Co. v. The Queen*, 2 Ex. C. R. 113. The following English cases are authority for the above:—In re *Stockport, etc., Ry. Co.*, L. J. 33 Q. B. 251; *Buccleuch v. The Metropolitan Board of Works*, L. R. 3 Ex. 306; 5 H. L. 418, and approved of in the case of *Cowper Essex v. Local Board of Acton*, 14 App. Cas. 154.

41. *Damages from construction and operation of railway.*—Upon an expropriation of land under the provisions of 50-51 Vict. c. 17, the measure of compensation is the depreciation in the value of the premises assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation. *McLeod v. The Queen*, 2 Ex. C. R. 106.

42. *Damages in the nature of interest—Rate thereof.*—Upon a bond for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest cannot be implied, and thereafter interest is not recoverable as interest, but as damages. *Goodchap v. Roberts*, 14 Ch. D. 49 referred to.

In assessing damages in the nature of interest on a bond payable at a particular place reference should, in general, be had to the rules in force at the place where the same is so payable. *The Queen v. The Grand Trunk Ry. Co.*, 2 Ex. C. R. 132.

43. *Loss of business.*—The loss of profits derivable from the prosecution of a certain business is of a personal character and cannot be construed as a direct or consequent damage to property within the meaning of sec. 34 of 31 Vict. ch. 12. *Lefebvre v. The Queen*, 1 Ex. C. R. 121.

44. *Expropriation—Value—Prix d'affection.*—In an action brought to set aside the Arbitrators' award made under the provisions of "*The Railway Act*" (R. S. C. ch. 109), it was *held* that the principle to be followed in making an award is that the proprietor shall be left in the same position, financially, as he was before his property was expropriated, without allowing any *prix d'affection*; and therefore when the evidence of the proprietor's witnesses proves that the remnant of the property, added to the sum awarded as compensation, is greater than the price for which the proprietor was willing to sell the whole property before the expropriation, the award must be held to be reasonable and adequate. *Benning v. The Atlantic & North West Ry. Co.*, 5 M. L. R. S. C. 137.

45. *Right to unnavigable water.*—The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it

crosses his property, and he is entitled to be indemnified for the destruction of any water power, which has been or may be derivable therefrom. *Lefebvre v. The Queen*, 1 Ex. C. R. 121.

46. *Unity of estate—Severance.*—In assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation. *Paint v. The Queen*, 2 Ex. C. R. 149.

47. *Government railway—Boundary ditches—Damages for overflow of water.*—In re *Morin v. The Queen*, 20 Can. S. C. R. 515, it was held, affirming the judgment of the Exchequer Court, 2 Ex. C. R. 396, that under 43 Vict. ch. 8 confirming the agreement of sale by the Grand Trunk Ry. Co. to the Crown of the purchase of the Riviere du Loup branch of their railway, the Crown cannot be held liable for damages caused from the accumulation of surface water to land crossed by the railway since 1879, unless it is caused by acts or omissions of the Crown's servants, and as the damages in the present case appear by the evidence to have been caused through the non-maintenance of the boundary ditches of claimant's property, which the Crown is under no obligation to repair or keep open, the claim for damages must be dismissed.

48. *Machinery in mill.*—Under the provisions of Arts. 379 and 380 C. C. L. C., machinery in mills becomes immoveable by destination and forms part of the realty. *Lefebvre v. The Queen*, 1 Ex. C. R. 121.

49. *Buildings and fixtures.*—The Crown, represented by the Commissioners of public works for the Province of Quebec in the year 1851, demised certain lands in the City of Montreal to the plaintiff's predecessors in title for the purpose of being used for the construction of a dock and shipyard for the building, reception and repair of vessels. The lease contained a proviso for its cancellation under certain circumstances, upon the lessors or their successors in office, paying to the "lessees, their executors, "administrators or assigns, the then value (with an addition of ten per "cent. thereon) of all the buildings and fixtures that shall be thereon "erected and belonging to the said lessees;" and it was held that the words "buildings and fixtures" in the proviso were large enough to include not only what were buildings, in the ordinary acceptation of the term, and the dock itself, but also whatever was accessory to, and necessary to the use of, such buildings and dock. *Grier v The Queen*, 4 Ex. C. R. 168.

50. *Returning officer—R. S. C. ch. 7—Claims for service of subordinate officers.*—A person duly appointed and acting during an election as returning officer under the provisions of *The North-West Territories Representation Act* (R. S. C. c. 7), cannot recover from the Crown for the services of the several enumerators, deputy-returning-officers or other persons employed in connection with such election. *Lucas v. The Queen*, 3 Ex. C. R. 238.

51. *Nature of title.*—In assessing compensation to be paid to a claimant whose land has been expropriated, the court will look at the nature of his title as one of the criteria or value. *The Queen v. Carrier*, 2 Ex. C. R. 36; *Samson v. The Queen*, 2 Ex. C. R. 30.

52. *Crown's Prerogatives—Priority of payment as single contract creditor.*—The Crown claiming as a single contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown, as representing the Dominion of Canada, when claim-

ing as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vict. ch. 23. *The Queen v. The Bank of Nova Scotia*, 11 S. C. R. 1. But see now *The Bank Act*, 53 Vict. ch. 31, sec. 53.

53. *Rights of Crown in Lower Canada.*—The Crown is bound by the two codes of the Province of Quebec, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its ordinary creditors. *Exchange Bank of Canada v. The Queen*, 11 App. Cas. 157. See No. 8 under sec. 17 of this Act; see also *The Bank Act*, 53 Vict. ch. 31, sec. 53.

54. *Conflict between Codes P. Q.—Crown's preference over chirographic creditors.*—Article 1994 of the Civil Code, L.C., must be construed according to the technical sense of "comptables." And Article 611 of the Code of Civil Procedure, L.C., giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the Legislature was that "in the "absence of any special privilege the Crown has a preference over unprivi- "leged chirographic creditors for sums due to it by a defendant being a "person accountable for its money." *Ibid.*

55. *Prerogatives of the Crown.*—The Crown is not bound by sections 100 and 122 of *The Dominion Elections Act*, 1874. The 46th clause of the 7th section of *The Interpretation Act* (now sec. 16, ch. 1, R. S., 1906), whereby it is provided that no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby, is not limited or qualified by any exception such as that mentioned in *The Magdalen College Case* (11 Rep. 70 b), that the King is impliedly bound by statutes passed for the general good..... or to prevent fraud, injury or wrong. *The Queen v. Pouliot*, 2 Ex. C. R. 49.

56. *Undertaking by Government to promote legislation—Breach of.*—An order of His Excellency The Governor-General-in-Council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages. *Quebec Skating Club v. The Queen*, 3 Ex. C. R. 387.

57. *Government cheque on deposit account with Bank—Right of payee for collection—Credit entry in payee's books—Reversal of.*—The Dominion Government having a deposit account of public moneys with the Bank of P. E. I., upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000 which, together with a number of other cheques, he sent to the branch of the Bank of Montreal, at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of P. E. I. for collection, but was not paid by the latter bank, which, subsequently to the presentment of the cheque, suspended payment generally. And the court held that the Bank of Montreal were mere agents for the collection of this cheque, and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having

been discounted by them; consequently, as the bank did not acquire property in the cheque and were never holders of it for value, they were entitled on the dishonour of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles v. Perkins*, 9 East, 12; *Ex parte Barkworth*, 2 DeG. & J. 194, referred to. *The Queen v. The Bank of Montreal*, 1 Ex. C. R. 154.

58. *Retroactive effect of statutes.*—Where vested rights are concerned, statutes shall not have reference to retrospective effect unless expressly so enacted. *McQueen v. The Queen*, 16 S. C. R. 116. On same subject see *Martin v. The Queen*, 20 S. C. R. 240, and *DeKuyper v. Van Dulken*, 3 Ex. C. R. 88.

59. *Estoppel.*—The doctrine of estoppel cannot be invoked against the Crown. *Humphrey v The Queen*, 2 Ex. C. R. 386. See *supra* No. 22.

60. *Estoppel—Claimant's acquiescence in construction of culvert—Damages.*—B. sought to recover damages for the flooding of a portion of his farm, resulting from the construction of certain works connected with the Intercolonial Railway. The Crown produced a release under B.'s hand given subsequent to the time of the expropriation of a portion of his farm for the right of way of a section of the said railway, whereby he accepted a certain sum "in full compensation and final settlement for de-"privation of water, fence-rails taken, damage by water, and all damages "past, present and prospective arising out of the construction of the "Intercolonial Railway," and released the Crown "from all claims and "demands whatever in connection therewith." It was also proved that although the works were executed subsequent to the date of this release they were undertaken at B.'s request and for his benefit, and not for the benefit of the railway, and that, with respect to part of them, he was present when it was being constructed and actively interfered in such construction. It was held that he was not entitled to compensation. And further that the Crown is under no obligation to maintain drains or back-ditches constructed under 52 Vict. c. 13, s. 4. *Bertrand v. The Queen*, 2 Ex. C. R. 285. See also *William v. Birmingham B. & M. Co.* (1899), 2 Q. B. 338. *Volenti non fit injuria*, 41 C. L. J. 387.

61. *Mandamus against the Crown.*—A mandamus will never under any circumstances be granted where direct relief is sought against the Crown. *McQueen v. The Queen*, 16 S. C. R. 1.

62. *Mandamus—Servant of Crown.*—A mandamus does not lie against a servant of the Crown in respect of acts for which he is amendable to the Crown, and which are not cast upon him by law as a duty to the public, distinct from his duty to the Crown. *McKenzie v. Bernier*, Q. R. 5, K. C. 251.

63. *Lien on Logs, etc.*—The lien in favour of the Crown for boomage and slidage dues only attaches to logs that have actually passed through the slides and booms. *Merchants Bank of Canada v. The Queen*, 1 Ex. C. R. 46.

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

65. *Offer to settle—Effect thereof.*—Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings, the court,

while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses. *Falconer v. The Queen*, 2 Ex. C. R. 82.

66. *Assignment of chose in action against the Crown.*—Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the court and the Crown making no objection, the court gave effect to such assignment.

Quære:—In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown? *The Queen v. McCurdy*, 2 Ex. C. R. 311.

67. *Minister or officer of the Crown—Power of.*—A Minister or officer of the Crown cannot bind the Crown without the authority of law. *Quebec Skating Club v. The Queen*, 3 Ex. C. R. 387.

68. *Laches of officers of the Crown—Damages.*—Laches cannot be imputed to the Crown, and, except where a liability has been created by a statute, it is not answerable for the negligence of its officers employed in the public service. *Burroughs v. The Queen*, 2 Ex. C. R. 293; 20 S. C. R. 420.

69. *Power of Minister of the Crown.*—Under the 6th section of *The Liquor License Act*, 1883, the boards of license commissioners for the various license districts in the Dominion were empowered to fix the salaries of license inspectors, subject to the approval of the Governor in Council, and the court held that such approval could not be given by a Minister of the Crown, and further that the Crown could not be held liable for any sum in excess of the salary fixed and approved of by the Governor-General-in-Council. *Ibid.*

70. *Authority of officer of the Crown.*—It was held, affirming the judgment of the Exchequer Court, that where by certain work done by the Government Railway authorities in the City of St. John the pipes for the water supply of the City were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the Chief Engineer of the Government Railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong & Gwynne, JJ., dissenting on the ground that the Chief Engineer had no authority to bind the Crown to pay the damages beyond any injury done. *The Queen v. The St. John Water Commissioners*, 19 S. C. R. 125.

71. *Ordnance lands—Power of Minister of Interior to lease.*—The Minister of the Interior cannot lease or authorize the use of Ordnance lands without the authority of the Governor in Council. R. S. C. c. 22, sec. 4; R. S. C., c. 55, secs. 4 and 5 discussed; *Wood v. The Queen*, 7 S. C. R. 634; *The Queen v. St. John Water Commissioners*, 19 S. C. R. 125; and *Hall v. The Queen*, 3 Ex. C. R. 373, referred to. *Quebec Skating Club v. The Queen*, 3 Ex. C. R. 387.

72. *Destruction of documents—Presumption therefrom—Omnia præsumuntur contra spoilatorem.*—In an action to recover from the Crown a balance of moneys alleged to be due for labour and materials supplied in respect of certain public works, a question arose as to the correctness of a number of pay-lists or accounts rendered by the suppliant to the Crown. Before the completion of the works a Commission had been appointed to inquire into the manner in which they had been carried on. It was likely that the correctness of such pay-lists or accounts would come in question

before such Commission. In view of the opening of the Commission the suppliant burnt his time-books and all the original papers and materials from which his accounts had been compiled as well as his own books of account, by which also the correctness of the accounts rendered by him might have been ascertained. It was *held*, under such circumstances, that the fair presumption from the destruction of such time-books and books of account was that if they had been accessible they would have shown that the accounts rendered by the suppliant were not true accounts. *St. Louis v. The Queen*, 4 Ex. C. R. 185. Reversed on appeal, 25 S. C. R. 649.

73. *Navigation—Obstruction of—37 Vict. ch. 29-43 Vict. c. 30.*—Where a ship had become a wreck and, owing to her position, constituted an obstruction to navigation, the court *held* that it was not necessary in an information against the owners for the recovery of moneys paid out by the Crown, under the provisions of 37 Vict. c. 29 and 43 Vict. c. 30, for removing the obstruction, to allege negligence or wrong-doing against the owners in relation to the existence of such obstruction. And the right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it continues an obstruction was first given by 49 Vict. c. 36, and such expenses could not be recovered under 37 Vict. c. 29 or 43 Vict. c. 30. *The Queen v. The Mississippi & Dominion Steamship Co.*, 4 Ex. C. R. 298. See also *Smith v. Wilson* (1896), A. C. 579; *The Snark* (1899), A. C. 74 and *Halliday v. National Telephone Co.* (1899), Q. B. 221.

74. *Responsibility.—Obstruction to Navigation.*—Under the Acts above mentioned it is only the owner of a ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal. *Ibid.*

75. *O. C. annulled.*—An Order in Council is not subject to be annulled by a Court of Justice. *Casgrain v. School Comrs., etc.*, Q. R. 9, S. C. 225.

76. *Navigable and floatable waters—Crown lands—Collateral circumstances leading to grant—Limitation of terms of grant—Fisheries—Arts.* 400, 414, 503 *C. C.*—A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that, at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell v. The Corporation of Quebec* (5 App. Cas. 84). followed.

Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of showing an intention to enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein. (*Steadman v. Robertson* [18 N. B. Rep. 580] and *The Queen v. Robertson* [6 S. C. R. 52] referred to; *in re Provincial Fisheries* [26 S. C. R. 444] 1898, A. C. 700, discussed). *Attorney-General, Quebec v. Fraser*, 37 S. C. R. 577.

The petition for leave to appeal to the Judicial Committee of the Privy Council was withdrawn by leave, the case having been settled out of Court, 5th June, 1907. 38 S. C. R. IX.

77. *Rivers and streams—Crown domain—Title to land—Flottage—Driving loose logs—Public servitude—Riparian ownership—Action possessoire—Arts.* 400, 503, 507, 2192 *C. C.*—*Art.* 1064 *C. P. Q.*—In the Province of Quebec, watercourses which are capable merely of floating loose logs (*flottables à buches perdues*) are not dependencies of the Crown domain

within the meaning of article 400 of the Civil Code. The owners of the adjoining riparian lands are, consequently, the proprietors of the banks and beds of such streams and have the right of action *au possessoire* in respect thereof.

There is, however, a right of servitude over such watercourses in respect to all advantages which the streams and their banks, in their natural condition, can afford to the public, there being no distinction, in this regard, between navigable or floatable streams and those which are neither navigable nor floatable. *McBean v. Carlisle* (19 L. C. Jur. 276) and *Tanguay v. Price* (37 S. C. R. 657), followed. *Tanguay v. Canadian Electric Light Co.*, 40 S. C. R. 1.

78. *Rivers and streams—Floating logs—Damage by—R. S. N. S.* (1900), *c.* 95, *s.* 17.—Persons engaged in the floating or transmission of logs down rivers and streams under the authority of R. S. N. S (1900), ch. 95, sec. 17, are liable for all damages caused thereby whether by negligence or otherwise, and the owner of the logs is not relieved from liability because the damage was done while the logs were being transmitted by another person under contract with him. *Dickie v. Campbell*, 34 S. C. R. 265.

See Notes under *The Expropriation Act*—printed *post*.

Stipulations of contract to govern.

48. In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow,—

(*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein; or,

(*b*) interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown. 50-51 V., c. 16, s. 33.

1. *Contract—Non-compliance with specification—Waiver by the Crown*—S. had a contract with the Crown to remove an old pier and to construct, under specifications, a new one in its place. He did not remove the whole of the lower tiers of the old one and erected the new pier upon part of them, and, without any order from the Crown, added extra tiers in order to make a better work. The Crown accepted the work done and raised no question except as to the fair value, which both parties agreed might be ascertained by reference to contract prices. The Crown did not stand on its legal rights and agreed to pay the fair value for the work done. *Held* that it was open to the court under the circumstances, to allow S. the value of such extra work and to deduct from the contract price the value of the work he had not actually done. *Sheridan v. The Queen*, February 10th, 1891.

2. *Contract—Delay by the Crown—Quantum meruit.*—During the North West rebellion the suppliants entered into a contract with the Government for the transport, from Grand Rapids to Selkirk, by means of their steamboats and barges, of a force of 1,585, men and officers under the command of Major-General Middleton. At the time the contract was made, it may fairly be said to have been contemplated by both parties

that the service would be performed in about fourteen days. The Government were paying $9, or first-class fare for each officer, and $5, or second-class fare, for each man, which was considered to be a fair compensation; but the suppliants having been delayed for 8 days, by reason of the Major-General waiting at Fort Pitt for Big Bear to come and surrender, it was *held* that as the delay was not anticipated by the parties at the time the contract was made, for the time the suppliants' steamers and barges were lying idle, a *quantum meruit* should be allowed, and it was fixed at $600 per day. *The North West Navigation Co. (Ltd.) v. The Queen* December 3rd, 1890.

3. *Returning officer—Paying of clerks.*—A person duly appointed returning officer and acting as such at an election under the provisions of *The North West Territories Representation Act* (R.S.C. *ch.* 7) cannot recover, as money paid for the Crown, the wages of a clerk employed by him during part of the time while such services were being rendered; but, on determining the value of his personal services, the fact that he had to engage a clerk to keep his office open, was taken into consideration. *Fitzgerald v. The Queen*, November 7th, 1890.

4. *Agent of Provincial Government—Services—Remuneration.*—A member of the Dominion Parliament was appointed by the Province of British Columbia as their agent at Ottawa and their delegate to London to present to the Queen a petition on behalf of the said Province. By the order in council appointing him such agent, provisions were made to reimburse him for expenses necessarily incurred. He was paid a certain sum in respect thereof, but all remuneration for his services being refused he brought a petition of right to recover compensation for the same. *Held* (by Supreme Court, B.C.,) that as there existed no stipulation for the remuneration of his services, the position he occupied was honorary and he was not entitled to any relief. *de Cosmos v. The Queen*, 1 B.C.R. Part II, p. 26.

5. *Breach of contract—Damages.*—K. entered into a contract with the Crown to remove and carry, in barges, to the Lachine Canal, rails to be landed from sea-going vessels, in the harbour of Montreal during the season of navigation of 1885. After having executed a portion of his contract, the Crown, without any complaint to K., cancelled the contract and employed other persons to do the work K. had agreed to perform. *Held* that K. was entitled to damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. *Kenney v. The Queen*, 1 Ex. C.R. 68.

6. *Breach of contract—Loss of profits—Damages.*—On a breach of contract by the Crown, in giving to persons other than the contractor work contracted for, it was held that the latter was entitled to be paid the difference between the value of the work done by such persons other than himself during the continuation of his contract, and the amount it would have actually cost him, as such contractor to perform that work, without making any deduction for superintendence generally, wear and tear of plant, building, etc., rent, insurance, fuel and taxes. *Boyd v. The Queen*, 1 Ex. C.R. 186.

7. *Contract—Certificate of engineer—Condition precedent.*—S. entered into a contract with the Crown for the construction of a bridge for a lump sum, and after having procured all the necessary materials for its construction under the specifications, the Crown materially altered the plan, and the Chief Engineer supplied him with new specifications with directions

to build the bridge thereunder. The contractor sued the Crown for the additional cost thereof, and based his claim upon an alleged new contract entered into when the new specifications were so supplied. On appeal to the Supreme Court of Canada (reversing the judgment of the Exchequer Court per Henry, J.) it was held that the engineer could not make a new contract binding on the Crown; that the claim came within the original contract and the provision thereof which made the certificate of the engineer a condition precedent to recovery. *Starr v. The Queen*, 17 S.C.R. 118.

8. *Contract, breach of.*—Where claimants sought to recover from he Crown the amount of damages they alleged they were obliged to pay to a contractor who was prevented by the expropriation from completing the construction of a wharf he had undertaken to build for them, it was held that as the contractor had been prevented from completing the construction of the wharf by the exercise of powers conferred by Act of Parliament, the claimants were excused from any liability to him in respect of the breach of contract, and could not maintain any claim against the Crown in that behalf. *Samson v. The Queen*, 2 Ex. C.R. 30.

9. *Contract, construction of—Omission in Schedule.*—A. entered into a contract with the Crown to supply, for a given time, "such quantities " of paper, and of such varieties, as may be required or desired from time " to time for the printing and publishing of the *Canada Gazette*, of the " statutes of Canada. and of such official and departmental and other " reports, forms, documents and other papers as may at any time be " required to be printed and published, or as may be ordered from time to " time by the proper authority therefor, according to the requirements of " Her Majesty in that behalf." Attached to the contract, and made part thereof, were a schedule and specifications showing the paper to be supplied and the price to be paid therefor, but in which no mention was made of double demy,—the paper ordinarily, though not exclusively, used for departmental printing. And it was held that notwithstanding this omission, the contractor had agreed to supply the Crown and the Crown by implication had agreed to purchase of the contractor, among other paper, that required for departmental printing. *Clarke v. The Queen*, 2 Ex. C.R.141.

10. *Breach of Contract to issue license—Sale of chattels—Implied warranty.*—A permit, issued under the authority of the Minister of the Interior, under which the purchaser has the right within a year to cut from the Crown domain a million feet of lumber, is a contract for the sale of personal chattels, and such a sale ordinarily implies a warranty of title on the part of the vendor; but if it appears from the facts and circumstances that the vendor did not intend to assert ownership, but only to transfer such interest as he had in the thing sold, there is no warranty. The Government of Canada by order in council authorized the issue of the usual annual license to the plaintiff company to cut timber upon the Crown domain, upon certain conditions therein mentioned. The company did not comply with such conditions, but before the expiry of the year during which such license might have been taken out, proceedings were commenced by the Government of Ontario against the company under which it was claimed that the title to the lands covered by the license was vested in the Crown for the use of the Province of Ontario, and that contention was ultimately sustained by the court of last resort. Under such circumstances it was held that there was a failure of consideration which entitled

the company to recover the ground-rent paid in advance on the Government's promise to issue such license. *The St. Catherines Milling & Lumber Co., v. The Queen*, 2 Ex. C. R. 202., 14 Ap. Cas. 60.

11. *Agreement for conveyance of passengers—Breach thereof—Demurrer.*—Where an information alleged an agreement with Her Majesty whereby in consideration of the conveyance by the I. C. Ry. of certain passengers between certain stations, the defendants agreed to pay Her Majesty, through the proper officer of that railway, the fares or passage money of such passengers at the rate therein mentioned as agreed to between the defendants and such officer. And when the defendants, admitting the agreement as alleged, sought to avoid it by setting up as a defence that such passengers were carried on *bons* in blank signed by one of the defendants only. It was held, on demurrer to the plea, to be no answer to the breach of contract alleged. *The Queen v. Pouliot*, 2 Ex. C. R. 49.

12. *Government contract—Power of Crown Officers and Engineers thereunder.*—In re *O'Brien v. The Queen*, 4 Can. S.C.R. 529., Ritchie, C.J., held that neither the engineer, nor the clerk of the works, nor any subordinate officer in charge of any of the works of the Dominion of Canada, has any power or authority, express or implied, under the law to bind the Crown to any contract or expenditure not specially authorized by the express terms of the contract duly entered into between the Crown and the contractor according to law, and then only in the specific manner provided for by the express terms of the contract.

13. *Contract—Construction—Implied promise.*—A. had a contract to carry Her Majesty's mail along a certain route. In the construction of a Government railway the Crown obstructed a highway used by A. in the carriage of such mails, and rendered it more difficult and expensive for him to execute his contract. After the contract had been fully performed by both parties, A. sought to maintain an action by petition of right for breach thereof on the ground that there was an implied undertaking on the part of the Crown in making such contract that the Minister of Railways would not so exercise the powers vested in him by statute as to render the execution of the contract by A. more onerous than it would otherwise have been. And the court held that such an undertaking could not be read into the contract by implication. *Archibald v. The Queen*, 2 Ex. C.R. 374.

14. *Contract—Public work—Authority of Government engineer to vary terms—Delay.*—Under a contract with the Dominion Government for building a bridge, the specifications of which called for a timber of a special kind which the contractor could only procure in North Carolina, the Government was not obliged in the absence of a special provision therefor, to have such timber inspected at that place and was not bound by the act of the government engineer in agreeing to such inspection, the contract containing a clause that no change in its terms would be binding on the Crown unless sanctioned by order in council.

A provision that the contractor should have no claim against the Crown by reason of delay in the progress of the work arising from the acts of any of Her Majesty's servants was also an answer to a suit by the contractor for damages caused by delay in having the timber inspected. *Mayes v. The Queen*, 23 S. C. R. 454; 2 Ex. C. R. 403.

15. *Contract—Carriage of Mails—Authority of P. M. G. to bind the Crown—R. S. C. c.* 35.—An action will not lie against the Crown for breach of a contract for carrying mails for nine months at the rate of

$10,000 a year, made by parol with the Postmaster-General, and accepted by the contractor by letter, notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than $1,000 it could not be made without the authority of an order in council and if temporary it was revocable at the will of the Postmaster-General. *Humphrey v. The Queen*, 20 S. C. R. 591.

16. *Contracts—Claim for extra work—Certificate of Engineer—Condition precedent.*—O. entered into a contract with the Government of Canada to construct for a lump sum a deep sea wharf, at Halifax, agreeably to the plans in the engineer's office and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract no work could be performed unless, "ordered in writing by the engineer in charge before the "execution of the work." O. was authorized by a letter of the Minister of Public Works to make an addition to the wharf, for the additional sum of $18,400. Further extra work, which amounted to $2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of $9,681, as the balance due, was paid to O., who gave the following receipt, dated 30th April, 1875:— "Received from the Intercolonial Railway, in full, for all amounts against the Government for works under contract, as follows: *Richmond* deep water wharf works for storage of coals, works for bracing wharf, rebuilding two stone cribs, the sum of $9,681." O. sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in and irregularity of payments. The petition was dismissed with cost, and a rule *nisi* for a new trial was subsequently moved for and discharged. And it was *held*, affirming the judgment of the court below, that all the works performed by O. for the Government was either contract work within the plans or specifications, or extra work within the meaning of the 7th clause of the contract, and that he was paid in full the contract price, and also the price of all extra work for which he could produce written authority, and that written authority of the engineer and the estimate of the value of the work are conditions precedent to the right of O. to recover payment for any other extra work. *O'Brien v. The Queen*, 4 S. C. R. 529. The following cases are also authority for the above:—*Jones v. The Queen*, 7 S. C. R. 570; *Guilbault v. McGreevy*, 18 S. C. R. 609; *The Queen v. McGreevy*, 18 S. C. R. 371; *The Queen v. Starrs*, 17 S. C. R. 118; *Berlinguet v. The Queen*, 13 S. C. R. 26; *Ross v. The Queen*, 4 Ex. C. R. 390., affirmed on appeal to S. C. 25, S. C. R. 564; *Murray v. The Queen*. 5 Ex. C. R. 192 and 26 S. C. R. 203; *Pigott, et al., v. The King*, 10 Ex. C. R. 248 and 38 S. C. R. 501, etc., etc.

17. *Parol contract between Crown and subject—Implied promise by the Crown—Quantum meruit.*—The provisions of sec. 11 of 42 Vict. c. 7 and of the 23rd sec. of R. S. C. c. 37, do not apply to the case of an executed contract; and where the Crown has received the benefit of work and labour done by it, or of goods or materials supplied to it, or of services rendered to it by the subject at the instance and request of its officer acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same. *Hall v. The Queen*, 3 Ex. C. R. 373.

18. *Breach of contract—Measure of damages.*—To the general rule as to the measure of damages for the breach of a contract there is an excep-

tion as well established as the rule itself, namely, that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain v. Fothergill*, L. R. 7 H. L. 158; *Flureau v. Thornhill*, 2 Wm. Bl. 1078, referred to. This exceptional rule is confined to cases of contract for the sale of lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has entered under covenants express or implied for good title or for quiet enjoyment. *Williams v. Burrell*, 1 C. B. 402; *Lock v. Furze*, L. R. 1 C. P. 441, referred to.

The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so. *Engel v. Fitch*, L. R. 3 Q. B. 314; *Robertson v. Dumaresq*, 2 Moo. P. C. N. S. 84, 95, referred to. *Bulmer v. The Queen*, 3 Ex. C. R. 184; 23 S. C. R. 488.

19. *Contractor—Liability of, to company.*—A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract. *Kerr v. Atlantic & North West Ry. Co.*, 25 S. C. R. 197.

20. *Contract—Interpretation of—Accident to subject-matter owing to cause not within contemplation of contracting parties—Warranty under Law of England and Province of Quebec.*—The suppliant entered into a contract with the Crown for certain repairs, mentioned in the contract, to a steamer belonging to the Government. The steamer was to be put in perfect running order and she was also to have a satisfactory trial trip before being handed over to the Department.

The vessel was built of iron and very old. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way during the progress of the works contracted for and was broken in when she grounded. The accident occurred through no negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications. And it was *held* that there was nothing to show, by the terms of the contract and specifications, that either party at the time of entering into the contract contemplated that the portion of the steamer lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order" was intended to apply only to the work the suppliants had expressly agreed to do, and should not be extended to other work or things which they did not agree to do or to replace or renew. That in such a contract as this, neither by the law of England nor by that of the Province of Quebec is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for. *Lainé v. The Queen*, 5 Ex. C. R. 103.

21. *Contract for public work—Delay in executing same—Notice by engineer—Forfeiture—Withdrawing work from contractor—Damages—Plant—Breach of contract—Profit on extras—Interest.*—There may be some question as to whether *Walker v. The London and North Western Railway Company* (L. R. 1, C. P. D. 518) should be accepted as establishing a general proposition that if in contracts creating a forfeiture for not

proceeding with work at the rate required, a time is fixed for its completion, the forfeiture cannot be enforced on the ground of delay after that date.

But at all events any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work,and the contractor must,with reference to such reasonable time for completion, make default or delay in diligently continuing to execute or advance the work to the satisfaction of the engineer. The engineer is to decide, having regard to a time that in the opinion of the court is reasonable, and the contractor is to have notice of his decision.

Where there is a breach of contract the damages are to be measured as near as may be by the profits the contractor would have made by completing the contract in a reasonable time.

In this case the contractor claimed for loss of profits in respect of certain extra work not covered by the contract.

Held, that inasmuch as it was not possible to say either that the engineer would have directed it to be done by him had the work remained in the suppliant's hands, or that in case the engineer had done so, that he would have fixed a price for it from which a profit would have been derived, it could not be taken into consideration.

Where in such a case the Crown dispossessed the contractor of his plant and used it for the purposes of the completion of the work, the contractor was held entitled to recover the value of such plant as a going concern, that is, its value to anyone situated as the contractor himself was at the time of the taking of the plant.

Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. *Stewart v. The King*, 7 Ex. C. R. 55, affirmed on appeal to the Supreme Court of Canada, 32 S. C. R. 483.

22. *Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.*—In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Company, to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where suppliant placed them until they were paid for. During the season of 1894, the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, and inspected; those accepted being marked with a dot of paint and the letters "B. & S.," and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them ; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties. And it was *held* that the B. & N. S. C.

Company had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. *McLennan v. The King*, 9 Ex. C R. 227.

23. *Contract—Bailment—Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Demise of Crown*—50-51 *Vict. c.* 16, *sec.* 16 (*c*).—Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case the Crown is liable under the contract of its officer or servant.

The suppliant entered into a contract with the Crown, through an officer of the Department of Public Works, to supply certain pack horses, with aparejos and saddles, for the purposes of construction of the Atlin-Quesnelle Telegraph line, at the sum of $2 per horse for each day the animals were so employed. It was not practicable, as the suppliant knew at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them from starving to death. It appeared that the aparejos and saddles were not returned to the suppliant. There was a time during construction when the horses could have been taken back alive and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of construction were sufficiently urgent to justify him in sacrificing the horses to the work. And it was *held* that having regard to the circumstances the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.

Wherever there is a breach of a contract binding on the Crown a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor and Annapolis Railway Co. v. The Queen* (11 A. C. 607) referred to.

The Crown is liable in respect of an obligation arising upon a contract implied by law. *The Queen v. Henderson* (28 S. C. R. 425) referred to.

An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown.

Semble:—That the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause (c) of the 16th section of *The Exchequer Court Act*. *Johnson v. The King*, 8 Ex. C. R. 360.

24. *Contract—Public work—Formation of contract—Ratification—Breach.*—On November 22nd, 1879, the Government of Canada entered into a contract with C. by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vict. ch. 7, sec. 6, and on November 25th, 1879, was assigned to W. who performed all the work sent to him up to

December 5th, 1884, when the term fixed by the contract having expired, he received a letter from the Queen's Printer as follows: "I am directed by the Honourable the Secretary of State to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter and then brought an action for the profits he would have had on work given to other parties during the seven years. And it was *held* that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorizing such contracts was not directory but limited the power of the Queen's Printer to make a contract except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer, and that he could not recover in respect of the work done after the original contract had expired.

On October 30th, 1886, an order in council was passed, which recited the execution and assignment of the original contract, the execution of the work by W. after it expired and the recommendation of the Secretary of State that a formal contract should be entered into extending the original to December 1st, 1887, and then authorized the Secretary of State to enter into such formal contract with W., but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by other parties up to the date of said execution. W. refused to accept the extension on such terms. And it was *held* that W. could not rely on the order in council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it. *The Queen v. Woodburn*, 29 S. C. R. 112.

25. *Contracts binding on the Crown—Goods sold and delivered on verbal order of Crown officials—Supplies in excess of tender.*—The provisions of the twenty-third section of the *Act respecting the Department of Railways and Canals* (R. S. C. ch. 37), which require all contracts affecting that Department to be signed by the Minister, the Deputy of the Minister, or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that Department.

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (See also *Woods v. The Queen*. 7 S. C. R. 634); *The Queen v. Henderson*, 28 S. C. R. 425; 6 Ex. C. R. 39.

26. *Contract for improvement of Government Canal—Change in works—Breach of contract—Spoil grounds—Cost of—Allowance for.*—The suppliants were contractors for certain works of improvement on the Rapide Plat Division of the Williamsburg Canals. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them. And it was *held* that the Crown was not bound to indemnify them for money expended in obtaining the said spoil grounds.

In order to carry on the works in the way contemplated by the contract and specification the contractors changed certain dump scows into deck scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck scows into dump scows. Under the circumstances the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work under the circumstances in which it was done as compared with the cost of doing it in the way contemplated by the contract. *Weddell v. The King*, 7 Ex. C. R. 323.

27. *Contract—Certificate Chief Engineer—Condition precedent.*—By sec. 18 of 31 Vict. ch. 13, it was provided that no money should be paid to a contractor for works on the I. C. Ry. until the Chief Engineer had certified that such work had been done, nor until approved by the Minister (42 Vict. ch. 7). The contractor claimed certain extras before obtaining any such certificate. The Chief Engineer having resigned, S. was appointed to investigate and report upon such claim. S. made a report which was not approved by the Minister, and it was held that the report of S. was not such a certificate as was contemplated by the statute and the contracts made thereunder. (*McGreevy v. The Queen*, 18 S. C. R. 371 followed). *Ross v. The King*, 4 Ex. C. R. 390. Affirmed on appeal to Supreme Court of Canada, 25 *S. C. R.* 564, and to the Judicial Committee of the Privy Council. *Coutlee's Digest*, 1589.

28. *Contract—Extra—Chief Engineer—Certificate—Condition precedent—Waiver by the Crown.*—O. & C., under the usual contract with the Crown, built a line of railway from Digby to Annapolis, N.S., and recovered the amount allowed under the Chief Engineer's final certificate, whereupon the contractors made and presented to the Crown a claim for allowances and additions over and above the amount so certified and the Chief Engineer having made a further report thereon increasing the amount already allowed by a sum of $1,925.61, the remainder of the claim which had not been allowed by the Chief Engineer was referred to the Exchequer Court by the Department of Railways and Canals. At the opening of the case, Counsel for the Crown waived, *inter alia*, the whole of claim 32 of the contract by which the Chief Engineer was made the sole arbitrator to settle any differences and that his certificate was a condition precedent to their recovery. Counsel, furthermore, waived that part of claim 8 of the contract, by which the Chief Engineer was made the sole judge of the meaning and interpretation of the specification and of the materials, quantity and that his decision thereon should be final. In the course of the trial Counsel for the Crown further stated that the Crown did not insist upon the clause of the contract which required that the prices for any deviations that may be held to exist in the works were to be fixed by the Engineer, within the meaning of the contract. Whereupon the Court ordered a reference to three Civil Engineers for enquiry and report upon, *inter alia*: 1st. The question of value when there was deviation; 2nd. Which was the fair price for the battered piles; the difference, between the fair price and what was allowed, to be recovered by the contractors. 3rd. Items 6, 7, 19, 20 and 21 of the claim generally. 4th. Upon the materials used and left in position respecting Item 8. 5th. Item No. 10 which cannot be allowed in the form in which it is

presented, but which might be taken as an element in dealing with Item No. 7. 6th. The fair price respecting Item No. 14. 7th. The classification and price respecting Item No. 15. 8th. The question as to whether, under the contract, specifications and evidence, an allowance should be made for cofferdams at any of the piers mentioned in Item No. 16. 9th. The question as to whether the turn-tables were a part of the Howe Truss or not, and if not to return them at the price of iron, wrought or cast.

The Engineers having reported upon the same, the contractors were allowed by the Court, under the circumstances, the sum of $37,840.37. *O'Neil & Campbell v. The Queen*, 15th June, 1896.

29. *Contract—Public work—Engineer's certificate condition precedent—Revision by succeeding Engineer—Right of action on monthly certificates—Waiver by Crown.*—A contract with the Crown, for the construction of certain works, contained the usual provision making the Chief Engineer's certificate, approved by the Minister, a condition precedent to the contractor's recovery. The Chief Engineer having refused to give his certificate for the amount claimed by the action, the Exchequer Court held (5 Ex. C. R. 19) that it had no power to alter or correct any certificate given by the Chief Engineer in pursuance of the terms of the contract. On appeal to the Supreme Court of Canada, the judgment was varied in view of the admission of Counsel for the Crown, declaring "he did not "raise any purely technical formal objection that the certificate did not "show on its face that there was no approval of the Minister, also no "objection that the certificate did not state that the work was done to "the satisfaction of the Engineer in so many words and Counsel further "admitting that certificate and estimate are sufficient in form." And the Supreme Court held that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be re-opened and revised by a succeeding engineer. The Court further *held* that the contractors could sue for monthly payments without waiting the final completion of the work. *Murray v. The Queen*, 26 S. C. R. 203.

30. *Contract for Inland Revenue stamps—Production by method different from that specified—Recovery of money paid—Quantum meruit—Set-off against Crown—"Fair cost of production."*—A contract between the Crown and the defendant company called for the production of certain inland revenue stamps printed from steel plates. The company delivered in lieu thereof stamps produced from steel transferred to stone. They were accepted, paid for and used by an officer of the Crown under the belief that they were produced by the process specified in the contract. The way in which the stamps were produced was subsequently ascertained, and the Crown sought to recover back the money paid therefor. And it was *held* that, as the company had agreed to print the stamps from steel plates but printed them from stone, it did not produce the thing bargained for but another and different thing, and the Crown was entitled to recover back the money paid.

Semble:—That in such a case the company could not recover from the Crown on a *quantum meruit* the fair value of the stamps produced from stone. *Wood v. The Queen* (7 S. C. R. 375); *Hall v. The Queen* (3 Ex C R 377); *Henderson v. The Queen* (3 Ex. C. R. 377; 28 S. C. R. 425), referred to.

Revenue stamps are not articles of merchandise and have no commercial value.

The company's right, if any, to an allowance for the stamps in question depended upon a right to set-off against the price paid for the stamps by the Crown the value thereof, ascertained, as they have no commercial value, by reference to the cost of production. But no such right of set-off exists against the Crown.

The Crown was not bound by the acceptance of the stamps by its officer. Whether in accepting them he knew or did not know how they were produced, was immaterial. In neither case could any request or authority for the production and delivery of the stamps be implied against the Crown.

The Crown having consented to allow the company the fair cost of production of the stamps, without any profit to the company, it was *held* that as the company had no right of set-off, it must accept the allowance proposed by the Crown or nothing, and that the "fair cost of production" was not necessarily the cost to the company or to any particular person; but the fair cost to a competent person with the necessary capital, skill, means and appliances for producing such stamps. *The King v. British American Bank Note Co.*, 7 Ex. C. R. 119.

31. *Lease — Canal — Water-power — Improvements on canal — Temporary stoppage of power—Compensation—Total stoppage—Measure of damages—Loss of profits.*—A mill was operated by water-power taken from the surplus water of the Galops Canal under a lease from the Crown. The lease provided that in case of a temporary stoppage in the supply caused by repairs or alterations in the canal system, the lessee would not be entitled to compensation unless the same continued for six months, and then only to an abatement of rent. And it was *held* that a stoppage of the supply for two whole seasons necessarily and *bonâ fide* caused by alterations in the system was a temporary stoppage under this provision.

The lease also provided that, in case the flow of surplus water should at any time be required for the use of the canal or any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease in which case the lessee should be entitled to be paid the value of all the buildings and fixtures thereon belonging to him with ten per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but later changes were made in the proposed work which caused a total stoppage and the lessee, by petition of right, claimed damages. And it was *held* that as the Crown had not given notice of its intention to cancel the lease, the lessee was not entitled to the damages provided for in case of cancellation. And further, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal. (Judgment of the Exchequer Court [9 Ex. C. R. 287] affirmed). *Beach v. The King*, 37 S. C. R. 259.

32. *Contract—Public Works—Progress estimates—Engineer's certificate —Approval by Head of Department—Final estimates—Condition precedent.* —The claim of a contractor upon a progress estimate was at first rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice made a certificate upon such progress estimate for the amount thus in dispute in the usual form but added after

his signature the following words:—"Certified as regards item 5 (the item in dispute), in accordance with letter of Deputy Minister of Justice, dated 15th January, 1896."

The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor. And it was held that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract, in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract. (*Murray v. The Queen*, 26 S. C. R. 203, discussed and distinguished). *Goodwin v. Queen*, 28 S. C. R. 273.

33. *Contract—Public work—Abandonment and substitution of work—Implied contract.*—After a portion of the works covered by a certain contract had been done, the Crown abandoned the scheme contemplated under the same and adopted another plan and the execution of the work was given to another contractor. And it was held that in the absence of express covenant, implied covenant on the part of the Crown being prohibited by the contract itself, the contractors were not entitled to the profits they would have made had the second contract been given to them. And in other words, as held by the Exchequer Court, where by a change in the plan of the works, certain works are abandoned and other substituted therefor, and the contractors being paid the loss of profits in respect of such abandoned works, they are not entitled to profits upon the substituted works. *The Gilbert Blasting & Dredging Co. v. The King*, 33 S. C. R. 21, and 7 Ex. C. R. 221. The Judgment of the Exchequer Court was affirmed on appeal to the Supreme Court.

34. *Petition of Right—Contract—Construction of Agreement.*—The suppliant had contracted with the Crown, during the Transvaal War, to supply Her Majesty's forces, at Fort Napier, all such quantities of whole or crushed mealies as may be required for the period of twelve months. The Crown not having entirely supplied Fort Napier with mealies under contract, but having used some procured from stores elsewhere, the suppliant sued the Crown for breach of contract, and it was *held*, that no obligation could be imported into the contract to bind the Crown to require supply; that injustice would not be done by the suppliant providing himself with mealies against delivery under the contract since he would be entitled to reasonable notice before being required to supply. *Fell v. The Queen*, 87, L. T. 203.

35. *Contract—Breach—Extras.*—Where the condition of a contract in regard to claims for extras was not complied with, the Court held that no such claim could be allowed; but, as the contractor had been improperly dismissed, an alternative claim for damages was allowed. *City of Toronto v. Metallic Roofing Co., Cout. Cases*, 388.

36. *Breach of contract—Crown—Demise—Change of Sovereign and His Advisors—Obligations.*—In matters of contract or quasi-contract, the Crown is in the same position in regard to its subjects, as the latter are

between themselves. Therefore these contracts are binding in the same manner and with the same effects as between private individuals. The Crown has a continuous and perpetual existence and the engagements or obligations taken and assumed by it continue to exist and have effect during all their legitimate existence, producing the same legal effects, although the Sovereign or His advisers have changed. *Demers v. The Queen* Q.R. 7 K.B. 433; affirmed on appeal to the Supreme Court of Canada, 32, S.C.R. 483.

37. *Public works—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—Words and phrases—"Stipulations"—Exchequer Court Act. sec. 33—Extra works—Engineer's certificate—Instruction in writing—Schedule of prices—Compensation at increased rates—Damages—Right of action—Quantum meruit.*—The suppliants were contractors with the Crown, for the widening and deepening of a canal and contended that there were such changes from the plans and specifications and in the manner in which the works were obliged to be executed as made the provisions of their contracts inapplicable and that they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisoes and stipulations contained in the contract. By the judgment appealed from, the judge of the Exchequer Court held (10 Ex. C.R. 248) and his decision was affirmed on appeal to the Supreme Court, per Girouard, Davies and Maclennan, J. J.), that there had been no such changes as would entitle the contractors to recover on a *quantum meruit*, as in the case of *Bush v. The Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392; 2 Hudson on *Building Contracts* (2 ed. 121); that the words "shall decide in accordance with the stipulations in such contract" in the thirty-third section of *The Exchequer Court Act* might be treated as directory only and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done, but that the remaining clauses of the section were imperative and there could be no valid waiver whereby a larger sum than the amount stipulated in the contract could be recovered e.g., on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada: Idington and Duff JJ. held that the word "stipulations" in the first part of the section referred to should be construed as having relation entirely to the second part of the section and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could, without proper authority, exceed its powers in relation to a fully executed contract or confer the powers to dispense with the requirements of the statute, and that, consequently there could not be a recovery upon *quantum meruit*. *Pigott & Ingles v. The King*. 38 S.C.R. 501.

38. *Interest—Contract in P.Q.*—Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the 33rd, sec. of *The Exchequer Court Act* does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that Province. *The Queen v. Henderson*, 28 S.C.R. 425: 6 Ex. C.R. 39.

39. *Interest—Not asked.*—The Court may not allow interest where it is not asked by the conclusion of a declaration. It would be allowing *ultra petita.—Delvincourt*, 147; 1 *Pr. Jean, Proc. Civ.* 155; *Carré and Chauveau*, Quest, 252; 16 Laurent, n. 320 et s.; 2 Baudry-Lacantinerie, n. 301.

40. *Contract—Construction—Crown.*—Where the respondent contracted with the Government to execute for a term of years the printing and binding of certain public documents at stipulated prices, but the Government did not expressly contract to give to the respondent all or any of the said work:—It was *Held*, that a stipulation to that effect could not be implied, and that there was no breach of contract by reason of orders for work being withheld. *The Queen v. Demers*, 1900 A.C. 103.

No clause to be deemed comminatory only.

49. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in such contract, shall be considered as comminatory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect. 50-51 V., c. 16, s. 34.

In determining compensation for land set off to be taken into consideration.

50. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue, by the construction and operation of such public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected. 54-55 V., c. 26, s. 7.

See annotations under section 47 hereof and under *The Expropriation Act* printed *post*.

Effect of Payment of Judgment.

Payment—A full discharge.

51. The payment of the amount due by any judgment of the Court shall be a full discharge to the Crown of all claim and demand touching any of the matters involved in the controversy. 50-51 V., c. 16, s. 35.

Judgment to bar further claim.

52. Any final judgment against the claimant on any claim prosecuted as provided in this Act shall for ever bar any further claim or demand against the Crown arising out of the matters involved in the controversy. 50-51 V., c. 16, s. 36.

INTEREST.

Interest may be allowed upon judgments.

53. The Minister of Finance may allow and pay to any person entitled by the judgment of the Court to any moneys or costs, interest thereon at a rate not exceeding four per centum from the date of such judgment until such moneys or costs are paid. 52 V., c. 38, s. 4.

Although the above section is in the permissive form, the rule adopted and followed by the Minister of Finance is to allow and pay interest at 4% upon the amount recovered under judgment from the date thereof until payment; unless the Deputy Minister of Justice reports overdue delay on the part of the claimant in prosecuting his claim or in any other proceedings and unless there are circumstances in the case which would justify the Crown in refusing to pay interest on the judgment.

1. *Interest against Crown.*—Interest is not allowable against the Crown, except when made payable by statute or by contract. In re *Gosman*, L. R. 17 Ch. D. 771; 50 L. J. Ch. 624; 45 L. T. 267; 29 W. R. 793.

Under sec. 31 of *The Expropriation Act*, interest is payable by the Crown on the compensation money from the date of the taking of the land.

2. *Interest—Damages—Breach of contract.*—The suppliant recovered damages against the Crown for the permanent stoppage of water supply enjoyed by him under a lease from the Crown, and interest, at the rate of five per centum per annum, was allowed on the amount of damages. *Beach v. The King*, 9 Ex. C.R. 287 and confirmed on appeal to the Supreme Court of Canada, 37 S.C.R. 259.

3. *Crown—Money had and received—Interest not recoverable.*—Although interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud, yet in a case where the Crown as plaintiff intentionally put aside all question of fraud, and accepted repayment as money paid by mistake, no evidence being offered in the civil suit of fraudulent pretences which had been proved against the defendant in a Criminal Court: *Held*, that interest was not recoverable; and that the order appealed from, granting interest on the ground of special damage, must be reversed without costs. *Johnson v. The King*, 1904 A.C. 817.

4. *Interest—Damages—Contract.*—Where damages are awarded for breach of contract, and no interest is included in the several amounts allowed to the plaintiff, although interest was asked for by the conclusions of the declaration and it appears from the evidence that these amounts are really the minimum estimate of the damages suffered, as they existed at the date of the institution of the action, he is entitled to interest from date of service of action on the total amount awarded to him by the judgment; and where such interest is not awarded by the Court below, the omission will be rectified on appeal. *Montreal Gas. Co. v. Vasey*, Q.R. 8 K.C. 412 (Vide Arts. 1067 & 1077 C.C.).

5. *Interest—Arts.* 1067 & 1077 C.C.—50-51 *Vict. ch.* 16 *s.* 33.—Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of *The Exchequer Court Act* does not apply, and interest may be recovered against the Crown, according to the practice prevailing in the Province. *The Queen v. Henderson et al*, 28 S.C.R. 425; 6 Ex. C.R. 39.

6. *Interest—Damages.*—The interest upon a condemnation in damages in the Province of Quebec runs from the date of judgment *Walsh v. Le Maire de Montréal* 5 L.C.J. 338. *Scanlon v. City of Montreal*, Q.R. 17 C.S. 363.

7. *Statute—Construction of—Interest—B. N. A. Act*—Unless expressly provided interest is never to be paid before it accrues due. There is no expressed provision in the B.N.A. Act that interest shall be deducted in advance on the excess of debt under sec. 118. *Dominion of Canada v. Provinces of Ontario & Quebec.* 24 S.C.R. 498.

See also introduction for observation on the question of Interest, ante p. 87 *et seq.*

EXECUTION.

Issue of writs of execution.

54. In addition to any writs of execution which are prescribed by general rules or orders, the Court may issue writs of execution against the person or the goods, lands or other property of any party, of the same tenor and effect as those which may be issued out of any of the superior courts of the province in which any judgment or order is to be executed; and when, by the law of the province, an order of a judge is required for the issue of any writ of execution, the judge of the court may make a similar order, as regards like executions to issue out of the court. 50-51 V., c. 16, s. 37.

Provincial laws to govern as to custody under process.

55. No person shall be taken into custody under process of execution for debt issued out of the Court at the suit of the Crown, unless he might be taken into custody under the laws of the province in which he happens to be, in a similar case between subject and subject; and any person taken into custody under such process may be discharged from imprisonment upon the same grounds as would entitle him to be discharged under the laws in force relating to imprisonment for debt in the province in which he is in custody. 50-51 V., c. 16, s. 38.

Execution of writs.

56. All writs of execution against real or personal property, as well those prescribed by general rules and orders as those hereinbefore authorized, shall, unless otherwise provided by general rule or order, be executed, as regards the property liable to execution and the mode of seizure and sale, as nearly as possible in the same manner as similar writs, issued out of the superior courts of the province in which the property to be seized is situated, are, by the law of the province, required to be executed; and such writs shall bind property in the same manner as such similar writs, and the rights of purchasers thereunder shall be the same as those of purchasers under such similar writs. 50-51 V., c. 16, s. 39.

Claims to property seized, how disposed of.

57. Every claim made by any person to property seized under a writ of execution issued out of the court, or to the proceeds of the sale of such property, shall, unless otherwise provided by general rule or order, be heard and disposed of, as nearly as may be, according to the procedure applicable to like claims to property seized under similar writs of execution issued out of the courts of the province. 50-51 V., c. 16, s. 40.

SHERIFF'S FEES.

Sheriffs' and Coroners' fees.

58. Sheriffs and coroners shall receive and take to their own use such fees as the Judge of the Exchequer Court, by general order, shall fix and determine. 50-51 V., c. 16, s. 41.

The Sheriff's remuneration for his attendance on the Exchequer Court is regulated by order in council, the purport of which, with further instruction on the above subject, will be found *post* at Rule 315, and notes thereunder.

EVIDENCE.

Administering Oaths.

59. All persons authorized to administer affidavits to be used in any of the superior courts of any province may administer oaths, affidavits and affirmations in such province to be used in the Exchequer Court. R.S., c. 135, s. 91.

Under the provision of *The Railway Act*, sub-sec. 3 of sec. 64, ch. 37, R.S., 1906: All persons authorized by the Governor in Council to administer oaths within or out of Canada, in or concerning any proceeding had or to be had in the Supreme Court of Canada or in the Exchequer Court of Canada, may administer oaths in or concerning any application, matter, or proceeding before the Board of Railway Commissioners for Canada.

Commissioners for taking oaths—Such oaths as valid as if taken before the Court.

60. The Governor in Council may, by commission, from time to time, empower such persons as he thinks necessary, within or out of Canada, to administer oaths, and to take and receive affidavits, declarations and affirmations in or concerning any proceeding had or to be had in the Exchequer Court.

2. Every such oath, affidavit, declaration or affirmation so taken or made shall be as valid and of the like effect, to all intents, as if it had been administered, taken, sworn, made or affirmed before the court in which it is intended to be used, or before the judge or any competent officer of the Court in Canada.

3. Every commissioner so empowered shall be styled a commissioner for administering oaths in the Exchequer Court of Canada. R.S., c. 135, s. 92.

LIST OF COMMISSIONERS TO ADMINISTER OATHS, ETC., FOR USE IN THE SUPREME AND EXCHEQUER COURTS OF CANADA.

NAME.	RESIDENCE.	DATE OF COMMISSION.
Winslow Warren	Boston, Mass., U.S.A.	13th Dec., 1886.
Louis Arthur Audette, K.C.	Ottawa, Ont.	30th Jany., 1888.
Charles Morse, K.C.	Ottawa, Ont.	26th April, 1889.
Robert Tuthill Litton	Melbourne, Australia	3rd Jany., 1890.
Frank John Leslie	Liverpool, Eng.	13th April, 1891.
Frederick Elliott Grant	Melbourne, Australia	1st June, 1891.
John Proffitt	Westminster, England	14th July, 1891.
Lewis W. desBarres	Halifax, N.S.	25th April, 1892.
Robert O. Stockton	St. John, N.B.	" "
John Augustus Longworth.	Charlottetown, P.E.I.	" "
John Bruce	Toronto, Ont.	" "
Godfrey Henry Walker	Winnipeg, Man.	" "
Dixie Watson	Regina, Sask.	" "
C. Gardner Johnson	Vancouver, B.C.	" "
W. E. Peters	Sydney, N.S.	" "
Edwin R. Rogers	Calgary, Alta.	2nd June, 1892.
H. F. A. Gourlay	Melbourne, Australia	7th Feby., 1894.
Frederick W. Walker	Sydney, Australia	23rd Feby., 1895.
Jean Alfred Charlebois	Quebec, Que.	23rd April, 1896.
George March Hill	London, Eng., (73a Queen St.)	28th Sept., 1896.
Frank Osborne, Not. Public	Sydney, Australia	14th Nov., 1896.
Charles Russell, Solicitor	London, Eng., (37 Norfolk St.)	1st Feby., 1897.
Edward Frank Day, Solicitor	London, Eng., (37 Norfolk St.)	1st Feby., 1897.
Joseph Fitzgerald, Barrister	Melbourne, Australia	1st March, 1897.
Alfred Godfrey, Barrister	Sydney, Australia	20th Oct., 1897.
Percival Birkett, Solicitor	London, Eng., (4 Lincoln's Inn, Fields Court)	20th Oct., 1897.
Harris H. Bligh, K.C.	Ottawa, Ont.	27th Jany., 1898.
Thomas Barclay, Barrister	Paris, France	3rd Feby., 1898.
Thomas Cato-Worsfold, Solicitor	London, Eng.	24th June, 1898.
John James Cambridge	New Westminster, B.C.	27th Oct., 1899.
Robert Henry Tetley	London, Eng.	29th May, 1900.
James Lawson	Ottawa, Ont.	10th Jany., 1902.
William L. Griffith	London, Eng.	16th May, 1903.
William Simpson Walker	Montreal, Que.	8th April, 1904.
Walter G. Forsyth, Solicitor	Sydney, Australia	12th Oct., 1905.
George D. Muggah	Sydney, N.S.	8th Nov., 1905.
Arnold C. Westley	Melbourne, Australia	13th Nov., 1906.
Charles Evan MacKay	Waganui, New Zealand	30th Nov., 1908.

How affidavits, etc., may be made out of Canada.

61 Any oath, affidavit, affirmation or declaration concerning any proceeding had or to be had in the Exchequer Court administered, sworn, affirmed or made out of Canada shall be as valid and of like effect to all intents as if it had been administered, sworn affirmed or made before a commissioner appointed under this Act, if it is so administered, sworn, affirmed or made out of Canada before,—

(*a*) any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England; or,

(*b*) any notary public and certified under his hand and official seal; or,

(*c*) a mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland or in any colony or possession of His Majesty out of Canada or in any foreign country and certified under the common seal of such city, borough, or town corporate; or,

(*d*) a judge of any court of superior jurisdiction in any colony or possession of His Majesty or dependency of the Crown out of Canada; or,

(*e*) any consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place and certified under his official seal. R.S., c. 135, s. 93.

No proof required of signature or seal of Commissioner.

62. Every document purporting to have affixed, imprinted or subscribed thereon or thereto the signature of,—

(*a*) any commissioner appointed under this Act; or,

(*b*) any person authorized to take affidavits to be used in any of the superior courts of any province; or,

(*c*) any commissioner authorized to receive affidavits to be used in His Majesty's High Court of Justice in England; or,

(*d*) any notary public under his official seal; or,

(*e*) any mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland or in any colony or possession of His Majesty out of Canada or in a foreign country, under the common seal of the corporation; or,

(*f*) any judge of any court of superior jurisdiction in any colony or possession of His Majesty, or dependency of the Crown out of Canada under the seal of the court of which he is such judge; or

(*g*) any consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place under his official seal;

in testimony of any oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of any such signature or seal or of the official character of such person. R.S., c. 135, s. 94.

Informality not to be an objection—Nor defeat an indictment for perjury.

63. No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall

be an objection to its reception in evidence in the Exchequer Court, if the Court or Judge thinks proper to receive it; and if such affidavit is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury. R.S., c. 135, s. 95.

Examination on interrogatories or by commission of persons who cannot conveniently attend.

64. If any party to any proceeding had or to be had in the Exchequer Court is desirous of having therein the evidence of any person, whether a party or not, or whether resident within or out of Canada, and, if in the opinion of the Court or the Judge thereof, it is, owing to the absence, age or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, the Court or the Judge may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise, before the Registrar of the Court, or any commissioner for taking affidavits in the Court, or any other person or persons to be named in such order, or may order the issue of a commission under the seal of the Court for such examination.

2. The Court or the Judge may, by the same or any subsequent order, give all such directions touching the time,place and manner of such examination, the attendance of the witnesses and the production of papers thereat, and all matters connected therewith, as appears reasonable. R.S., c. 135, s. 96.

Examination taken in absence of Examiner.—Depositions taken at a preliminary enquiry, in the absence of the magistrate before whom the case is proceeding, have no legal value whatever; and therefore, the commitment by the magistrate of a prisoner for trial, the bill of indictment founded on his legal commitment or on his illegal deposition and the true bill and indictment reported by the Grand Jury are null and void. *The King v. Traynor*, Q. R. 10, K. B. 63.

Duty of persons taking such examination.

65. Every person authorized to take the examination of any witness in pursuance of any of the provisions of this Act, shall take such examination upon the oath of the witness, or upon affirmation, as provided in the Canada Evidence Act. R.S., c. 135, s. 97; 56 V., c. 31, ss. 23 and 24.

Further examination may be ordered.

66. The Court, or the Judge may, if it is considered for the ends of justice expedient so to do, order the further examination before either the Court, or the Judge thereof, or other person, of any witness; and if the party on whose behalf the evidence is tendered neglects or refuses to obtain such further examination, the Court or Judge, in its or his discretion, may decline to act on the evidence. R.S., c. 135, s, 98.

Notice to adverse party.

67. Such notice of the time and place of the examination as is prescribed in the order, shall be given to the adverse party. R.S., c. 135, s. 99.

Neglect or refusal to attend to be deemed contempt of court—As to production of papers.

68. When any order is made for the examination of a witness, and a copy of the order, together with a notice of the time and place of attendance, signed by the person or one of the persons to take the examination, has been duly served on the witness within Canada, and he has been tendered his legal fees for attendance and travel, his refusal or neglect to attend for examination or to answer any proper question put to him on examination, or to produce any paper which he has been notified to produce, shall be deemed a contempt of court and may be punished by the same process as other contempts of court; but he shall not be compelled to produce any paper which he would not be compelled to produce, or to answer any question which he would not be bound to answer in court. R. S., c. 135, s. 100.

For writs of execution and for contempt see annotations under Rule 243.

Contempt.—Under the English cases, recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. *Mathew, J., in re Maria Davies* (21 Q. B. D. 239) said: "Under the old procedure of the Court of Chancery an attachment for an indefinite period was often obtainable as of course, and, as was said, *ex debito justitiae*. But under the new (Judicature) Rules of Court the old law of contempt has been materially modified. The granting of an attachment is now discretionary, and this discretion would seem to be conferred upon the Court to protect offenders against punishments of undue severity."

In this case D. was imprisoned for contempt and disobedience of an injunction, and was discharged from custody on an order granted on terms of substantial justice between the parties at variance. Idem., p. 236.

Jessel, M. R., *in re Clements* (46 L. J. ch. at p. 383 [1876]) said: "It seems to me that this jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be jealously and carefully watched and exercised, if I may say so, with the greatest reluctance on the part of the judges. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted."

In this case "an order was made in the suit for the inspection of documents, at the office of C., the defendant's solicitor. An order was also made to stay the proceedings in the suit till security was given for the costs. E., the plaintiff's solicitor, called on C., offered him a bond as security, and left with him a draft copy of the bond for his perusal. E. then proposed to inspect the documents; C. refused to allow him to do so, and also declined to accept the security. E. then left the office, but soon after returned, and asked for the draft bond. C. refused to give it up, and used

abusive language to, and assaulted E., but afterwards apologized for his conduct. On a motion to commit C. for contempt,—Held, by one of the Vice-Chancellors, that he had been guilty of a contempt, within the spirit, if not the letter of the above order; and that as the motion to commit was originally sustainable, he must pay the costs of it; but upon appeal the decision was reversed." Under the English practice, prior to the Judicature Acts, there was a difference between committal and attachment for contempts. It was unnecessary to serve notice of motion for attachment, *e converso* in the case of committal. "Committal" was the proper remedy for doing a prohibited act, "attachment" for neglecting to do some act ordered to be done. (See per Chitty, J., in *Callow v. Young*, 1886, 56 L. T. N. S. 147). Since the Judicature Act of 1873 notice of motion is necessary in both cases, but for a committal notice must be served personally on the party in contempt, while for attachment service on his solicitor of record is sufficient. (See per Chitty, J., in *Harvey v. Harvey*, 1884, 26 Ch. D. 654).

"There is, however, a distinction between committal and attachment in the process by which they are respectively carried out. The operation of an order for committal is more summary and expeditious than that of a writ of attachment. In the case of committal, the person in contempt is taken, wherever he may be, under the order by the tipstaff of the Court and lodged in Holloway gaol; but in the case of attachment a writ is obtained from the central office of the Supreme Court, and directed to the sheriff of the bailiwick in which the person sought to be attached is supposed to be. The writ is executed by the sheriff's officer, and can only be executed within the bailiwick of the sheriff to whom it is directed, and if the offender cannot be found within that bailiwick a fresh writ must be obtained. The person in contempt (when caught) is lodged in the county or other gaol of the place where the writ is enforced." *Ency. Laws of Eng.* iii, p. 317.

Purging Contempt.—A contempt may be cleared by the contemner doing the enjoined act and paying to the adverse party the costs occasioned by his contumacy. *Daniell's Chan. Pr.* 6th ed. p. 900. Under Art. 834 of Code Civil Procedure P.Q., coercive imprisonment may be ordered for contempt of any process or order of the Court or a judge, or for resistance to such process or order, etc.

By Art. 837 "coercive imprisonment can be ordered only under a special rule granted by the Court, after personal notice to the party liable." By Art. 839 coercive process is by writ like a writ of execution. By Art. 839 coercive imprisonment is to be made in the common gaol of the district.

As a mere disobedience to the order of the Court in a civil action is not a criminal matter, no doubt the Quebec practice would prevail. But it is submitted that there is no real difference between the English and Quebec practice.

Effect of consent of parties.

69. If the parties in any case pending consent in writing that a witness may be examined within or out of Canada by interrogatories or otherwise, such consent and the proceedings had thereunder shall be as valid in all respects as if an order had been made and the proceedings had thereunder. R. S., c. 135, s. 101.

Return of examinations taken in Canada—Use thereof.

70. All examinations taken in Canada, in pursuance of any of the provisions of this Act, shall be returned to the Court; and the depositions, certified under the hands of the person or one of the persons taking the same, may, without further proof, be used in evidence, saving all just exception. R. S., c. 135, s. 102.

And out of Canada—Use thereof.

71. All examinations taken out of Canada, in pursuance of any of the provisions of this Act, shall be proved by affidavit of the due taking of such examinations, sworn before some commissioner or other person authorized under this or any other Act to take such affidavit, at the place where such examination has been taken, and shall be returned to the Court; and the depositions so returned, together with such affidavit, and the order or commission, closed under the hand and seal of the person or one of the persons authorized to take the examination, may, without further proof, be used in evidence, saving all just exceptions. R. S. c., 135, s. 103.

Reading of examination.

72. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order. R. S., c. 135, s. 104.

GENERAL.

Process of Court effective throughout Canada.

73. The process of the Exchequer Court shall be tested in the name of the Judge of the Court and shall run throughout Canada. 50-51 V., c. 16, s. 42

To be directed to Sheriff—Or Coroner.

74. The process of the Court shall be directed to the sheriff of any county or other judicial division into which any province is divided; and the sheriffs of the said respective counties or divisions shall be deemed and taken to be *ex-officio* officers of the Exchequer Court, and shall perform the duties and functions of sheriffs in connection with the Court.

2. In any case where the sheriff is disqualified, such process shall be directed to any of the coroners of the county or district. 50-51 V., c. 16, s. 43.

Service of process upon defendant abroad—Delay for filing defence—Power of Court to determine after service.

75. When a defendant, whether a British subject or a foreigner, is out of the jurisdiction of the Exchequer Court and whether in His Majesty's dominions or in a foreign country,

the Court or the Judge, upon application, supported by affidavit or other evidence, stating that, in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or the Judge thinks fit to direct.

2. The order shall in such case limit a time, depending on the place of service, within which the defendant is to file his statement in defence, plea, answer, exception or demurrer, or otherwise make his defence, according to the practice applicable to the particular case, or obtain from the Court or Judge further time to do so.

3. Upon service being effected as authorized by the order, the Court shall have jurisdiction to proceed and adjudicate in the cause or matter to all intents and purposes in the same manner, to the same extent, and with the like effect as if the defendant had been duly served within the jurisdiction of the Court. 2 Edw. VII., c. 8, s. 3.

See *post*. Rule 81 and notes thereunder.

Recognizances.

76. Every commissioner for administering oaths in the Exchequer Court, who resides within Canada, may take and receive acknowledgments or recognizances of bail, and all other recognizances in the Exchequer Court. 50-51 V., c. 16, s. 44.

Enforcement of orders.

77. An order for payment of money, whether for costs or otherwise, may be enforced by the same writs of execution as a judgment. 50-51 V., c. 16, s. 45.

No attachment of body for debt.

78. No attachment as for contempt shall issue for the non-payment of money only. 50-51 V., c. 16, s. 46.

Application and payment of moneys.

79. Any moneys or costs awarded to the Crown shall be paid to the Minister of Finance, and he shall pay, out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any moneys or costs awarded to any person against the Crown. 50-51 V., c. 16, s. 47.

A similar provision has been made by sec. 33 of *The Expropriation Act*, see *post*., notes under same.

Fees payable by stamps.

80. All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue,

who shall regulate the sale thereof; and the proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. 50-51 V., c. 16, s. 48.

Reasons for judgments to be filed.

81. The Judge of the Court shall file with the Registrar a copy of the reason, if any, given by him for any judgment pronounced by him. 50-51 V., c. 16, s. 49.

APPEALS.

Appeal—Deposit—Setting down appeals—Notice—What the notice may contain—When the judgment shall be deemed final.

82. Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as the Judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

2. The Registrar shall thereupon set the appeal down for hearing by the Supreme Court at the nearest convenient time according to the rules in that behalf of the Supreme Court, and the party appealing shall within ten days after the said appeal has been so set down as aforesaid, or within such other time as the Court or a judge thereof shall allow, give to the parties affected by the appeal, or their respective attorneys or solicitors, by whom such parties were represented before the Exchequer Court, a notice in writing that the case has been so set down to be heard in appeal as aforesaid, and the said appeal shall thereupon be heard and determined by the Supreme Court.

3. In such notice the said party so appealing may, if he so desires, limit the subject of the appeal to any special defined question or questions.

4. A judgment shall be considered final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability. 53 V., c. 35, s. 1; 2 E. VII., c. 8, s. 2; 6 E. VII., c. 11, s. 1.

Any party appealing from a judgment of the Exchequer Court must, under the provisions of Rule No. 298, notify the Registrar of the Exchequer Court to that effect. See sec. 282 ch. 48 R. S., 1906, respecting appeals in Customs cases.

1. *Application for leave to appeal made after expiry of 30 days.*—Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court prescribed by the above section 51 may be extended after such prescribed time has expired. (The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken). The fact that a

solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired. Pressure of public business preventing a consultation between the Attorney-General of Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted, although the application therefor may not be made until after the expiry of such prescribed time. *Clarke v. The Queen*, 3 Ex. C. R. 1.

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

3. *No appeal from order extending time.*—In re *Neill v. Travellers' Insurance Co.*, 9 Ont. App. 54, the Court of Appeal for Ontario held that an appeal will not lie from the order of a judge of that court extending the time for appealing. *Semble*, also that where an appeal is made from the exercise of discretion by a judge, the court should not review his exercise of discretion.

4. For further authorities on the question of extension of time for leave to appeal, see *Wilson's Judicature Act*, 6th Edn., p. 446; the *Annual Practice*, 1893-94, pp. 1033-35; *Chitty's Archibold's Practice*, 14th Edn., p. 978; *Maclennan's Judicature Acts*, 2nd Edn., pp. 696-698; and *Holmsted & Langton's Ontario Judicature Acts*, p. 691.

5. For rule on appeal from court with or without a jury, see *The Accomac* (1891) Pr. D. 354; *The Phœnix Insurance Co. v. McGhee*, 18 S. C. R. 73, per Strong, C. J.; and *Jones v. Hough*, 5 Ex. D. 122.

6. *Appeal—Limitation of time—Final judgment.*—On the trial before the Exchequer Court in 1887 of an action against the Crown for breach of a contract to purchase paper from the suppliants no defence was offered and the case was sent to referees to ascertain the damages. In 1891 the report of the referees was brought before the court and judgment was given against the Crown for the amount thereby found due. The Crown appealed to the Supreme Court, having obtained from the Exchequer Court an extension of the time for appeal limited by statute, and sought to impugn on such appeal the judgment pronounced in 1887. And the court held that the appeal must be restricted to the final judgment pronounced in 1891; that an appeal from the judgment given in 1887 could only be brought within thirty days thereafter unless the time was extended as provided by the statute and the extension of the time granted by the Exchequer Court on its face only refers to an appeal from the judgment pronounced in 1891. *Clark v. The Queen*, 21 S. C. R. 656.

7. *Application for leave to appeal made after expiry of one day.*—One day after the time limited by the statute for appealing had expired, the defendants applied to extend the time for leave to appeal upon the ground that, by the inadvertence of the solicitor's partner, the statutory period had been allowed to expire, *Per Curiam*: I have never refused an order to extend unless the other party had placed himself in a position, by reason of lapse of time, whereby he would be prejudiced. Here the

application is made one day after the expiry of the statutory period, and I think the order ought to be granted. *Copeland-Chatterson Co. v. Hatton, et al.*, April 11th, 1906.

8. *Appeal—Extension of time.*—Leave to appeal, notwithstanding a lapse of five months, ought to be given, when it appears that mistakes as to the validity of the resolution forming special ground for the application had been discovered in the meantime and when the respondents had no equity to resist the application. (Observations on the principle on which the Courts grant extension of time for appeal) *In re Manchester E. Ry. Co.*, 1883, 24 ch., D. 488.

9. *Practice—Appeal—Extension of time—Order of reference—Amendment of record—Laches.*—An order of reference had been settled in such a way as to omit to reserve certain questions which the court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed and the referee's report filed. After final judgment in the action, the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal, an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended. Under the circumstances, the Court extended the time to appeal but refused to amend the order of reference as settled. *Woodburn v. The Queen*, 6 Ex. C. R. 69.

10. *Leave to appeal—Delay.*—The Judge of the Exchequer Court has authority to grant leave to appeal to the Supreme Court from an order of Reference to ascertain the amount of damages, even after an appeal from the final judgment has been lodged to the Supreme Court of Canada. *The Queen v. Woodburn*, 29 S. C. R. 112.

11. *Application for extension of time for leave to appeal from preliminary judgment, until 30 days after whole matter is disposed of.*—By a judgment of this Court, the respondent was held liable to indemnify the claimant in respect of certain expenditure made under the provisions of the North West Angle Treaty No. 3, and certain matters having been by the said judgment reserved for further consideration, the decision might have been a matter for an immediate appeal; but on an application by the respondent to extend the time for leave to appeal until 30 days after the final judgment upon the whole matters, the application was granted. *The Dominion of Canada v. Province of Ontario*, 16th April, 1907.

12. *Practice—Appeal—Extension of Time—Mistake of Counsel.*—Where an appeal to the Court of Appeal from an order in a matter not being an action has not been brought within fourteen days, as prescribed by Order LVIII, Rule 15, that Court will not grant special leave to appeal under the rule on the ground that the delay has been caused by a mistake of the appellant's counsel. *Helsby, in re; Trustee ex parte* (63 L. J. Q. B. 265; [1894], 1 Q. B. 742; 9 R. 139), followed. *In re Coles* (1907), L. J. 76, *K. B. Div.* 27.

13. *Scheme of Arrangement—Appeal—Extension of time.*—Fifteen months and a half after a Scheme of Arrangement, made under the provisions of *The Railway Act* had been confirmed and enrolled in conformity with the said Act and the Rules of Court made

thereunder, and after the Trustees, under the said Scheme, had had the railway sold by a decree of the Exchequer Court, and after all creditors had been called and the Court had passed upon their claims, a foreign bondholder, N., applied for an extension of time to appeal to the Supreme Court of Canada from the judgment confirming the Scheme, which was not, by him attacked as bad, but with the object of sharing thereunder with the other bondholders,—upon the ground that N. only became aware of it four months after the confirmation and that he was then unable to comply with the requirements of the same and exchange his bonds for certificates of participation thereunder.

Held, that this case differed materially from an ordinary case; that as the railway, a public utility, had already been sold under a decree of the Court and the rights and priorities of the several creditors adjudicated upon and the Scheme duly confirmed and enrolled in strict compliance with the statute and the Rules of Court, and that such Scheme had, under the 287 section of the Act, acquired the force of a statutory enactment, the application could not be entertained. *Re The Atlantic & Lake Superior Ry. Co.* and *The North Eastern Banking Co., Ltd.*, 12th October, 1908.

14. *Leave to appeal—Amount less than* $500*—Discretion of Judge.*—Where the amount involved in a suit in the Exchequer Court is under $500, leave to appeal should not be granted, unless the judge before whom the application is made is of the opinion that the judgment of the Court below is so clearly erroneous that there is reasonable ground for believing that a court of appeal should reverse the judgment upon a point of law, or upon the ground that the evidence does not at all warrant the conclusions of fact arrived at. *Schulze v. The Queen*, 6 Ex. C. R. 273.

15. *Appeal—Leave—Refusal by Court below—Stay of proceedings—Special Circumstances—Judicature Act, sec.* 77.—Leave to appeal to the Court of Appeal from an order of a Divisional Court affirming an order of a Judge in Chambers, which set aside an order of a reference in Chambers, whereby the proceedings in the action were stayed pending the determination of an action in England brought by some of the present defendants, and to which the present plaintiffs were defendants, was refused by a Judge of the Court of Appeal, where such leave had previously been refused by the Court whose decision was complained of, where there were good grounds on which that decision could be supported, where none of the special circumstances existed, which sec. 77 of the Judicature Act makes essential, and there were no special reasons for treating the case as exceptional. *Great North-West Central R. W. Co. v. Stevens*, 18 O. P. R. 392.

16. *Appeal—Extension of Time—Grounds of refusal—Solicitor's Affidavit—Practice.*—Judgment against suppliants was delivered on the 17th of January, and the time allowed for leave to appeal by the 51st section of *The Exchequer Court Act* expired on the 17th of February. On the 22nd of April following, the suppliants applied for an extension of the time to appeal on the ground that before judgment the suppliants' solicitor had been given instructions to appeal in the event of the judgment in the Exchequer Court going against them. There was no affidavit establishing this fact by the solicitor for the suppliants, but there was an affidavit made by an agent of the suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until the 27th of March, and it was *held* that the knowledge of the solicitor must be

taken to be the knowledge of the company, that notice to him was notice to the company, and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of the suppliant's manager or agent as to the state of the cause. Order refused. *The Alliance Assce. Co. v. The Queen*, 6 Ex. C. R. 126.

17. *Application for leave to appeal after expiry of thirty days—Special circumstances—Refusal.*—Where on an application for an extension of time to appeal after the expiry of thirty days fixed by statute, the special circumstances or grounds in support of the application were that one of the Crown's Counsel had been away from his office for medical treatment and where it appeared that at trial, the Crown had waived the plea of prescription to part of the claim and that the claimant had accordingly abandoned part of his claim and accepted the amount of the Crown's valuators for certain damages sustained from the flooding of his land by some new works to the Soulanges Canal, a public work of Canada:—The Judge refused the application on the grounds that there was no special circumstances disclosed and that it was not a proper case for the exercise of his indulgence. *Lacouture v. The Queen*, April 14, 1896.

18. *Patent of invention—Order postponing hearing of demurrer—Leave to appeal.*—Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of sections 51 and 52 of *The Exchequer Court Act*, as amended by 2 Edw. VII. ch. 8.—*Toronto Type Foundry Co. v. Mergenthaler Linotype Co.* 36 S.C.R. 593.

19. *Appeal—Extension of time—Special period.*—When judgment had been pronounced in several expropriation cases, ten in all, wherein at trial the evidence had been made common so far as applicable and wherein one element of damage was involved which was common to them all and further, where one of such cases had been appealed to the Supreme Court of Canada upon this common issue, the Exchequer Court extended the time for leave to appeal—in one of the said cases involving this common issue, but which raised another one not common to all— for a period of ten days after such time as judgment would be given upon the case so appealed. *The Queen v. Wm. I. Sheets*, No. 865, Dec. 23rd. 1895.

20. *Appeal—Time limit.*—The time for appealing to the Supreme Court of Canada runs from the pronouncing and not from the entry of the judgment appealed from. *New Printing Co. v. Macrae* 26 Can. S.C.R. 695; *Martin v. Simpson et al.* 26 S.C.R. 707.

21. *Vacation*—The delay of 60 days for appealing to the Supreme Court prescribed by sec. 40 of R.S.C. ch. 135, is not suspended during vacation of the Court established by its rules. *New Printing Co. v. Macrae* 26 S.C.R. 695.

22. *Appealable amount—Addition of interest.*—Interest cannot be added to the sum demanded to raise it to the amount necessary to give right to appeal. *Dufresne v. Guévremont*, 26 S.C.R. 216.

No appeal when the amount does not exceed $500—Exceptions—Validity of Acts—Fee of office, etc.

83. No appeal shall lie from any judgment of the Exchequer Court in any action, suit, cause, matter or other judicial proceeding, wherein the actual amount in controversy does not exceed the sum or value of five hundred dollars, unless such

appeal is allowed by a judge of the Supreme Court, and such action, suit, cause, matter or other judicial proceeding,—

(*a*) involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an ordinance or act of any of the councils or legislative bodies of any of the territories or districts of Canada; or,

(*b*) relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty, or to any title to lands, tenements or annual rents, or to any question affecting any patent of invention, copyright, trade mark or industrial design, or to any matter or thing where rights in future might be bound. 50-51 V., c. 16, s. 52; 54-55 V., c. 26, s. 8.

On the argument of the appeal in the case of *Carter, Macey & Co., v. The Queen*, the question as to whether, under the provisions of the original section, as it stood before the passing of 53 Vict. ch. 35, an appeal would lie to the Supreme Court of Canada in a case instituted in this court by a Reference under the provisions of sections 182 and 183 of "The Customs Act," (as amended by 51 Vict. ch. 14) having been raised, new legislation was adopted and this section, as now in force, enacted,

1. *Security—Amount.*—In the patent case of *Chamberlin v. Peace*, Idington, J., fixed security at $500—June 8th, 1905.

In *re Sharples v. National Manufacturing Co.*, another Patent case, Girourard, J., made a similar order fixing security for costs at $500.—June, 1905.

2. *Patent—Appeal—Jurisdiction—Amount in controversy.—Costs*—On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed; but the appellants were ordered to pay costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion. *Dreschel v. The Auer Incandescent Light Manufacturing Co.* 28 S. C. R. 268.

3. *Patent of Invention assigned—Leave to appeal—Refused.*—An application for leave to appeal, having been made by the defendant, from a judgment of the Exchequer Court finding he had infringed the patent of invention assigned by him to the plaintiff; Idington, J. refused to entertain the same upon the grounds: 1st, That the improvement maintained by the judgment was so infinitesimal that it was not important enough to justify an appeal, and 2ndly, That upon ordinary principles of honesty the defendant having sold his patent should not be encouraged in his appeal and in keeping the plaintiffs, his assignees, in litigation. *Re Indiana Manufacturing Company v. Smith.* Nov. 22nd, 1905.

Appeal on behalf of the Crown when amount does not exceed $500—Affects other cases—Public interest—Allowed by Judge of Supreme Court—Costs.

84. Notwithstanding anything in this Act contained, an appeal shall lie on behalf of the Crown from any final judgment

given by the Court in any action, suit, cause, matter or other judicial proceeding wherein the Crown is a party, in which the actual amount in controversy does not exceed five hundred dollars; if,—

(*a*) such final judgment or the principle affirmed thereby affects or is likely to affect any case or class of cases then pending or likely to be instituted wherein the aggregate amount claimed or to be claimed exceeds or will probably exceed five hundred dollars; or,

(*b*) in the opinion of the Attorney-General of Canada, certified in writing, the principle affirmed by the decision is of general public importance; and

(*c*) such appeal is allowed by a judge of the Supreme Court.

2. In case of such appeal being allowed by a judge of the Supreme Court, he may impose such terms as to costs and otherwise as he thinks the justice of the case requires. 2 E. VII., c. 8, s. 4.

Crown not obliged to make deposit.

85 If the appeal is by or on behalf of the Crown no deposit shall be necessary, but the person acting for the Crown shall file with the Registrar of the Supreme Court a notice stating that the Crown is dissatisfied with such decision, and intends to appeal against the same, and thereupon the like proceedings shall be had as if such notice were a deposit by way of security for costs. 50-51 V., c. 16, s. 53.

Registrar to enter case on list.

86. Every appeal from the Exchequer Court set down for hearing before the Supreme Court shall be entered by the Registrar on the list for the province in which the action, matter or proceeding, the subject of the appeal, was tried or heard by the Exchequer Court; or if such action, matter or proceeding was partly heard or tried in one province and partly in another, then on such list as the Registrar thinks most convenient for the parties to the appeal. 54-55 V., c. 26, s. 9.

Questions of constitutional law and appeals from the Court of Claims have the right of way ahead of any other cases before the Supreme Court of the United States.

RULES AND ORDERS.

Rules and orders may be made.

87. The Judge of the Exchequer Court may, from time to time, make general rules and orders,—

(*a*) for regulating the procedure of and in the Exchequer Court;

(*b*) for the effectual execution and working of this Act, and the attainment of the intention and objects thereof;

(*c*) for the effectual execution and working in respect to proceedings in such Court or before such Judge, of any Act giving jurisdiction to such Court or Judge and the

attainment of the intention and objects of any such Act;

(*d*) for fixing the fees and costs to be taxed and allowed to, and received and taken by, and the rights and duties of the officers of the said Court; and,

(*e*) for awarding and regulating costs in such Court in favour of or against the Crown, as well as the subject. 52 V., c. 38, s. 2.

["(*f*) for empowering the registrar to do any such thing and transact any such business as is specified in such rules or orders, and to exercise any such authority and jurisdiction in respect thereof as is now or may be hereafter done, transacted or exercised by the Judge of the Exchequer Court sitting in chambers in virtue of any statute or custom or by the practice of the Court."]

Sub-sec. (f) hereof, empowering the Judge of the Court to make rules giving the Registrar jurisdiction of Judge in Chambers has been added by sec. 2 of 7-8 Ed. VII, ch 27, and Rules of Court have since been made and published, given effect thereto. See Rule 312.

Extent and effect thereof—Copies for Parliament—May be repealed by Parliament.

88. Such rules and orders may extend to any matter of procedure or otherwise, not provided for by any Act, but for which it is found necessary to provide in order to ensure their proper working and the better attainment of the objects thereof.

2. Copies of all such rules and orders shall be laid before both Houses of Parliament within ten days after the opening of the session next after the making thereof.

3. All such rules and orders and every portion of the same not inconsistent with the express provisions of any Act shall have and continue to have force and effect as if herein enacted, unless during such session an address of either the Senate or House of Commons shall be passed for the repeal of the same or of any portion thereof, in which case the same or such portion shall be and become repealed: Provided that the Governor in Council may, by proclamation, published in the *Canada Gazette*, or either House of Parliament may, by any resolution passed at any time within thirty days after such rules and orders have been laid before Parliament, suspend any rule or order made under this Act; and such rule or order shall, thereupon, cease to have force and effect until the end of the then next session of Parliament. 50-51 V., c. 16, s. 56; 52 V., c. 38, s. 2.

JURISDICTION

UNDER

SPECIAL ACTS.

1.—THE PETITION OF RIGHT ACT.
2.—THE EXPROPRIATION ACT.
3.—THE PATENT ACT. (*Part*).
4.—THE COPYRIGHT ACT. (*Part*).
5.—THE TRADE MARK AND DESIGN ACT. (*Part*).
6.—THE CUSTOMS ACT. (*Part*).
7.—TRADE COMBINES. (*Part of Customs Tariff Act*, 1907)
8.—THE GOVERNMENT RAILWAY ACT. (*Part*).
9.—THE RAILWAY ACT. (*Part*).
10.—THE CANADA EVIDENCE ACT.

NOTE.—For the sake of convenience it was thought advisable to give here those parts of the Acts relating to Patent of Invention, Copyright, Trade-Mark, Customs and the Two Railway Acts, which deal with jurisdiction, procedure and evidence, together with such other sections as have a general bearing upon the whole of the respective Acts. The Admiralty Act, under which the Exchequer Court of Canada is given jurisdiction, and the Admiralty Rules have not been printed here for the reason that it would make this volume too bulky. It may, however, hereafter be the subject of another publication by itself.

The Petition of Right Act.

REVISED STATUTES OF CANADA, 1906.

CHAPTER 142.

An Act Respecting Proceedings against the Crown by Petition of Right.

The Revised Statutes of Canada, 1906, came into force on the 31st day of January, 1907.

The first time the Parliament of Canada legislated on the subject of petition of right was in the year 1875, when the Act 38 Vict., ch. 12, was passed, and jurisdiction to try suits by petition of right against the Crown in right of the Dominion was therein given to the Superior Courts of the several Provinces. In the following session of Parliament (1876) the establishment of the Exchequer Court was provided for, and the Act of 1875 was entirely repealed and superseded by 39 Vict., ch. 27, which gave jurisdiction to the Exchequer Court in respect of petition of right in Dominion matters. This last Act (39 Vict., ch. 27) was subsequently re-enacted in *The Revised Statutes of Canada*, 1886, under chapter 136, which was slightly amended, with respect to sec. 4, by 4 Ed. VII, ch. 27. The whole, as amended, is now re-enacted in ch. 142 of *The Revised Statutes of Canada*, 1906, which, at the present time constitutes the Act in force

The practice and procedure relating to petition of right in England are now regulated by 23-24 Vict., ch. 34. Section 18 thereof provides, however, that nothing contained in this Act shall prevent a suppliant from proceeding as before the passing of the same. The Act regulated the practice, but not the law; and therefore the jurisprudence established prior to the passing of the statute has not been interfered with by this new legislation. The Act but formulates a course of procedure which hitherto had been in vogue. It gave no new right.

For the origin of the remedy by petition of right, the liability of the Crown thereunder from the earliest times and a brief discussion of some of the leading cases on the subject *see* Introduction to this book, *ante* p. 70 *et seq.*—Under sections 19 and 20 of *The Exchequer Court Act* printed ante pp. 104 and 115 will be found jurisprudence bearing upon the subject of petition of right.

Short Title.

1. This Act may be cited as the Petition of Right Act. R. S., c. 136, s. 1.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*a*) 'Court' means the Exchequer Court of Canada;

(*b*) 'judge' means the judge of the said Court;

(*c*) 'relief' includes every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right or a return of lands or chattels, or payment of money, or damages, or otherwise. R. S., c. 136, s. 2; 50-51 V., c. 16, sch. A.

This word "relief" in the Canadian Act has been taken from the Imperial Statutes. See *ante* pp. 104 and 115 *et seq.*, under the annotations of sec. 19 of *The Exchequer Court Act* for an enumeration of the several classes of cases in which a petition of right will or will not lie.

The right of the subject to sue the Crown is technically dependent on the King's grace. The cause of action is stated in the Petition of Right which is left with or transmitted to, with the sum of $2.00, the Secretary of State who transmits it to the Attorney-General who, in turn, before making any recommendation thereon consults the Department that may be affected by the claim. If the opinion of the Attorney-General is favourable, the petition is submitted for Royal endorsement of the fiat "Let right be done." With the fiat so endorsed thereon the Petition is transmitted to the Exchequer Court where it is proceeded with in the ordinary course provided by the Rules of Practice in that behalf.

Form of Petition.

3. A petition of right may be addressed to His Majesty to the effect of the form A in the schedule to this Act. R. S., c. 136, s. 3.

It is customary in Canada to call the person presenting a petition of right the "suppliant," and the Crown the "respondent." A similar practice exists in England. See Clode on *petition of right*, page 1.

1. As the prayer of the petition is granted *ex debito justitiae*, it is called a petition of right. 8, *Campbell's R. C.* 271.

2. The petition of right must state the christian name and surname and usual place of abode of the suppliant and of his Attorney, if any. 8, *Campbell's Rg. Cases* 272.

3. *Petition of Right—Practice.*—A petition of right was addressed to the King "in his Court of Exchequer," and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the Barons of his Majesty's Exchequer." The King indorsed the petition, "Let right be done." *Held*, that this Court had no jurisdiction to adjudicate upon the matter.—*In re Pering*, 8 Eng. Rg. C. 268.

To be left for Governor's fiat.

4. The petition shall be left with the Secretary of State of Canada, for submission to the Governor General, so that he may consider it and, if he thinks fit, grant his fiat that right be done; and nothing shall be payable by the suppliant on leaving the petition. R. S., c. 136, s. 4; 4 E. VII., c. 27, s. 1.

The policy of the Government has always been opposed to radically abating the rigour of the ancient prerogatives of the Crown, and as it is the fundamental law of the constitution that the Crown would not be

amenable to the suit of an individual without its consent, hence the necessity of obtaining a fiat upon a petition of right before the subject can sue the Crown.

Since the Crown in this country, as pioneer of improvements, embarks upon undertakings which partake of a private nature, such as that of common carrier, the construction of railways, canals and other works of that nature, placing itself in a competitive position in relation with its subject, the exercise of its bounty in granting fiats should become more and more lenient. However, while the fiat is not as a rule granted as a matter of course, it can be said it is never refused in a reasonable case.

1. In re *Nathan* (L. R. 12 Q. B. D. 479) Bowen, L. J., said: "The "fiat of the Crown is granted as a matter, I will not say, of right, but "as a matter of invariable grace by the Crown, whenever there is a shadow "of a claim, nay, more, it is the constitutional duty of the Attorney-"General not to advise a refusal of the fiat, unless the claim is frivolous."

2. *Duty of King's advisers in respect of Petition of Right.—Semble* it is not competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right. *Ryves v. The Duke of Wellington*, 9 Beav. 579.

3. On the 2nd of May, 1901, in the course of a discussion arising in the Canadian Senate upon a bill to amend *The Exchequer Court Act*, the Honourable D. Mills, K.C., then Minister of Justice, speaking as to the propriety of granting or refusing the fiat on Petitions of Right, expressed the opinion that "in every case where a subject has a claim to property "or under contract against the Crown, it is the duty of the Crown to see "that that right is tried by a proper judicial tribunal." . . . . .
"That has been the opinion expressed by Sir Fitzroy Kelly, when he was "Attorney-General, and also by Lord Selborne, when he was Attorney-"General, and both these distinguished legal luminaries have held that "to be the right doctrine." (From the Senate Debates—No. 39—May 2nd, 1901).

4. At a later date speaking in the Canadian House of Commons upon the same subject, the Honourable A. B. Aylesworth, Minister of Justice, said: "I entertain very strong views upon that subject, and unless a "claim is manifestly frivolous and absurd, I would hold that the claimant "should be allowed to resort to the Courts. (Hansard, H. C., 20th February, 1907, p. 3482, Unrevised Edition).

97. *Constitutional law—Construction of statutes—"Crown Procedure Act" R. S. B. C. c. 57—Duty of responsible ministers of the Crown—Refusal to submit petition of right—Tort—Right of action—Damages—Pleading—Practice—Withdrawal of case from jury—New trial—Costs.*—Under the provisions of the "Crown Procedure Act," R. S. B. C. ch. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant-Governor within a reasonable time after presentation and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once and the fact that submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from (12 B. C. Rep. 476), which had affirmed the judgment at the trial withdrawing the case from the jury and dismissing the action and allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the courts and a new trial ordered.

Davies and Maclennan, J.J., dissented, and, taking the view that the refusal, though illegal, had not been made maliciously, considered that, on that issue, the plaintiff was entitled to nominal damages, that in other respects, the judgment appealed from should be affirmed and that there should be no costs allowed on the appeal to the Supreme Court of Canada. *Norton v. Fulton*, 39 S. C. R. 202.

When and how to be filed.

5. Upon the Governor General's fiat being obtained, the suppliant shall pay to the Secretary of State the sum of two dollars, the amount of the court fee on filing the petition, and thereupon the Secretary of State shall cause the petition and fiat to be filed in the Exchequer Court of Canada, which Court shall have exclusive original cognizance of such petitions, and thereafter a copy of the petition and fiat shall be left at the office of the Attorney General of Canada, with an endorsement thereon to the effect of the form B in the schedule to this Act. R. S., c. 136, s. 5; 4 E. VII., c. 27, s. 2.

See Rules of Court upon this subject, No. 67 *et seq.*

Time of filing statement of defence.

6. There shall be no preliminary inquisition finding the truth of the petition, or the right of the suppliant, but the statement in defence or demurrer, or both, shall be filed within four weeks after service of the petition, or such further time as is allowed by the Court. R. S., c. 136, s. 6; 50-51 V., c. 16, s. 57.

Service on other persons—No Scire Facias.

7. If the petition is presented for the recovery of any real or personal property, or any right in or to the same, which has been granted away or disposed of by or on behalf of His Majesty, or his predecessors, a copy of the petition and fiat, endorsed with a notice to the effect of the form C in the schedule to this Act, shall be served upon or left at the last or usual or last known place of abode of the person in the possession or occupation of such property or right.

2. It shall not be necessary to issue any *scire facias* or other process to such person for the purpose of requiring him to file his statement in defence, but, if he intends to contest the petition, he shall, within four weeks after such copy has been so served or left, or within such further time as is allowed by the Court, file his statement of defence or demurrer, or both. R. S., c. 136, s. 7; 50-51 V., c. 16, s. 57.

On the subject of joining persons other than the Crown as respondents to a petition of right, see *Kirk v. The Queen*, L. R. 14, Ex. 558.

What defence may be raised.

8. The statement of defence or demurrer may raise, besides any legal or equitable defences in fact or in law available under this Act, any legal or equitable defences which would have been available if the proceeding had been a suit or action in a competent court between subject and subject; and any grounds of defence which would be sufficient on behalf of His Majesty may be alleged on behalf of any such person as aforesaid. R. S., c. 136, s. 8.

The Crown can plead the statute of limitations under the above section, *McQueen v. The Queen*, 16 S. C. R. 4.

Judgment by default—May be set aside on terms.

9. In case of default, on behalf of His Majesty, or of such other person as aforesaid, to file a statement in defence or demurrer in due time, the suppliant may apply to the Court for an order that the petition may be taken as confessed; and the Court may, on being satisfied that there has been such failure, order that the petition be taken as confessed as against His Majesty, or such other person, and thereupon the suppliant may have judgment, but such judgment may afterwards be set aside by the Court, in its discretion, upon such terms as to the Court seems fit. R. S., c. 136, s. 11; 50-51 V., c. 16, s. 57.

See Rule of Practice No. 130 upon this subject.

Form of judgment.

10. The judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion of the relief sought by his petition, or to such other relief, and upon such terms and conditions, if any, as are just. R. S., c. 136, s. 12.

For forms of judgment see Schedule U to the Rules of Court printed in this volume.

Effect of judgment for suppliant.

11. In all cases in which the judgment commonly called a judgment of *amoveas manus*, was formerly given in England upon a petition of right, a judgment that the suppliant is entitled to relief, as herein provided, shall be of the same effect as such judgment of *amoveas manus*. R. S., c. 136, s. 13.

See Rules of Court respecting writs of possession

Costs may be awarded to suppliant—Recovery thereof.

12. Upon any such petition of right, the suppliant shall be entitled to costs against His Majesty, and also against any other person appearing or pleading, or answering to any such petition of right, in like manner and subject to the same rules, regulations and provisions, restrictions and discretion, so far as they are applicable, as are or may be usually adopted or in force in respect to the right to recover costs in proceedings between subject and subject.

2. For the recovery of any such costs from any such person other than His Majesty, appearing or pleading, or answering, in pursuance hereof, to any such petition of right, such and the same remedies and writs of execution as are authorized for enforcing payment of costs upon rules, orders, decrees or judgments, in personal actions between subject and subject, shall and may be prosecuted, sued out and executed on behalf of such suppliant. R. S., c. 136, s. 14.

Under sec. 79 of *The Exchequer Court Act* (ch. 140, R. S., 1906), all costs awarded to the Crown are payable to the Minister of Finance, and the costs awarded to any person against the Crown are payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada.

Judgment for relief or order for costs to suppliant to be certified to the Minister of Finance.

13. Whenever, on a petition of right, judgment is given that the suppliant is entitled to relief and there is no appeal, and whenever, upon appeal, judgment is affirmed or given that the suppliant is entitled to relief, and whenever any rule or order is made, entitling the suppliant to costs, the judge shall, upon application after the lapse of fourteen days from the making, giving or affirming of such judgment, rule or order, certify to the Minister of Finance the tenor and purport of the same, to the effect of the form D in the schedule to this Act.

2. Such certificate may be sent to, or left at the Department of Finance. R. S., c. 136, s. 15; 50-51 V., c. 16, s. 57.

See Rule of Court No. 215 and forms thereunder respecting this Certificate to the Minister of Finance.

SCHEDULE.

FORM A.

PETITION OF RIGHT.

In the Exchequer Court of Canada.

To the King's Most Excellent Majesty:

County (*or* district) of (*place proposed for trial*) to wit:

The humble petition of A.B....., of....., showeth that (*state with convenient certainty the facts on which petitioner relies as entitling him to relief*).

Conclusion.

Your suppliant therefore humbly prays that (*state the relief claimed*).

Dated the day of , A.D.

(Signed) A. B.

or C. D., Counsel for A. B.

For the sake of convenience to the practitioner, an extended form of a petition of right has been inserted here. It may be used *mutatis mutandis*.

Form of petition of right, viz.:—

IN THE EXCHEQUER COURT OF CANADA.

TO THE KING'S MOST EXCELLENT MAJESTY.

County (*or* district) of (*place proposed for trial*) to wit:

The humble petition of A, of.....Merchant, acting in his quality of tutor, duly appointed to B., of the same place, a minor of the age of nineteen years, etc.,

RESPECTFULLY SHOWETH:—

1. THAT on the 23rd day of January last, the suppliant was duly appointed tutor to B., of.....minor, etc.

2. THAT on the 30th day of December, 1906, the said B. sustained an injury to her person, while being a passenger, and travelling, upon the Intercolonial Railway of Canada, which is a public work within the meaning of *The Revised Statutes of Canada*, 1906, ch. 140, sec. 20, and which is owned and operated by the Government of the Dominion of Canada.

3. THAT the said injury to the said B. was caused by, and resulted from, the negligence of the officers, servants and employees of the Crown while acting within the scope of their duties and employment, in connection with the operation of the said Intercolonial Railway.

4. THAT on the said 30th day of December, the said B. was, as aforesaid, a passenger on the train operated as a part of the Railway System known as the Intercolonial Railway aforesaid, which said train was then proceeding on a trip or run from Halifax to Montreal.

5. THAT the said train, on the date aforesaid, while the said B. was a passenger lawfully in and upon the said train, became derailed and ran off the track, at a distance of about.....miles from.....Station, on the line of the said Railway, in the Province of.....with the result that the passenger cars of the said train were upset and overturned, and that the said B. was violently thrown about and crushed, thereby sustaining, among other injuries, a fractured arm and severe nervous and physical shock, all of which will severely impair her earning capacity for the rest of her natural life and oblige her and the suppliant, in his quality aforesaid, to expend a considerable sum of money for medical attendance, nursing and medicines.

6. THAT the train aforesaid became derailed and the said B. injured as aforesaid, owing to the fault and negligence of the Crown's officers, servants and employees acting as aforesaid, in that they, at all times, neglected and omitted to keep the track, at the place where the said train became derailed as aforesaid, in a fit and proper condition for the purpose of running the cars or trains over the same, and in that the Crown's said officers, servants and employees, who were in charge of the said train on the occasion aforesaid, were causing the said train to proceed, under the circumstances, at too great a rate of speed and without keeping a proper look-out to avoid the possibility of accident.

7. THAT the rails aforesaid, at the place where the said train became derailed on the occasion above mentioned, had been to the knowledge of the Crown's officers, servants and employees acting as aforesaid, in a defective and unsafe condition, and the ties and other appliances, as well as the roadbed itself, had also been in a notoriously defective condition for a long time previous to the 30th December last.

8. THAT the said B., by reason of the injuries received by her as aforesaid, has suffered loss and damage, which the suppliant, acting in his

quality aforesaid, estimates at the sum of three thousand dollars, made up of the amounts specified in the next following allegations.

9. THAT the suppliant, acting in his quality aforesaid, will necessarily be obliged to expend the sum of at least two hundred dollars for medical attendance, nursing and medicine, for the benefit of the said minor.

10. THAT the said B. is now nineteen years of age and was able, previous to her accident, to earn the sum of eight dollars a week, and she had actually been earning that amount for some time previous to the accident above referred to, consequently the suppliant estimates the future loss of earning capacity which the said B. will suffer for the rest of her life, at the sum of twenty-eight hundred dollars.

11. THEREFORE, your suppliant, acting in his quality aforesaid, humbly prays as follows:—

(a). That the Crown be condemned to pay him, the said suppliant, in his quality aforesaid, the said sum of three thousand dollars, with interest and costs.

(b). Such further and other relief as to this Honourable Court shall seem meet.

Dated at.....this.....day of.....190

(Signed) C. D.,
Of Counsel for Suppliant.

Endorsement required by section 5 of the Act, (usual endorsement).

FORM B.

The suppliant prays for a statement in defence on behalf of His Majesty, within four weeks after the date of service hereof, or otherwise that the petition may be taken as confessed.

Endorsement required by sec. 7 of the Act, where service of the petition is made on other persons than the Attorney-General.

FORM C.

To A. B.:

You are hereby required to file a statement in defence to the within petition in His Majesty's Exchequer Court of Canada, within four weeks after the date of service hereof.

Take notice, that if you fail to file a statement in defence or demurrer in due time, the said petition may, as against you, be ordered to be taken as confessed.

Dated the day of , A.D. .

FORM D.

To the Honourable the Minister of Finance and Receiver General:

Petition of right of A. B. in His Majesty's Exchequer Court of Canada, at

I hereby certify, that on the day of , A.D. , it was, by the said court adjudged (*or* ordered), that the above named suppliant was entitled to, etc.

(*Judge's signature*).

See also Rule No. 215, respecting Certificates of judgment for the Minister of Finance and Receiver General.

The Expropriation Act.

THE REVISED STATUTES OF CANADA, 1906.

CHAPTER 143

An Act respecting the Expropriation of Lands.

Short Title.

1. This Act may be cited as the Expropriation Act. 52 V., c. 13, s. 1.

INTERPRETATION.

Definitions—Minister—Department—Superintendent—Public Works—Conveyance—Land—Lease—Exchequer Court—Court—Registrar of deeds—Registry of deeds.

2. In this Act, unless the context otherwise requires,—

(*a*) 'minister' means the head of the department charged with the construction and maintenance of the public work;

(*b*) 'department' means the department of the Government of Canada charged with the construction and maintenance of the public work;

(*c*) 'superintendent' means the superintendent of the public works of which he has, under the minister, the charge and direction;

(*d*) 'public work' or 'public works' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the lighthouses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only;

(*e*) 'conveyance' includes a 'surrender' to the Crown; and any conveyance to His Majesty, or to the minister, or to any officer of the department, in trust for or to the use of His Majesty, shall be held to be a surrender;

(*f*) 'land' includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act;

(*g*) 'lease' includes any agreement for a lease;

(*h*) 'the Exchequer Court' or 'the Court' means the Exchequer Court of Canada;

(*i*) 'registrar of deeds' or 'registrar' includes the registrar of land titles, or other officer with whom the title to the land is registered;

(*j*) 'registry of deeds,' or other words descriptive of the office of the registrar of deeds, includes the land titles office, or other office in which the title to the land is registered. 50-51 V., c. 16, s. 1; 52 V., c. 13, s. 2; 57-58 V., c. 28, s. 144.

Power to Take Land, &c.

Power of the minister—Entering lands—Taking possession—Deposit and removal of materials—Temporary roads—Drains—Changing course of streams, etc.—Alteration of water pipes, etc.

3. The minister may by himself, his engineers, superintendents, agents, workmen and servants,—

(*a*) enter into and upon any land to whomsoever belonging, and survey and take levels of the same, and make such borings, or sink such trial pits as he deems necessary for any purpose relative to the public work;

(*b*) enter upon and take possession of any land, real property, streams, waters and watercourses, the appropriation of which is, in his judgment, necessary for the use, construction, maintenance or repair of the public work, or for obtaining better access thereto;

(*c*) enter with workmen, carts, carriages and horses upon any land, and deposit thereon soil, earth, gravel, trees, bushes, logs, poles, brushwood or other material found on the land required for the public work, or for the purpose of digging up, quarrying and carrying away earth, stones, gravel or other material, and cutting down and carrying away trees, bushes, logs, poles and brushwood therefrom, for the making, constructing, maintaining or repairing the public work;

(*d*) make and use all such temporary roads to and from such timber, stones, clay, gravel, sand or gravel pits as are required by him for the convenient passing to and from the works during their construction and repair;

(*e*) enter upon any land for the purpose of making proper drains to carry off the water from the public work, or for keeping such drains in repair;

(*f*) alter the course of any river, canal, brook, stream or watercourse, and divert or alter, as well temporarily as permanently, the course of any rivers, streams, railways, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper; but before discontinuing or altering any railway or public

road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land theretofore used for any railway or road, or the part of a railway or road so discontinued, may be transferred by the minister to, and shall thereafter become the property of, the owner of the land of which it originally formed part; and,

(g) divert or alter the position of any water-pipe, gas-pipe, sewer, drain, or any telegraph, telephone or electric light wire or pole. 52 V., c. 13, s. 3; 62-63 V., c. 39, s. 1.

Authority of officer of the Crown—Interference with water-pipes.—It was held, affirming the judgment of the Exchequer Court, that where by certain work done by the Government Railway authorities in the City of St. John the pipes for the water supply of the City were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the Chief Engineer of the Government Railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong & Gwynne, JJ., dissenting on the ground that the Chief Engineer had no authority to bind the Crown to pay the damages beyond any injury done. *The Queen v. The St. John Water Commissioners*, 19 S. C. R. 125.

Removal and replacement of fences, etc., adjoining any public work.

4. Whenever it is necessary, in the building, maintaining or repairing of the public work, to take down or remove any wall or fence of any owner or occupier of land or premises adjoining the public work, or to construct any back ditches or drains for carrying off water, such wall or fence shall be replaced as soon as the necessity which caused its taking down or removal has ceased; and after the same has been so replaced, or when such drain or back ditch is completed, the owner or occupier of such land or premises shall maintain such walls or fences, drains or back ditches, to the same extent as such owner or occupier might be by law required to do, if such walls or fences had never been so taken down or removed, or such drains or back ditches had always existed. 52 V., c. 13, s. 4.

Power to make sidings, etc., to land from which materials are taken—And for maintaining the public work.

5. Whenever any gravel, stone, earth, sand or water is taken as aforesaid, at a distance from the public work, the minister may lay down the necessary sidings, water pipes or conduits, or tracks over or through any land intervening between the public work and the land on which such material or water is found, whatever the distance is; and all the provisions of this Act, except such as relate to the filing of plans and descriptions, shall apply and may be used and exercised

to obtain the right of way from the public work to the land on which such materials are situate; and such right may be acquired for a term of years, or permanently, as the minister thinks proper.

2. The powers in this section contained may, at all times, be exercised and used in all respects, after the public work is constructed, for the purpose of repairing and maintaining the same. 52 V., c. 13, s. 5.

Railway siding—Damages.—The construction of a railway siding along the sidewalk contiguous to lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation. *The Queen v. Barry*, 2 Ex. C. R. 333.

When whole lot can be more advantageously purchased than a part.

6. Whenever for the purpose of procuring sufficient lands for railway stations or gravel pits, or for constructing, maintaining and using the public work, any land may be taken under the provisions of this Act, and by purchasing the whole of any lot or parcel of land, of which any part may be taken under the said provisions, the minister can obtain the same at a more reasonable price, or to greater advantage than by purchasing such part only as aforesaid, he may purchase, hold, use or enjoy the whole of such lot or parcel, and also the right of way thereto, if the same is separated from the public work, and may sell and convey the same, or any part thereof, from time to time, as he deems expedient; but the compulsory provisions of this Act shall not apply to the taking of any portion of such lot or parcel which is not, in the opinion of the minister, necessary for the purposes aforesaid. 52 V., c. 13, s. 6.

Who may be employed to make surveys of land —Boundaries—Effect of survey—Boundaries true and unalterable—Formalities not obligatory.

7. The minister may employ any person duly licensed or empowered to act as a surveyor for any province of Canada or any engineer, to make any survey, or establish any boundary and furnish the plans and descriptions of any property acquired or to be acquired by His Majesty for the public work.

2. The boundaries of such properties may be permanently established by means of proper stone or iron monuments planted by the engineer or surveyor so employed by the minister.

3. Such surveys, boundaries, plans and descriptions shall have the same effect to all intent and purposes as if the operations pertaining thereto or connected therewith had been performed and such boundaries had been established and such monuments planted by a land surveyor duly licensed and sworn in and for the province in which the property is situate.

4. Such boundaries shall be held to be true and unalterable boundaries of such property, if,—

(*a*) they are so established, and such monuments of iron or stone so planted, after due notice of the intention to establish and plant the same has been given in writing to the proprietors of the land thereby affected; and,

(*b*) a procès-verbal or written description of such boundaries is approved and signed in the presence of two witnesses by such engineer or surveyor on behalf of the minister and by the other person concerned; or, in case of the refusal of any proprietor to approve or to sign such procès-verbal or description, such refusal is recorded in such procès-verbal or description; and,

(*c*) such boundary marks or monuments are planted in the presence of at least one witness who shall sign the said procès-verbal or description.

5. It shall not be incumbent on the minister or those acting for him to have boundaries established with the formalities in this section mentioned, but the same may be resorted to whenever the minister deems it necessary. 52 V., c. 13, s. 7.

EXPROPRIATION.

Proceedings for taking possession of lands—Deposit of plans and description—If limited estate only is required—All provisions to this Act apply.

8. Land taken for the use of His Majesty shall be laid off by metes and bounds; and when no proper deed or conveyance thereof to His Majesty is made and executed by the person having the power to make such deed or conveyance, or, when a person interested in such land is incapable of making such deed or conveyance, or when, for any other reason, the minister deems it advisable so to do, a plan and description of such land signed by the minister, the deputy of the minister or the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed and sworn in and for the province in which the land is situate, shall be deposited of record in the office of the registrar of deeds for the county or registration division in which the land is situate and such land, by such deposit, shall thereupon become and remain vested in His Majesty.

2. When any land taken is required for a limited time only, or only a limited estate or interest therein is required, the plan and description so deposited may indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate or interest therein is taken, and by the deposit in such case, the right of possession for such limited time or such limited estate or interest, shall become and be vested in His Majesty.

3. All the provisions of this Act shall, so far as they are applicable, apply to the acquisition for public works of such right of possession and such limited estate or interest. 52 V., c. 13, s 8; 3 E. VII., c. 22, s. 1.

Sub-secs. 2 and 3 hereof were introduced for the first time only by 3 Ed. VII, sec. 1.

1. *Trespass—Action against Public Officers in their Official Capacity—Agent of Executive Government—Liability of Servants of the Crown—Prerogative—Jurisdiction—Amendment.*—Alleged authority of an executive Department is no justification for a trespass, but only those who commit or in fact authorize the trespass are liable.

The head of a Government Department is not liable for wrongful acts of officials in the Department, unless it can be shewn that the act complained of was substantially the act of the head of the Department himself.

The plaintiffs commenced an action against the Lords of the Admiralty, with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain lands, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass. *Held*, that though the plaintiffs could sue any of the defendants individually for trespasses committed or threatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie; leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land, was also refused, and the action was dismissed with costs. *Raleigh v Goschen*, 1 Ch. D. 73.

2. *Expropriation—Metes and bounds.*—Under 34 Vict. (P. E. I.) ch 4, the commissioners who had charge of the construction of the Prince Edward Island Railway, were, among other things, required to lay off by metes and bounds the lands expropriated for the railway purposes before recording a description of the same in the office of the Registrar of Deeds. Having failed to do so it was *held* that they had not complied with the statute and that the Crown had not acquired title to the land. *The Queen v. Sigsworth*, 2 Ex. C. R. 194.

3. *Possessory action—Expropriation—Procès-verbal—Prescription—Act.* 708, 749, 750, 902, 903, 913 *M. C. P. Q.*—A municipal corporation has no right to take possession of land to be used as a public highway, without having before expropriated the owner thereof in compliance with the requirements set out in the Municipal Code. 2nd. The owner of the land who has been expropriated without compliance with these requirements, may, without ever having caused to be annuled, within the thirty days, the procès-verbal establishing this road, exercise his remedy by a possessory action against the corporation and recover damages. *Walsh v. Corporation of Cascapedia*, Q. R. 7, Q. B. 290; see also *Bourget v. The Queen*, 2 Ex. C. R. 2; *Llewellyn v. Vale of Glamorgan Ry. Co.* (1898), 1 Q. B. D. 473.

Corrections.

9. In case of any omission, misstatement or erroneous description in such plan or description, a corrected plan and description may be deposited with like effect. 52 V., c. 13, s. 9.

Expropriation—Filing new plan—Information—Crown's right to discontinue—Costs—Fiat—Amendment.—Where issue has been joined and the trial fixed in an expropriation proceeding, the Crown may obtain an

order to discontinue upon payment of defendants' costs; but the court will not require the Crown to give an undertaking for a *fiat* to issue upon any petition of right which the defendant may subsequently present. The Crown, in expropriation proceedings, cannot file a new plan purporting to take less land than was sought to be taken by the plan originally filed in the Registry Office and then obtain an order to amend in conformity therewith. *The Queen v. Stewart*, 6 Ex. C. R. 215. It appears that this could now be done under sec. 23 of *The Expropriation Act*, ch. 143 R. S., 1906.

Plan of land in possession of H. M. may be deposited at any time.

10. A plan and description of any land at any time in the occupation or possession of His Majesty, and used for the purposes of any public work, may be deposited at any time, in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein. 52 V., c. 13, s. 10.

Deposit deemed to be by authority of minister.

11. In all cases, when any such plan and description, purporting to be signed by the deputy of the minister, or by the secretary of the department, or by the superintendent of the public work, or by an engineer of the department, or by a land surveyor duly licensed as aforesaid, is deposited of record as aforesaid, the same shall be deemed and taken to have been deposited by the direction and authority of the minister, and as indicating that in his judgment the land therein described is necessary for the purposes of the public work; and the said plan and description shall not be called in question except by the minister, or by some person acting for him or for the Crown. 52 V., c. 13, s. 11.

Certified copy to be evidence.

12. A copy of any such plan and description, certified by the registrar of deeds, to be a true copy thereof, shall, without proof of the official character or handwriting of such registrar, be deemed and taken as *primâ facie* evidence of the original, and of the depositing thereof. 52 V., c. 13, s. 12.

Notwithstanding death of registrar.

13. A copy of any such plan and description, certified by the registrar of deeds, as in the last preceding section mentioned, shall be *primâ facie* evidence of the original and of the depositing thereof, although such registrar at the time the same is so offered in evidence, is dead, or has resigned or has been removed from office. 52 V., c. 13, s. 13.

When provincial Crown lands are taken.

14. If the land taken is Crown land, under the control of the government of the province in which such land is situate, a plan of such land shall also be deposited in the Crown land department of the province. 52 V., c. 13, s. 14.

AGREEMENTS AND CONVEYANCES.

Contracts on behalf of persons legally incapable to contract.

15. Any tenant in tail or for life, *grevé de substitution*, seigneur, guardian, tutor, curator, executor, administrator, master or person, not only for and on behalf of himself, his heirs, successors and assigns, but also for and on behalf of those whom he represents, whether infants, issue unborn, lunatics, idiots, married women, or other persons, seized, possessed or interested in any land or other property, may contract and agree with the minister for the sale of the whole or any part thereof, and may convey the same to the Crown; and may also contract and agree with the minister as to the amount of compensation to be paid for any such land or property, or for damages occasioned thereto, by the construction of any public work, and give acquittance therefor. 52 V., c. 13, s. 15.

Assignment of rights in land expropriated previously acquired by lease, conveyance.—An agreement by a proprietor to sell land to the Crown, for a public work, followed by immediate possession and, within a year, by a deed of surrender, is sufficient under *The Expropriation Act*, s. 6 (R. S. C. c. 39) to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender. *The Queen v. McCurdy*, 2 Ex. C. R. 311.

Appointment by Exchequer Court of legal representative.

16. In any case in which there is no guardian or other person to represent any person under any disability, the Exchequer Court may, after due notice to the persons interested, appoint a guardian or person to represent for the purposes hereof such person so under such disability, with authority to give such acquittance. 52 V., c. 13, s. 16.

1. *Appointment of guardian.*—On an application to appoint a guardian under the provisions of sec. 16 of *The Expropriation Act*, it is necessary to show first whether any guardian has not already been appointed to the infant in question. *The Queen v. Wood*, January 23rd, 1893.

2. *Practice—Expropriation—Appointment of guardian—Secs.* 16 *and* 17 *of the Expropriation Act—Distribution of moneys—Infant—Interest Costs.*—Where in an expropriation matter, one of the parties was an infant and the compensation for the land taken had been agreed upon, an application was made to appoint a guardian to the infant under sec. 16 of *The Expropriation Act* and for the distribution of the compensation moneys under sec. 17 thereof. The parties entitled to the moneys were the mother of the infant, who had a life interest in the property with remainder in fee in the infant. On this application, the Court appointed a guardian to the infant and made a reference to the Registrar to ascertain the proportion of the compensation money to which the mother might be entitled by reason of her life interest in the lands and as to the share to which the infant was entitled. On the application to confirm the Registrar's report, *held*, confirming the same, that the moneys be distributed on a basis of five per cent.; that the compensation money bear interest at the rate of six per cent. from the date of taking possession up to date;

that the amount of the reversion coming to the infant, with interest at six per cent. from the taking possession up to date—less, however, the accrued interests which may be now paid to the guardian for the infant—remain in the hands of the Crown, bearing interest at four per cent. from this day, and which interest is to be paid yearly to the guardian of the infant, until he becomes of age, when the said moneys, in capital and interest, are to be paid to him. Costs refused to either party. (*Lalonde v Lalonde*, 11 Ont. P. R. 143; *Gaskill v. Gaskill*, 6 Sim. 643; *Basnel v. Moxon*, L. R. 20, Eq. 183 referred to. *In re W. A. McNairn.* March 11th, 1898.

Disposal of Compensation money.

17. The Court in making any order in the two sections last preceding mentioned shall give such directions as to the disposal, application or investment of such compensation money as it deems necessary to secure the interests of all persons interested therein. 52 V., c. 13, s. 17.

Tender—Reference—Compensation—Disposal.—Where in a case of expropriation all the claimants but one were of age and those of age had agreed to accept the amount of compensation tendered by the Crown, the court in view of such infancy of one of the claimants directed that there should be a reference to take evidence for the purpose of establishing whether the amount so tendered was a fair and reasonable compensation for the land taken, and further when the amount of compensation had been so ascertained the moneys coming to the said infant were ordered to remain in the hands of the Crown, and bear interest at the rate of four per cent. from the date of the judgment until the infant had become of age, when the said moneys were to be paid over to him. *Porter v. The Queen*, October 4th, 1889. The same principle was recognized in *The Queen v. Wood et al.*, March 13th, 1893.

Contracts under this Act valid.

18. Any contract or agreement made hereunder, and any conveyance or other instrument made or given in pursuance of such contract or agreement shall be good and valid to all intents and purposes whatsoever. 52 V., c. 13, s. 18.

Effect of contract made before deposit of plan.

19. Every such contract or agreement made before the deposit of plans and description, and before the setting out and ascertaining of the land required for the public work, shall be binding at the price agreed upon for the same land, if it is afterwards so set out and ascertained within one year from the date of the contract or agreement, and although such land has, in the meantime, become the property of a third person. 52 V., c. 13, s. 19.

Agreement to accept a certain sum as compensation—Specific performance.—A and B entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of $1,250. At the date of such agreement the centre line of the railway had been staked off through the property of A and B and they were fully aware of the location of the right of way and the quantity of land to be taken from

them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of R. S. C. c. 39. Upon A and B refusing to carry out this agreement on the ground that the damages were greater than they anticipated, and the matter being brought into court on the information of the Attorney-General, the court assessed the damages at the sum so agreed upon. *Quære*:—Is the Crown in such a case entitled to specific performance? *The Queen v. McKenzie*, 2 Ex. C. R. 198.

Registration not necessary.

20. No surrender, conveyance, agreement or award under this Act shall require registration or enrolment to preserve the rights of His Majesty under it, but the same may be registered in the registry of deeds for the place where the land lies, if the minister deems it advisable. 52 V., c. 13, s. 20.

WARRANT FOR POSSESSION.

Warrant for possession, how issued and executed—Return to be made to the Exchequer Court.

21. If any resistance or opposition is made by any person to the minister, or any person acting for him, entering upon and taking possession of any lands, the judge of the Exchequer Court, or any judge of any superior court may, on proof of the execution of a conveyance of such lands to His Majesty, or agreement therefor, or of the depositing in the office of the registrar of deeds of a plan and description thereof as aforesaid, and after notice to show cause given in such manner as he prescribes, issue his warrant to the sheriff of the district or county within which such lands are situate directing him to put down such resistance or opposition, and to put the minister, or some person acting for him in possession thereof.

2. The sheriff shall take with him sufficient assistance for such purpose, and shall put down such resistance and opposition, and shall put the minister, or such person acting for him, in possession thereof; and shall forthwith make return to the Exchequer Court of such warrant, and of the manner in which he executed the same. 52 V., c. 13, s. 21.

COMPENSATION.

Compensation money to stand in lieu of land.

22. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects His Majesty, be converted into a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact

of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty. 52 V., c. 13, s. 22.

1. *Injurious affection.*—For the measure of damages in cases where lands are not taken, but injuriously affected only, see *Barry v. The Queen*, 2 Ex. C. R. 333. *Buccleuch v. The Metropolitan Board of Works*, L. R. 5, H. L. 418 (1871). In re *Wadham*, L. R. 14 Q. B. D. 747 (1884); *Parkdale v. West*, 12 App. Cas. 616, (1887); *Powell v. Toronto H. & B. Ry. Co.*, 25 *Ont. A. R.* 209; *Bowen v. Canada Southern Ry. Co.*, 14 *Ont. A. R.* 1; *Beckett v. Mid land Ry. Co.*, (1867) *L.R.* 3 *C. P.* 82; *Caledonian R. W. Co., v. Walker's Trustees*, (1882) 7 *A. C.* 259; *North Shore Ry. Co. v. Pion*, (1889) 14 *A. C.* 612; *Brodeur v. Boxton Falls* (1882) 11 *R. L.* 447; *Hammersmith & City Ry. Co. v. Brand*, (1867) *L. R.* 4 *H. L.* 171.

2. *Railways—Lands injuriously Affected—Compensation—Operation of Railway—Interest.*—A claimant entitled under the Railway Act of Canada, 51 Vict. ch. 29, to compensation for injury to lands by reason of a railway, owing to alterations in the grades of streets and other structural alterations, is also, having regard to secs. 90, 92, and 144, entitled to an award of damages arising in respect of the operation of the railway, and to interest upon the amounts awarded, notwithstanding that no part of such lands has been taken for the railway. *Hammersmith, etc. R. W. Co. v. Brand*, L. R. 4 H. L. 171, distinguished. *Re Birely and Toronto, Hamilton, and Buffalo Railway Co.*, 28 Ont. R. 468.

3. *Land injuriously affected—Compensation.*—A railway company took, for the purpose of their undertaking, land which was subject to a covenant, entered into by their vendor, not to erect thereon "any building other than private dwelling-houses." The company erected a railway embankment on the land:—*Held*, that the erection of the embankment was a breach of the covenant. *Long Eaton Recreation Grounds Co. v. Midland Railway*, 1902, 2 K. B. Div. 574.

4. *Lands injuriously affected.*—Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under the *Government Railways Act*, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade. *The Queen v. Barry*, 2 Ex. C. R. 333.

5. *Similarity of English and Canadian laws in expropriation matters.*—In so far as "*The Government Railway Act*, 1881," re-enacts the provisions of the *Lands Clauses Consolidation Act* (8-9 Vict. (U.K.) ch. 18), and the *Railways Clauses Consolidation Act* (8-9 Vict. (U.K.) ch. 20), where the latter statutes have been authoritatively construed by a court of appeal in England, such construction should be adopted by the Courts in Canada. *Trimble v. Hill*, 5 App. Cas. 342; and *City Bank v. Barrow*, 5 App. Cas. 664, referred to. *Paradis v. The Queen*, 1 Ex. C. R. 191.

6. *Similarity of English and Canadian laws in expropriation matters.*—The words "injury done" in 31 Vict., ch. 12, sec. 40 is commensurate with, and has the same intendment as the words "injuriously affected" in 8-9 Vict., ch. 18, sec. 68 (Imperial Lands Clauses Consolidation Act), and in so far as the similarity extends, cases decided under the Imperial Act may be cited with authority in construing the Canadian statute. *McPherson v. The Queen*, 1 Ex. C. R. 53.

7. *Similarity of the laws of England and of the Province of Quebec in expropriation matters.*—Apart from any legislation of the Dominion Parliament, where lands have been expropriated for any purposes, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England. *Paradis v. The Queen*, 1 Ex. C. R. 191.

8. *Injury to trade and business.*—Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation, but where lands have been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works. *Jubb v. The Hull Dock Co.*, 9 Q. B. 443; and *Duke of Buccleuch v. The Metropolitan Board of Works*, L. R. 5 Ex. 221, and L. R. 5 H. L. 418, referred to. *Ibid.* See post No. 7.

9. *Municipal assessment roll.*—The valuation of a property appearing upon the municipal assessment roll does not constitute a test of the actual value upon which compensation should be based, where such valuation is made arbitrarily and without consideration of the trade carried on upon the property, or the profits derivable therefrom. *Ibid.*

10. *Loss of business.*—Claims in expropriation matters must be only for direct and consequent damages to the property and not to the person or to the business of the claimant. *McPherson v. The Queen*, 1 Ex. C. R. 53 (1882).

11. *Gravel pit.*—Where lands expropriated for the purpose of a railway gravel pit were assessed in respect of their agricultural value, it was held that such basis of valuation was erroneous and that the assessment should be made in respect of the value as a sand and gravel pit.—*Semble* further that when lands taken possess capabilities rendering them available for more than one purpose, compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value. *Burton v. The Queen* 1 Ex. C. R. 87.

12. *Expropriation—Public work—Damages—Reference back to Referees—Rules for adjudicating upon claim.*—Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, it appeared to the court expedient that the matter should be referred back to the referees to find, at the date of expropriation, the value of the wharf, land and premises taken by the Crown, excluding from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. Taking further into account the condition, situation, and prospects of the property taken, and the value the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects.

With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. *The King v. Shives*, 9 Ex. C. R. 200.

13. *Expropriation—Value.*—In respect to the lands taken the court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing v. The Metropolitan Board of Works* (L. R. 6 Q. B. 37), and *Paint v. The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) followed. *The Queen v. Harwood, et al.*, 6 Ex. C. R. 420.

14. *Expropriation—Compensation — Damages — Appeal—Finding of trial Judge.*—Where no question of law is involved and no question raised respecting the legal principles that must guide a trial Judge in arriving at the amount of the proper compensation for the land taken and damages resulting from an expropriation by the Crown, the appellate Court will not interfere with the judgment of the trial Judge. *The King v. Warburton, Cout. cases*, 307.

15. *Railway—Compensation—Damage from working of Railway—Damage from Construction.*—The defendants, a railway company, were authorized by their special Act (which incorporated the Lands Clauses and Railways Clauses Acts) to construct an underground railway. They accordingly constructed part of the railway in a tunnel, and having purchased a piece of ground at the back of a dwelling-house, carried the tunnel through such ground and made an aperture in the ground for the purpose of ventilating the tunnel. Some years afterwards the plaintiff became lessee of the house, and during his tenacy the defendants, with a view to the better ventilation of their line, enlarged the aperture, the effect of which was that the quantity of smoke, steam, and foul air coming from the railway to the plaintiff's house was much increased, and the house materially depreciated in value:—and the Court *Held*, that whether the alteration was made by the defendants in the exercise of their rights as owners of the land or under the powers conferred by s. 16 of the Railways Clauses Act, the plaintiff, according to the principle of *Hammersmith Ry. Co. v. Brand* (Law Rep. 4. H. L. 171), had no right to compensation, for the alteration would cause no damage to him if the line was not used, the damage arising, not from the construction, but from the working of the railway. *Attorney-General v. Metropolitan Railway Co.*, 1894, 1. Q. B. 384.

16. *Expropriation—Claim for damages for business—Claim for depreciation of value of machinery—Compensation.*—Where the whole property is taken and there is no severance the owner is entitled to compensation for the land and property taken, and for such damage as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.

Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants and sold for less than it was worth to them when used for such purposes. And it was *held*, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been in use. *The King v. Stairs*, 11 Ex. C. R. 137.

17. *Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.*—The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but as the license laws then stood, it could be renewed in favour of the then

owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the owner sold the property it was shown that the use to which he put it could not be continued, and it was *held*, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken. *The King v. Rogers et al*, 11 Ex. C. R. 132.

18. *Public work— Injurious affection of property—Deprivation of access—Street—Damages.*—By the construction of a public work, a public highway was closed up at a point two hundred and fifty feet distant from the suppliant 's property which fronted on the highway. In the first expropriation of land in the neighbourhood, for the public work, no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing of the street or highway should be taken into account as one of the elements of damage, and it was *held*, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway which was proximate and not remote. *Metropolitan Board of Works v. McCarthy* (L. R. 7 H. L. 243); *Caledonian Railway Co. v. Walker's Trustees* (7 App. Cas. 259); *Barry v. The Queen* (2 Ex. C. R. 333) referred to. *McQuade v. The King*, 7 Ex. C. R. 318.

19. *Expropriation of lands—Leasehold property—Tenants' improvements—Expense of removal to new premises—Compensation.*—The suppliant was tenant of certain buildings and wharves erected upon the lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk-dealer. The terms for which these leases were made had expired at the time of the expropriation of the said lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same conditions for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence showed that the lessor had no present intention of paying for the improvements and resuming possession of the property, and in addition to the value of his improvements, the suppliant was allowed compensation for the value, under all the circumstances, of his possession under the leases at the date of the expropriation. *McGoldrick v. The King*, 8 Ex. C. R. 169.

20. *Expropriation for railway purposes—Owner left possession of buildings on expropriated property—Use and occupation—Profits—Interest —Compensation.*—Where the Crown had expropriated certain real property for the purposes of a railway, but had for a number of years left the owner in the use and occupation of several buildings thereon, two of which, an hotel and a store, were burned uninsured before action brought, compensation was allowed him for the value, at the time of the expropriation, of all the buildings, together with interest on the value of the hotel and store from the time they were so destroyed. *The Queen v. Clarke*, 5 Ex. C. R. 64.

21. *Expropriation—Foundry—Depreciation in value of machinery and tools by reason of expropriation—Compensation.*—Where a building used as a foundry is expropriated for the purpose of a public work, the owner who is unable to find suitable premises elsewhere to carry on his business is entitled to compensation for the depreciation in value of the machinery, tools, and other personal property with which his foundry is fitted up. *The King v. Thompson*, 11 Ex. C. R. 16.

22. *Title to land—Estoppel—Compensation.*—The acceptance of a deed of compromise in respect to the tenure of real property, which included certain lands, estopped the appellant from any claim for compensation for the expropriation of lands forming part of the excluded area. *The Queen v. Sheets & Tait.—Cout. cases*, 158.

23. *Public work—Injurious affection where no property taken—Injury suffered in common with public—Deprivation of access—Compensation.*—An interference with the right of navigation in a harbour, which the owner of a wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situated resulting from the construction of a public work. But where the interference affects a private right of access which the owner has to and from the water of the harbour, or with the use of such water for the lading and unlading of vessels at his wharf, the claimant is entitled to compensation. *Magee v. The Queen*, 5 Ex. C. R. 391.

24. *Public work—Lands injuriously affected—Closing highway—Inconvenient substitute.—Injury common to public.*—The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated as it arises from the subsequent use of the work and not its construction and is an inconvenience common to the public generally.

The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment mere inconvenience to an individual or loss of trade or business is not the subject of compensation. *The King v. MacArthur*, 34 S. C. R. 570: 8 Ex. C. R. 245.

25. *Public work—Injurious affection of property arising from construction—Damage peculiar to property in question—Compensation.*—To entitle the owner of property alleged to be injuriously affected by the construction of a public work to compensation, it must appear that there is an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which other of Her Majesty's subjects are exposed. It is not enough that such interference is greater in degree only than that which is suffered in common with the public. *Robinson v. The Queen*, 4 Ex. C.R. 439, affirmed on appeal to the S. C., 25 S. C. R. 692.

26. *Compensation—Land—Use of it by owners.*—In assessing the compensation for lands taken the intention of the owners to use his land for a particular purpose ought to be taken into consideration, although he had done nothing towards carrying that intention into execution. *Bailey v. Isle of Thanet Light Railways Co.*, (1900) 2 Q. B. Div. 722.

27. *Expropriation of land for canal purposes—Damage to remaining lands—Access—Undertaking to give right of way—52 Vict. ch. 38, sec. 3—*

Effect of in estimating damages—Future damages—Agreements as to—Increased value by reason of public work.—Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purposes of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. ch. 38, sec. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence showed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the court assessed damages for past deprivation only.

It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the court took cognizance of such agreement in pronouncing judgment. *The Queen v. Harwood, et al.*, 6 Ex. C. R. 420.

28. *Expropriation—Temporary enhancement in value of lands—Compensation.*—The temporary enhancement in the value of lands by reason of their being adjacent to the site of a projected railway terminus which had been abandoned, was not taken into consideration by the court in assessing compensation under the 31st section of *The Exchequer Court Act* (prior to its amendment by 54-55 Vict., c. 26, s. 37) for the expropriation of such lands. *The Queen v. Murray et al*, 5 Ex. C. R. 69. See now sec. 50 of *The Exchequer Court Act*, (ch. 140 R. S., 1906.)

29. *Expropriation—Just indemnity—Country residence—Interference with award of arbitrators.*—Where part of a property occupied as a country residence is expropriated for railway purposes and its value as a country residence is thereby greatly diminished, the true test in estimating the indemnity to which the owner is entitled is, what was the commercial value of the property as an attractive country residence at the time of the expropriation, and what was the depreciation in that marketable value by reason of the expropriation of the strip of land by the railway company, and the intended working of its train service across it, and while the court has the right under the Dominion Railway Act, to reconsider the evidence of value and to vary the decision of the arbitrators or a majority of them, this power was intended only as a cheque upon possible fraud, accidental error, or gross incompetence, and should never be exercised unless in correction of an award which carries upon its face unmistakable evidence of serious injustice. *Canada Atlantic Ry. Co. v. Norris.* 2 Q. L. R. 222.

30. *Expropriation—Possession by officers of the Crown of lands not expropriated—Taking of highway—Rifle range—Damages.*—Defendants complained that possession of certain lands, not covered by the plan and description filed by the Crown in an expropriation proceeding, had been taken by the officers of the Crown, and claimed compensation therefor, and the Court held that the right to recover compensation must be limited to lands actually mentioned in the plan and description filed, and to the injurious affection of other lands held therewith.

The defendants' predecessor in title in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown

closed up the roadway and from the land taken from the defendants opened another in lieu thereof, and in respect of the taking of such roadway the defendants were not entitled to compensation.

Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for the damages arising from the use of such rifle range. *The King v. Harris et al*, 7 Ex. C. R. 277.

31. *Defence Acts—Lands taken Compulsorily—Compensation—Injurious Affection of adjoining Lands—Land taken for Fort—Ranges.*—Where lands are compulsorily taken under the Defence Acts for the erection of a fort, the owner is entitled to compensation for the injurious affection of his adjoining lands arising from the natural and ordinary use of the lands taken for the purpose of a fort and the firing of guns placed therein. *Reg. v. Abbott* (1897) 2, I. R. 362 and In re *Ned's Point Battery*, (1903) 2 I. R. 192, approved and followed—*Blundell v. The King*, 1905 1. K. B. 576.

32. *Expropriation—Actual value—Compulsory taking—Compensation.*—In expropriation cases where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per centum of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where the price allowed is liberal and generous, nothing should be added for the compulsory taking. *Symonds et al v. The King*, 8 Ex. C. R. 319.

33. *Expropriation—Public work—Compulsory taking—Value to be considered—Compensation.*—It is the value of the land at the time of the expropriation that the court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss.

Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis, *The King v. Sedger*, 7 Ex. C. R. 274.

34. *Prospective capabilities.*—In assessing compensation in respect of damage to property arising from the construction, or connected with the execution, of any public work under the provisions of 31 Vict. ch. 12, sec. 34, the prospective capabilities, of such property, must be taken into consideration, as they may form an important element in determining its real value. *Lefebvre v. The Queen*, 1 Ex. C. R. 121; *Secretary of State v. Charleworth*, (1900) A. C. 373.

35. *Loss of profits.*—In assessing damages for injury occasioned to a property by the construction of a railway, the loss of profits since the commencement of the injury, as well as the permanent decrease in the value of property, must be taken into consideration. *Pouliot v. The Queen*, 1 Ex. C. R. 313.

36. *Gravel pit.*—Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel. *Vezina v.* The Queen, 17 S. C. R. 1.

37. *Nature of title—Public harbours.*—S.'s title to a water-lot at Levis, in the harbour of Quebec, was based on a grant from the Lieutenant-Governor of Quebec prior to Confederation. The grant contained, *inter alia*, a provision that, upon giving the grantee twelve month's notice and paying him a reasonable sum as indemnity for improvements, the Crown might resume possession of the said water-lot for the purpose of public improve-

ment. *Held* that the property being situated in a public harbour, this power of resuming possession for the purpose of public improvement, would be exercisable by the Crown as represented by the Government of Canada. *Holman v. Green*, 6 S. C. R. 707 referred to. And further that inasmuch as the Crown had not exercised this power, but had proceeded under the expropriation clauses of *The Government Railways Act*, S. was entitled to recover the fair value of the lot at the date of expropriation. That value, however, should be determined with reference to the nature of the title. *Samson v. The Queen*, 2 Ex. C. R. 30.

38. *Expropriation, riparian rights, damages.*—A. and B. who were prosecuting a milling business on certain waters forming part of the Trent Valley Canal, asserted a claim against the Crown for a quantity of land taken for the improvement of the navigation of such waters, and also claimed a large sum for damages alleged to have been sustained by them (1) as riparian owners by reason of the taking of the land on both sides of a head-race preventing any future enlargement of the width of such head-race, and (2) from the fact that they would not be able in the future to use to the full extent all the power which the mill-pond contained because they could not cut race-ways from the pond into the river through the expropriated part. And it was held that while A. and B. were entitled to compensation for the quantity of land taken by the Crown they could not recover for any injury to the remaining land arising from the utilization of the waters of the stream for the purpose of improving navigation. *The Queen v. Fowlds*, 4 Ex. C. R. 1.

39. *Value of lands for building purposes.*—When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value. *Falconer v. The Queen*, 2 Ex. C. R. 82.

40. *Compensation, unfinished wharf—Builder's profit—Basis of value.*—Where a wharf in course of construction, and materials to be used in completing it, had been taken by the Crown, the court allowed the claimants a sum representing the value of the wharf as it stood, together with that of the materials; and to this amount added a reasonable sum for the superintendence of the work by the builder, who was one of the claimants, for the use of money advanced, and for the risks incurred by him during the construction thereof, in other words a sum to cover a fair profit to the builder on the work so far completed. *Samson v. The Queen*, 2 Ex. C. R. 94.

41. *Compensation money, transfer of land after expropriation.*—Under section 11 of *The Expropriation Act*. (R.S.C. ch. 39), the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim or encumbrance upon such land is converted into a claim of compensation, and such claim once created continues to exist as something distinct from the land, and is not affected by any subsequent transfer or surrender of such land. *Partridge v. The Great Western Railway Company*, 8 U. C. C. P. 97, and *Dixon v. Baltimore and Potomac Railroad Company*, 1 Mackey, 78, referred to. *The Queen v. McCurdy*, 2 Ex. C.R. 311.

42. *Damages from construction and user of public works.—Quære:*—Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of author-

ized works, and must not be extended to those resulting from the use of such works, is applicable to cases arising under *The Government Railways Act*, 1881? *Ibid.*

43. *Overhead crossing—Obstruction of access—Damages.*—In the construction of a Government railway, the Crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to M.'s property, which he had theretofore enjoyed; and the court *held* that M. was entitled to compensation under *The Government Railways Act* and *The Expropriation Act*. *Beckett v. The Midland Railway Company*, L.R. 3 C. P. 82 referred to. *The Queen v. Malcolm*, 2 Ex. C. R. 357.

44. *Expropriation—Description of premises.*—In an award for land expropriated for railway purposes where there is an adequate and sufficient description, with convenient certainty of the land intended to be valued, and of the land actually valued, such award cannot afterwards be set aside on the ground that there is a variation between the description of the land in the notice of expropriation and in the award. *Bigaouette v. The North Shore Railway Company*, 17 S. C. R. 363; 14 A. C. 612.

45. *Right of way over Crown property—Easement—Prescription C. S. U. C. c.* 88, 37, 40 *and* 44*—Possession—Predecessors in title.*—The provisions of chapter 88 of *The Consolidated Statutes of Upper Canada*, sections 37, 40 and 44, were in force at the time of Confederation and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.

Under such provisions, where in Ontario one enjoys an easement as against the Crown and over Crown property, within the limits of some town or township, or other parcel or tract of land duly surveyed, and laid out by proper authority, for a period of twenty years he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation.

To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. *McGee v. The King*, 7 Ex. C. R. 309.

46. *Expropriation—Crossing at embankment and cutting—Assessment once for all.*—In assessing compensation in expropriation cases, consideration should be given to the character of the embankment and cutting made for the building of the railway and to the nature of the ground on each side which would forbid the making of a reasonably practicable crossing, and also to the fact that the consequence of the severance would remain notwithstanding all that under the circumstances could be done towards making a crossing. Compensation for a severance should be given once for all. *Kearney v. The King, Cameron's S. C. Cases* 344.

47. *Injurious affection—Damages once for all.*—The damages resulting from the flooding of land should be assessed once for all. *Davidson v. The Queen*, 5 Ex. C. R. 51: See also *Browne and Allan, on the law of Compensation*, 130.

48. *Expropriation—Compensation varied on appeal—Court might give less than amount fixed by assessors.*—The appellate court being of opinion that the evidence at trial showed that the amount assessed by the Crown's valuators and tendered was a very generous compensation for the land

taken, varied the judgment appealed from and held that the increase by the judgment appealed from was not justified. The Court holding further that while a less sum than that fixed by the valuators should not be given in this case, that the same course would not necessarily be followed in future cases of the kind.—*Likely v. The King*, 32 S. C. R. 47.

49. *Expropriation of land—Prospective value for purposes other than present use—Assessed value.*—Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes, such prospective value was taken into consideration in assessing compensation.

In assessing compensation in this case the court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken. *The King v. The Turnbull Estate Co. et al.*, (8 Ex. C. R. 163), affirmed on appeal to the Supreme Court of Canada, 33 S. C. R. 677.

50. *Expropriation of land—Payment—Market value—Potential value—Evidence.*—D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000 which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed. And it was *held*, reversing the judgment of the Exchequer Court (10 Ex. C. R. 208), Girouard J. dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.

D. claimed the larger price as potential value of the land for orchard purposes to which he had intended to devote it; but as he had not proved the land to be fit for such purpose and the evidence tended to disprove it, compensation on that ground was refused, *Dodge v. The King*. 38 S. C. R. 149.

Abandonment of land not required—Written notice—Registration of abandonment—Land to revest subject to interest retained—Compensation in case of abandonment.

23. Whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing.

2. Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall revest in the person from whom it was taken or in those entitled to claim under him.

3. In the event of a limited estate or interest therein being retained by the Crown, the land shall so revest subject to the estate or interest so retained.

4. The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken. 3 E. VII., c. 22, ss. 2 and 3.

See *The Queen v. Stewart* 6 Ex. C. R. 215, *supra* under section 9 hereof and Annotations under *The Exchequer Court Act, Supra.*

See also Art. 407 of the Civil Code P. Q., and the annotations thereunder in the Edition by Mr. J. J. Beauchamp, K.C.

Payment when case does not exceed $100.

24. If the compensation money agreed for or adjudged does not exceed one hundred dollars, it may, in any province, be paid to the person who, under this Act, can lawfully convey the land or property or agree for the compensation to be made in the case, saving always the rights of any other person to such compensation money as against the person receiving the same. 52 V., c. 13, s. 23.

Particulars of estate or interest to be declared upon demand.

25. Every person who has any estate or interest in any land or property acquired or taken for, or injuriously affected by the construction of any public work, or who represents or is the husband of any such person, shall, upon demand made therefor by or on behalf of the minister, furnish to the minister a true statement showing the particulars of such estate and interest and of every charge, lien or encumbrance to which the same is subject, and of the claim made by such person in respect of such estate or interest. 52 V., c. 13, s. 24.

See notes to Rule 165.

1. *Particular interest—Compensation.*—The particular interest of each party should be found in an expropriation action, and a distinct compensation awarded in respect thereof. *North Staffordshire Ry. Co. v. Landor*, 2 Ex. 235. Hodges *On Railways*, 6th Edn. 175.

2. *Interest—Damages.*—Every person having any interest partial, or temporary, or permanent, or absolute, is entitled to damages proportioned to the injury to that interest. Sutherland *On damages*, vol. 3, p. 447. As to tenants in common and mortgagees, see Hodges *On Railways*, 6th Edn. page 185, and cases there cited.

3. *Expropriation—Will—Construction—Gift over in the event of death—Life estate—Interest on compensation money.*—A testatrix made the following disposition of a certain portion of her estate:—"I give, devise, and bequeath unto my niece M. W. of H., spinster, daughter of my eldest sister M., all that dwelling-house and lot of land now occupied by me (describing it) together with all and singular the appurtenances thereunto belonging, and all fixtures, furniture, bedding and clothing, and all sum and sums of money and other things that may be remaining and found in my said dwelling-house at the time of my decease, and all debts due me, save except as hereinafter mentioned, to have and to hold the said dwelling-house, lot of land and premises aforesaid unto her my said neice M. W., her heirs, executors, administrators and assigns, forever. But in case she

should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children being females." Following this there was a residuary gift or bequest to "the daughter of my sisters M. and H., and to the daughters or daughter of my late brother J., and to their children if any being daughters." And it was *held* that there was nothing in the will to indicate any intention on the part of the testatrix that the gift ever should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue; but on the contrary it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of the said M. W. without leaving lawful issue, the other nieces to whom she left the residue of her estate should take the property. *Cowen v. Allen* (25 S.C.R. 292); *Fraser v. Fraser* (26 S. C. R. 316); *Olivant v. Wright* (1 Chan. Div. 348) referred to.

The property in question had been expropriated by the Crown for the purpose of a public work, and it was *held* that the suppliant M. T., the devisee under the will, *sub nomine* M. W., was in any event entitled to a life interest in the compensation money, and that she might be paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. *Trail v. The Queen*, 7 Ex. C. R. 98.

4. *Expropriation—Lessor and lessee—Covenant to build on demised premises—Compensation.*—When a lessee is under covenant to build upon the demised premises, and a part of the said premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the court in fixing the amount of compensation to be paid to such lessee. *The King v. Young et al.* 7 Ex. C. R. 282.

5. *Lease.*—Compensation was allowed the lessee for cancellation of lease in expropriation of lands. *The King v. Young et al.* No. 307, Nov. 12th, 1888; *G. T. Boating Club v. Corporation of Verdun*, Q. R. 7 Q. B. 185; *The Queen v. Armour*, 31 S. C. R. 499.

6. *Lease—Expropriation of demised property—Lessees' loss of profits—Increased cost of carrying on business—Measure of damages.—Third-party.*—The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid two thousand five hundred dollars for the improvements thay had made, and it was *held* that the measure of compensation to be paid to the suppliants was the value at the time of the expropriation of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to show what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss and that the cost of carrying on their business had been increased.

The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them or to any person in a like position of their interest in the premises.

The suppliants also contended that if they had not been disturbed in their possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed. *Gibbon et al., v. The Queen and St. John Terminal Ry. Co.* 6 Ex. C. R. 430.

Information by Attorney-General, showing—Date of acquisition, etc.—Persons interested—Amount of tender—Other facts.

26. In any case in which land or property is acquired or taken for or injuriously affected by the construction of any public work, the Attorney-General of Canada may cause to be exhibited in the Exchequer Court an information in which shall be set forth,—

(*a*) the date at which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) the persons who, at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge, lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) the sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and,

(*d*) any other facts material to the consideration and determination of the questions involved in such proceedings. 52 V., c. 13, s. 25.

The following forms of Information and Statement in Defence in expropriation proceedings may be used, viz:—

INFORMATION.

In the Exchequer Court of Canada.

Between

The King, on the Information of the Attorney-General of Canada,

Plaintiff;

And

A. B.

Defendant.

Filed on the day of 19 .

To the Honourable the Judge of the Exchequer Court of Canada,—

The Information of the Honourable , His Majesty's Attorney-General of Canada on behalf of His Majesty,

Sheweth as follows:—

1. The lands hereinafter described were taken under the provisions and authority of section 3 of *The Expropriation Act*, ch. 143 of *The Revised Statutes of Canada*, 1906, by His Majesty the King, for the purposes of a public work of Canada, to wit: (a Drill Hall, *as the case may be*) by depositing of record under the provisions of sec. 8 thereof, a plan and description of such land, in the office of the registrar of deeds for the county or registration Division of....., in the Province of....., in which County or Registration Division said lands are situate, whereby the said lands have become and now remain vested in His Majesty the King. (*Such other allegation, as may be deemed necessary, under the circumstances of the case, may be stated here.*)

2. The said lands and real property are described as follows.— (*Here insert description of land.*)

3. The defendant claims to have been the owner in fee simple of the lands and real property subject, however, to a mortgage made on the 27th day of October, 1885, by C. D. and wife, the predecessors in title of the said defendant to E. F. and G. H., trustees of I. F., to secure the sum of $600 at the time of filing the said plan and description, and the said defendant claims that he has sustained loss and damage in respect of his estate and title in the said lands and real property by reason of the said entry and taking of said lands and real property and by reason of the erection thereon of the Drill Hall, (*as the case may be*), above mentioned, and by reason of other lands of the said defendant being injuriously affected by said expropriation.

4. His Majesty the King is willing to pay to the defendant the sum of $1,800.00 in full satisfaction of his estate, right, title and interest, free from encumbrance on the said land and real property and in full satisfaction and discharge of all claims of the defendant in respect of damages or loss, if any, that may be occasioned to him by reason of the said expropriation and the location and erection of said Drill Hall, (*as the case may be*), on said lands and real property and by reason of other lands of said defendant being injuriously affected by said expropriation.

5. His Majesty the King is not aware of any other facts material to the consideration and determination of the question involved in the matter aforesaid.

6. The Attorney-General on behalf of His Majesty claims as follows:—

(*a*). That it may be declared that the above described lands and real property are vested in His Majesty The King.

(*b*). That it may be declared that the said sum of $1,800.00 is sufficient and just compensation to the defendant for and in respect of the above described lands and real estate so taken as aforesaid, and for the said claim for alleged loss and damage mentioned in the third paragraph of this information.

(*c*). That it may be declared that the amount due on the mortgage mentioned in the third paragraph of this information be paid out of the compensation awarded herein to the defendant.

(*d*). Such further and other relief as to this Honourable Court shall seem meet.

(Sgd.)

Y. Z.

Attorney-General of Canada.

L. M.

Solicitor for the Attorney-General of Canada.

(*Address*)

NOTE.—This Information is filed by , His Majesty's Attorney-General on behalf of His Majesty.

Statement in defence.

Heading as above.

The defendant in answer to the information by the Honourable Attorney-General of Canada filed herein, says as follows:—

1. He admits the statements in paragraphs 1, 2, 3, and 5.

2. He says that the mortgage in part set out in paragraph 3 is over due and under the control of the defendant.

3. The defendant says that he has for a long time owned and possessed the lands described in the information and that they were valuable tenement properties, and the said defendant obtained every year a large sum as rentals for said premises, and by reason of the said expropriation and ouster the said defendant lost a valuable source of income and the defendant charges and claims that the said tender is wholly and grossly insufficient and inadequate and that by reason of the said expropriation and ouster he has sustained damage to the amount of $2,500.00.

4. The defendant therefore claims that it may be declared that the said tender of $1,800 is not sufficient and just compensation to the defendant for and in respect of the land, etc., expropriated, and for his loss and damage consequent therefrom, and that it may be adjudged and declared that the defendant is entitled to the sum of $2,500 therefor, together with interest and his costs.

Dated at 19 .

C. D.
Solicitor for defendant.

To the Honourable
The Attorney-General of Canada.
and to E. F., Esq., his Solicitor

Information beginning of action—Service.

27. Such information shall be deemed and taken to be the institution of a suit against the persons named therein, and shall conclude with a claim for such a judgment or declaration as, in the opinion of the Attorney-General, the facts warrant.

2. The information shall be served in like manner as other informations, and all proceedings in respect thereof or subsequent thereto shall be regulated by and shall conform as nearly as may be to the procedure in other cases instituted by information in the Court. 52 V., c. 13, s. 26.

See under preceding section for form of Information.

Defences thereto.

28. Any person who is mentioned in any such information, or who afterwards is made or becomes a party thereto, may, by his answer, exception or defence, raise any question of fact or law incident to the determination of his rights to such compensation money or any part thereof, or in respect of the sufficiency of such compensation money. 52 V., c. 13, s. 27.

See under section 26 hereof for form of statement in defence.

Proceedings a bar to all claims for compensation money.

29. Such proceedings shall, so far as the parties thereto are concerned, bar all claims to the compensation money or any part thereof, including any claim in respect of dower, or of dower not yet open, as well as in respect of all mortgages, hypothecs or encumbrances upon the land or property; and the Court shall make such order for the distribution, payment or investment of the compensation money and for the securing

of the rights of all persons interested, as to right and justice, and according to the provisions of this Act, and to law appertain. 52 V., c.13, s. 28.

In an action for expropriation under 52 Vict. ch. 13, the Crown must first prove the expropriation by filing the plan and description of the lands and file also its tender, if any, and it is for the Defendant to open on the question of value of the lands taken and damages to the same. *The Queen v. Armour.* June 21st, 1898.

See now Rule 168.

Alterations in or additions to works may be ordered.

30. If the injury to any land or property alleged to be injuriously affected by the construction of any public work may be removed wholly or in part by any alteration in, or addition to, any such public work, or by the construction of any additional work, or by the abandonment of any portion of the land taken from the claimant, or by the grant to him of any land or easement, and if the Crown, by its pleadings, or on the trial, or before judgment, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken, or to grant such land or easement, the damages shall be assessed in view of such undertaking, and the Court shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or portion of land abandoned, or such grant made to him. 3 E. VII., c. 22, s. 4.

This section formerly formed part of *The Exchequer Court Act* and was first introduced by 52 Vict. ch. 38.

The alterations or additions above mentioned should be made, if possible, by the pleadings; as if they are made after the issues are joined or at the trial they necessarily, in a number of cases, involve a deal of costs and sometimes a costly adjournment.

See Rule 165.

INTEREST.

Rate of interest five per centum from date of tender—Interest may be refused or diminished in certain cases—If expropriation is prior to July 7th, 1900.

31. Interest at the rate of five per centum per annum may be allowed on such compensation money from the time when the land or property was acquired, taken or injuriously affected to the date when judgment is given; but no person to whom has been tendered a sum equal to or greater than the amount to which the Court finds him entitled shall be allowed any interest on such compensation money for any time subsequent to the date of such tender.

2. If the Court is of opinion that the delay in the final determination of any such matter is attributable in whole or in part to any person entitled to such compensation money or any part thereof, or that such person has not, upon demand made therefor, furnished to the minister within a reasonable time a true statement of the particulars of his claim required

to be furnished as hereinbefore provided, the Court may, for the whole or any portion of the time for which he would otherwise be entitled to interest, refuse to allow him interest, or it may allow the same at such rate less than five per centum per annum as to the Court appears just.

3. This section shall not apply to any case where the land was expropriated or injuriously affected prior to the seventh day of July, one thousand nine hundred. 63-64 V., c. 22, ss. 1, 2 and 3.

The rate of interest has been changed from six to five by 63-64 Vict. ch. 22. That act came into force on the 7th of July, 1900.

It will be noted that, under the provisions of the above section, the Court is only empowered to allow interest to the date when judgment is given. However, under sec. 53 of *The Exchequer Court Act* (R. S., 1906, ch. 140.) the Minister of Finance may allow and pay interest, to any person entitled by the judgment of the court to any moneys or costs, at the rate of 4% from the date of such judgment until payment. See notes under said section, *supra* p. 216.

Compensation—Interest.—Where the Crown has gone into possession of lands sought to be expropriated for the purposes of a public work, interest upon the sum awarded as their value may be computed from the date of entering into possession, notwithstanding the fact that the Crown may not have acquired a good title to the lands until a date subsequent to that of such entry into possession. *The Queen v. Murray et al.* 5 Ex. C. R. 69.

2. *Expropriation—Compensation—Interest—When it begins to run.*—Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date. *Drury v. The Queen*, 6 Ex. C. R. 204.

Costs.

As to costs.

32. The costs of and incident to any proceedings hereunder shall be in the discretion of the Exchequer Court, which may direct that the whole or any part thereof shall be paid by the Crown or by any party to such proceeding. 52 V., c. 13, s. 31.

1. *Expropriation — Tender — Sufficiency of — Costs— Mortgages.*—Where the amount of compensation tendered by the Crown in an expropriation proceeding was found by the Court to be sufficient, and there was no dispute about the amount of interest to which the defendant was entitled, but the same was not tendered by the Crown although allowed by the court, costs were refused to either party.

Where mortgagees were made parties to an expropriation proceeding and they had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs. *The Queen v. Wallace.* 6 Ex. C. R. 264.

2. *Adequate tender—Cost.*—Where a tender was adequate though not liberal, no cost was allowed after the time the money was first paid into Court. *The Lotus*, 7 P. D. 199.

3 Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs, although the amount awarded exceeded somewhat the tender. *McLeod v. The Queen*, 2 Ex. C. R. 106.

PAYMENT OF COMPENSATION OR COSTS

Payment of compensation and costs.

33. The Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any sum to which, under the judgment of the Exchequer Court, in virtue of the provisions of this Act, he is entitled as compensation money or costs. 52 V., c. 13, s. 32.

Same provision made with respect to moneys or costs awarded to any person against the Crown, under sec. 79 of *The Exchequer Court Act*, (R. S., 1906, ch. 140). This entitles a person in whose favour judgment has been pronounced to recover forthwith the amount thereof without having to wait for a vote by Parliament.

LANDS VESTED IN HIS MAJESTY.

Lands acquired vested in His Majesty—Hydraulic powers—Shores and beds of public harbours may be sold or leased—Private rights saved—Proceeds of sale or lease.

34. All lands, streams, watercourses and property acquired for any public work shall be vested in His Majesty and, when not required for the public work, may be sold or disposed of under the authority of the Governor in Council.

2. All hydraulic powers created by the construction of any public work, or the expenditure of public money thereon, shall be vested in His Majesty, and any portion thereof not required for the public work may be sold or leased under the authority aforesaid.

3. Any portion of the shore or bed of any public harbour vested in His Majesty, as represented by the Government of Canada, not required for public purposes, may, on the joint recommendation of the Ministers of Public Works and of Marine and Fisheries, be sold or leased under the authority aforesaid.

4. No such sale or lease shall prejudice or affect any right or privilege of any riparian owner.

5. The proceeds of all such sales and leases shall be accounted for as public money. 52 V., c. 13, s. 33.

Water or bed of streams.—The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof. *The Queen v. Fowlds*, 4 Ex. C. R. 1.

WORKS INTERFERING WITH NAVIGATION.

Interference with navigation—Certain works are lawful works.

35. Whenever in any Act of the Parliament of Canada authority is given by the appropriation of public money or otherwise to construct any bridge, wharf or other public work in any navigable water, such authority includes authority to interfere with the navigation of such water in such manner

and to such extent as shall be approved by the Governor in Council, subject always to any provisions of any such Act for limiting such interference.

2. Every bridge, wharf or other public work heretofore constructed with the public money of Canada in or over navigable water, shall be and be deemed to be a lawful work or structure. 52 V., c. 13, s. 34.

1. *Interference with navigation—Dominion and Provincial rights.*—Whenever by an Act of a Provincial Legislature passed before the Union authority is given to the Crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General and not by the Lieutenant-Governor of the Province. *The Queen v. Fisher*, 2 Ex. C. R. 365.

2. *Grant from the Crown—Dominion and Provincial rights.*—A grant from the Crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament. The Provincial Legislatures, since the union of the provinces, cannot authorize such an interference. *Ibid.*

3. *Riparian rights—Obstructions to 'accès et sortie'—Right of action.*—A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie* and such obstruction without parliamentary authority is an actionable wrong. *Pion v. North Shore Railway Co.*, 14 App. Cas. 612, followed. *Bigaouette v. The North Shore Railway Co.*, 17 S. C. R. 363 and *The Queen v. Malcolm*, 2 Ex. C. R. 357: *Thompson v. Hurdman*, Q. R. 4 Q. B. 409.

4. *Navigation—Trent canal crossing—Swing bridge—Cost of construction—Maintenance—Order in council.*—The C. P. Ry. Co., applied for liberty to build a bridge over the Otonabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order in council was passed providing that "The company . . . shall "construct either a swing in the bridge now in question . . the cost "to be borne by themselves or else a new swing bridge over the contem-"plated canal (Trent Valley Canal) in which case the expense incurred "over and above the cost of the swing itself and the necessary pivot pier "therefor shall be borne by the Government." A new swing bridge was constructed over the canal by agreements with the company, and it was *held*, that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the Company. *The Canadian Pacific Railway Co. v. The King*, 38 S. C. R. 211: 10 Ex. C. R. 317.

5. *Navigable waters—Title to soil in bed of—Crown—Dedication of public lands by—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.*—The title to the soil in the beds of navigable rivers is in the Crown in right of the Provinces, not in right of the Dominion. *Dixson v. Snetsinger*, (23 U. C. C. P. 235) discussed.

The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.

By 23 V. c. 2 s. 35 (P.C.) power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.

If a Province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefits to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. *The Queen v. Moss*, 26 S. C. R. 322.

6. *Rivers—Navigable and floatable—Public Domain—Mis en cause—Art.* 400 C. C.—The principles of the old French law obtain in the settlement of the question as to whether rivers are floatable or navigable in the Provice of Quebec, and navigable and floatable rivers of that Province form part of the public domain of the Province of Quebec and cannot be sold without express concession from the Crown. On the other hand unnavigable and not floatable rivers belong to the adjoining proprietor, unless there be a reserve to the contrary. A river may be declared partly navigable and partly floatable *Regina v. Fraser*, Q. R. 25 S. C. 104.—Affirmed by Supreme Court of Canada 37 S. C. R. 577, and petition for leave to appeal to Privy Council withdrawn, 38 S.C.R IX.

7. *Trespass—Interference with submarine cable—Notice—Damages.*—By the regulation passed by the Quebec Harbour Commissioners in 1895 and subsequently approved by the Governor in Council and duly published, the Commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published, the Commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour where vessels had been so prohibited from casting anchor. No marks or signs had been placed in the harbour to indicate where the cable was laid. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the prohibited space, and cast anchor. Her anchor caught in the cable, and in the effort to disengage it the cable was broken. And the court *held* that she was liable in damages therefor. *The Bell Telephone Co. v. The Brigantine "Rapid,"* 5 Ex. C. R. 413.

See also Annotation, *supra*, under *The Exchequer Court Act.*

The Patent Act.

PART OF CHAPTER 69 OF THE REVISED STATUTES OF CANADA, 1906.

By section 45, ch. 69, of *The Revised Statutes of Canada*, 1906, the Exchequer Court is given original jurisdiction for the forfeiture of patents of invention in cases (1) of failure by the patentee to construct or manufacture the invention patented within two years from the date thereof; (2) and when the patentee, after the expiration of twelve months from the date of the patent, imports or causes to be imported into Canada the invention for which the patent is granted. The whole, however, subject to the provisions of sections 38, 39, 40, 41, 42 and 43 hereof.

By section 35 of the same Act the court is further given concurrent original jurisdiction with the provincial courts in proceedings for the impeachment of patents.

An Act respecting Patents of Invention.

Short Title.

1. This Act may be cited as the Patent Act. R.S., c. 61, s. 1.

INTERPRETATION.

Definitions—Minister—Commissioner—Invention—Legal representatives.

2. In this Act, unless the context otherwise requires,—

(*a*) 'Minister' means the Minister of Agriculture;

(*b*) 'Commissioner' means the Commissioner of Patents, and 'Deputy Commissioner' means the Deputy Commissioner of Patents;

(*c*) 'invention' means any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter;

(*d*) 'legal representatives' includes heirs, executors, administrators and assigns or other legal representatives. R.S., c. 61, s. 2.

By the 46th section of the Patent Act, 1883 (Imp.) the word 'Invention' is defined as follows:—"Invention means any manner of new "manufacture the subject of letters patent and grant of privilege within "sec. 6 of the Statute of Monopolies (21 Jacques I, ch. 3) and includes "an alleged invention."

PATENT OFFICE AND APPOINTMENT OF OFFICERS.

Patent office constituted.

3. There shall be attached to the Department of Agriculture, as a branch thereof, an office which shall be called the Patent Office; and the Minister of Agriculture for the time being shall be the Commissioner of Patents. R.S., c. 61, s. 3.

Duties of commissioner.

4. The Commissioner shall receive all applications, fees, papers, documents and models for patents, and shall perform and do all acts and things requisite for the granting and issuing of patents of invention; and he shall have the charge and custody of the books, records, papers, models, machines and other things belonging to the Patent Office. R.S., c. 61, s. 4.

Deputy and officers—Powers and Duties of Deputy.

5. The Deputy Minister of Agriculture shall be the Deputy Commissioner, and the Governor in Council may, from time to time, appoint such officers and clerks under the Deputy Commissioner as are necessary for the purposes of this Act, and such officers and clerks shall hold office during pleasure.

2. The Deputy Commissioner may do any act or thing, whether judicial or ministerial, which the Commissioner of Patents is authorized or empowered to do by any provision of this Act; and, in the absence of the Deputy Commissioner, any person performing the duties of the Deputy Minister of Agriculture under the authority of the Civil Service Act may, as acting deputy commissioner, do any such act or thing. 60-61 V., c. 25, s. 1; 3 E. VII., c. 46, s. 1.

Extension of time—Manufacture—Acting Deputy Commissioner—Quære.—Can the power of extension of time for the construction or manufacture of the patented article be exercised by an Acting Deputy Commissioner. *Power v. Griffin*, 33 S. C. R. 39.

Since the above decision in 1902 the Act has been amended giving the Acting Deputy Commissioner that power, removing thus any doubt upon this point.

Seal.

6. The Commissioner shall cause a seal to be made for the purposes of this Act, and may cause to be sealed therewith every patent and other instrument and copy thereof issuing from the Patent Office. R.S., c. 61, s. 6.

APPLICATIONS FOR PATENTS.

Who may obtain patents—What may be patented.

7. Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exculsive property in such invention

2. No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem. R.S., c. 61, s. 7.

The subject matter of a patent of invention must be new, useful and involve ingenuity of invention.

1. *Patent for invention—Infringement—Pioneer discovery—Evidence.*—Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed. *American Dunlop Tire Co. v. Goold Bicycle Co., et al.*, 6 Ex. C. R. 223. See also *Patric v. Sylvester*, 23 Gr. 573.

2. *Patent for invention—Wing Snow-plough—Experimental public use—Limited interest of public invention—Defeat of Patent.*—The use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary, and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise the use in public of the device or invention for a time longer than the statute prescribes will be a dedication of it to the public; and when that happens the inventor cannot recall the gift. *Conway v. Ottawa Electric Ry. Co.*, 8 Ex. C. R. 432. See also *Summers v. Abell*, 15 Gr. 532; *Bonathan v. Bowmanville Furniture Mfg. Co.*, 31 U. C. Q. B. 413.

3. *Patent of invention—Cleansing pickled eggs—Claim—Patentability—Subject-matter.*—The application of well known things to a new analogous use is not properly the subject of a patent.

The defendants employed a solution of hydro-chloric acid to remove from pickled eggs the deposit of carbonate of lime that forms upon them while being preserved in a pickle of lime-water. From the known properties of the acid and its use for analogous purposes it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, and the defendants were the first to use the process and to discover that it could be practised safely and with advantage in the business of preserving and marketing eggs; but there was nothing in the mode of employing such solution demanding the exercise of the inventive faculties. And it was *held* that there was no invention, and that a patent for the process could not be sustained. *Meldrum v. Wilson et al.* 7 Ex. C. R. 198. Affirmed on appeal to the Supreme Court of Canada.

4. *Patent for invention—Railroad tie plates—Novelty—Patentability—Defence not raised in pleadings—Amendment—Costs.*—S., the plaintiffs' predecessor in title, obtained Canadian letters patent No. 20,566 for certain improvements on wear plates for railroad ties which, according to the specification of the patent, consist in a flat, or comparatively flat body, portion provided at its opposite sides with depending flat-edge flanges adapted to enter the wooden body of the cross ties without injuring the same, which flanges are relatively parallel and lie in planes approximately at right angles to that of the said body portion. The inventor claimed (1) a wear plate for railroad ties consisting of a body having projecting flanges at its side edges; and (2) the combination with a railroad rail and supporting cross-tie of a wear plate consisting of a body having projecting side flanges; said plate being interposed between

the rail and tie with its flanges entered into the tie longitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or depending flanges at the edges of the plate adapted to enter the wooden body of the cross ties without injuring the same. S. had also obtained an earlier patent, in 1882, which only differed from the one above set out in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S.'s alleged improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would give greater durability to the rail. It was also a matter of general knowledge that reduction of the weight of the plate without loss of strength could be effected by using channel iron or angle iron, or by having the plate made with flanges or ribs. It was equally a matter of common knowledge that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place. And it was *held* that there was no invention in either of the improvements for which S.'s patents were granted. *Servis Railroad Tie Plate Co., v. Hamilton Steel and Iron Co.*, 8 Ex. C. R. 381.

5. *Patent of Invention—New application of old mechanical device.*—The application to a new purpose of an old mechanical device is patentable when the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. The application to an oil pump of the principle of "rolling contact" was held patentable. *Bicknell v. Peterson*, 24 Ont. A. R. 427.

6. *Patent for invention—Prisms for deflecting light—Anticipation—Novelty.*—A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.

Semble, that if the former patents were to be broadly constructed as for a device for deflecting the course of light passing through glass it would fail for want of novelty. *Luxfer Prism Co. v. Webster et al*, 8 Ex. C. R. 59.

7. *Prior user abandoned.*—Prior use which is afterwards discontinued is presumed experimental only. *Household v. Neilson* (1843), 1 W. P. C. 713.

8. *Patent of invention—Illuminant device—Infringement—Process—Reissue—Equivalents—Manufacture—Importation—Price.*—An inventor, in the specification to his first Canadian patent, after disclaiming all other illuminant appliances, for burners, claimed: "An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as herein described." In the specification the substances and the proportions in which they might be combined were stated. Eight years afterwards the owner of the original patent surrendered the same and obtained a reissue, the specification whereof differed from that of the original only in respect of the claim, which was as follows:—"The method herein described of making incandescent devices, which consists in impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when

oxidized for an incandescent, and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed." And the Court *held* that although in the claim of the reissue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths "occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification, or to their equivalents.

That the reissue was for the same invention as that which was the subject of the earlier patent.

The reissue being for the same invention as the original patent, delay in making the application for the reissue did not invalidate the same.

That the Act 55-56 Vict. c. 77, passed for the relief of Von Welsbach and Williams, the original patentees, was effective although at the time it was passed others than they were interested in the patent.

To give the Commissioner jurisdiction to authorize the reissue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in sec. 23 of *The Patent Act*. It is sufficient to support his jurisdiction that he deems the patent defective or inoperative for any such reasons, and his decision as to that is final and conclusive.

That it was open to the owners of the patent to import the impregnating fluid or solution mentioned in the specification of their patent, without violating the provisions of the law as to manufacture.

That although the plaintiffs had at the outset put an unreasonable price upon their invention, yet as it was not shown that during such time any one desiring to obtain it had been refused it at a lower and reasonable price, the plaintiffs had not violated the provisions of the law as to the sale of their invention in Canada.

That it is not open to any one in Canada to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiffs' patent. *The Auer Incandescent Light Manufacturing Co. v. O'Brien*, 5 Ex. C. R. 243. See also *Hambly v. Albright & Wilson*, 7 Ex. C. R. 363; *Meldrum v. Wilson*, 7 Ex. C. R. 198.

9. *Patent of invention—Infringement—Lantern—Want of element of inventiveness—Subject-matter.*—This was an action for infringement of Letters patent No. 69,088 for an improvement in lanterns, the globes of which could be lifted vertically for the purpose of lighting the lanterns. One question in issue was as to whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lighted, or in the working out of this idea or conception, there was invention to sustain a patent. And the Court *held* that there was no invention. *Kemp v. Chown*, 7 Ex. C. R. 306. See also *Taylor v. Brandon Mfg. Co.*, 21 Ont. A. R. 361.

10. *Patent for invention—Process and product—Purchaser of articles infringing—Profits and damages—Accounts—High Court—Final Court of Appeal—Deference to Exchequer Court—Onus of proof.*—A patent granting the exclusive right of making, constructing, using and selling to others to be used an invention, as described in the specifications setting forth and claiming the method of manufacture, protects not only the process but the thing produced by that process, and an action will lie against any person purchasing and using articles made in derogation of the patent no matter where they came from; and although the plaintiff cannot have both

an account of profits and also damages against the same defendant, he may have both remedies as against different persons (e.g., maker and purchaser) in respect of the same article.

A keeping of the accounts pending the action against the importers does not operate as a license to justify the sale of the articles; it is only an expedient to preserve the rights of all parties to the close of the litigation.

As the infringing articles were manufactured in the United States and brought into Canada for sale, there was sufficient evidence given that they were made according to the plaintiff's process to throw the onus on the defendants of shewing the contrary.

Although the High Court may be a final Court of Appeal it will defer to previous cases decided affirming the validity of a patent and follow the Court of Appeal in refusing to disturb a decision in the Exchequer Court. Earlier and later American cases commented on. *Toronto Auer Light Co., Ltd., et al. v. Colling*, 31 Ont. R. 18.

11. *Patent of invention—Infringement—Want of novelty—New and beneficial results—Subject-matter of invention—Purchase of patented device—Estoppel.*—The plaintiffs were patentees of a device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act on manifolding sheets so folded as to occupy the entire platen of standard typewriters, and, at the same time, without waste, to provide a binding margin for the leaf with the book-keeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required; with two-leaf sheets the upper leaf forming an original or invoice, and the lower leaf the duplicate and book-keeping entry; with three-leaf sheet the third leaf serving either as a duplicate or to be used as an original duplicated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc. to be easily detached, leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheet to secure these advantages. An action for infringement by the defendants using, manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court, and on appeal to the Supreme Court of Canada, it was held, affirming the judgment appealed from (10 Ex. C. R. 410) that there was neither subject-matter nor novelty in the above device claimed as an invention and, consequently, that it was not patentable. *The Copeland Chatterson Co. v. Paquette*, 38 S. C. R. 451.

12. *Infringement—Want of novelty.*—When the combination of old elements is a mere aggregation of parts not in themselves patentable, and producing no new result due to the combination itself, there is no invention and consequently such combination cannot form the subject of a patent. *Hunter v. Carrick*, 11 S. C. R. 300.

13. *Patent—New combination of old materials or devices.*—An invention consisting of a new and useful combination of well known materials or devices which produces a result not theretofore so obtained is a proper subject for a patent. *Toronto Telephone Mfg. Co. v. Bell Telephone Co.*, 2 Ex. C. R. 495.

14. *Presumption in favour of patentee—Burden of proof—Composition of matter—Novel combination—Novel process for overcoming difficulty in application of old process.*—The issue of a patent of invention raises a presumption in favour of the patentee that the article is a valid subject-matter of a patent. The *onus* of proof is on the party who attacks the patent to establish the contrary.

The words "composition of matter" in sec. 7 of *The Patent Act* (R. S. C. cap. LXIX) include all composite articles, whether they be the result of chemical union or of mechanical mixture, and the latter may therefore be the subject-matter of a patent.

A novel and useful combination of old and well known things may be the subject-matter of a patent.

Any novel process for overcoming a difficulty in the way of applying an old process may be the subject-matter of a patent. *The Electric Fireproofing Co. v. The Electric Fireproofing Co. of Canada*, Q. R. 31, S. C. 34.

15. *Injunction—Patent right—Chair-back pump.*—The simplicity of an invention is no reason why a patent in respect thereof should not be protected; where, therefore, by a simple contrivance of cutting away a portion of the log out of which a pump was to be manufactured, thus giving it the form of a chair; and by the introduction into the tube of a conical tube through which the piston worked, the plaintiff had been enabled to construct a force-pump made of wood, for which he had procured a patent of invention, the Court restrained the infringement of the patent. *Powell v. Begley*, 13 Grant's Chan. Rep. 381; see also *Yates v. Great Western Ry. Co.*, 24 Gr. 495; *Summers v. Abell*, 15 Gr. 532; *Owens v. Taylor*, 29 Gr. 210.

16. *New application of old invention, but no discovery of new principle.*—The patent must involve ingenuity of invention, the saving of labour and expense and the production of a new and useful result is not sufficient to support a patent. *Waterous v. Bishop*, 20 U. C. C. P. 29.

17. *Old elements—New and useful result—Previous use.*—The mere insertion of one known article in place of another known article is not patentable. *Wisner v. Coulthard et al*, 22 S. C. R. 178; see also *Baril v. Masterman*, 4 L. N. 181.

18. *Prior patent—True inventor.*—A prior patent to a person who is not the true inventor is no defence to an action by the true inventor under a patent issued to him subsequently. *Smith v. Goldie*, 9 S. C. R. 46. See also *Vanorman v. Leonard*, 2 U. C. Q. B. 72 and *The Queen v. Laforce*, 4 Ex. C. R. 14.

19. *Rival inventors—Prior disclosure.*—A patent granted in Canada to an independent inventor after the plaintiff's foreign patent, but before his application for a patent in Canada was valid against the plaintiff's subsequent patent. *Barter v. Howland*, 26 Gr. 135. See also *The Queen v. Laforce*, 4 Ex. C. R. 14.

20. *Patent for steadying device in cream separators—Improvement on old device—Narrow construction.*—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, in this case a tubular cream separator. And it was *held* that the patent must be given a narrow construction and be limited to a device substantially in the form described in the patent and specification. *Sharples et al. v. National Mfg. Co.*, 9 Ex. C. R. 460. An appeal was taken to the Supreme Court of Canada, but the case was settled before judgment.

21. *Patent of invention—Novelty—Combination of known elements—Infringement—Mechanical equivalents.*—A device resulting in the first useful and successful application of certain known arts and processes in a new combination for manufacturing purposes is not unpatentable for want of novelty merely because some of the elements so combined have been previously used with other manufacturing devices. Judgment appealed from (11 Ex. C. R. 103) affirmed. *Dominion Fence Co. v. Clinton Wire Cloth Co.*, 39 S. C. R. 535.

22. *Letters patent of invention—Subject-matter—Novelty—Ingenuity and invention—Contrivance previously known—Substitution of one substance to another—Obvious means of attaining result.*—A mechanical contrivance to be good subject-matter of a patent must, besides utility, possess the incident of novelty and be the result of some ingenuity or invention. Letters patent, therefore, for a contrivance already known, or consisting merely in the substitution of metal for wood to reduce size and volume, which any mechanic would suggest, are void and give no right of action for infringement. *Larose v. Aubertin*, Q. R. 32, S. C. 430.

23. *Use of device before patent granted.*—The inventor of a new machine before taking out a patent, erected and sold a machine embodying his invention and the purchaser had it in use for three years before the inventor procured a patent, and it was held the inventor had lost his right to a patent. *Hessin v. Coppin*, 19 Gr. 629. See also *Bernier v. Beauchemin*, 5 L. C. J. 29, and *Woodruff v. Moseley*, 19 L. C. J. 169.

24. *Combination of elements.*—The combination of known elements not previously in use and involving ingenuity and invention is patentable. *Dansereau v. Bellemare*, 16 S. C. R. 180.

25. *Combination—New result.*—The mere aggregation of parts not in themselves patentable, and producing no new result due to the combination itself, is no invention, and consequently cannot form the subject of a patent. *Hunter v. Carrick*, 11 S. C. R. 300.

26. *Mechanical equivalent*—The substitution of one well known material, metal, for another equally well known material, India-rubber, to produce the same result on the same principle in a more agreeable and useful manner, or a mere mechanical equivalent for the use of India-rubber, is void of invention and not the subject of a patent. *Ball v. Crompton Corset Co.*, 13 S. C. R. 469.

See also annotations under sec. 31 hereof.

As to inventions for which foreign patents have been taken out—Manufacture in Canada—Expiry of Canadian patent.

8. Any inventor who elects to obtain a patent for his invention in a foreign country before obtaining a patent for the same invention in Canada, may obtain a patent in Canada, if the patent is applied for within one year from the date of the issue of the first foreign patent for such invention.

2. If within three months after the date of the issue of a foreign patent, the inventor gives notice to the Commissioner of his intention to apply for a patent in Canada for such invention, then no other person having commenced to manufacture the same device in Canada during such period of one year, shall be entitled to continue the manufacture of the same after the inventor has obtained a patent therefor in Canada, without the consent or allowance of the inventor.

3. No Canadian patent issued previous to the thirteenth day of August, one thousand nine hundred and three, shall be deemed to have expired before the end of the term for which it was granted merely because of the expiry of a foreign patent for the same invention. 55-56 V., c. 24, s. 1; 3 E. VII., c. 46, s. 2.

Sub-sec. 3 was enacted after the following decision in the *General Engineering Case* (1902), A. C. 570. However, the section now repealed, under the Auer Light Case (28 S. C. R. 608), only referred to foreign patents in existence when the Canadian patent was granted.

1. *Expiry of patent—British patent a Foreign Patent.*—By the true construction of sec. 8 of ch. 61 of *The Revised Statutes of Canada*, 1886, as amended by 55-56 Vic. ch. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act. *General Engineering Co. v. Dominion Cotton Mills Co.* (1902), A. C. 570. (6 Ex. C. R. 357 and 31 S. C. R. 75).

2. *Patent of invention—Canadian patent—Foreign patent—Expiration of—Effect of.*—The expression "any foreign patent" occurring in the concluding clause of the 8th section of the Patent Act, viz.: "Under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires" must be limited to foreign patents in existence when the Canadian patent was granted. This judgment was affirmed on appeal to the Supreme Court of Canada. *Auer Incandescent Light Mfg. Co. v. Dreschel*, 6 Ex. C. R. 55; 28 S. C. R. 608. The Patent Act has since been amended and this case has thus been practically overruled.

Improvements may be patented.

9. Any person who has invented any improvement on any patented invention, may obtain a patent for such improvement; but he shall not thereby obtain the right of vending or using the original invention, nor shall the patent for the original invention confer the right of vending or using the patented improvement. R. S., c. 61, s. 9.

1. *Patent of invention—Furnace stoker—Combination—Infringement.*—On the 15th October, 1892, Jones obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of Jones' invention was that instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent; but was not worked out by its inventor, it being his view apparently that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The Worthington patent was not commercially successful. Jones, using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between Worthington's and Jones' there was all the difference between failure and success. And it was *held* that Jones' patent was valid. *General Engineering Co. v. Dominion Cotton Mills Co.*, 6 Ex. C. R. 309, (1902) A. C. 570.

2. *Patent of invention—Infringement—Improvements in truing up car wheels—Combination—Invention—Utility.*—The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there was a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined, or used together. And it was *held* that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels, and that the invention was useful. *Griffin et al. v. Toronto Ry. Co. et al.*, 7 Ex. C. R. 411.

3. *Patent—New combination of known elements.*—A new combination of known elements is an invention and as such is patentable. The person who has devised such new combination has all the rights and privileges of an inventor even if the novelty consists in a trifling mechanical change, provided, in the latter case, some economic or other result is produced some way different from what was obtained before. *Mitchell v. The Hancock Inspirator Co.*, 2 Ex. C. R. 539.

See also *Sharples v. National Mfg. Co.*, 9 Ex. C. R. 460; *Conway v. Ottawa Street Ry. Co.*, 8 Ex. C. R. 432; *Bonathan v. Bowmanville Furniture Mfg. Co.*, 31 U. C. Q. B. 413; *Huntington v. Lutz*, 13 U. C. Q. B. 168; and *North v. Williams*, 17 Gr. 179.

10, 11, 12. These sections deal with the oath the inventor must make before obtaining a patent; or, of the applicant if the inventor is dead, and before whom such oath may be taken. The election of domicile in Canada the applicant must make and the particulars required on his application for a patent.

What the specification shall show—Place and date—In the case of a machine—Drawings to be furnished in certain cases—Drawings how disposed of—Certain matters may be dispensed with.

13. The specification shall correctly and fully describe the mode or modes of operating the invention, as contemplated by the inventor; and shall state clearly and distinctly the contrivances and things which he claims as new and for the use of which he claims an exclusive property and privilege.

2. Such specification shall bear the name of the place where, and the date when it is made, and shall be signed by the inventor, if he is alive, and if not, by the applicant, and by two witnesses to such signature of the inventor or applicant.

3. In the case of a machine the specification shall fully explain the principle and the several modes in which it is intended to apply and work out the same.

4. In the case of a machine, or in any other case in which the invention admits of illustration by means of drawings, the applicant shall also, with his application, send in drawings in duplicate, showing clearly all parts of the invention; and each drawing shall bear the signature of the inventor, if he is alive,

and, if not, of the applicant, or of the attorney of such inventor or applicant, and shall have written references corresponding with the specification; but the Commissioner may require further drawings or dispense with any of them, as he sees fit.

5. One duplicate of the specification and of the drawings, if there are drawings, shall be annexed to the patent, of which it shall form an essential part, and the other duplicate shall remain deposited in the Patent Office.

6. The Commissioner may, in his discretion, dispense with the duplicate specification and drawing, and in lieu thereof cause copies of the specification and drawing, in print or otherwise, to be attached to the patent, of which they shall form an essential part. R. S., c. 61, s. 13.

1. *Specifications, interpretation of by reference to drawings.*—The drawings annexed to a patent may be looked at to explain or illustrate the specifications. *The Queen v. La Force*, 4 Ex. C. R. 14.

As to sufficiency of specifications, see *Smith v. Ball*, 21 U. C. C. P. 29; *Waterous v. Bishop*, 20 U. C. C. P. 29; *Taylor v. Brandon Mfg. Co.*, 21 Ont. A. R. 361; *Emery v. Iredale*, 11 U. C. C. P. 106; *Pairic v. Sylvester*, 23 Gr. 573; and *Smith v. Mutchmore*, 11 U. C. C. P. 458.

14, 15, 16. These sections deal with the models or specimens to be furnished when required; the precautions to be taken in cases of dangerous substances. The examinations made by Patent Office of application for patents and the withdrawal of applications for patents.

REFUSAL TO GRANT PATENTS.

Commissioner may object to grant a patent in certain cases.

17. The Commissioner may object to grant a patent in any of the following cases:—

(*a*) When he is of opinion that the alleged invention is not patentable in law;

(*b*) When it appears to him that the invention is already in the possession of the public, with the consent or allowance of the inventor;

(*c*) When it appears to him that there is no novelty in the invention;

(*d*) When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public;

(*e*) When it appears to him that the invention has already been patented in Canada, unless the Commissioner has doubts as to whether the patentee or the applicant is the first inventor;

(*f*) When it appears to him that the invention has already been patented in a foreign country, and the year has not expired within which the foreign patentee may apply for a patent in Canada, unless the Commissioner has doubts as to whether the foreign patentee or the applicant is the first inventor. R. S., c. 61, s. 16.

1. *Combination—Novelty.*—An invention consisting of the combination in a machine of three parts or elements, A, B and C, each of which

being old and of which A had been previously combined with B in one machine, and B and C in another machine, but the united action of which in the patented machine producing new and useful results is a patentable invention. *Smith v. Goldie*, 9 S. C. R. 47.

2. *Importation of elements common to several patented inventions belonging to same patentee, but used for one only.*—Where the owner of several patents illegally imports elements common to the composition of all his inventions but uses the same in the construction of one of them only, such importation operates a forfeiture in respect of the particular invention so constructed but does not affect the other patents. *Toronto Telephone Mfg. Co. v. Bell Telephone Co.*, 2 Ex. C. R. 524. See also *In re Bell Telephone Company*, 7 Ont. R. 605.

18, 19, 20. These sections deal with the cases when the commissioner objecting to grant a patent must notify the applicant; the latter is also given an appeal to the Governor in Council from the commissioner's decision. Section 20 deals with conflicting applications.

Appointment of arbitrator.—Where one of the applicants for a patent refuses to unite with the others in appointing an arbitrator, the commissioner may make the appointment. *Faller v. Aylen*, 8 Ont. R. 70.

GRANT AND DURATION OF PATENTS.

What the patent shall contain and confer—Joint applications.

21. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall grant to the patentee and his legal representatives, for the term therein mentioned, from the granting of the same, the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction.

2. In cases of joint applications, the patents shall be granted in the names of all the applicants. R. S., c. 61, s. 20.

1. *British Patent a Foreign Patent.*—A British patent is a foreign patent within the meaning of the Canadian Patent Act. *General Engineering Company of Ontario v. Dominion Cotton Mills Co.* (6 Ex. C. R. 357), (31 S. C. R. 75), (A. C. 1902, 570).

2. *Foreign patent—Effect in Canada.*—Letters patent for invention, granted under Her Majesty's Privy Council seal in England, are of no force or effect in Canada. *Adam v. Peel*, 1 L. C. R. 130. It would appear to be different with respect to copyright. See sec. 4 thereof.

3. *Contractual character of a patent—Liberal interpretation.*—The granting of letters patent to inventors is not the creation of an unjust monopoly, nor the concession of a privilege by mere gratuitous favour, but it is a contract between the state and the discoverer, which, in favor of the latter, ought to receive a liberal interpretation. *Barter v. Smith*, 2 Ex. C. R. 455. The decision in this case has been of late seriously criticized and materially shaken by the case of *Power v. Griffin*, 33 S. C. R. 39, and *Hildreth v. McCormick Mfg. Co.*, 10 Ex. C. R. 378; 39 S. C. R. 499.

A patent is a royal grant and not a contract between the patentee and the public, as represented by the Crown. Taking this view as the right one the Court, in construing a patent should not lean more to

one side than the other. *Harmer v. Plane*, 14 Ves. 131; *Tubes Ltd. v. Perfecta Ltd.*, 20 Cut. R. P. C. 95; and *Feather v. The Queen*, 6 B. & S. 257.

22. This section deals with the form of the patent and empowers the commissioner to submit the patent to the Minister of Justice before it is issued.

Duration of patent—If partial fee only is paid—Effect of second and further payment.

23. The term limited for the duration of every patent of invention issued by the Patent Office shall be eighteen years; but, at the time of the application therefor, it shall be at the option of the applicant to pay the full fee required for the term of eighteen years, or the partial fee required for the term of six years, or the partial fee required for the term of twelve years.

2. If a partial fee only is paid, the proportion of the fee shall be stated in the patent, and the patent shall, notwithstanding anything therein or in this Act contained, cease at the end of the term for which the partial fee has been paid, unless before the expiration of the said term the holder of the patent pays the fee required for the further term of six or twelve years, and obtains from the Patent Office a certificate of such payment in the form which is, from time to time, adopted, which certificate shall be attached to and refer to the patent, and shall be under the signature of the Commissioner or of the Deputy Commissioner.

3. If such second payment, together with the first payment, makes up only the fee required for twelve years, then the patent shall, notwithstanding anything therein or in this Act contained, cease at the end of the term of twelve years, unless at or before the expiration of such term the holder thereof pays the further fee required for the remaining six years, making up the full term of eighteen years, and obtains a like certificate in respect thereof. 55-56 V., c. 24, s. 5; 56 V., c. 34, s. 3.

RE-ISSUE OF PATENTS.

In certain cases new patent or amended specification may be issued—Death or assignment—Effect of new patent—Separate patents for separate parts of invention.

24. Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention, for any part or for the whole of the then unexpired residue of the term for which the original patent was, or might have been granted.

2. In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representatives.

3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a re-issue for each of such re-issued patents. R. S., c. 61, s. 23.

1. *Patent of invention—Illuminant device—Infringement—Process—Reissue—Equivalents—Manufacture—Importation—Price.*—An inventor, in the specification to his first Canadian patent, after disclaiming all other illuminant appliances, for burners, claimed:

"An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as herein described." In the specification the substances and the proportions in which they might be combined were stated. Eight years afterwards the owner of the original patent surrendered the same and obtained a reissue, the specification whereof differed from that of the original only in respect of the claim, which was as follows: "The method herein described of making incandescent devices, which consists in impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed." And it was *held* that although in the claim of the reissue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths" occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification, or to their equivalents.

That the reissue was for the same invention as that which was the subject of the earlier patent.

The reissue being for the same invention as the original patent, delay in making the application for the reissue did not invalidate the same.

That the Act 55-56 Vict. ch. 77, passed for the relief of Von Welsbach and Williams, the original patentees, was effective although at the time it was passed others than they were interested in the patent.

To give the Commissioner jurisdiction to authorize the reissue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in sec. 23 of *The Patent Act*. It is sufficient to support his jurisdiction that he deems the patent defective or inoperative for any such reasons, and his decision as to that is final and conclusive. *Auer Incandescent Light Mfg. Co. v. O'Brien*, 5 Ex. C. R. 243. See also *Hunter v. Garrick*, 11 S. C. R. 300.

2. *Reissue—Delay—Mistake in original patent*—The delay, without any excuse, of a patentee for over a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a reissue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a reissue) before the application for a reissue in this country, is fatal to the validity of the reissue here. *Kidder et al. v. Smart*, 8 Ont. R. 362.

3. *Patent law—Reissue—Specification—Extended claim—Pleading—Evidence—Certified copies of foreign patents—Patent Act of* 1872—35 *Vic. c.* 26 *D.—Imp.* 14-15 *Vic. c.* 99, *secs.* 7, 11.—Where to an action to restrain certain alleged infringements of a reissued patent, it was objected by way of defence that the reissued patent contained a combination not in the original patent or the application therefor, and was therefore invalid; and it appeared that the combination in question was manifested in the drawings and specifications of the original patent, but by mistake and inadvertence was not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the original patent: *Held, per Boyd, C.*, (affirming the decision of Ferguson, J.), that the reissued patent was nevertheless valid, Proudfoot, J., *dissentiente*.

Per Boyd, C.—What could have been claimed as part of the invention under the specifications and descriptions accompanying the original patent, but was not by reason of error, mistake or inadvertence, may be claimed on a reissue if there has been no laches. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application, is the measure of his rights on a reissue.

Per Proudfoot, J.—A reissued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872, to say it authorizes a reissue "with broader and more comprehensive claims," if by that be meant that it authorizes a reissue with a claim not in the original patent at all; neither is it enough to justify a reissue that all the elements of the new claim may be found in the specifications of the original patent; but if the claim is so imperfectly described, through error or mistake, as not to cover the invention, then a reissue may be had.

Per Proudfoot, J.—The earlier decisions in the United States are more in conformity with the language and intention of our Patent Acts than the later decisions, which seem to recognize the right in the reissue to broaden the claims in a manner which the law does not appear to justify. *Withrow et al. v. Malcolm et al.*, 6 Ont. R. 12.

Disclaimers.

Patentee may disclaim anything included in patent by mistake—Form and attestation of disclaimer—Not to affect pending suits—In case of death of patentee—Effect of disclaimer.

25. Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has,—

(*a*) made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor; or,

(*b*) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented, of which he was not the first inventor, and to which he had no lawful right;

the patentee may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof.

2. Such disclaimer shall be in writing, and in duplicate, and shall be attested in the manner hereinbefore prescribed,

in respect of an application for a patent; one copy thereof shall be filed and recorded in the office of the Commissioner, and the other copy thereof shall be attached to the patent and made a part thereof by reference, and such disclaimer shall thereafter be taken and considered as part of the original specification.

3. Such disclaimer shall not affect any action pending at the time of its being made, except in so far as relates to the question of unreasonable neglect or delay in making it.

4. In case of the death of the original patentee, or of his having assigned the patent, a like right shall vest in his legal representatives, any of whom may make disclaimer.

5. The patent shall thereafter be deemed good and valid for so much of the invention as is truly the invention of the disclaimant, and is not disclaimed, if it is a material and substantial part of the invention, and is definitely distinguished from other parts claimed without right; and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly. R. S., c. 61, s. 24.

ASSIGNMENTS.

When representatives may obtain the patent.

26. The patent may be granted to any person to whom the inventor, entitled under this Act to obtain a patent, has assigned or bequeathed the right of obtaining the same, or in default of such assignment or bequest, to the legal representatives of the deceased inventor. R. S., c. 61, s. 25.

1. *Patent for invention—Pneumatic straw stackers—Combination—Assignment—Right of assignor to impeach validity of patent—Right to limit construction—Estoppel.*—The assignor of a patent, sued as an infringer by his assignee, is estopped from saying that the patent is not good; but he is not estopped from showing what it is good for, *i.e.*, he can show the state of the art or manufacture at the time of the invention with a view to limiting the construction of the patent.

In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter, speaking generally, the combination was old, each element was old, and no new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents. And it was *held* that while as between the plaintiff and any one at liberty to dispute the validity of the later patent, it might be impossible on these facts to sustain the patent, as against the assignor, who was estopped from impeaching it, it must be taken to be good for a combination of which the element mentioned was a feature. *Indiana Mfg. Co. v. Smith et al.*, 10 Ex. C. R. 17. Motion for leave to appeal to the Supreme Court refused with costs. *Cout.* Cases 380.

2. *Patent for invention—Infringement—Assignor and assignee—Estoppel—Fair construction.*—Where the original owner of a patent had

assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to show that on a fair construction of the patent he had not infringed. *The Indiana Mfg. Co. v. Smith et al.*, 9 Ex. C. R. 154.

3. See also in cases of want of consideration for the assignment. *Vermilyea v. Canniff*, 12 Ont. R. 164. When patent given under condition to user: *Mergenthaler Linotype Co. v. Toronto Type Foundry Co.*, Q. R. 14, K. B. 458. In case of an assignment for a limited period followed by sale: *Bennett v. Wortman*, 2 Ont. L. R. 292. The enforcement of the payment of royalties under agreement when patent is void: *Owens v. Taylor*, 29 Gr. 210; *Beam v. Merner*, 14 Ont. R. 412. As to the right of licensee to terminate: *Noxon v. Noxon*, 24 Ont. R. 401. Rights of assignee against subsequent patent granted to assignor: *Watson v. Harris*, 31 Ont. R. 134; *Bigham v. McMurray*, 30 S. C. R. 159. Subsequent assignments of the same patent and the rights of assignees: *Fire Extinguisher Co. v. North Western Fire Extinguish Co.* (*Babcock*), 20 Gr. 625; *Gillies v. Cotton*, 22 Gr. 123; *Dalgleish v. Conboy*, 26 U. C. C. P. 254; *Stovin v. Dean*, 26 U. C. Q. B. 600. And as to the right of licensee to make alterations and improvements, see *McLaughlin v. Lake Erie & Detroit Ry. Co.*, 3 Ont. L. R. 706.

Patents to be assignable—Registration—Assignment null if not registered.

27. Every patent issued for an invention shall be assignable in law, either as to the whole interest or as to any part thereof, by any instrument in writing; but such assignment, and every grant and conveyance of any exclusive right to make and use and to grant to others the right to make and use the invention patented, within and throughout Canada or any part thereof, shall be registered in the Patent Office in the manner, from time to time, prescribed by the Commissioner for such registration; and every assignment affecting a patent for invention shall be null and void against any subsequent assignee, unless such instrument is registered as hereinbefore prescribed, before the registration of the instrument under which such subsequent assignee claims. R. S., c. 61, s. 26.

See notes under sec. 26 hereof.

1. *License—Patent.*—During the existence of a license the licensee cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another. *Whiting v. Tuttle*, 17 Gr. 454.

Assignment in cases of joint applications.

28. In cases of joint applications or grants, every assignment from one or more of the applicants or patentees to the other or others, or to any other person, shall be registered in like manner as other assignments. R. S., c. 61, s. 27.

IMPEACHMENT AND OTHER LEGAL PROCEEDINGS IN RESPECT OF PATENT.

Patent to be void in certain cases, or valid only for part.—Proviso —Copies of judgment to be sent to patent office.

29. A patent shall be void, if any material allegation in the petition or declaration of the applicant hereinbefore mentioned in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, when such omission or addition is wilfully made for the purpose of misleading: Provided that if it appears to the court that such omission or addition was an involuntary error, and if it is proved that the patentee is entitled to the remainder of his patent *pro tanto*, the court shall render a judgment in accordance with the facts, and shall determine as to costs, and the patent shall be held valid for such part of the invention described, as the patentee is so found entitled to.

2. Two office copies of such judgment shall be furnished to the Patent Office by the patentee, one of which shall be registered and remain of record in the office, and the other of which shall be attached to the patent, and made a part of it by a reference thereto. R. S., c. 61, s. 28.

Remedy for infringement of patent.

30. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or to use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought. R. S., c. 61, s. 29.

1. *Patent of invention—Pneumatic bicycle tires—Infringement.*—The plaintiffs were the owners of letters-patent No. 38,284, for improvements in bicycle tires. The inventors' object was to produce a pneumatic tire combining the advantages of both the "Dunlop" tire and the "Clincher" tire, and that was done by finding a new method of attaching the tire to the rim of the wheel. They used for this purpose an outer covering the two edges of which were made inextensible by inserting in them endless wires or cords, the diameter of the circle formed by each wire being something less than the diameter of the outer edge of the crescent or "U" shaped rim that was used and into which the tire was placed. Then when the inner or air tube was inflated, the edges of the outer covering were pressed upwards and outwards, as far as the endless wires would permit, and were there held in position by the pressure exerted by the air tube. In the second and third claims made by the plaintiffs, and in their description of the invention they describe a rim "provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering." In their first or more general statement of the claim

is described "a rim, the sides of which are so formed as to grip the wired edges of the outer tube." And it was *held* that a rim with annular recesses did not constitute an essential feature of the invention, the substance of which consisted in the use of an outer covering having inextensible edges which are forced by the air tube when inflated into contact or union with a grooved rim, the diameter of the outer edges of which are greater than the diameters of the circles made by such inextensible edges. The defendants manufactured a pneumatic tire with an outer covering through the edges of which was passed an endless wire forming two circles instead of one. The wire was placed in pockets, in the outer covering, which ran nearly parallel to each other except at one point where the two circles crossed each other. The wire being endless the two circles performed in respect of the inextensibility of the edges of the outer covering, the same part and office that the wire with a single coil or circle in the plaintiffs' tire performed. There was, however, this difference that the two circles, into which the wire would form itself in the defendants' tire when the inner tube was inflated, would not be concentric, but as one circle became larger the other would become smaller. *Held*, that while the defendants' tire might have been an improvement on that of the plaintiffs,' it involved the substance of the plaintiffs' patent and constituted an infringement upon it. *The American Dunlop Tire Co. v. The Anderson Tire Co.*, 5 Ex. C. R. 194.

2. *Canadian Patent—Infringement—Metal weather strips—Prior American Patent—Narrow construction.*—The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shown and described in an American patent of a date prior to the Canadian patent, owned by the plaintiffs, than it was to any of the forms shown and described in the plaintiffs' patent. And it was *held* that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shown and described therein; and that upon the facts proved the defendants had not infringed. *Chamberlin Metal Weather Strip Co. v. Peace*, 9 Ex. C. R. 399. Affirmed on appeal to the Supreme Court of Canada, 36 S. C. R. 530.

3. *Patent—Alleged infringement—Coupler with steam-tight fasteners and automatic separator—New combination of known features.*—In an action for infringement of a patent, if the merit of the invention consists in the idea or principle which is embodied in it, and not merely in the means by which that idea or principle is carried into effect, the patentee must show that the idea or principle is new; and must fail if the merit of his invention lies merely in a new combination of known features.

Where the appellants, patentees for improvements in hose coupling, had produced a coupler of pipes or hose attached to two railway cars, so as to secure a steam-tight fastening which would permit an automatic separation of the two ends when the cars were uncoupled; while the respondent's coupler was in all material respects the same as the appellants' and produced the same result, but omitted the use of one particular feature called a "rib" or hinge-joint, which was proved to have been a very material element in the success of the appellants' coupler, their specification shewing that they never contemplated its omission or that their invention could be operated without it. *Held* that there had been no infringement, for the respondent's coupler was shewn to have been a different and a new way of achieving the end contemplated by the appellants' coupler. *Consolidated Car Heating Co. v. Came* (1903), A. C. 509.

4. *Patent — Infringement — Combination — Subject-matter—Repair—Fitting new Component Part.*—A patentee invented a wheel rim of a particular shape which he claimed would hold a solid rubber tire without pinching and without wires or bands for securing it. He claimed the rim, and also the combination of the rim and the tire, but not the tire. A rim would wear out many tires. The defendants having made and fitted a new tire to one of the patentee's rims to replace a worn out tire, the patentee sued for infringement of the combination. And the Court *held* that, even assuming the patent for the rim to be valid, there was no subject-matter in the combination, as it was the only and obvious manner of using the rim and contained no separate merit or invention. (*Clark v. Adie* [1877], 2 App. Cas. 315, 321, applied). *Held*, also, that under the circumstances the defendants' acts only amounted to fair repair. *Dunlop Pneumatic Tire Co., Ltd. v. David Moseley & Sons, Ltd.* (1904), 1 Ch. 612, 621, discussed. *Dunlop Pneumatic Tire Co. v. Neal* (1899), 1 Ch. 807, distinguished. *Sirdar Rubber Co. v. Wallington, Weston & Co.* (1905), 1 Ch. Div. 451.

5. *Patent of invention—Infringement—Sale for reasonable price—Use of a patented device—Contract—"Patent Act," R. S. C., c. 61, s. 37—Evidence.*—The patentee of a device for binding loose sheets sold the defendant H., binders subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. And it was *held* that the condition in the contract with H., imposing the restriction upon the manner in which he should use the binders, was not a contravention of the provisions of section 37 of the "Patent Act," R. S. C., ch. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent. Judgment appealed from (10 Ex. C. R. 224), affirmed. *Hatton v. Copeland-Chatterson Co.*, 3[illegible] S. C. R. 651.

6. *Patent for invention—Wire fences—Electrical welding—Infringement—Pioneer invention—Broad construction.*—The defendants had made for them and had used a machine for making wire fences, the wires being, by the use of electrical currents, welded automatically at their points of intersection. It differed in a number of details from the machine described in the plaintiff's patent, but it made the same product in a similar manner and with similar devices.

Held, that giving a broad construction to the plaintiff's patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way described in such patent, the defendants had infringed the same. *Clinton Wire Cloth Co. v. Dominion Fence Co.*, 11 Ex. C. R. 103. Affirmed on appeal to Supreme Court, 39 S. C. R. 535.

7. *Infringement—Measure of damages.*—Where C.'s machine was a mere colourable imitation, based upon the same principle, composed of the same elements and producing no results materially different, it was held to infringe, and further that there was no necessity in order to recover damages that C.'s patent should first be set aside by *scire facias*. *Collette v. Lasmer*, 13 S. C. R. 565.

8. *Patent—Counter-claim—Threats.*—The patentee is not bound to

try the question of infringement by counter-claim in an action for threats, he may bring a separate action. *Combined Weighing Co. v. Automatic Weighing Co.* (1889), 6 R. P. C. 509.

Action for infringement of patent.

31. Any action for the infringement of a patent may be brought in the court of record having jurisdiction, to the amount of the damages claimed, in the province in which the infringement is alleged to have taken place, which holds its sittings nearest to the place of residence or of business of the defendant; and such court shall decide the case and determine as to costs. R. S., c. 61, s. 30.

1. *Patent—Validity—Pleadings.*—Where the plaintiff in his action does not attack the validity of the defendant's patent referred to in his declaration, he is not entitled to attack the validity of the patent by his answer to the defendant's plea. *American Stoker Co. v. General Engineering Co.*, Q. R., 14 S. C. R. 479.

2. *Patent of invention—Action to avoid—Default of pleading—Judgment—Registrar's certificate—Practice.*—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service. *Peterson v. The Crown Cork & Seal Co.*, 5 Ex. C. R. 400.

STATEMENT OF CLAIM.

The following form of *Statement of Claim* may be used *mutatis mutandis* in an action for the infringement of letters patent for invention, viz.:—

In the Exchequer Court of Canada.

Between,—

A. B.,

Plaintiff;

AND

C. D. AND E. F.,

Defendants.

STATEMENT OF CLAIM.

Filed day of A.D. 19 .

1. The Plaintiff, A. B., is a manufacturer, carrying on business in the City of Toronto, Province of Ontario, Canada; the Defendants, C. D. and E. F. carry on .....business, with head office in the City of Montreal, Province of Quebec, Canada.

2. T,....., of the City of Chicago, in the State of Illinois, one of the United States of America, discovered and was the first and true inventor of a certain new and useful improvement in..... for which application for letters patent for the Dominion of Canada was duly made; and before the issue of said Letters Patent the said T by an instrument in writing, duly filed in the Patent Office for Canada on the.....day of....., 19.., assigned all his interest in said invention, and in the Letters Patent obtainable therefor, to the said plaintiff, A. B.; and no other person before, or at such time, made, used, exercised or vended the said invention.

3. That by Letters Patent of Invention for the Dominion of Canada, numbered....., bearing date the .....day of....., A.D. 19.., under the seal of the Patent Office for the Dominion of Canada, there was duly granted to the said plaintiff (as assignee of the said T.....), his executors and administrators, legal representatives and assigns, for the period of eighteen years from said date, the exclusive right, privilege and liberty of making, constructing and using, exercising and vending to others, to be used in the Dominion of Canada, the said invention, consisting of an improvement in....., described in the specifications and drawings attached to said Letters Patent, and forming an essential part thereof; and it is further witnessed by said Letters Patent that the partial fee required for the term of six years from the date of said patent, to wit the .....day of....., A.D. 19.., aforesaid, has been duly paid.

4. That the said plaintiff, A. B., is the sole proprietor of said Canadian Letters Patent, numbered.....and entitled to all the benefits and emoluments arising therefrom.

5. That the said Canadian Letters Patent, numbered.....have never been impeached, and are now and always have been in full force and effect, and was and is novel, useful and valuable, and the said plaintiff has duly applied the said invention, and has manufactured the same with profit, and complied with all the requirements, terms and conditions called for by the Patent Act of Canada, chap. 69 of The Revised Statutes of Canada, 1906, and the Acts amending the same.

6. The plaintiff has recently discovered for the first time that the said defendants.....without the license, permission or assent of the said plaintiff, and in fraud of and to the detriment of his rights, have imported into Canada, from the United States of America, one or more.....procured from a person or firm not authorized by the plaintiff to supply the same, which contain the said plaintiff's patented improvements, and said defendants have for some time past, been using, and still are using in their manufacture.....Street, in the said City of....., or elsewhere in Canada, the said....., containing the plaintiff's patented improvements, without the consent, in writing, of the said plaintiff.

7. That by such unauthorized importation and use referred to in the sixth paragraph hereof, the said defendants have infringed the following claims of the plaintiff's said Letters Patent....., in the.....clause referred to, viz.: claims one, two, three, four, six, seven, ten, eleven, seventeen, twenty-one and twenty-two.

8. By reason of the wrongful acts of the defendants,..... the plaintiff has suffered large damages.

9. The plaintiff has applied to the defendants, and requested them to discontinue the use of his said invention and the infringement of his said patent, and to pay to the plaintiff the damage sustained by him by such use and infringement; but the defendants have refused to comply with such request.

The plaintiff therefore prays:—

(*a*) That it may be declared that the said defendants have infringed the plaintiff's said patent, and that an injunction may be awarded to the plaintiff restraining the defendants,....., their and each of their servants, workmen, and agents, from further infringing said Canadian Patent No....., and from using, manufacturing, vending or

selling the plaintiff's patented improvements in.....described in the specifications and drawings attached to said Letters Patent.

(*b*) That the plaintiff may be paid the damages sustained by reason of the wrongful acts of the defendants.

(*c*) That all necessary inquiries may be made and accounts taken for the purpose of ascertaining said damages.

(*d*) That the defendants may be ordered to pay the costs of this action.

(*e*) That such further and other relief may be awarded as the nature of the case may require or this Honourable Court may deem just.

F. G.,
of Counsel for Plaintiff.

Injunction may issue—Appeal.

32. In any action for the infringement of a patent, the court, or any judge thereof, may, on the application of the plaintiff, or defendant respectively, make such order as the court or judge sees fit,—

(*a*) restraining or for an injunction restraining the opposite party from further use, manufacture or sale of the subject-matter of the patent, and for his punishment in the event of disobedience of such order; or,

(*b*) for and respecting inspection or account; and,

(*c*) generally respecting the proceedings in the action.

2. An appeal shall lie from any such order under the same circumstances, and to the same court, as from other judgments or orders of the court in which the order is made. R. S., c. 61, s. 31.

1. *Patent of invention—Infringement—Injunction—Stay of proceedings pending appeal—Costs.*—The plaintiffs obtained judgment in the Exchequer Court for an injunction to restrain the defendants from infringing upon their Patent of Invention for a detachable bicycle tire, known as the Dunlop Tire. The defendants appealed from the said judgment to the Supreme Court of Canada and made an application to stay the injunction and the proceedings under the said judgment pending the appeal to the Supreme Court. Upon their undertaking to keep an account of the manufacture and sale of these tires known as the Electric and the Imperial, and upon their paying into Court $5,000 to stand as security for the payment to the plaintiffs of the damages and costs awarded against them by the judgment of this Court or that which may be awarded by the Supreme Court:—this Court ordered all proceedings under its judgment to be stayed until the 14th August next, unless the said appeal shall have been sooner disposed of, in which case such stay of proceedings shall expire upon the disposition of the said appeal. Leave being reserved to the defendants to apply for an extension of time, and to the plaintiffs for an increase of the amount deposited into Court; but costs were made costs in the cause. *American Dunlop Tire Co. v. The Goold Bicycle Co. (Ltd.)* No. 1032, Feby. 13th, 1899.

See also Rule 270 and notes thereunder.

Court may discriminate in certain cases.

33. Whenever the plaintiff, in any such action, fails to sustain the same, because his specification and claim embrace

more than that of which he was the first inventor, and it appears that the defendant used or infringed any part of the invention justly and truly specified and claimed as new, the court may discriminate, and the judgment may be rendered accordingly. R. S., c. 61, s. 32.

Defence in action for infringement.

34. The Defendant, in any such action, may plead as matter of defence, any fact or default which, by this Act, or by law, renders the patent void; and the court shall take cognizance of such pleading and of the facts connected therewith, and shall decide the case accordingly. R. S., c. 61, s. 33.

STATEMENT IN DEFENCE.

The following form of *Statement in Defence* may be used *mutatis mutandis* in action for infringements of Letters Patent for invention, viz.:—

In the Exchequer Court of Canada.

Between,—

A. B.,

Plaintiff;

AND

C. D. AND E. F.

Defendants.

STATEMENT IN DEFENCE.

Filed on the.....day of....., A.D. 19..

1. The defendants admit the first paragraph of plaintiff's Statement of Claim, but deny all other allegations therein contained. And as to the said patent in the plaintiff's Statement of Claim referred to the defendants say as follows:—

2. The subject-matter of said Letters Patent is not the proper subject-matter of a patent.

3. Nothing was in fact invented by the alleged inventor of the devices described therein.

4. The alleged invention comprised therein was not new at the alleged date of invention thereof.

5. The alleged invention had been previously disclosed and described in foreign patents and publications.

6. The said inventor was not the first and true inventor of the alleged invention therein described.

7. The said alleged invention therein described was not useful.

8. The specification and drawings which form a part of said Letters Patent do not particularly describe the nature of the invention claimed to be invented, and do not correctly and fully describe the mode or modes of operating same and do not fully explain the principle thereof, and it would not be possible for any one skilled in the art to which the alleged invention appertains to make or construct the same from the information afforded in the specifications, and on those grounds such patent is void.

9. The claims of said patent are insufficient and do not embrace operative devices or combinations.

10. The specification of said patent is too broad, claiming more than that of which the patentee was the first inventor.

11. Patents for the same device as that described in the said Letters Patent were in existence in other countries for more than twelve months prior to the application for such patent in Canada.

12. The said alleged invention was well known and in use long before the alleged invention thereof by the said inventor.

13. The defendants have not infringed the said patent.

14. The allegations that the claims in the application of the said inventor for the said patent in the drawings attached to his specification set out were new and had not been anticipated were untrue and wilfully misleading, and therefore the said patent was void, and such application intentionally claimed more than was necessary for the purpose for which they purported to be made.

15. The alleged invention is not a new and useful art, machine, manufacture or composition of matter nor any improvement thereon, but is merely the result of mechanical skill and results merely from the substitution of known mechanical equivalents for parts of existing devices of the same character.

Therefore the defendants submit that this action should be dismissed with costs.

Dated this.....day of.....A.D. 19...

.....

of Counsel for Defendants.

Proceedings for impeachment of patent—Scire facias may issue.

35. Any person who desires to impeach any patent issued under this Act, may obtain a sealed and certified copy of the patent and of the petition, affidavit, specification and drawings thereunto relating, and may have the same filed in the office of the prothonotary or clerk of any of the divisions of the High Court of Justice in Ontario, or of the Superior Court of Quebec or of the Supreme Court in Nova Scotia, New Brunswick, British Columbia or Prince Edward Island, respectively, or of the Court of King's Bench in Manitoba, or of the Supreme Court of the Northwest Territories in the provinces of Saskatchewan and Alberta respectively, pending the disestablishment of that Court by the legislature of those provinces respectively, and thereafter of such superior court of justice as, in respect of civil jurisdiction, is established by the said legislatures respectively in lieu thereof, or of the Territorial Court in the Yukon Territory, according to the domicile elected by the patentee, as aforesaid, or in the office of the registrar of the Exchequer Court of Canada, and such courts, respectively, shall adjudicate on the matter and decide as to costs; and if the domicile elected by the patentee is in that part of Canada formerly known as the district of Keewatin, the Court of King's Bench of Manitoba shall have jurisdiction until there is a superior court therein, after which, such superior court shall have jurisdiction.

2. The patent and documents aforesaid shall then be held as of record in such courts respectively, so that a writ of *scire facias*, under the seal of the court, grounded upon such record, may issue for the repeal of the patent, for cause as aforesaid, if, upon proceedings had upon the writ in accordance with the meaning of this Act, the patent is adjudged to be void. R. S., c. 61, s. 34; 53 V., c. 13, s. 1.

1. *Prior foreign invention unknown to Canadian inventor—Scire facias.* —The fact that prior to the invention of anything by an independent Canadian inventor, to whom a patent therefor is subsequently granted in

Canada, a foreign inventor had conceived the same thing but had not used it or in any way disclosed it to the public, is not sufficient under the patent laws of Canada to defeat a Canadian patent. *The Queen v. La Force*, 4 Ex. C. R. 14.

2. *Inventor—Prior patent to person not inventor—Scire facias.*—To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit. *Smith v. Goldie*, 9 S. C. R. 47.

3. *Scire facias—Expiry of foreign patent.*—Upon a proceeding by *scire facias* to set aside a patent of invention because of the alleged expiry of a foreign patent for the same invention under the provisions of sec. 8 of *The Patent Act* (55-56 Vic. ch. 24): *Held*, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of sec. 34 of the Act that the action should be dismissed. *The Queen Ex. Rel. The American Stoker Co. v. General Engineering Co.*, 6 Ex. C. R. 328. But see now the above sec. 35 as amended.

Judgment voiding patent to be filed in Patent Office.

36. A certificate of the judgment avoiding any patent shall, at the request of any person filing it to make it of record in the Patent Office, be entered on the margin of the enrolment of the patent in the Patent Office, and the patent shall thereupon be and be held to have been void and of no effect, unless the judgment is reversed on appeal as hereinafter provided. R. S., c. 61, s. 35.

Appeal.

37. The judgment declaring or refusing to declare any patent void shall be subject to appeal to any court having appellate jurisdiction in other cases decided by the court by which such judgment was rendered. R. S., c. 61, s. 36.

Conditions and extension.

Patent conditional—Manufacture in Canada within two years—Importation prohibited.

38. Every patent shall, unless otherwise ordered by the Commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:—

(*a*) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada;

(*b*) If, after the expiration of twelve months from the granting of a patent, or an authorized extension of such period, the patentee or patentees, or any of them, or his or their or any of their legal representatives, for the whole or a part of his or their or any of their interest in the patent, import or cause to be imported into Canada, the invention for which the patent is granted, such patent shall be void as to the interest of the person or persons so importing or causing to be imported. 3 E. VII., c. 46, s. 4.

1. *Patent of invention—R. S. C., c.* 61, s. 37, *and amendments—Importation after prescribed time—Sale, effect of—Importation of parts, effect of.*—The A. D. T. Co., who were the assignees of a patent for an improvement in tires for bicycles, imported, after the period allowed by *The Patent Act* for importations of the patented invention to be lawfully made, some 21 tires in a complete and finished state, and 59 covers that required only the insertion of the rubber tube to complete them. In the completed tires and in the covers in the state in which they were imported was to be found the invention protected by the said patent. These tires and covers were not imported by the company for sale, but to be given to expert riders to be tested, and for the purpose of advertising the tire so patented. However, one pair of such tires was sold through inadvertence or otherwise but they were not imported for sale. The company had a factory in Canada, where the invention patented was manufactured, and the value of the labour displaced by the importation complained of only amounted to two dollars and eighteen cents. And it was *held*, in accordance with the decision in *Barter v. Smith* (2 Ex. C. R. 455), which the Court felt bound to follow, that the facts did not constitute sufficient ground for cancellation of the patent under the provisions of the 37th section of *The Patent Act*.

In order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of materials which, while requiring but a trifling amount of labour and expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention. *The Anderson Tire Co. v. The American Dunlop Tire Co.*, 5 Ex. C. R. 82.

2. *Patent for invention—Process for manufacturing phosphorus—Importation and non-manufacture—The Patent Act, sec.* 37*—Interpretation.*—A patentee is not in default for not manufacturing his invention unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum. (*The Anderson Tire Co. of Toronto v. The American Dunlop Tire Co.* [5 Ex. C. R. 100] referred to).

The effect of section 31 of *The Patent Act* is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned.

Semble: That the importation of an invention made in accordance with a process protected by a patent is an importation of the invention,—

Sed Quære whether the provision of section 37 of *The Patent Act*

requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applied to the case of a patent for an art or process? *Hambly v. Albright & Wilson*, 7 Ex. C. R. 363.

3. *Patent law—Canadian Patent Act—R. S.*, 1906, *c.* 69, *s.* 38—*Manufacture—Sale—Lease or license.*—Under the Canadian Patent Act the holder of a patent is obliged, after the expiration of two years from its date, or an authorized extension of that period, to sell his invention to any person desiring to obtain it and cannot claim the right merely to lease it or license its use. Judgment of the Exchequer Court (10 Ex. C. R. 378) affirmed. *Hildreth v. McCormick Manufacturing Co.*, 39 S. C. R. 499. A cross appeal taken herein has just been argued before the Supreme Court of Canada. It is understood that the case will be carried to the Privy Council just as soon as the judgment on the cross appeal is pronounced.

4. *Patent of invention—Novelty—Infringement.*—C. & Co. were assignees of a patent for a check-book used by shop-keepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as fly-leaves with a carbonized leaf bound in next the cover and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check-book with a like device but instead of the tape the end of the carbonized leaf, for about half an inch, was left without carbon and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent, the Supreme Court of Canada, *held*, affirming the decision of the Exchequer Court, that the evidence at the trial showed the device for turning over the black leaf without soiling the fingers to have been used before the patent of C. & Co. was issued and it was therefore not new; that the only novelty in the said patent was in the use of the tape; and that using the margin of the paper instead of the tape was not an infringement. *Carter & Co. v. Hamilton*, 23 S. C. R. 172; 3 Ex. C. R. 351.

5. *Burden of proof—Duty of patentee as to creating market for patent.*—It is not incumbent upon a patentee to show that he has made active efforts to create a market for his patented invention in Canada. It rests upon those who seek to defeat the patent to show that he neglected or refused to sell the invention for a reasonable price when proper application was made to him therefor. *Barter v. Smith*, 2 Ex. C. R. 455.

6. *Patent—Obligation to sell invention.*—Upon application being made to the respondents to purchase a number of their telephones for private purposes they refused to sell the same, accompanying such refusal by the statement:—"We do not sell telephones, but we rent them." It was held that the respondents had thereby afforded a good ground for forfeiture of their patent. *Toronto Telephone Mfg. Co. v. Bell Telephone Co.*, 2 Ex. C. R. 495.

7. *Connivance in importation by patentee.*—Connivance by the patentee in an improper importation is equal to importing or causing to be imported within the meaning of the statute. *Ibid.*

8. *How patentee may satisfy requirements of statute as to manufacture.*—A patentee is within the meaning of the law in regard to his obligation to manufacture, when he has kept himself ready either to furnish the patented article or to sell the right of using, although not one

single specimen of the article may have been produced, and he may have avoided his patent by refusal to sell, although his patent is in general use. *Toronto Telephone Mfg. Co. v. Bell Telephone Co.*, 2 Ex. C. R. 524.

9. *Patents—Articles of Commerce—Importation.*—If an article imported by a patentee and used by him in the construction of his invention is a common commercial article employed for many purposes, and is not specified in the patentee's claim as an essential part of his invention such importation does not operate a forfeiture of the patent. *Royal Electric Co. v. Edison Electric Co.*, 2 Ex. C. R. 576.

10. *Importation of parts.*—A fair test of the patentee's ability to freely import any article required in the construction of his invention is to ascertain if it is open to every person in Canada to manufacture, import, sell and use the same without thereby infringing the patent in question. If the article is thus part of the public domain, the patentee is at liberty either to import it or purchase it in Canada for the purposes of such construction. *Ibid.*

11. *Novelty forming part of combination patented.*—Where the subject of a patent is a combination of elements and one of them is a novelty invented by the patentee, such novelty is in the same position as the other elements with respect to importation by him unless its production or manufacture is covered by the patent in question. *Ibid.*

12. *Penalty in section 37, how to be applied.*—There is no express provision in the statute imposing the penalty of forfeiture for importing into Canada the various parts of the invention in respect of which the patent was granted, much less for importing one of its parts. The words of the statute are "the invention for which the patent is granted," and they ought not to be extended beyond their plain meaning. In administering the statute, the Minister (*a*) can only apply the penalty to the offence which the statute forbids. He cannot apply it to an attempt to evade the statute, and in imposing penalties, Parliament must take its own measures to prevent evasion, and it would be most unsafe to impose, in the case of an evasion, the heavy penalty which the law has levelled at the principal offence, on the theory which may or may not be correct, that Parliament intended by an equal penalty to forbid the doing of that which would be almost or quite an equivalent of the principal offence. *Ibid.*

(*a*) The above holding was made prior to the amendments of sec. 37 as enacted in R. S. C. 1886.—The judicial powers formerly exercised by the Minister have been transferred to the Exchequer Court.

13. *Patentee's right to impose limitation on sale.*—Where the article patented is of delicate and skilful manufacture, and one from which the patentee can only reap the reward of his labour and expenditure through it being esteemed successful by the public, it is reasonable for him, at a time when public opinion with respect to it is in suspense, to decline to sell his invention unconditionally to those who, by unsuitable use, would fail to derive benefit from it themselves, and would create an impression in the public mind that the invention was a failure. If, upon application made to him for the purchase of his invention, he imposes a limitation in respect of its use, he ought not to be held to have thereby forfeited his patent unless it appear that such limitation was imposed for the purpose of evading compliance with the provisions of the statute which require him to sell the patented invention at a reasonable price. *Ibid.*

14. *Price—Monopoly.*—In relation to the provisions of section 37 of *The Patent Act* touching the price of the patented invention to purchasers,

it would appear that the evil the statute was principally intended to prevent is the exaction of exorbitant prices under the monopoly secured by the patent. *Ibid.*

15. *Patent of invention—Manufacture—Extension of time.*—A patent of invention expires in two years from its date or at the expiration of a lawful extension thereof if the inventor has not commenced and continuously carried on its construction or manufacture in Canada so that any person desiring to use it could obtain it or cause it to be made.

A patent is not kept alive after the two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it if he has not commenced to manufacture in Canada. *Barter v. Smith* (2 Ex. C. R. 455), overruled on this point.

The power of extension beyond the two years given to the Commissioner of Patents or his deputy can only be exercised once. *Power v. Griffin*, 33 S. C. R. 39. This decision has the effect of overruling *Barter v. Smith*, 2 Ex. C. R. 455.

16. See also on the question of importation of parts as bearing upon forfeiture of patent: *Mitchell v. Hancock Inspirator Co.*, 2 Ex. C. R. 539, and *Wright v. Bell Telephone Co.*, 2 Ex. C. R. 552. Personal manufacture by patentee not necessary: *Brook v. Broadhead*, 2 Ex. C. R. 562. Sale to person desiring to use patented invention. Requirements of valid sale: *Copeland-Chatterson Co. v. Hatton*, 10 Ex. C. R. 224. Reasonable price is a reasonable price in money: *Copeland-Chatterson Co. v. Paquette*, 10 Ex. C. R. 410.

The provisions of sec. 38 as to manufacture and the jurisprudence thereunder have to be read in the light of sec. 44, which became law in 1903.

Term for manufacture in Canada may be extended.

39. Whenever a patentee is unable to commence or carry on the construction or manufacture of his invention within the two years hereinbefore provided, the Commissioner may, at any time not more than three months before the expiration of that term, grant to the patentee or his legal representatives an extension of the term of two years, on his proving to the satisfaction of the Commissioner that his failure to commence or carry on such construction or manufacture is due to reasons beyond his control. 3 E. VII., c. 46, s. 5.

Term for importation may be extended—Proviso.

40. The Commissioner may grant to the patentee or his legal representatives, for the whole or any part of the patent, an extension for a further term not exceeding one year, during which he may import or cause to be imported into Canada the invention for which the patent is granted, if he or they show cause, satisfactory to the Commissioner, to warrant the granting of such extension; but no extension shall be granted unless application is made to the Commissioner at some time within three months before the expiry of the twelve months aforesaid. 3 E. VII., c. 46, s. 6.

Validity of any extensions already granted.

41. The validity of any extension granted or assumed to be granted before the thirteenth day of August, one thousand nine hundred and three, of the period of two years theretofore limited by statute in that behalf for the commencement of the construction or manufacture of a patented invention, or of the period of twelve months theretofore so limited for the importation of a patented invention, shall not be open to impeachment, nor shall the patent for any invention in respect of which any such extension had been so granted be deemed to have lapsed or expired, because,—

(*a*) such extension, instead of being granted by the Commissioner, was so granted or assumed to be granted by the Deputy Commissioner, or, as acting deputy commissioner, by a person performing the duties of the Deputy Minister of Agriculture under the provisions of the Civil Service Act in that behalf, instead of by the Commissioner; or,

(*b*) in the case of the invention to which such extension relates, there had been granted or assumed to be granted a previous extension or previous extensions of such period of two years, or such period of twelve months, as the case may be. 3 E. VII., c. 46, s. 9.

Conditional validity of certain patents granted before August 13th, 1903.

42. The validity of any patent granted before the thirteenth day of August, one thousand nine hundred and three, shall not be impeached, nor shall such patent be deemed to have lapsed or expired, by reason of the failure of the patentee to construct or manufacture the patented invention, if the patentee within the period of two years from the date of the patent allowed for such construction or manufacture, or within an authorized extension of that period, became, and at all times thereafter continued to be, ready either to furnish the patented invention himself or to license the right of using it, on reasonable terms, to any person desiring to use it, and if the patentee, or his legal representatives, within six months from the thirteenth day of August, one thousand nine hundred and three, had,—

(*a*) commenced, and after such commencement continuously carried on in Canada, the construction or manufacture of the patented invention in such manner as to enable any person desiring to use it to obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada; or,

(*b*) applied for and thereupon obtained an order of the Commissioner making the patent subject to the condition hereinafter provided for authorizing application for the issue of licenses to make, construct, use and sell the patented invention. 3 E. VII., c. 46, s. 10.

Rights of third persons saved.

43. In the case of any patent which before the thirteenth day of August, one thousand nine hundred and three, had become void or the validity of which might have been impeached, and which was revived or protected from impeachment by any provision of the Act, passed in the third year of His Majesty's reign, chapter forty-six, intituled *An Act to amend the Patent Act*, or which, by reason of any such provision, is to be deemed not to have elapsed or expired, any person who had, between the time when such patent became void or the ground for such impeachment arose, and the thirteenth day of August, one thousand nine hundred and three, aforesaid, commenced to manufacture, use or sell in Canada the invention covered by such patent, may continue to manufacture, use or sell it in as full and ample a measure as if such revival or protection from impeachment had not been effected; and, in case any person had, before the thirteenth day of August aforesaid, contracted with the owner of the patent for the right to manufacture, use or sell such invention in Canada, the contract shall be deemed to have remained in full force and effect notwithstanding that the patent had become void as aforesaid, unless the person who had so contracted with such owner can show that in the meantime, by reason or on the faith of such invalidity or lapsing, he has materially altered his position with respect to such invention and that the revival of such contract would cause him damage. 3 E. VII., c. 46, s. 14.

Conditions which may be substituted—Application by any person to use patent—Order of Commissioner—Assessors—More than one license may be granted—Forfeiture of patent for refusal to grant license.

44. On the application of the applicant for a patent, previous to the issue thereof, or on the application within six months after issue of a patent of the patentee or his legal representatives, the Commissioner, having regard to the nature of the invention, may order that such patent, instead of being subject to the condition with respect to the construction and manufacture of the patented invention hereinbefore provided, shall be subject to the following conditions, that is to say:—

(*a*) Any person, at any time while the patent continues in force, may apply to the Commissioner by petition for a license to make, construct, use and sell the patented invention, and the Commissioner shall, subject to general rules which may be made for carrying out this section, hear the person applying and the owner of the patent, and, if he is satisfied that the reasonable requirements of the public in reference to the invention have not been satisfied by reason of the neglect or refusal of the patentee or his legal representatives to make, construct, use or sell the invention, or to grant licenses to others on reasonable terms to make, construct, use or sell the same, may make an order under his hand and the seal of the Patent Office requiring the owner of the patent to grant a license to the person apply-

ing therefor, in such form, and upon such terms as to the duration of the license, the amount of the royalties, security for payment, and otherwise, as the Commissioner, having regard to the nature of the invention and the circumstances of the case, deems just;

(*b*) The Commissioner may, if he thinks fit, and shall on the request of either of the parties to the proceedings, call in the aid of an assessor, specially qualified, and hear the case wholly or partially with his assistance;

(*c*) The existence of one or more licenses shall not be a bar to an order by the Commissioner for, or to the granting of a license on any application, under this section; and,

(*d*) The patent and all rights and privileges thereby granted shall cease and determine, and the patent shall be null and void, if the Commissioner makes an order requiring the owner of the patent to grant any license, and the owner of the patent refuses or neglects to comply with such order within three calendar months next after a copy of it is addressed to him or to his duly authorized agent. 3 E. VII., c. 46, s. 7.

References to the Exchequer Court—Jurisdiction of other courts.

45. Any question which arises as to whether a patent, or any interest therein, has or has not become void under any of the provisions of the seven last preceding sections of this Act, may be adjudicated upon by the Exchequer Court of Canada, which court shall have jurisdiction to decide any such questions upon information in the name of the Attorney-General of Canada, or at the suit of any person interested; but this section shall not be held to take away or affect the jurisdiction which any court other than the Exchequer Court of Canada possesses. 3 E. VII., c. 46, s. 8.

It is for the Judge to decide whether or not there was an infringement and not for a witness, as the Judge is not to surrender his own independent judgment to that of any witness. In the course of the argument of the case of *Brook v. Steele et al*, 14 C. P. C. 73, Lord Russell, C.J., observed that it was wrong to ask a witness what was the substance or meaning of the invention. He was amazed at the looseness with which this evidence was admitted. If the rules of evidence were observed, that would probably reduce the voluminous amount of evidence in patent cases. The question whether the defendants' article was an infringement was for the Judge, and not for an expert witness.

46, 47, 48, 49, 50, 51.—These sections deal with caveats and the tariff of fees in the Patent Office.

GENERAL.

Government may use patented invention.

52. The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof. R. S., c. 61, s. 44.

Patent for invention—Crown's right to use—Compensation—Condition precedent to right of action.—Apart from statute the Crown has power, if it sees fit to do so, to use a patented invention without the assent of the patentee and without making any compensation to him therefor.

By the 44th section of *The Patent Act* the Government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation therefor. And it was *held* that a report by the Commissioner is a condition precedent to any right of action for such compensation. *McDonald v. The King*, 10 Ex. C. R. 338.

As to use of patented invention in foreign vessels.

53. No patent shall extend to prevent the use of any invention in any foreign ship or vessel, if such invention is not so used for the manufacture of any goods to be vended within or exported from Canada. R. S., c. 61, s. 45.

Patent not to affect a previous purchaser—Proviso as to other persons.

54. Every person who, before the issuing of a patent, has purchased, constructed or acquired any invention for which a patent is afterwards obtained under this Act, shall have the right of using and vending to others the specific article, machine, manufacture or composition of matter patented and so purchased, constructed or acquired before the issue of the patent therefor, without being liable to the patentee or his legal representatives for so doing; but the patent shall not, as regards other persons, be held invalid by reason of such purchase, construction or acquisition or use of the invention, by the person first aforesaid or by those to whom he has sold the same, unless the same was purchased, constructed, acquired or used, with the consent or allowance of the inventor thereof, for a longer period than one year before the application for a patent therefor, thereby making the invention one which has become public and in public use. R. S., c. 61, s. 46.

1. *Patent for Invention—R. S. C. ch. 61. sec. 46—Rights of Prior Manufacturer.*—Section 46 of *The Patent Act*, R. S. C. (1886), ch. 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use and sell the articles manufactured by him prior thereto. *Fowell v. Chown.* 25 Ont. R. 71.

2. *Patent for Invention—Construction of Articles Previous to Patent—Right to sell After Patent—Consent of Inventor—R. S. C. 1886, ch. 61, sec. 46.*—The defendants bought from the plaintiffs a punching bag, which had on it the words "Pat. applied for", and before the issue of the patent, manufactured and advertised for sale a number of similar bags in spite of the plaintiffs' remonstrances; and after patent obtained by the plaintiffs, nevertheless continued to sell the bags which they had so manufactured:—and it was *held*, that the defendants were entitled to do so under sec. 46 of *The Patent Act*, R. S. C. 1886, ch. 61; and that it made no difference that they had acted without the consent and allowance of the

inventor. *Fowell v. Chown*, (1894) 25 O. R. 71, distinguished. *Lean v. Huston* (1885) 8 O. R., 521, referred to and distinguished. *Victor Sporting Goods Co. v. H. A. Wilson Co.* 7 Ont. L. R. 570.

Patented article to be stamped or marked.

55. Every patentee under this Act shall stamp or engrave on each patented article sold or offered for sale by him the year of the date of the patent applying to such article, thus,—*Patented*, 1906, or as the case may be, or when, from the nature of the article, this cannot be done, then by affixing to it, or to every package wherein one or more of such articles is or are inclosed, a label marked with a like notice. R. S., c. 61, s 54.

Sections **56** to **63,** both inclusive, excepting however sections 60 and 62, deal with the internal regulations of the Patent Office.

Seals of Patent Office to be evidence.

60. Every court, judge and person whosoever shall take notice of the seal of the Patent Office and shall receive the impressions thereof in evidence, in like manner as the impressions of the Great Seal are received in evidence, and shall also take notice of and receive in evidence, without further proof and without production of the originals, all copies or extracts certified under the seal of the Patent Office to be copies of or extracts from documents deposited in such office. R. S., c. 61, s. 50.

Regulations may be made and forms prescribed.

62. The Commissioner may, from time to time, subject to the approval of the Governor in Council, make such rules and regulations, and prescribe such forms, as appear to him necessary and expedient for the purposes of this Act, and notice thereof shall be given in the *Canada Gazette*; and all documents, executed in conformity with the same and accepted by the Commissioner, shall be held valid, so far as relates to proceedings in the Patent Office. R. S., c. 61, s. 52.

The three last sections of the Act, **64, 65 and 66,** deal with offences and penalties.

The Copyright Act.

PART OF CHAPTER 70 OF THE REVISED STATUTES OF CANADA, 1906.

By section 21 of R. S., 1906, the Exchequer Court is given jurisdiction to adjudicate upon conflicting claims to copyright.

An Act respecting Copyright.

NOTE.—The original Act is chapter 88 of 38 Vic., although there is another Act passed in the same year also chaptered 88. It was assented to by Her late Majesty under the authority of the Imperial Act 38-39 Vic., cap. 53.

Short Title.

1. This Act may be cited as the Copyright Act. R. S., c. c. 62, s. 1.

INTERPRETATION.

Definitions—Minister—Department—Legal representatives.

2. In this Act, unless the context otherwise requires,—

(*a*) 'Minister' means the Minister of Agriculture;

(*b*) 'Department' means the Department of Agriculture;

(*c*) 'legal representatives' includes heirs, executors, administrators and assigns, or other legal representatives. R. S., c. 62, s. 2.

PART I.

REGISTERS OF COPYRIGHTS.

Minister shall cause to be kept.

3. The Minister shall cause to be kept, at the Department, books to be called the Registers of Copyrights, in which proprietors of literary, scientific and artistic works or compositions, may have the same registered in accordance with the provisions of this Act. R. S., c. 62, s. 3.

SUBJECTS AND CONDITIONS OF COPYRIGHT.

Who may have copyright—For twenty-eight years—Translations.

4. Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, who is the author of any book, map, chart or musical composition, or of any original painting, drawing, statue, sculpture or photograph, or who invents, designs, etches, engraves or causes to be engraved, etched or made from his own design, any print, cut, or engraving, and the legal representatives of such person or citizen, shall for the term of twenty-eight years, from the time of recording the copyright thereof in the manner hereinafter directed, have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing and vending such

literary, scientific or artistic work or composition, in whole or in part, and of allowing translations of such work from one language into other languages to be printed or reprinted and sold. R. S., c. 62, s. 4.

This section is declared to be repealed by sec. 47 hereof, which is embodied in Part II of the Act. Part II, however, has never come into force having never received the royal assent and no proclamation having as yet issued in compliance with section 45. Hence the above section 4 is still in full force and effect.

1 *Constitutionality.*—It was held by the Judicial Committee of the Privy Council, in *Routledge v. Low* (L. R. 3. E. & I. App. 100), that the Imperial Copyright Act of 1842 extended the protection of British Copyright to every part of the British dominions, even to a colony having its own Copyright Act. (See especially the opinion of Lord Cranworth, at p. 113). Lord Cransworth's opinion that it is within the power of the Imperial Parliament to enact legislation touching any subject in the domain of private law, which shall be binding upon a colony enjoying a previous grant of the power to legislate upon such subject is, of course, fortified by the provisions of s. 2 of the Colonial Laws Validity Act, 1865, and was apparently adopted by the Court in the leading Canadian case of *Smiles v. Belford* (See per Moss, J. A., in 1 Ont. A. R. at p. 447). It is to be borne in mind that the decision in this case has been repeatedly impugned by counsel in subsequent cases. However, it was followed in the recent case of *Black v. Imperial Book Co.* (1894) 8 Ont. L. R. 9; and on the appeal in the last mentioned case, the Supreme Court of Canada refused to say that *Smiles v. Belford* was rightly or wrongly decided. (See 35 S. C. R. 488, and compare the observations of Lord Atkinson in the *Alien Labour Case* (1906) A. C. at p. 547, as to the plenary power of the Parliament of Canada to legislate upon any subject granted to it unreservedly by the B. N. A. Act, 1867.) The Dominion Copyright Act of 1872 was disallowed by the Imperial authorities, because they deemed it to be in conflict with Imperial legislation. (See Canada Sess. Papers (1875) Vol. VIII, No. 28.) After the Dominion and Imperial authorities had arrived at an understanding in the matter, the Canadian Copyright Act of 1875 was passed and ratified in the same year by the Imperial Statute 38 & 39 Vict., c. 53, and the order in council made thereunder. This Act is embodied in c. 62 of *The Revised Statutes of Canada*, 1886. By s.-s. 4 of s. 8 of *The International Copyright Act* (Imp.) 1866, it is provided that "nothing in the Copyright Acts, or this Act, shall prevent the passing in a British possession of any Act or ordinance respecting the copyright within the limits of such possession of works first produced in such possession."

By an Order of Her Majesty in Council, passed in the year 1868, under *The Imperial Foreign Reprints Act*, 1847, the prohibition against importing foreign reprints of British copyright works was suspended so far as Canada was concerned. In 1889 the Dominion Parliament passed an Act to amend the Copyright Act of 1875, the provisions of which were designed to prevent authors belonging to the United States publishing their works in Great Britain, and thus securing copyright in Canada under the Imperial Act. It was also intended to prevent British authors from making arrangements with United States publishers whereby the latter secured the Canadian as well as the United States market. (*See Canada Sessional Papers*, 1894, No. 50; ibid., 1895, No. 81.) The

royal assent was withheld from this Act. In 1900, however, an Act, the provisions of which are embodied in ss. 28, 29, 30, and 31 of this chapter, was passed by the Canadian Parliament, and received the royal assent. It will be observed that this Act does not attempt to affect British copyright. If, however, a British author desires to have a Canadian copyright, he must arrange with a local publisher and have a special Canadian edition printed, although the type therefor need not be set in Canada. This being done, the Canadian edition will be protected, and neither the author nor anyone else will be permitted to import copies of the work into Canada.

The present Copyright Act protects foreign authors, wheresoever resident, where there is a first or contemporaneous publication within the Empire: *Life Publishing Co. v. Rose Publishing Co.*, (1906), 12 Ont. L. R. 386.

As to priorities of British and Canadian copyrights, see *Anglo-Canadian Music Publishers' Association v. Suckling* 17 Ont. R. 239.

The Imperial Act, 25 & 26 Vict. c. 68, being an Act for amending the law relating to Copyright in works of Fine Art, does not extend to the colonies, and copyright thereby conferred is confined to the United Kingdom. *Graves v. Gorrie*, 32 Ont. R. 266; 1 Ont. L. R. 309; (1903) A. C. 496. *Tuck v. Priester*, 16 Q. B. D. 629.

Subject-matter—Circulars—Forms. The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright if time, labour and experience have been devoted to its production. *Church v. Linton*, 25 Ont. R. 131.

Subject-matter—Biographical sketches: *Gemmill v. Garland*, 14 S. C. R. 321.

Subject-matter—"Newspaper": *Grossman v. Canada Cycle Co.* (1903) 5 Ont. L. R. 55.

See Annotations to R. S., 1906, p. 1311 & seq.

2. *Copyright—Foreign Reprints—License—Assignment—Entry at Stationers' Hall—Imperial Acts in force in Canada—Imperial Acts* 5 & 6 *Vic. ch.* 45, *secs.* 17, 18, 19; 39 & 40 *Vict. ch.* 36 *sec.* 152.—Section 152 of the Imperial Customs Act, 1876, 39-40 Vict., ch. 36, requiring notice to be given to the Commissioner of Customs of copyright, and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to Table IV of the appendix to Vol. 3 of the R. S. O. 1897. That statement is no part of the enactment of the Legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 Vict. ch. 45, is left to its full operation. *Smiles v. Belford* (1877) I. A. R. 436 followed.

A certified copy of the entry at Stationers' Hall of an encyclopædia is *primâ facie* evidence of proprietorship under secs. 18 & 19 of the Act of 1842, and it is not necessary for such *primâ facie* case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author.

An agreement in writing, whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last four years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs.

was held to be a license, and not an assignment, and so not to require registration under sec. 19 of the Imperial Act, 5 & 6 Vict., ch. 45. *Black v. Imperial Book Co.* 8 Ont. L. R. 9; affirmed on appeal to the Supreme Court of Canada, 35 S. C. R. 488. Leave to appeal to Privy Council refused. 35 S. C. R. IV.

3. *Copyright.*—In *W. Marshall and Co. (Limited) v. A. H. Bull (Limited)*, 17 T. L. R. 684, the Court of appeal held, affirming Byrne, J., that fashion designs in a catalogue were protected by registration of the catalogue under the Copyright Act, and that purchasers of the blocks from persons who had been given the blocks for their own use only could not reproduce the designs. 18 C. L. T. 407.

4. *International copyright—Literary work produced in a foreign country—Rights of the author—Purview of the International Copyright Act, 1886, Eng.—Construction of the British North America Act, 1867, as to legislative powers.*—Under the International Copyright Act, 1886, Eng., sect. 4, compliance with the conditions and formalities of the country where a literary work is first published gives the author a copyright in Canada without his having to conform to the copyright act, cap. 62 R. S. C. The International Copyright Act, 1886, Eng., extends to the whole of the British Dominions and is therefore in force in Canada.

The words "*exclusive*" legislative authority, in sect. 91 and "*may exclusively make laws*" in sect. 92 of the B. N. A. 1867, mean "to the exclusion of the Provincial Legislatures in the former and to the exclusion of the Dominion Parliament" in the latter. They cannot be construed to affect the power of the Imperial Parliament to legislate for Canada. *Hubert v. Mary*, Q. R. 15. K. B. 381.

5. *Copyright—Public property—Registration.*—The publication in Canada of a serial illustrated story of Buster Brown and his dog Tige, by the New York Herald, without the protection of the copyright statutes and without complying with the requirements thereof made this illustrated story public property. *Quære*:—Can these illustrated stories be the subject of a trade-mark? *New York Herald v. The Ottawa Citizen Co. Ltd.*, 12 Ex. C. R. Confirmed on appeal to S. C.

Duration.

5. In no case shall the said sole and exclusive right and liberty in Canada continue to exist after it has expired elsewhere. R.S., c. 62, s. 5.

This section is also declared to be repealed by sec. 47, Part II. As Part II is not in force, the section remains effective.

Conditions for obtaining copyright.

6. The condition for obtaining such copyright shall be that the said literary, scientific or artistic works shall be printed and published or reprinted and republished in Canada, or in the case of works of art that they shall be produced or reproduced in Canada, whether they are so published or produced for the first time, contemporaneously with or subsequently to publication or production elsewhere. R. S., c. 62, s. 5.

This section is also declared to be repealed by sec. 47 of Part II. As Part II is not in force, the section remains effective.

Exception as to immoral works.

7. No literary, scientific or artistic work which is immoral, licentious, irreligious, or treasonable or seditious, shall be the legitimate subject of such registration or copyright. R. S., c. 62, s. 5.

Copyright in Canada of British copyright works—Importation—Foreign reprints imported may be sold—Burden of proof.

8. Every work of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada, under any Act of the Parliament of Canada, or of the Legislature of the late province of Canada, or of the legislature of any of the provinces forming part of Canada, shall, when printed and published, or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall, except as hereinafter provided, be held to prohibit the importation from the United Kingdom of copies of any such work lawfully printed there.

2. If any such copyright work is reprinted subsequently to its publication in the United Kingdom, any person who has, previously to the date of entry of such work upon the Registers of Copyright, imported any foreign reprints, may dispose of such reprints by sale or otherwise; but the burden of proof of establishing the extent and regularity of the transaction shall in such case be upon such person. R. S., c. 62, s. 6; 63-64 V., c. 25, s 1.

This section is also declared to be repealed by sec. 47 of Part II hereof. However, as Part II has not as yet received the royal assent, the above section is in full force and effect.

Foreign Copyright.—It is not necessary for the author of a book, copyrighted in England, to copyright it in Canada with the view of restraining a reprint in Canada. However, if he desires to prevent the importation into Canada of printed copies from a foreign country, he must copyright the book in Canada. *Smiles v. Belford*, 1 Ont. A. R. 436. See also *Morang v. Publishers' Syndicate*, 32 Ont. A. 393: *Black v. Imperial Book Co.*, 8 Ont. L. R. 9. affirmed 35 S. C. R. 488.

Registration of work first published in separate articles in periodicals.

9. Any literary work intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be registered under this Act while it is so preliminarily published, if the title of the manuscript and a short analysis of the work are deposited at the Department, and if every separate article so published is preceded by the words, *Registered in accordance with the Copyright Act*: Provided that the work, when published in book or pamphlet form, shall be subject, also, to the other requirements of this Act. R. S., c. 62, s. 7.

Copyright—Publishers—Encyclopædia.—The copyright of articles written for an encyclopædia, paid by the publishers of the latter, remains, in the absence of special terms of employment, in the writer of the article. *Aglalo v. Lawrence* 17, T. L. R. 729.

Books published anonymously.

10. If a book is published anonymously, it shall be sufficient to enter it in the name of the first publisher thereof, either on behalf of the un-named author or on behalf of such first publisher, as the case may be. R. S., c. 62, s. 8.

Deposit of copies in Department—Record of copyright.

11. No person shall be entitled to the benefit of this Act unless he has deposited at the Department three copies of the book, map, chart, musical composition, photograph, print, cut, or engraving, and in the case of paintings, drawings, statuary and sculpture, unless he has furnished a written description of such works of art; and the Minister shall cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose, in the manner adopted by him, or prescribed by the rules and forms made, from time to time, as herein provided. R. S., c. 62, s. 9; 58-59 V., c. 37, s. 1.

Deposit—Neglect.—The neglect to deposit a copy in the Parliamentary library would not prevent the author from bringing an action for infringement. *Griffin v. Kingston & Pembroke Ry. Co.* 17 Ont. R. 660. See now sec. 12, following.

One copy to Library of Parliament and British Museum.

12. The Minister shall cause one of such three copies of such book, map, chart, musical composition, photograph, print, cut, or engraving, to be deposited in the Library of the Parliament of Canada and one in the British Museum. R. S., c. 62, s. 10; 58-59 V., c. 37, s. 2.

As to second and subsequent editions.

13. It shall not be requisite to deliver any printed copy of the second or of any subsequent edition of any book unless the same contains very important alterations or additions. R. S., c. 62, s. 11.

Notice of copyright to appear on work—Form—Exception.

14. No person shall be entitled to the benefit of this Act unless he gives information of the copyright being secured,—

(*a*) if the work is a book, by causing to be inserted in the several copies of every edition published during the term secured, on the title page, or on the page immediately following; or,

(*b*) if the work is a map, chart, musical composition, print, cut, engraving or photograph, by causing to be impressed on the face thereof; or,

(*c*) if the work is a volume of maps, charts, music, engravings or photographs, by causing to be impressed upon the title page or frontispiece thereof;

the words:—*Copyright, Canada*, 190 , *by A. B.*

2. As regards paintings, drawings, statuary and sculptures, the signature of the artist shall be deemed a sufficient notice of such proprietorship. R. S., c. 62, s. 12.

This section has been amended by 7-8 Ed. VII. ch. 17, by striking out from the said section the words "Entered according to the Act of the Parliament of Canada, in the year....., by A. B., at the Department of Agriculture" and substituting therefor the words "Copyright, Canada, 190 , by A. B."

Statutory form of notice.—The notice of copyright to be inserted in the title page of a copyrighted work is sufficient if it substantially follows the statutory form. *Gemmill v. Garland.* 14 S. C. R. 321.

Interim copyright, how obtainable—Registration—Duration—Notice.

15. The author of any literary, scientific or artistic work, or his legal representatives, may, pending the publication or republication thereof in Canada, obtain an interim copyright therefor by depositing at the Department a copy of the title or a designation of such work,intended for publication or republication in Canada.

2. Such title or designation shall be registered in an interim copyright register at the Department to secure to such author aforesaid or his legal representatives, the exclusive rights recognized by this Act, previous to publication or republication in Canada.

3. Such interim registration shall not endure for more than one month from the date of the original publication elsewhere, within which period the work shall be printed or reprinted and published in Canada.

4. In every case of interim registration under this Act the author or his legal representatives shall cause notice of such registration to be inserted once in the *Canada Gazette.* R. S., c. 62, s. 13.

Application for registration—Unauthorized assumption of agency.

16. The application for the registration of a copyright, or of a temporary or of an interim copyright may be made in the name of the author or of his legal representatives, by any person purporting to be agent of such author or legal representatives.

2. Any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable in any court of competent jurisdiction. R. S., c. 62, s. 14.

ASSIGNMENTS AND RENEWALS.

Copyright and right to obtain it assignable—In duplicate—Duplicates, disposal of.

17. The right of an author of a literary, scientific or artistic work to obtain a copyright, and the copyright when obtained, shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing, made in duplicate, and which shall be registered at the Department on production of both duplicates and payment of the fee hereinafter mentioned.

2. One of the duplicates shall be retained at the Department, and the other shall be returned, with a certificate of registration, to the person depositing it. R. S., c. 62, s. 15.

On this question of the assignment of proprietorship of copyright and the necessity for its registration see *Morang v. Publishers' Syndicate*, 32 Ont. R. 393: *Anglo-Canadian Music Publishers' Assn. v. Dupuis* Q. R. 27, S. C. 485. And as to the requirement of a license to publish, acquiescence in infringement and estoppel, see *Allen v. Lyon*. 5 Ont. R. 615.

Copyright to assignee of author.

18. Whenever the author of a literary, scientific or artistic work or composition which may be the subject of copyright has executed the same for another person, or has sold the same to another person for due consideration, such author shall not be entitled to obtain or to retain the proprietorship of such copyright, which is, by the said transaction, virtually transferred to the purchaser, and such purchaser may avail himself of such privilege, unless a reserve of the privilege is specially made by the author or artist in a deed duly executed. R. S., c. 62, s. 16.

Extension of term—Title to be again registered.

19. If, at the expiration of the said term of twenty-eight years, the author, or any of the authors when the work has been originally composed and made by more than one person, is still living, or if such author is dead and has left a widow or a child, or children living, the same sole and exclusive right and liberty shall be continued to such author, or to such authors still living, or, if dead, then to such widow and child or children, as the case may be, for the further term of fourteen years; but in such case, within one year after the expiration of such term of twenty-eight years, the title of the work secured shall be a second time registered, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright. R. S., c. 62, s. 17.

Notice of renewal to be published.

20. In all cases of renewal of copyright under this Act the author or proprietor shall, within two months from the date of such renewal, cause notice of the registration thereof to be published once in the *Canada Gazette*. R. S., c. 62, s. 18.

CONFLICTING CLAIMS TO COPYRIGHT.

How determined—Court—Duty of Minister—Exchequer Court.

21. In case of any person making application to register as his own, the copyright of a literary, scientific or artistic work already registered in the name of another person, or in case of simultaneous conflicting applications, or of an application made by any person other than the person entered as proprietor of a registered copyright, to cancel the said copyright, the person

so applying shall be notified by the Minister that the question is one for the decision of a court of competent jurisdiction, and no further proceedings shall be had or taken by the Minister concerning the application until a judgment is produced maintaining, cancelling or otherwise deciding the matter.

2. Such registration, cancellation or adjustment of the said right shall then be made by the Minister in accordance with such decision.

3. The Exchequer Court of Canada shall be a competent court within the meaning of this Act, and shall have jurisdiction to adjudicate upon any question arising under this section, upon information in the name of the Attorney-General of Canada, or at the suit of any person interested. R. S., c. 62, s. 19; 53 V., c. 12, s. 1; 54-55 V., c. 34, s. 1.

Unauthorized Publication of Manuscript.

Printing of manuscript without authority—Damages.

22. Every person who, without the consent of the author or lawful proprietor thereof first obtained, prints or publishes or causes to be printed or published, any manuscript not previously printed in Canada or elsewhere, shall be liable to the author or proprietor for all damages occasioned by such publication, and the same shall be recoverable in any court of competent jurisdiction. R. S., c. 62, s. 20.

1. *Infringement.*—The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor. *Gemmill v. Garland*, 14 S. C. R. 321. See also *Allen v. Lyon*, 5 Ont. R. 615.

2. *Stereotype plates.*—Printing and publishing a book from stereotype plates imported into Canada is a sufficient 'printing' within the meaning of the Act, though no typographical work is done in the preparation of the copies. *Frowde v. Parrish*, 27 Ont. R. 526. See also *Anglo-Canadian Music Publishers' Association v. Winnifrith Bros.*, 15 Ont. R. 164; *Liddell v. Copp-Clarke Co.*, 19 Ont. P. R. 332, and *Morang v. Publishers' Syndicate*, 32 Ont. R. 393.

3. *Textual copy.*—Where in the publication of a dictionary, the treatment of almost all its subjects, including errors and mistakes, were taken from a previous publication, it was *held* that such evidences made out *primâ facie* case of piracy. *Beauchemin v. Cadieux*, 31 S. C. R. 370.

Licenses to Re-publish.

Copyrighted work out of print—License.

23. If a work copyrighted in Canada becomes out of print, a complaint may be lodged by any person with the Minister, who, on the fact being ascertained to his satisfaction, shall notify the owner of the copyright of the complaint and of the fact; and if, within a reasonable time, no remedy is applied by such owner, the Minister may grant a license to any person to publish a new edition or to import the work, specifying the

number of copies and the royalty to be paid on each to the owner of the copyright. R. S., c. 62, s. 21.

24. This section deals with departmental fees.

RIGHT TO REPRESENT SCENE OR OBJECT.

Saved.

25. Nothing herein contained shall prejudice the right of any person to represent any scene or object, notwithstanding that there may be copyright in some other representation of such scene or object. R. S., c. 62, s. 23.

FOREIGN NEWSPAPERS AND MAGAZINES.

May be imported.

26. Newspapers and magazines published in foreign countries, and which contain, together with foreign original matter, portions of British copyright works republished with the consent of the author or his legal representatives, or under the law of the country where such copyright exists, may be imported into Canada. R. S., c. 62, s. 24.

CLERICAL ERRORS NOT TO INVALIDATE.

Corrected by Minister.

27. Clerical errors which occur in the framing or copying of any instrument drawn by any officer or employee in or of the Department shall not be construed as invalidating such instrument, but when discovered they may be corrected under the authority of the Minister. R. S., c. 62, s. 25.

IMPORTATION.

If copyright owner licenses reproduction in Canada—Minister may prohibit importation—Proviso.

28. If a book as to which there is subsisting copyright under this Act has been first lawfully published in any part of His Majesty's dominions, other than Canada, and if it is proved to the satisfaction of the Minister that the owner of the copyright so subsisting and of the copyright acquired by such publication has lawfully granted a license to reproduce in Canada, from movable or other types, or from stereotype plates, or from electroplates, or from lithograph stones, or by any process for facsimile reproduction, an edition or editions of such book designed for sale only in Canada, the Minister may, notwithstanding anything in this Act, by order under his hand, prohibit the importation into Canada, except with the written consent of the licensee, of any copies of such book printed elsewhere: Provided that two such copies may be specially imported for the *bonâ fide* use of any public free library or any university or college library, or for the library of any duly incorporated institution or society for the use of the members of such institution or society. 63-64 V., c. 25, s. 1.

Suspension or revocation of prohibition.

29. The Minister may at any time in like manner, by order under his hand, suspend or revoke such prohibition upon importation if it is proved to his satisfaction that,—

(*a*) the license to reproduce in Canada has terminated or expired; or,

(*b*) the reasonable demand for the book in Canada is not sufficiently met without importation; or,

(*c*) the book is not, having regard to the demand therefor in Canada, being suitably printed or published; or,

(*d*) any other state of things exists on account of which it is not in the public interest to further prohibit importation. 63-64 V., c. 25, s. 2.

Licensee if required to furnish copy of any edition—Otherwise prohibition may be revoked.

30. At any time after the importation of a book has been so prohibited, any person resident or being in Canada may apply, either directly or through a book-seller or other agent, to the person so licensed to reproduce such book, for a copy of any edition of such book then on sale and reasonably obtainable in the United Kingdom or any other part of His Majesty's dominions, and it shall thereupon be the duty of the person so licensed, as soon as reasonably may be, to import and sell such copy to the person so applying therefor, at the ordinary selling price of such copy in the United Kingdom, or such other part of His Majesty's dominions, with the duty and reasonable forwarding charges added.

2. The failure or neglect, without lawful excuse, of the person so licensed to supply such copy within a reasonable time shall be a reason for which the Minister may, if he sees fit, suspend or revoke the prohibition upon importation. 63-64 V., c. 25, s. 3.

Prohibition to be notified to Customs.

31. The Minister shall forthwith inform the Department of Customs of any order made by him under this Act. 63-64 V., c. 25, s. 4.

EVIDENCE.

Certified copies.

32. All copies or extracts certified from the Department shall be received in evidence without further proof and without production of the originals. R. S., c. 62, s. 26.

Validity of documents.

33. All documents, executed and accepted by the Minister shall be held valid, so far as relates to official proceedings under this Act. R. S., c. 62, s. 27.

Rules and Regulations.

Minister to make rules and forms.

34. The Minister may, from time to time, subject to the approval of the Governor in Council, make such rules and regulations, and prescribe such forms as appear to him necessary and expedient for the purposes of this Act; and such regulations and forms, circulated in print for the use of the public, shall be deemed to be correct for the purposes of this Act. R. S., c. 62, s. 27.

Rules and regulations, as provided for in the above section, have been made under the authority of an Order in Council bearing date the 3rd December, 1907, and are to be found at page 110 of the Dominion Statutes of 1908.

35-44. These sections, both inclusive, deal with offences, penalties and forfeitures under this Act, the recovery and enforcement thereof and prescribe the time within which action must be taken.

PART II.

This Part includes sections 45 to 54, both inclusive, to the end of the Act. Section 47 purports to repeal sections 4, 5, 6 and 8 of Part I. But upon reference to section 45, it will be seen that Part II shall only come into force on a day to be named by proclamation of the Governor General. This Part II embodies the provisions of 52 Vict. ch. 29, and is not as yet in force, as it has not, up to the present, received the royal assent. No proclamation, as provided by sec. 45, has ever been issued by the Governor General. See *supra*, notes under section 4 hereof.

The Trade-mark and Design Act.

PART OF CHAPTER 71 OF THE REVISED STATUTES OF CANADA, 1906.

By section 12 of R. S. 1906, ch. 71, the Exchequer Court is invested with the jurisdiction for deciding matters of dispute touching the registration of a trade-mark, on the reference to the court by the Minister of Agriculture; by sec. 42 of the same Act, the court is further endowed with jurisdiction in matters respecting the entries in the register of trade-marks and in the register of industrial designs, the rectification of such registers and the alteration of such trade-marks or industrial designs, and the further jurisdiction for making, expunging or varying any entry in such registers. By sec. 43 the court is given jurisdiction for adding to or altering any trade-mark or industrial design.

An Act respecting trade-marks and industrial designs—Short title.

1. This Act may be cited as the Trade-Mark and Design Act. R. S., c. 63, s. 1.

GENERAL INTERPRETATION.

Minister.

2. In this Act, unless the context otherwise requires, 'Minister' means the Minister of Agriculture.

Division of Act.

3. This Act is divided into three parts. Part I. applies only to Trade-Marks. Part II. applies only to Industrial Designs, but does not apply to any design the proprietor of which is not a person resident within Canada, nor to any design which is not applied to a subject-matter manufactured in Canada. Part III. is general and applies to both Trade-Marks and Industrial Designs. R. S., 63, ss. 2, 24 and 36.

PART I.

TRADE-MARKS.

INTERPRETATION.

Definitions.

4. In this Part, unless the context otherwise requires,—

(*a*) 'general trade-mark' means a trade-mark used in connection with the sale of various articles in which a proprietor deals in his trade, business, occupation or calling generally;

(*b*) 'specific trade-mark' means a trade-mark used in connection with the sale of a class merchandise of a particular description. R. S., c. 63, s. 4.

What shall be deemed to be trade-marks.

5. All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade-marks. R. S., c. 63, s. 3.

1. *Trade-mark—What constitutes.*—"The world is wide," said Lord Justice Bowen once in a trade-mark case, "and there are many names." The world is wide and there are many designs. There is really no excuse for imitation in a cathedral stove or anything else, and when we find such a stove selling largely, and another enterprising trader producing a similar article, only with different tracery, his conduct is only explicable on one hypothesis, and that is a desire to appropriate the benefit of another person's business. (*Harper & Co. v. Wright & Co.*, [1895] 2 ch. 593, 64 L. J. ch. 813; reversed on appeal, W. N. [1895], p. 146). The argument of undesigned coincidence is one which may be commended to Judæus Apella, and the other argument—the stock argument—as to the proprietor of a design or trade-mark not being entitled to monopolize art or the English language, is about equally deserving of respect. In such cases, as Lord Westbury said in *Holdsworth v. McCrea* (L. R. 2 H. L. at p. 388) and Lord Herschell in *Hecla Foundry Co. v. Walker* (14 App. Cas. 550), repeated, the appeal is to the eye, and rightly. It is the eye by which the buyer judges, and by which, if colourable imitations are by law allowed, he will be deceived and defrauded. 12 Q. L. R. 12.

2. *Trade-mark—"Asbestic"—Word merely descriptive.*—Where a word is merely descriptive of a natural product, it cannot be appropriated and form part of a trade-mark. Hence, the word "asbestic" prefixed to "wall plaster," being merely descriptive of the material used in the plaster, the sale by other parties of plaster under that name is not an infringement of a registered trade-mark for "asbestic wall plaster." *Asbestos and Asbestic Co. v. Wm. Sclater Co.*, Q. R. 18, S. C. 360.

3. *Trade-mark—Invented word—"Absorbine."*—The word "Absorbine," as applied to a veterinary preparation for absorbing and removing swellings, was *held* (affirming Joyce, J., [1904] 1 ch. 696), to be a mere variation of an existing English word, and therefore not an "invented word" capable of registration. *Christy v. Tipper* (1905), 1 Chan. Div. 1.

4. *Trade-mark—Infringement—Inventive term—Coined word—Exclusive use—Colourable imitation—Common idea—Description of goods—Deceit and fraud—Passing-off goods.*—The hyphenated coined words "shur-on" and "staz-on" are not purely inventive terms but are merely corruptions of words descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and, therefore, they cannot properly be the subject of exclusive use as trade-marks. A trader using the term "Staz-on" as descriptive of such goods, is not guilty of infringement of any rights to the use of the term "shur-on" by another trader as his trade-mark, nor of fraudulently counterfeiting similar goods described by the latter term; nor is such a use of the former term a colourable imitation of the latter term cal-

culated to deceive purchasers, as the terms are neither phonetically nor visually alike. The judgment appealed from (13 Ont. L. R. 144), was affirmed. *Kirstein Sons & Co. v. Cohen Bros.*, 39 S. C. R. 286.

5. *Trade-mark—Fancy name—Descriptive letters.*—The letters C. A. P., standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trade-mark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates." *Provident Chemical Works v. Canada Chemical Mfg. Co.* (1902), Ont. L. R. 545.

6. *Trade-mark—Essential elements of.*—The essential elements of a legal trade-mark are (1) the universality of right to its use, *i.e.*, the right to use it the world over as a representation of, or substitute for, the owner's signature; (2) exclusiveness of the right to use it. *The J. P. Bush Mfg. Co. v. Hanson*, 2 Ex. C. R. 557.

7. *Trade-mark—Cigars—Infringement—Representations of the King and the Royal Arms—Validity—User before registration—R. S. C., c. 63, s. 8—Declaration signed by agent.*—A label, as applied to boxes containing cigars, bearing upon it "in an oval form a vignette of King Edward VII., with a coat of arms on one side, and a marine view on the other surmounted by the words 'Our King,' and with the words 'Edward VII.' underneath," constitutes a good trade-mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac-simile of the Royal Arms surmounted by the words "King Edward."

The English rule prohibiting the use of the Royal Arms, representations of His Majesty, or any member of the Royal Family, of the Royal Crown or the national Arms or Flags of Great Britain, as the subjects of trade-marks, is not in force in Canada.

It is not essential to the validity of a trade-mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade-mark. In this respect there is no difference between the law of Canada and the law of England.

The declaration required from the proprietor of a trade-mark by section 8 of *The Trade-Mark and Design Act*, R. S. C., c. 63, may be signed by his duly authorized attorney or agent. *Spilling Brothers v. Ryall*, 8 Ex. C. R. 195.

8. *Trade-mark—Infringement—Prior use—'King' cigars—Application to rectify register—Counter-claim—Title in trade-mark—Defence.*—A manufacturer or dealer in cigars cannot acquire the right to the exclusive use, and be entitled to the registration, of a specific trade-mark, of which the term 'King' forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term in combination with the likeness of other kings. *Spilling Bros. v. Ryall* (8 Ex. C. R. 195) explained.

An application to rectify the register of trade-marks cannot be made by counter-claim. (*Secus* now, under general order).

In an action for the infringement of a trade-mark the defendant may attack the legal title of the plaintiffs to the exclusive use of the trade-mark which they have registered. *Partlo v. Todd* (17 S. C. R. 196) referred to. *Provident Chemical Works v. Canadian Chemical Manu-*

facturing Co. (4 O. L. R. 545) approved. *Spilling Bros. v. O'Kelly*, 8 Ex. C. R. 426.

9. *Prior use—Word expressing quality only—Foreign and classical words.*—A person accused of infringement may show that the trade-mark was in common use before registration. Property cannot be acquired in marks, etc., known to a particular trade as designating quality only and not, in themselves indicating that the goods to which they are affixed are the manufacture of a particular person. Nor can property be acquired in any ordinary English word expressive of quality merely though it might be in a foreign word or word of a dead language. *Partlo v. Todd*, 17 S. C. R. 196.

10. *Publici juris—Definition of trade-mark—Monogram.*—Words which are separately *publici juris*, such as 'Red' and 'Seal,' when combined and applied to a specific manufacture may cease to be so, and may be protected as trade-mark. Single or more letters may also form a trade-mark, and more especially when combined, woven, or introduced into a monogram.

The Canadian Act defines trade-mark in more general and comprehensive terms than the English Act, therefore some care must be used in considering English decisions. *Smith v. Fair*, 14 Ont. R. 729, and 11 Ont. A. R. 755.

11. *Geographical name.*—The use of a geographical name in a secondary sense as part of the title identifying a mercantile journal and not as merely descriptive of the place where the journal is published will be protected. *Rose v. McLean Publishing Co.*, 24 Ont. A. R. 240.

12. *Trade sign.*—The words "Golden Lion" used as shop sign will be protected. *Walker v. Alley*, 13 Gr. 366.

13. *Alien friend.—Patent medicines*—The right at common law of an alien friend, in respect of trade-marks, stands on the same ground as that of a subject. The word 'painkiller' will be protected. *Davis v. Kennedy*, 13 Gr. 523.

14. *Validity—Microbe killer.*—The words 'microbe killer' regularly registered constitute a valid trade-mark. *Radam v. Shaw*, 28 Ont. R. 612.

15. *Word 'Imperial.'*—The word 'Imperial' as applied to soap will be protected. *Crawford v. Shuttock*, 13 Gr. 149. See also on the broad question of what constitutes a trade-mark: *Partlo v. Todd*, 12 Ont. R. 171, 14 Ont. A. R. 444, 17 S. C. R. 196; *McCall v. Theal*, 28 Gr. 48; *Davis v. Reid*, 17 Gr. 69; and *Kerry v. Les Soeurs de l'Asile de la Providence*, 1 L. N. 472.

16. *Word in common use not eligible as trade-mark.*—Where the word 'Imperial' designating cough drops or candy was really public property and a common brand or designation for candy long before plaintiff's registration of the words 'Imperial Cough Drops,' his action for infringement against the defendant's trade-mark 'Imperial Cough Candy' was dismissed. *Watson v. Westlake*, 12 Ont. R. 449.

17. *Newspaper.*—A commercial firm published a newspaper called and registered under the name of *The Commercial Traveller and Mercantile Journal*, which was known as *The Commercial Traveller* will be protected as against a newspaper subsequently published under the name of *The Traveller*. *Carey v. Goss*, 11 Ont. R. 619.

18. Fancy names may also be the subject of valid trade-marks. *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 4 Ont. L. R. 545; *Gillett v. Lumsden*, 8 Ont. L. R. 168; and *Grand Hotel Co. of Caledonia v Wilson* (1904), A. C. 103.

19. *Trade-mark—First use.*—First use is the prime essential of a trade-mark, and a transferee must, at his peril, be sure of his title. *Groff v. The Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568.

20. *Trade-mark—Infringement—Use of Corporate name—Fraud and deceit—Evidence.*—The plaintiffs, incorporated in the United States, have done business there and in Canada, manufacturing and dealing in India rubber boots and shoes, under the name of "The Boston Rubber Shoe Company" having a trade line of their manufactures marked with the impression of their corporate name, used as a trade-mark, known as "Bostons," which had acquired a favourable reputation. This trade-mark was registered in Canada in 1897. The defendants were incorporated in Canada in 1896, by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods to those manufactured and sold by the plaintiffs, on one grade of which was impressed the defendants' corporate name, these goods being referred to in their price lists, catalogues and advertisements as "Bostons," and the Company's name frequently mentioned therein as the "Boston Rubber Company" without the addition "Montreal." In an action to restrain defendants from the use of such mark or any similar mark on the goods in question, as an infringement on the plaintiffs' registered trade-mark, it was held, reversing the judgment appealed from, (7 Ex. C. R. 187), that under the circumstances the defendants' use of their corporate name in the manner described was a fraudulent infringement of plaintiffs' registered trade-mark calculated to deceive the public and so to obtain sales of their own goods as if they were plaintiffs manufactures, and consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark on their goods manufactured in Canada. *Boston Rubber Shoe Co. v. Boston Rubber Company of Montreal*, 32 S. C. R. 315.

21. *Trade-mark—Trade name—'Fly poison pad.'*—The plaintiffs sold sheets of paper, saturated with fly poison, under the name of 'Wilson's Fly Poison Pad.' These words were registered by them as a trade-mark, and were printed on each sheet, and the sheets became known in the trade as 'pads.' And it was *held*, that the word 'pads' was *publici juris*, and that the defendants who were manufacturers and vendors of fly poison, were entitled to describe as 'pads' sheets of paper used by them for a similar purpose, the general appearance of the sheets being different, and their name appearing prominently on them. *Wilson v. Lyman*, 25 Ont. A. R. 303.

22. *Trade-mark—Infringement—Sterling silver "hall-mark"—Right to register goods bearing mark on Canadian market.*—If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public.

Quære: Whether any one would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks?

The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to goods manufactured by them from sterling silver which, it was thought, so resembled the Birmingham Hall-mark, or a hall-mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing the Birmingham Hall-mark were also upon the market here. And it was *held* that the plaintiff could not, under the circumstances, acquire the exclusive right to the use as a trade-mark of the mark that he had been so using. *The Gorham Mfg. Co. v. Ellis & Co.*, 8 Ex. C. R. 401.

23. *Trade-mark Name.*—Under the provisions of sec. 5 R. S. 71, *The Trade-Mark and Design Act*, the name of an individual or firm without anything more, without being accompanied by any particular and distinctive feature, may be considered and known as a trade-mark, and is entitled to registration as such. Much more so, as in the present case, if the mark had been in use for a number of years previous to the application. *Per Sir Thomas Taylor, J. In re Elkington & Co.* 18 Feby., 1908.

As to timber or lumber.

6. Timber or lumber of any kind upon which labour has been expended by any person in his trade, business, occupation or calling, shall, for the purposes of this Act, be deemed a manufacture, product or article. R. S., 63, s. 3.

SEAL.

Seal and its use.

7. The Minister may cause a seal to be made for the purposes of this Part, and may cause to be sealed therewith trade-marks and other instruments, and copies of such trade-marks and other instruments, proceeding from his office in relation to trade-marks. R. S., c. 63, s. 7.

REGISTRATION.

Register to be kept.

8. A register shall be kept at the Department of Agriculture for the registration of trade-marks. R. S., c. 63, s. 5.

Registration by Minister.

9. Subject to the provisions of this Act, the Minister shall, on application duly made in that behalf, register therein the trade-mark of any proprietor applying for such registration in manner as provided by this Act in that behalf and by the rules and regulations made thereunder. R. S., c. 63, ss. 5, and 8.

1. *First use—Ownership.*—First use of a trade-mark will give ownership of same and the registration of the same by another person will be set aside and cancelled at the instance of the first user. *Groff v. Snow Drift Baking Powder*, 2 Ex. C. R. 568.

2. *Registration before action—Definition of prior user.*—The inability to sue for the infringement of a trade-mark before registration only applies

where the infringement has been done innocently, and not to the case of fraudulent imitation or forgery of trade-mark. Prior user means user before adoption by the registrant, not before registration. *Smith v. Fair*, 14 Ont. R. 729.

3. *Registration.*—Prior registration of a mark in the United States does not invalidate the registration of a similar mark in Canada by another person. *Morse v. Martin*, 5 L. N. 99.

Nature of trade-mark to be specified.

10. Every proprietor of a trade-mark who applies for its registration shall state in his application whether the said trade-mark is intended to be used as a general trade-mark or as a specific trade-mark. R. S., c. 63, s. 9.

Minister may refuse to register trade-mark in certain cases.

11. The Minister may refuse to register any trade-mark,—

(*a*) if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark;

(*b*) if the trade-mark proposed for registration is identical with or resembles a trade-mark already registered;

(*c*) if it appears that the trade-mark is calculated to deceive or mislead the public;

(*d*) if the trade-mark contains any immorality or scandalous figure;

(*e*) if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking. 54-55 V., c. 35, s. 1.

1. *Trade-marks—Resemblance between—Refusal to register both—Grounds of.*—The object of section 11 of the Act respecting Trade-marks and Industrial Designs (R. S. C. c. 63) as enacted in 54-55 Victoria, c. 35, is to prevent the registration of a trade-mark bearing such a resemblance to one already registered as to mislead the public, and to render it possible that goods bearing the trade-mark proposed to be registered may be sold as the goods of the owner of the registered trade-mark.

The resemblance between the two trade-marks, justifying a refusal by the Minister of Agriculture in refusing to register the second trade-mark, or the court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade-mark to obtain an injunction against the applicant in an action of infringement.

It is the duty of the Minister to refuse to register a trade-mark when it is not clear that deception may not result from such registration. (*Eno v. Dunn*, 15 App. Cas. 252; and *In re Trade-mark of John Dewhurst & Son, Ltd.*, [1896] 2 Ch. 137, referred to) *Melchers, W. Z., v. DeKuyper & Son*, 6 Ex. C. R. 82.

2. *Registration—Restriction—Representations of the Royal Crown.*—There is no positive rule binding upon the Court prohibiting the registration of a trade-mark containing the representation of a crown. The instructions issued by the Comptroller General of Trade-Marks to applicants for registration, containing a regulation that "representations of the Royal Crown" will not be registered as trade-marks or as prominent parts of trade-marks, do not prohibit every form of crown, but only representations of the Crown as it appears on the Royal Arms, namely, a circle

surmounted by two arches. Whether these instructions are binding upon the Court or not, the practice in the Trade-Mark Office, which has been based upon them since 1875, ought not now to be departed from. *In re König & Ebhardt*, 1896, 2 Ch. 236.

3. Pursuant to rule 30 of the Trade-Marks Rules, 1898, made in England by the Board of Trade, under the provisions of the Patent, Designs and Trade-Marks Acts, 1883 and 1888, the following will not be registered as trade-marks, or as prominent parts of trade-marks, unless the marks have been used before the 13th August, 1875, viz.:—

The Royal Arms, or Arms so nearly resembling them as to be calculated to deceive.

Representations of Her Majesty the Queen, or of any Member of the Royal Family.

Representations of the Royal Crown.

The National Arms or Flags of Great Britain.

Sebastian, 4 Ed. 468.

See also annotations under section 9 hereof.

Reference to the Exchequer Court.

12. The Minister may in any case in the last preceding section mentioned, if he thinks fit, refer the matter to the Exchequer Court of Canada, and, in that event, such court shall have jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted. 54-55 V., c. 35, s. 1.

1. *Trade-mark.*—The Exchequer Court has no common law jurisdiction. Under sec. 12 of *The Trade-Mark Act* the Court has jurisdiction in an action for the rectification of the Register of Trade-Mark, at the instance of an aggrieved party; but would not at his instance, unless his trade-mark is registered (sec. 19) have jurisdiction in actions for infringement and damages resulting therefor. See Rules 33 to 41 of General Order.

2. *Trade-mark—Jurisdiction—Rectification of Register.*—Burbidge J., in dealing with the question of jurisdiction of the court respecting infringement of trade-marks, since the amending Act of 54-55 Vict., ch. 35, said in re *DeKuyper v. Van Dulkin*, 4 Ex. C. R. 71-91: "The court has no "general authority or jurisdiction to restrain one person from selling his "goods as those of another, or to give damages in such a case, or to "prevent any one from adopting, in his business, labels or devices that "may be calculated to deceive or mislead the public, unless the use of such "labels or devices constitute an infringement of a registered trade-mark, "(R. S. ch. 63, sec. 19; 54-55 Vict. ch. 26, sec. 4 [c].) In such a case as "has been pointed out the point is not whether there has been an infringe-"ment of the mark which the plaintiff has used in his business, but "whether there has been an infringement of the mark which he has "actually registered." Sebastian, 3rd Edn. p. 137, citing *Ellis & Sons v. Ruthin Soda Water Co.*

It was further held in the same case that when any one comes to register a trade-mark as his own, and to say to the rest of the world "here is something that you may not use" he ought to make clear to every one what the thing is that may not be used.

In the certificate of registration the plaintiffs' trade-mark was described as consisting of "the representation of an anchor with the

letters 'J. D. K. & Z;' or the words 'John DeKuyper & Son, Rotterdam, &c.' as per the annexed drawings and application." In the application the trade-mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z.," or the words 'John DeKuyper & Sons, Rotterdam,' which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac simile* of which was attached to the application, but there was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z," and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Holland's Geneva" which it was admitted were common to the trade. The plaintiffs had for a number of years, prior to registering their trade-mark used this white heart-shaped label on bottles containing geneva sold by them in Canada, and they claimed that by such use and registration they had acquired the exclusive right to use the same. It was held that the shape of the label did not form an essential feature of the trade-mark as registered.

The defendants' trade-mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co.," above the eagle being written the words "Finest Hollands Geneva"; on each side are the two faces of a medal; underneath on a scroll the name of the firm "Van Dulken, Weiland & Co.," and the word "Schiedam," and lastly, at the bottom the two faces of a third medal, the whole on a label in the shape of a heart (*le tout sur une étiquette en forme de coeur*). The colour of the label was white. And it was held that in view of the plaintiffs' prior use of the white heart-shaped label in Canada, and the allegation by the defendants, in their pleadings, that the use of a heart-shaped label was common to the trade prior to the plaintiffs' registration of their trade-mark, that the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade-mark should be so rectified as to make it clear that the heart-shaped label forms no part of such trade-mark.

3. *Trade-mark — Rectification of register — Jurisdiction.* — The Exchequer Court has jurisdiction to rectify the register of trade-mark in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54-55 Vict. ch. 35 came into force. *Quære*: Has the court jurisdiction to give relief for the infringement of a trade-mark where the cause of action arose out of acts done prior to the passage of 54-55 Vict. ch. 26? *DeKuyper v. Van Dulken*, 3 Ex. C. R. 88.

4. *Trade-mark—Expunging—Rectifying.*—The solicitor in an action filed a Petition for expunging a certain trade-mark from the register, and for rectifying the same under instructions of one W. who was taken to be doing business under the name, style and firm of "Victor Sporting Goods Company." However, upon preparing his affidavit on production he learned for the first time that the "Victor Sporting Goods Company" was the name of an incorporated company, and that W. was only the Treasurer and manager of the said company. Whereupon upon application by said W. it was ordered, *inter alia*, that the Petitioner be at liberty to amend the Petition by adding the "Victor Sporting Goods Company"

as a party petitioner herein (Chitty's Archibold, 1020). No. 1308, *Whitney v. Fudger* (February 1st, 1904).

How registration may be effected—Exclusive right to trade-mark.

13. Subject to the foregoing provisions, the proprietor of a trade-mark may, on forwarding to the Minister a drawing and description in duplicate of such trade-mark, and a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof, together with the fee required by this Act in that behalf, and on otherwise complying with the provisions of this Act in relation to trade-marks and with the rules and regulations made thereunder, have such trade-mark registered for his own exclusive use.

2. Thereafter such proprietor shall have the exclusive right to use the trade-mark to designate articles manufactured or sold by him. R. S., c. 63, ss. 3, 5, 8 and 13.

Certificate of registration.

14. Upon any trade-mark being registered under this Act, the Minister shall return to the proprietor registering the same one copy of the drawing and description forwarded to him with a certificate signed by the Minister to the effect that the said trade-mark has been duly registered in accordance with the provisions of this Act; and the day, month and year of the entry of the trade-mark in the register shall also be set forth in such certificate. R. S., c. 63, s. 13.

ASSIGNMENT.

Trade-marks may be assigned—Entry.

15. Every trade-mark registered in the office of the Minister shall be assignable in law.

2. On the assignment being produced, and the fee by this Act prescribed therefor being paid, the Minister shall cause the name of the assignee, with the date of the assignment and such other details as he sees fit, to be entered in the margin of the register of trade-marks on the folio where such trade-mark is registered. R. S., c. 63, s. 16.

1. *Assignment.*—It is not necessary to register an assignment to give effect to the same. *Carey v. Goss*, 11 Ont. R. 625.

2. *Assignment.*—Where one sold his stock in trade with the good-will and all advantages pertaining to his name and business, the exclusive right to use the trade-mark of the vendor passed to the purchaser without express mention thereof in the contract. *Thompson v. MacKinnon*, 21 L. C. J. 335. See also *Smith v. Fair*, 14 Ont. R. 729, upon this question.

3. *Assignment—Execution.*—The right of property in a registered specific trade-mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which the trade-mark has been used. *Gegg v. Basset*, 3 Ont. L. R. 263.

4. *Cancellation of registration in favour of prior assignee under unlimited assignment.* See *Bush Mfg. Co. v. Hanson*, 2 Ex. C. R. 557, noted under sec. 42 hereof.

TIME LIMIT.

Duration of general trade-mark.

16. A general trade-mark once registered and destined to be the sign in trade of the proprietor thereof shall endure without limitation. R. S., c. 63, s. 14.

And of specific trade-mark.

17. A specific trade-mark, when registered, shall endure for the term of twenty-five years, but may be renewed before the expiration of the said term by the proprietor thereof, or by his legal representative, for another term of twenty-five years, and so on from time to time; but every such renewal shall be registered before the expiration of the current term of twenty-five years. R. S., c. 63, s. 14.

CANCELLATION.

Cancellation of trade-mark—Effect of cancellation.

18. Any person who has registered a trade-mark may petition for the cancellation of the same, and the Minister may, on receiving such petition, cause the said trade-mark to be so cancelled.

2. Such trade-mark shall, after such cancellation, be considered as if it had never been registered under the name of the said person. R. S., c. 63, s. 15.

RIGHT OF ACTION.

Suit by proprietor.

19. An action or suit may be maintained by any proprietor of a trade-mark against any person who uses the registered trade-mark of such proprietor, or any fraudulent imitation thereof, or who sells any article bearing such trade-mark or any such imitation thereof, or contained in any package of such proprietor or purporting to be his, contrary to the provisions of this Act. R. S., c. 63, s. 18.

Trade-mark—Injunction.—The principle on which the court protects trade-marks is, that it will not permit a party to sell his own goods as the goods of another, a party therefore will not be allowed to use names, marks, letters or other *indicia*, by which he may pass off his own goods to purchasers as the manufacture of another person. *McCall v. Theal*, 28 Gr. 48. See also *Perry v. Truefit*, 6 Beav. 66, and *Sebastian*, 4 Ed. 1.

No suit unless trade-mark is registered.

20. No person shall institute any proceeding to prevent the infringement of any trade-mark, unless such trade-mark is registered in pursuance of this Act. R. S., c. 63, s. 19.

1. *Trade-mark—Infringement—Trade-Name—Statement of claim—Sufficiency of Demurrer—Pleadings.*—In an action for infringement of a trade-mark, it is a sufficient allegation that the trade-mark used by the defendant is the registered trade-mark of the plaintiff to charge in the

statement of claim that the registered trade-mark of the plaintiff and the mark used by the defendant are in their essential features the same.

It is not necessary in such statement of claim to allege that the imitation by the defendant of the plaintiff's trade-mark is a fraudulent imitation.

It is not necessary either to allege that the defendant used the mark with intent to deceive, and to induce a belief that the goods on which their mark was used were made by the plaintiff. *Boston Rubber Shoe Co. v. The Boston Rubber Co. of Montreal*, 7 Ex. C. R. 9.

See also *DeKuyper v. Van Dulken*, 4 Ex. C. R. 71, affirmed on appeal 24 S. C. R. 114; *Davis v. Reid*, 17 Gr. 69; *Watson v. Westlake*, 12 Ont. R. 449; *Wilson v. Lyman*, 25 Ont. A. R. 303; *Carey v. Goss*, 11 Ont. R. 619; *Canada Publishing Co. v. Gage*, 11 S. C. R. 306, 11 Ont. A. R. 402; *Spilling Bros. v. O'Kelly*, 8 Ex. C. R. 426; *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal*, 32 S. C. R. 315; *Doran v. Hogadore*, 11 Ont. L. R. 321; and *Kerstein v. Cohen*, 11 Ont. L. R. 450.

21. This section deals with offences and penalties.

Warranty upon Sale.

Warranty that trade-mark is genuine.

22. Upon the sale or in the contract for the sale of any goods to which a trade-mark, or mark, or trade description has been applied, the vendor shall, unless the contrary is expressed in some writing, signed by or on behalf of the vendor, and delivered at the time of the sale or contract to and accepted by the vendee, be deemed to warrant that the mark is a genuine trade-mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of Part VII. of the Criminal Code. 51 V., c. 41, s. 18.

PART II.

Industrial Designs.

Registration.

Register of to be kept.

23. The Minister shall cause to be kept a book to be called the Register of Industrial Designs for the registration therein of industrial designs. R. S., c. 63, s. 22.

Drawing and description to be deposited.

24. The proprietor applying for the registration of any design shall deposit with the Minister a drawing and description in duplicate of the same, together with a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof. R. S., c. 63, s. 22.

Examination prior to registration.

25. On receipt of the fee prescribed by this Act in that behalf, the Minister shall cause any design for which the pro-

prietor has made application for registry to be examined to ascertain whether it resembles any other design already registered. R. S., c. 63, s. 22.

Registration of design—Proviso.

26. The Minister shall register the design if he finds that it is not identical with or does not so closely resemble any other design already registered as to be confounded therewith; and he shall return to the proprietor thereof one copy of the drawing and description with the certificate required by this Part: Provided that he may refuse, subject to appeal to the Governor in Council, to register such designs as do not appear to him to be within the provisions of this Part or any design which is contrary to public morality or order. R. S., c. 63, ss. 22 and 27.

Certificate of Minister—Particulars thereof—Certificate to be evidence of contents.

27. On the copy of the drawing and description returned to the person registering a certificate shall be given signed by the Minister or the Deputy Minister of Agriculture to the effect that such design has been duly registered in accordance with the provisions of this Act.

2. Such certificate shall show the date of registration including the day, month and year of the entry thereof in the proper register, the name and address of the registered proprietor, the number of such design and the number or letter employed to denote or correspond to the registration.

3. The said certificate, in the absence of proof to the contrary, shall be sufficient evidence of the design, of the originality of the design, of the name of the proprietor, of the person named as proprietor being proprietor, of the commencement and term of registry, and of compliance with the provisions of this Act. R. S., c. 63, ss. 22 and 28.

Who may register.

28. If the author of any design shall, for a good and valuable consideration, have executed the same for some other person, such other person shall alone be entitled to register it. R. S., c. 63, s. 25.

EXCLUSIVE RIGHT.

Registration gives.

29. An exclusive right for an industrial design may be acquired by registration of the same under this Part. R. S., c. 63, s. 29.

Duration of right—Renewal—Proviso.

30. Such exclusive right shall be valid for the term of five years, but may be renewed, at or before the expiration of the said term of five years, for a further period of five years or less on

payment of the fee in this Act prescribed for extension of time: Provided that the whole duration of the exclusive right shall not exceed ten years in all. R. S., c. 63, s. 29.

Using design without leave—Unlawful.

31. During the existence of such exclusive right, whether of the entire or partial use of such design, no person shall without the license in writing of the registered proprietor, or, if assigned, of his assignee, apply for the purposes of sale such design or a fraudulent imitation thereof to the ornamenting of any article of manufacture or other article to which an industrial design may be applied or attached, or publish, sell or expose for sale or use, any such article as aforesaid to which such design or fraudulent imitation thereof has been applied. R. S., c. 63, s. 31.

PROPRIETORSHIP.

Who shall be deemed proprietor—Acquired right.

32. The author of any design shall be considered the proprietor thereof unless he has executed the design for another person for a good or valuable consideration, in which case such other person shall be considered the proprietor.

2. The right of such other person to the property shall only be co-extensive with the right which he has acquired. R. S., c. 63, s. 25.

ASSIGNMENTS.

Design to be assignable—Right to use design—License.

33. Every design shall be assignable in law, either as to the whole interest or any undivided part thereof, by an instrument in writing which shall be recorded in the office of the Minister on payment of the fees prescribed by this Act in that behalf.

2. Every proprietor of a design may grant and convey an exclusive right to make, use and vend and to grant to others the right to make, use and vend such design within and throughout Canada or any part thereof for the unexpired term of its duration or any part thereof.

3. Such exclusive grant and conveyance shall be called a license, and shall be recorded in like manner and time as assignments. R. S., c. 63, s. 30.

PROTECTION OF DESIGN

Conditions of registration—How mark shall be applied.

34. In order that any design may be protected, it shall be registered before publication, and, after registration, the name of the proprietor shall appear upon the article to which his design applies by being marked, if the manufacture is a woven fabric, on one end thereof, together with the letters *Rd.*, and, if the manufacture is of any other substance, with the letters

Rd., and the year of registration at the edge or upon any convenient part thereof.

2. The mark may be put upon the manufacture by making it on the material itself, or by attaching thereto a label with the proper marks thereon. R. S., c. 63, s. 24.

Right of Action.

Suit by proprietor.

35. If any person applies or imitates any design for the purpose of sale, being aware that the proprietor of such design has not given his consent to such application, an action may be maintained by the proprietor of such design, against such person for the damages such proprietor has sustained by reason of such application or imitation. R. S., c. 63, s. 35.

1. *Industrial Design—Cook stove—Imitation—Infringement—Injunction—Cancellation of conflicting design.*—The plaintiffs were registered owners of an industrial design for a cook stove, called the "Royal Favorite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of the said stoves, caused a model to be made of it, and with some minor alterations, chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement and for an order to expunge defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs. And the defendants under the circumstances were enjoined from infringing the plaintiffs' design, and the registration of that of the defendants was ordered to be expunged from the register. *Findlay v. Ottawa Furnace and Foundry Co.*, 7 Ex. C. R. 338.

See also annotation under sec. 19 hereof.

36, 37 and 38. These sections deal with offences and penalties, the mode of recovery thereof and the time within which suits must be brought.

PART III.

GENERAL.

Rules, Regulations and Forms.

Minister may make rules and adopt forms—Documents deemed valid.

39. The Minister may, from time to time, subject to the approval of the Governor in Council, make rules and regulations and adopt forms for the purposes of this Act respecting trade-marks and industrial designs; and such rules, regulations and forms circulated in print for the use of the public shall be deemed to be correct for the purposes of this Act.

2. All documents executed according to the said rules, regulations and forms, and accepted by the Minister, shall be deemed to be valid so far as relates to official proceedings under this Act. R. S., c. 63, ss. 6 and 23.

Rules and regulations, as provided in the above section, have been made under the authority of an order in council bearing date the 25th October, 1907, and are to be found at p. CVII, of the Dominion Statutes of 1908.

Clerical Errors.

Correction.

40. Clerical errors which occur in the drawing up or copying of any instrument under this Act respecting trade-marks or industrial designs shall not be construed as invalidating the same, but, when discovered, may be corrected under the authority of the Minister. R. S., c. 63, ss. 21 and 38.

1. *Error—Rectification.*—The name of a trade-mark having been given by telephone and erroneously understood to be "Dr. Agnew's Catarrh Powders," it was subsequently registered as such. The error having been discovered and it being ascertained that the real name and that actually telephoned was "Dr. Agnew's Catarrhal Powder," an application was made to the Department of Agriculture, under section 21, ch. 63, R. S. C., to rectify such error. The application was refused by the Minister on the ground that it was not a clerical error coming within the meaning of section 21, but a proper matter to be brought before the Exchequer Court under the provisions of section 12 of the Act as amended by 54-55 Vict., ch. 35.

Upon an application made before the Exchequer Court, under the provisions of section 12, the said trade-mark was ordered to be altered and rectified as prayed for, and without costs. *In re Detchon*, January 21st, 1895.

Inspection.

Inspection of registers—Copies.

41. Any person may be allowed to inspect the register of trade-marks or the register of industrial designs.

2. The Minister may cause copies of representations of trade-marks or copies of representations of industrial designs to be delivered on the applicant for the same paying the fee or fees prescribed by this Act in that behalf. R. S., c. 63 ss. 20 and 37.

PROCEDURE AS TO RECTIFICATION AND ALTERATION.

Exchequer Court may rectify entries—Costs—Questions to be decided.

42. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit, or the Court may refuse the application.

2. In either case, the Court may make such order with respect to the cost of the proceedings as the Court thinks fit.

3. The Court may in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register. 54-55 V., c. 35, s. 1.

1. *Registration—Trade-mark—Calculated to deceive.*—The registration of a conflicting trade-mark will be refused when it appears that it is calculated to deceive and mislead. It is not the competition between trade-marks, but the deception itself in representing the goods to be what they are not, that is objectionable. *Salaman, On trade-marks*, 39.

2. *Limited assignment—Cancellation of registration in favour of prior assignee under unlimited assignment.*—Where respondents had obtained the exclusive right to use a certain trade-mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof made before the date of the instrument under which respondents claimed title, the prior registration was cancelled. *The J. P. Bush Manufacturing Co. v. Hanson*, 2 Ex. C. R. 557.

3. *Trade-mark—Cancellation of registration in favour of prior transferee.*—In the year 1885, the respondents, by their corporate title, registered a trade-mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the Department of Agriculture. Some four years after such registration by respondents, the claimant applied to register the word-symbol "Snow Flake" as a trade-mark for the same class of merchandise,—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegations. And it was *held* that the word-symbol in question had become the specific trade-mark of the claimant by virtue of first use, and that the registration by respondents must be cancelled. *Groff v. The Snow Drift Baking Powder Co.*, 2 Ex. C. R. 568.

4. *Trade-mark—Contempt of Court—Circular issued pendente lite—Libel—Injunction.—Coats v. Chadwick* (1894), 1 Ch. 347, was an action to restrain the infringement of a trade-mark. During the progress of the action the plaintiffs issued a circular to the trade warning them of the action, and entering into the merits of the litigation; the defendants moved for an injunction to restrain the plaintiffs from issuing it, or any other calculated to hinder the fair trial of the action. Chitty, J., granted the injunction, holding the circular to be a contempt of court, but saying he would not have granted it if the circular had been confined to warning the trade against infringement or imitation of the plaintiff's trade-mark, without discussing the merits or demerits of the case. 30 C. L. J. 262.

Jurisdiction—Forum—Exchequer Court.—The amendments to *The Exchequer Court Act* since the decision in *Partlo v. Todd* (1886), 12 O. R. 175 (1887), 14 A. R. 444 (1888), 17 S. C. R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade-mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade-mark, its invalidity may be shown. *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 1902, O. L. R. 545.

This case has been approved in *Spilling Bros. v. O'Kelley*, 8 Ex. C. R. 426.

See also 12 *Law Quarterly Review*, p. 12 and 18 *Legal News*, pp. 309 and seq.

Trade-mark or design may be corrected by the Court—Notice to Minister.

43. The registered proprietor of any registered trade-mark or industrial design may apply to the Exchequer Court of Canada for leave to add to or alter any such trade-mark or industrial design in any particular not being an essential particular, and the Court may refuse or grant leave on such terms as it may think fit.

2. Notice of any intended application to the Court under this section for leave to add to or alter any such trade-mark or industrial design shall be given to the Minister, and he shall be entitled to be heard on the application. 54-55 V., c. 35, s. 1.

1. See *In re Detchon*, under sec. 40 hereof.

2. *Trade-mark—"Maple Leaf"—Sale of whiskey—Prior user.*—Certain specific trade-marks to be applied to the sale of whiskey, consisting of the representation of a maple leaf and such words as "Old Red Wheat," "Early Dew," and "Grand Jewel," having been registered, registration of a specific trade-mark to be applied to the sale of whiskey, consisting of the words "Maple Leaf" and the device of a maple leaf on which was impressed the figure of a beaver used separately or in conjunction with the words "Fine Old" and the words "Rye Whiskey, bottled by Meagher Bros. & Co., Montreal," was refused on the ground that it too closely resembled those already registered.

The respondents in July, 1892, sought to register a specific trade-mark to be applied to the sale of whiskey consisting of the words "Early Dew," the representation of a maple leaf, and the letters "R.V.O." Objection was raised by the Department of Agriculture that one J. C. had previously obtained registration of a specific trade-mark to be applied to the sale of whiskey, consisting of the monogram "J.C." surmounted by a maple leaf, with the words "Old Red Wheat" above, and "Whiskey Absolutely Pure, James Corcoran, Stratford" below the monogram. Respondents then bought out J.C.'s rights in the mark last mentioned, and had it cancelled, whereupon they obtained registration of their own mark. The petitioners sought, *inter alia*, to have the respondents' mark expunged on the ground that the statement in their declaration that they were the first to use the said mark was untrue.

Inasmuch as the declaration made by the respondents was that they believed the trade-mark was theirs on account of having been the first to use it, and that such declaration when made was true; and, further, that when they learned of J.C.'s registered trade-mark they purchased it from him, there was no ground for expunging their trade-mark.

In the year 1902 after the controversy between the parties had arisen, and without notice to the petitioners, the respondents obtained registration of another specific trade-mark to be applied to the sale of whiskey which consisted of the words "Maple Leaf" and the representation of a maple leaf. And it was *held* that the registration of the last mentioned trade-mark of the respondents should be expunged. *Meagher v. The Hamilton Distillery Co.*, 8 Ex. C. R. 311.

Consequent rectification of register.

44. A Certified copy of any order of the Court for the making, expunging or varying of any entry in the register of trade-

marks or in the register of industrial designs, or for adding to or altering any registered trade-mark or registered industrial design, shall be transmitted to the Minister by the Registrar of the Court, and such register shall thereupon be rectified or altered in conformity with such order, or the purport of the order otherwise duly entered therein, as the case may be. R. S., c. 63, s. 34; 54-55 V., c. 35, s. 1.

Evidence.

No proof of signature of certificate required.

45. Every certificate under this Act that any trade-mark or industrial design has been duly registered in accordance with the provisions of this Act, which purports to be signed by the Minister or the Deputy Minister of Agriculture shall, without proof of the signature be received in all courts in Canada as *primâ facie* evidence of the facts therein alleged. R. S., c. 63, ss. 13, 22 and 28.

46, 47 and 48. These three sections, which are the last of the chapter, deal with the fees payable to the Minister and the disposal of the same.

The Customs Act.

PART OF CHAPTER 48 OF THE REVISED STATUTES OF CANADA, 1906

CHAPTER 48.

An Act respecting the Customs.

Short Title.

1. This Act may be cited as the Customs Act. R. S., c. 32, s. 1.

INTERPRETATION.

Definitions — Minister — Port — Collector — Officer — Vessel — Vehicle — Master — Conductor — Owner — Importer — Exporter — Goods — Warehouse — Customs warehouse — Oath—Seized and forfeited—Liable to forfeiture—Subject to forfeiture — Value — Frontier port — Court — Duty—Inland navigation—Unlawfully breaking of bulk—Liberal construction for protection of revenue.

2. In or for the purposes of this Act, or any other law relating to the Customs, unless the context otherwise requires,—

(*a*) 'Minister' means the Minister of Customs;

(*b*) 'port' means a place where vessels or vehicles may discharge or load cargo;

(*c*) 'collector' means the collector of the Customs at the port or place intended, or any person lawfully deputed, appointed or authorized to do the duty of collector thereat;

(*d*) 'officer' means an officer of the Customs;

(*e*) 'vessel' includes any ship, vessel or boat of any kind whatsoever, whether propelled by steam or otherwise, and whether used as a sea-going vessel or on inland waters only, and also includes any vehicle as hereinafter defined;

(*f*) 'vehicle' means any cart, car, wagon, carriage, barrow, sleigh or other conveyance of what kind soever, whether drawn or propelled by steam, by animals, or by hand or other power, and includes the harness or tackle of the animals, and the fittings, furnishings and appurtenances of the vehicle;

(*g*) 'master' means the person having or taking charge of any vessel or vehicle;

(*h*) 'conductor' means the person in charge or having the chief direction of any railway train;

(*i*) 'owner', 'importer,' or 'exporter' includes any person lawfully acting on behalf of the owner, importer or exporter;

(*j*) 'goods' means goods, wares and merchandise, or movable effects of any kind, including carriages, horses, cattle and other animals;

(*k*) 'warehouse' means any place, whether house, shed, yard, dock, pond or other place in which goods imported may be lodged, kept and secured without payment of duty,

(*l*) 'Customs warehouse' includes sufferance warehouse, bonding warehouse and examining warehouse;
(*m*) 'oath' includes declaration and affirmation;
(*n*) 'seized and forfeited,' 'liable to forfeiture,' or 'subject to forfeiture,' or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed;
(*o*) 'value' in respect of any penalty or forfeiture imposed by this Act and based upon the value of any goods or articles, means the duty-paid value of such goods or articles at the time of the commission of the offence by which such penalty or forfeiture is incurred;
(*p*) 'frontier port' means the first port at which the vehical carrying the goods to be entered arrives by land in Canade after crossing the frontier, and the sea, lake or river port at which the vessel in which the goods are carried arrives direct from a port or place out of Canada;
(*q*) 'court' means the Exchequer Court of Canada, or any superior court;
(*r*) 'duty' or 'duties' includes special duty and surtax;
(*s*) all carrying by water which is not a carrying by sea or coastwise shall be deemed to be a carrying by inland navigation;
(*t*) the necessary discharging of any goods for the purpose of lightening a vessel in order to pass any shoal or otherwise for the safety of such vessel shall not be deemed an unlawful landing or breaking of bulk.

2. All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit. R. S., c. 32, ss. 2, 29, 111; 51 V., c. 14, s. 2; 58-59 V., c. 22, s. 3; 4 E. VII., c. 10, s. 1.

1. *Customs—Construction of doubtful interpretation in favour of importer.*—Notwithstanding the interpretation clause in *The Customs Act*, 1883, which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, etc., in cases of doubtful interpretation the construction should be in favour of the importer. *The Queen v. Ayer Co.*, 1 Ex. C. R. 232.

2. *Customs Act—Construction.*—A taxing Act is not to be construed differently from any other statute. *Algoma Central Ry. Co. v. The King*, 32 S. C. R. 277 and (1903) A. C. 478.

3. *Statutory interpretation—Penal statute, construction of—Customs Amendment Act of Canada, 1888, section 197.*—The rule that a penal statute shall be construed strictly does not imply that the narrowest meaning of which they are susceptible, must be given to its words. The rule of interpretation and construction really is that such statutes are to be taken as not including anything which is not within their letter and spirit, and is not comprised in their words and which is manifestly not

intended by the legislature. Applying this principle to section 197 of *The Customs Amendment Act* of 1888, the punishment imposed by the section applies not only to the case where the goods are not found in the possession and keeping of the offender, but also to the case where they are so found; it being apparent that the object of substituted section 197 was to make the person liable to punishment who illegally imported goods without paying the duty lawfully payable whether the goods were found or were not found in his possession or keeping. *O'Grady v. Wiseman*, Q. R. 9 K. C. 169.

3, 4 and 5. These three sections deal with the constitution of the Department of Customs which is presided over by the Minister of Customs. The Deputy Minister is called "Commissioner of Customs" and he has an assistant called "Assistant Commissioner of Customs."

Valuation for Duty.

How determined.

40. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada. R. S., c. 32, s. 58.

Fair market value—Cash discount for duty purposes.

"**41.** Such market value shall be the fair market value of such goods, in the usual and ordinary commercial acceptation of the term, and as sold in the ordinary course of trade: Provided that a discount for cash, for duty purposes, shall not exceed two and one-half per cent. and shall not be allowed unless it has been actually allowed and deducted by the exporter on the invoice to the importer."

As amended by sec. 3, ch. 10, of 6-7 Ed. VII.

1. *Market value.*—Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of sections 68 and 69 of *The Customs Act*, 1883, is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty. *The Queen v. Ayer Co.*, 1 Ex. C. R. 232.

2. *Market value—Undervaluation.*—The suppliants, who were manufacturers of oil in the United States, sold some of their oils in retail lots to purchasers in Canada. The price of such oils to the consumer at Rochester was taken as a basis upon which the price per gallon to the Canadian purchaser was made up, but the goods were entered for duty at a lower value,—two sets of invoices being used, one for the purchaser in Canada and the other for the Company's broker at the port of entry. It was *held* that the oils were undervalued.

The suppliants, however, having established a warehouse in Montreal as the distributing point of their Canadian business, exported oils from the United States to Montreal in wholesale lots. The invoices showed prices which were not below the fair market value of such oils when sold at wholesale for home consumption in the principal markets of the United States, and it was *held* that there was here no undervaluation. *The Vacuum Oil Co. v. The Queen*, 2 Ex. C. R. 234.

3. *Invoice best evidence of value of goods—Market value.*—When goods are procured by purchase in the ordinary course of business, and not under any exceptional circumstances, an invoice correctly disclosing the transaction affords the best evidence of the value of such goods for duty. In such a case the cost to him who buys the goods abroad is, as a general rule, assumed to indicate the market value thereof. It is presumed that he buys at the ordinary market value. *Ibid.*

4. *Market value.*—It is not the value at the manufactory, or place of production, but the value in the principal markets of the country, *i.e.*, the price there paid by consumers or middlemen to dealers, that should govern. Such value for duty must be ascertained by reference to the fair market value of such, or like goods, when sold in like quantity and condition for home consumption in the principal markets of the country whence they are exported. *Ibid.*

5. *Market value—Value for duty.*—The rule for determining the value for duty of goods imported into Canada, prescribed by the 58th and 59th sections of *The Customs Act* (R. S. C. ch. 32), is not one that can be universally applied. When the goods imported have no market value in the usual and ordinary commercial acceptation of the term in the country of their production or manufacture, or where they have no such value for home consumption, their value for duty may be determined by reference to the fair market value for home consumption of like goods sold under like conditions. (*The Vacuum Oil Co. v. The Queen*, 2 Ex. C. R. 234 referred to). *Smith and Patterson v. The Queen*, 2 Ex. C. R. 417.

6. *Market value.*—The market value is to be determined not by the value of the manufacturers' wholesale prices, but the sale price in the market from whence the goods were exported. *Attorney-General v. Thompson*, 4 U. C. C. P. 548.

7. *Market value.*—The true market value is ascertained by the value of the goods for home consumption in the principal markets of the country from which the goods are imported and without making allowance for trade discounts. *Schulze & Co. v. The Queen*, 6 Ex. C. R. 268.

Duties Constitute a Debt.

Duties to be a debt to His Majesty—How recoverable.

117. The true amount of Customs duties payable to His Majesty with respect to any goods imported into Canada or exported therefrom shall, from and after the time when such duties should have been paid or accounted for, constitute a debt due and payable to His Majesty, jointly and severally, from the owner of the goods at the time of the importation or exportation thereof, and from the importer or exporter thereof, as the case may be; and such debt may, at any time, be recovered with full costs of suit, in any court of competent jurisdiction. R. S., c. 32, s. 7; 4 E. VII., c. 10, s. 2.

1. *Jurisdiction—Debt.*—The Exchequer Court has jurisdiction under sec. 31 (*a*) of *The Exchequer Court Act* to entertain an action for duties constituting a debt under sec. 117 of *The Customs Act*. Secus as to penalties under sec. 206 of the latter Act. See *The Queen v. Fitzgibbon & Co.*, 6 Ex. C. R. 383, and *The King v. Lovejoy*, 9 Ex. C. R. 377.

2. *Lien of Crown—Unpaid duties.*—Some time before B. assigned, by permission of the Customs Department, upon giving security, he sold a certain quantity of coal, imported by him, without first paying the duty

upon it. And it was *held* that there was nothing in *The Customs Act*, nor in law, giving the Crown a lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him. *Clarkson v. Attorney-General of Canada*, 15 Ont. R. 632; 16 Ont. A. R. 202.

3. *Duty, Penalties.*—The additional duty of 50 per cent. on the true duty, payable for undervaluation under section 102 of *The Customs Act*, 1883, is a debt due to Her Majesty which is not barred by the three years' prescription contained in section 207, but may be recovered at any time in a court of competent jurisdiction. *Quære*: Is such additional duty a penalty? *The Vacuum Oil Co. v. The Queen* 2 Ex. C. R. 234.

Writs of Assistance.

Who may issue—Duration of writ—As to Manitoba and Keewatin.

158. The judge of the Exchequer Court of Canada, or any judge of any of the superior courts in any province of Canada, having jurisdiction in the province or place where the application is made, shall grant a writ of assistance upon application made to him for that purpose by His Majesty's Attorney-General of Canada or by a collector or by any superior officer of Customs; and such writ shall remain in force so long as any person named therein remains an officer of Customs, whether in the same capacity or not.

2. For the purposes of this section, any judge of the Court of King's Bench, in the province of Manitoba, shall have jurisdiction over that part of Canada formerly known as the district of Keewatin, and shall grant a writ of assistance for use therein, in like manner and with like effect as he might grant such writ for use in the province of Manitoba. R. S., c. 32, s. 141; 51 V., c. 14, s. 28.

Existing writs to remain in force.

159. Every writ of assistance granted before the coming into force of this Act under the authority of Acts relating to the Customs now repealed, shall remain in force, notwithstanding such repeal, in the same manner as if such Acts had not been repealed. R. S., c. 32, s. 142.

Proceedings upon Seizure or Alleged Penalty or Forfeiture Incurred.

* * * * * * * * *

Matter referred to Court.

179. If the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, within thirty days after being notified of the Minister's decision, gives him notice in writing that such decision will not be accepted, the Minister may refer the matter to the court. 51 V., c. 14, s. 34.

Hearing by Court—Judgment.

180. On any reference of any such matter by the Minister to the court, the court shall hear and consider such matter upon the papers and evidence referred and upon any further

evidence which, under the direction of the court, the owner or claimant of the thing seized or detained, or the person alleged to have incurred the penalty, or the Crown, produces, and the court shall decide according to the right of the matter.

2. Judgment may be entered upon any such decision, and the same shall be enforceable and enforced in like manner as other judgments of the court. 51 V., c. 14, s. 34.

1. *Evidence by affidavit.*—Where in a case coming before this court on a reference under the provisions of sections 182 and 183 of *The Customs Act* (as amended by 51 Vict. ch 14) evidence taken by affidavits sworn to in Scotland since the Reference had been made to the court and in support of the main issue or gravamen of the case, was tendered at trial. *Held*, that such evidence by affidavits should be refused because cross-examination of the deponents who had sworn to these affidavits was not afforded to the opposite party, cross-examination being a most important machinery by which courts of justice get evidence. *Dominion Bag Co. v. The Queen.* Dec. 7th, 1894.

2. *Evidence by affidavit—Evidence—Costs.*—Evidence by affidavit at the trial will be refused, following *Dominion Bag Co. v. The Queen, Audette Ex. Prac.* 183. The evidence of a letter written by a third party respecting the matter in question will not be allowed until evidence is given of the agency of such third party. When a case is decided mainly upon evidence which was not before the Minister of Customs at the time he gave his decision when such evidence was in the possession or at the command of the claimants who neglected to produce it, no costs will be allowed the successful claimants. *Red Wing Sewer Pipe Co. v. The King*, 12 Ex. C. R. (not yet reported.)

3. *Intent to defraud.*—Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue simply because he had the mind to do something with them, which, had it been done in the country from which they were exported would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which in fact was never done before the goods came into his possession after passing the Customs. *The Queen v. Ayer Co.* 1. Ex. C. R. 232.

4. *Tariff Act* 1886—"*Shaped*" *Lumber.*—Under item (departmental No.) 726 in schedule "C" of the *Tariff Act* (1886) oak lumber sawn, but not "shaped, planed, or otherwise manufactured," may be imported into Canada free of duty. M. imported a quantity of white oak lumber from the United States which had been sawn to certain dimensions so as to admit of it being used in the manufacture of railway cars and trucks without waste of material, but yet before being used for such purpose had to be recut and fitted. *Held* that the lumber, being merely sawn to such dimensions as would enable it to be worked up without waste, was not "shaped" within the meaning of the *Tariff Act*, and was not dutiable. *Magann v. The Queen*, 2 Ex. C. R. 64.

5. *Goods in transitu—Customs-duties.*—A. made two shipments of tea from Japan to New York for transportation in bond to Canada In one case the bills of lading were marked "in transit to Canada;" in the other the teas appeared upon the consular invoice made at the place of shipment to be consigned to A.'s brokers in New York for transhipment to Canada. On the arrival of both lots at New York, and pending

a sale thereof in Canada, they were allowed to be sent to a bonded warehouse as unclaimed goods for some five or six months and were finally entered at the New York Custom House for transportation to Canada, and forwarded to Montreal. There being nothing to show that A. at any time proposed to make any other disposition of the teas, and there being nothing in what he did that contravened the laws or regulations of the United States or of Canada with respect to the transportation of goods in bond; it was *held*, affirming the judgment of the Exchequer Court, (2 Ex. C. R. 126) that as it clearly appeared that the tea was never entered for sale or consumption in the United States; that it was shipped from there within the time limited by law for goods in transit to remain in a warehouse; and that no act had been done changing its character during transit, it was therefore "tea imported into Canada from a country other than the United States but passing in bond through the United States," and under sec. 10 of the Act relating to duties of customs (R. S. C. ch. 33) not liable to duty as goods exported from the United States to Canada. But see now 52 Vic., ch. 14 (D). *Carter Macey & Co., v The Queen*, 18 S. C. R., 706.

6. *Value of goods—Misrepresentation—Costs.*—The goods in question in this case were part of a job lot of discontinued watch cases, and at the time of their sale for export were not being bought and sold in the markets of the United States. They could be purchased for sale or use there, but only at published prices which were greater than any one would pay for them.

The claimants bought the goods for export at their fair value, being about half such published prices. They let their agent in Canada know the prices paid, but withheld from him the fact that the purchase was made on the condition that the goods were to be exported. The agent, without intending to deceive the Customs appraiser, represented that the prices paid were those at which the goods could be had in the United States when purchased for home consumption. The representation was untrue. On the question of the alleged undervaluation the court found for the claimants, but, because of such misrepresentation, without costs. *Smith et al., v. The Queen.* 2 Ex. C. R. 417.

7. *Customs-duties—Article imported in parts—Rate of duty—Good faith—46 Vict., ch. 12, s. 153—Subsequent legislation—Effect of—Statutory declaration.*—G., manufacturer of an "automatic sprinkler," a brass device composed of several parts, was desirous of importing the same into Canada, with the intention of putting the parts together there and putting the completed article on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers and paid the duty on the several parts, and the Customs officials then caused the same to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, undervaluation and knowingly keeping and selling goods illegally imported, under secs. 153 and 155 of *The Customs Act*, 1883, and it was *held*, reversing the judgment of the Exchequer Court, per Gwynne, J., that there was no importation of sprinklers, as completed articles, by G., and as the Act is not imposing a duty on parts of an article, the information should be dismissed, and further, that the subsequent passage of an Act (48-49 Vict., ch. 61, s. 11, re-enacted by 49 Vict., ch. 32, s. 61, R. S. C.) imposing a duty on such parts was a legislative declaration that it did not previously exist.

(But see now "*An Act to amend 'The Interpretation Act,'*" 53 Vict., ch. 7) *Grinnell v. The Queen*, 16 S. C. R. 119.

8. *Smuggling—Evidence—Burden of proof.*—Where the Queen claims the forfeiture of imported goods which were carried past the Custom-House without entry or permit, and that such goods are subsequently claimed by the owner who denies such charge, the *onus probandi* is on the owner. *Regina v. 1 Box of Jewellery*, 8. L. C. J. 130; 1 L. C. J. 85 and 31 Vict., ch. 6, sec. 51, (Q).

9. *Customs-duties—Importation of steel rails for street railways—Word "railway."*—The word "railway" as used in (free) item 173 of the Tariff Act of 1887, 50-51 Vict., c. 39., does not include street railways. *Toronto Railway Co. v. The Queen*, 4 Ex. C. R. 262. See item 28.

10. *Construction of Revenue Act—General fiscal policy, reference to.*—In construing a revenue Act regard should be had to the general fiscal policy of the country at the time the Act was passed. When that is a matter of history reference must be had to the sources of such history, which are not only to be found in the Acts of Parliament, but in the proceedings of Parliament, and in the debates and discussions which take place there and elsewhere. This is a different matter from construing a particular clause or provision of the Act by reference to the intention of the mover or promoter of it expressed while the Bill or the resolution on which it was founded was before the House, which cannot be done under the rules which govern the construction of statutes. *Ibid.*

11. *Custom-duties—R. S. C. ch. 32—Interpretation—Good faith—Importation of Jute cloth.*—By item 673 of R. S. C. 33, "Jute cloth as "taken from the loom, neither pressed, mangled, calendered nor in any "way finished, and not less than forty inches wide, when imported by "manufacturers of Jute bags for use in their own factories" was made free of duty. By item 261 of such Act it was provided that manufactures of Jute cloth not elsewhere specified should be subject to a duty of 20 per cent. *ad valorem*. The claimants, who where manufacturers of Jute bags, had for a number of years imported into Canada Jute cloth cropped after it was taken from the loom. Item 673 was susceptible of several interpretations, one of which was, that the Jute cloth so cropped should be entered free of duty, and in this construction the importers and the officers of Customs had concurred during such period of importation, and the court *held* that inasmuch as the cloth in question had been, in good faith, entered as free of duty and manufactured into Jute bags and sold, and it would happen that if another construction than that so adopted by the importers and Customs officers was now put upon the statute the whole burden of the duty would fall upon the importers, the doubt as to such construction should be resolved in their favour. *Dominion Bag Co. v. The Queen*, 4 Ex. C. R. 311.

12. *Revenue Act, construction of.*—In construing a clause of a Tariff Act which governs the imposition of duty upon an article which has acquired a special and technical signification in a certain trade, reference must be had to the language, understanding and usage of such trade. *Ibid.*

13. *Customs Act, sec. 183—Right of the matter—Interpretation—Quære:*—Whether the words used in Section 183 of *The Customs Act* (as amended by 51 Vict. 51 c. 14, s. 34) "the Court..... shall decide according to the right of the matter" were intended by the legislature in any way or case to free the Court from following the strict letter of the law, and to

give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the Court, work injustice? *Ibid.*

14. *Customs-duties—50-51 Vict. ch. 39, items 88 and 173—Steel rails for temporary use during construction of railway.*—Steel rails weighing twenty-five pounds per lineal yard to be temporarily used for construction purposes on a railway and not intended to form any part of the permanent track cannot be imported free of duty under item 173 of The Tariff Act of 1887 (50-51 Vict. c. 39). *Sinclair v. The Queen*, 4 Ex. C. R. 275.

15. *Customs-duties—R. S. C. ch. 32, sec. 13—Similitude Clause.*—In virtue of Clause 13 of *The Customs Act* (R. S. C. c. 32) the Court held that such rails (*see No. 19 supra*) should pay duty at the same rate as tramway rails (under 50-51 Vict. c. 39, item 88) to which of all the enumerated articles in the Tariff they bore the strongest similitude or resemblance. *Ibid.*

16. *Arrival of vessel—False statements.*—Where there has been nothing done by the master to show an intent to defraud the Customs, a vessel entering a port for shelter, before reaching a place of safety there, has not "arrived" at such port within the meaning of 40 Vict. ch. 10, s. 12 so as to justify seizure of her cargo for not reporting to the Customs authorities. And where false statements are made by the master regarding the character of the cargo and port of destination of his vessel, which would subject him to a penalty under sub-sec. 2 of sec. 12, 40 Vict., ch. 10, they cannot be relied on to support an information claiming forfeiture of the cargo for his not having made a report in writing of his arrival as required by sub-sec. 1, s. 12 of the said Act. *The Queen v. MacDonell*, 1 Ex. C. R. 99.

17. *Customs export bonds—Penalties—Enforcement—Law of the Province of Quebec.*—The provisions of section 8 of 8 and 9 Wm. III, c. 11, affecting actions upon bonds, do not apply to proceedings by the Crown for the enforcement of a penalty for breach of a Customs export bond.

Two Customs export bonds were entered into by warehousemen at the port of Montreal, P.Q. Upon breach of the conditions of the bonds the Crown took action to recover the amount of the penalties fixed by such bonds. And it was *held* that the case must be determined by the law of the Province of Quebec, and that under that law (Arts. 1036 and 1135) judgment should be entered for the full amount of each bond. *The Queen v. Finlayson et al.*, 6 Ex. C. R. 202.

18. *Law of Canada—Customs Tariff Act*, 1894, *s.* 4—*R. S. C.* (1886), *c.* 32, *s.* 150—*Construction—Date of importation of goods.*—By the true construction of *The Customs Tariff Act*, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or when they are taken out of warehouse, if instead of being delivered they have been placed in bond.

Sect. 150 of *The Customs Act*, 1886, which directs that the precise time of the importation of goods shall be deemed to be the time when "they came within the limits of the port at which they ought to be reported," refers on its true construction to the port at which the goods are to be landed—that is, where the effective report is to be made. Such construction is required in order to place a consistent, rational, and probable meaning of the context and other clauses of the Act. *Canada*

Sugar Refining Co. v. The Queen, 1898, A. C. 735; 27 S. C. R. 395 and 5 Ex. C. R. 177.

19. *Revenue—Customs-duties—Importation into Canada—Retrospective legislation.*—The importation as defined by sec. 150 of *The Customs Act* (R. S. C. ch. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.

Section 4 of *The Tariff Act*, 1895, (58 and 59 Vict. ch. 23) provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895," It was not assented to until July. And it was *held* that goods imported into Canada on May 4th, 1895, were subject to duty under said Act. *The Queen v. The Canada Sugar Refining Co.*, 27 S. C. R. 395.

20. *Canadian Customs Tariff Act*, 1897, *s.* 4—*Duty on imported goods —Foreign-built ship.*—A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, sched. A, item 409. *Algoma Central Railway Co. v. The King*, 1903, A. C. 478.

21. *Customs law—Breach—Seizure of vessel—Controller's decision—Reference to court—Petition of right—Jurisdiction—Damages for wrongful seizure and detention.*—The Controller of Customs had made his decision in respect of the seizure and detention of a vessel under the provisions of *The Customs Act*, confirming such seizure. The owner of the vessel within the thirty days mentioned in the 181st and 182nd sections of the said Act gave notice in writing to the Controller that his decision would not be accepted. No reference of the matter was made by the Controller to the court as provided in section 181, but the claimant presented a petition of right and a *fiat* was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the Controller to the court. And the court held it had jurisdiction and that damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the Customs law; but that the claimant is entitled to the restitution of the vessel. *Julien v. The Queen*, 5 Ex. C. R. 238.

22. *Customs law—Reference—The Customs Act, secs.* 182, 183—*Minister's decision—Appeal—Practice.*—Where a claim has been referred to the Exchequer Court under sec. 182 of *The Customs Act*, the proceeding thereon, as regulated by the provisions of sec. 183 of the Act, is not in the nature of an appeal from the decision of the Minister; and the court has power to hear, consider and determine the matter upon the evidence adduced before it, whether the same has been before the Minister or not. *Tyrrell v. The Queen*, 6 Ex. C. R. 169.

23. *Customs law—Breach—Importation—Fraudulent undervaluation—Manufactured cloths—Cut lengths—Trade discounts—Forfeiture.*—Claimants were charged with a breach of *The Customs Act* by reason of fraudulent undervaluation of certain manufactured cloths imported into Canada. The goods were imported in given lengths cut to order, and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty showed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of showing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shown on the invoices were further reduced by certain

alleged trade discounts for which there was no apparent justification or excuse. And it was held that the circumstances amounted to fraudulent undervaluation; and that the decision of the Controller of Customs declaring the goods forfeited must be confirmed. (Leave to appeal to Supreme Court of Canada refused). *Schulze & Co. v.The Queen*, 6 Ex. C. R. 268.

24. *The Customs Act—Infraction—Smuggling—Preventive Officer—Salary—Share of condemnation money.*—The suppliant had been empowered to act as a preventive officer of Customs by the Chief Inspector of the Department of Customs. The appointment was verbal, but a shorthand writer's note of what took place between the Chief Inspector and the suppliant, at the time of the latter's appointment, showed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and if you have informers, an award to your informers and you must depend wholly upon these seizures." Certain regulations in force at the time provided that, in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively. And it was *held* that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the court could not interfere with the Minister's discretion. *Bouchard v. The King*, 9 Ex. C. R. 216.

25. *Customs Act—Infringement by importation of cattle without payment of duty—Intention to infringe—Exercise of ownership in Canada.*—Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles south of the boundary line between Canada and the United States, whence they may stray into Canada, constitutes an element in the offence of smuggling.

Where cattle are brought into Canada for pasturage, or to a point from which they themselves may stray into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of *The Customs Act* is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle. This judgment was affirmed on appeal to the Supreme Court of Canada, 39 S. C. R. 12. *Spencer v. The King*, 10 Ex. C. R. 79.

26. *Customs-duties—Drawback—Materials for ships—Refusal of Minister to grant drawback—Remedy.*—By the Customs Act, 1877, (40 Vict. c. 10), section 125, clause 11, it was enacted, *inter alia*, that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, section 11, the Governor in Council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also *The Customs Act*, 1883, s. 230, clause 12, and *The Revised Statutes of Canada*, chapter 32, s. 245 *m*.) By an order of the Governor General in Council, dated the 15th day of May, 1880, it was provided as follows: "A drawback may be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country since the first day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed or 9 years, at the rate of 65 cents per registered ton on iron kneed ships or

vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th of November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1893." And the Court *held* that a petition of right would not lie upon a refusal by the Controller of Customs to grant a drawback in any particular case.

Semble.—That the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority. *Matton v. The Queen*, 5 Ex. C. R. 401.

27. *Liability of Government as compulsory Bailees for Hire—Negligence of Bailee—Volenti non fit injuria—Queensland Customs Act.*—Where the Government, being bailees for hire, stored the appellants' explosive goods in sheds near to the water-edge: It was *held*, that the selection of such a site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; that the appellants were entitled to rely on the care and skill of their bailees, and could not be said to have accepted any risks of defective storage with which they had made themselves acquainted.

Case remanded for a new trial, to ascertain whether the Government negligently stored the goods at too low a level, or whether, on the advent of the floods, they failed to take reasonable and proper measures for saving the goods, or part thereof.

Decisions that public bodies are not liable to individuals for nonfeasance have no application where the public body is under contract with the individual for remuneration. *Brabant & Co. v. King.* 1895 L. R., A. C. 632.

28. *Law of Canada—Construction—Dominion Act* (50 & 51 *Vict. c.* 39) *s.* 1. *item* 88; *s.* 2, *item* 173—*Imported Steel Rails* (*Railways*)—*Street Railways—Tramways.*—Although there may be in various Canadian Acts and for other purposes substantial distinctions between railways or railway tracks and street railways, and tramways, yet for the purpose of separating free and dutiable articles such distinction is not maintained in Canadian Act 50 & 51 Vict. c. 39, and its three predecessors.

According to the true construction of that Act (see s. 1., item 88, and s. 2, item 173), the question whether imported steel rails are taxable or free depends solely upon their weight, not upon the character of the railway track for which they are intended. *Toronto Street Ry. v. The Queen* 1896, A. C. 551.

(The Judgment of the Exchequer Court (4Ex. C. R. 262) was affirmed by the Supreme Court of Canada (25 S. C. R. 24) and reversed by the Judicial Committee of His Majesty's Privy Council.)

29. *Importation—Stress of weather.*—To an information for the condemnation of goods as illegally imported, the defendant pleaded that they were not imported *modo et formâ*. On the trial of this issue the defendant was not allowed to prove that the goods were landed through stress of weather, and the jury found for the Crown. The court *held* the evidence should have been received, and granted a new trial. *Atty.-Gen. v. Spafford*, Dra. 320.

30. *Customs—Information—Oaths—Condemnation of goods.*—The meaning of the statute is that no goods shall be unladen without entry

nor after entry, except at some place where an officer is appointed. An entry without the oath the law requires is not a due entry, necessary to give the right to unlade. *Atty.-Gen. v. Brunskill* 8 U. C. Q. B. 546.

31. *Goods stolen while in bond in Customs Warehouse—Claim for value thereof against the Crown—Crown not a bailee—Personal remedy against officer through whose act or negligence the loss happens.*—The plaintiffs sought to recover from the Crown the sum of $465.74, and interest, for the duty paid value of a quantity of glaziers' diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the examining warehouse at the port of Montreal.

On the 21st Februrary, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway Company, at Point St. Charles and on that day the plaintiff made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom-house carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the Custom examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the court drew that inference for the purposes of the case. *Held*, that, admitting the diamonds were stolen while in the examining warehouse, the Crown is not liable therefor.

In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Custom officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens. *Corse v. The Queen.* 3 Ex. C. R. 13.

32. *Port—Goods seized by other collector than first one who passed goods.*—Where goods, subject to a duty *ad valorem*, have been entered at a port upon the importer's own declaration of value, which the collector has accepted and acted upon, the same goods cannot be afterwards seized by the collector of another port on the ground of their having been undervalued upon their entry with the first collector. *The Queen v. Jagger et al.* 3 U. C. Q. B. 255. See also *Wile v. Cayley.* 14 U. C. Q. B. 285.

33. *Collector — Deputy — Bond—Responsibility.*—A. having been appointed collector of customs gave bond to well and truly discharge his duties and having received written instructions that all entries etc., were to be made by him and having permitted his deputy to assume and perform duties entrusted to A. alone, A. was responsible under his bond for defalcations of his deputy. *The Queen v. Stanton.* 2 U. C. C. P. 18.

See also Consolidated Revenue & Audit Act. R. S., 1906 c. 24, secs. 19 to 22, 37, 38, 84, to 95.

34. *Officer—Protection of.*—A party who, acting as a revenue officer or conceiving that he has authority so to act, seizes goods, is entitled to notice before action brought, without the necessity of proving his commission or appointment. *Wadsworth v. Murphy.* 1 U. C. Q. B. 190. See also *Julien v. The Queen*, 5 Ex. C. R. 238. *Boyd v. Smith* 4 Ex. C. R. 116 and 57-58 Vict., ch. 19 sec. 1.

35. *Officer—Seizure—Excess—Immunity.*—An officer of Customs who, in making a seizure of certain prohibited goods by the Customs laws, caused the taking away of other goods the nature of which he could not at the time determine without a prolonged examination, is not liable for damages resulting from this seizure of these last mentioned goods. *Saunders v. Barry.* 14 L. C. R. 370.

36. *Custom-house officers—Liability of, in trespass—Seizure of goods once passed.*—Trespass cannot be maintained against a custom-house officer for seizing goods as forfeited, upon grounds which, if they existed, would justify such seizure. If he was misled by false information, or acted maliciously, another form of action is the proper remedy; but no action will lie while the legality of the seizure is still undetermined.

Goods which have passed the custom-house upon importation, and been taken into the interior, are still liable to seizure if it should appear that they have been fraudulently undervalued; but not for defects of form, such as the want of a permit. *Wile v. Cayley et al.* 14 U. C. Q. B. 285.

37. *Revendication—Goods seized.*—It is not competent for an importer whose goods have been seized by the Customs to claim them by writ of revendication. *Sanche v. Ryan.* M. R. 4 Q. B. 312.

38. *Officer—Protection—Auctioneer.*—*Quære* whether an auctioneer who has sold goods seized under *The Customs Act* can avail himself of the clause for protection of officers. *McDonald v. Clark*, 20 N. S. R. 254.

39. *Contraband goods imported with goods not subject to duty.*—An entry at the Custom-House declared that the packages contained articles not subject to duty, but some of them contained contraband goods and it was *held* that it was but one entry and being false as to some of the packages, the goods were not duly entered and the whole were forfeited. *The Queen v. Six Barrels of Hams.* 3 Allen (N. B.) 387.

Production of books and papers in Court—Consequences of failure to produce.

184. Whenever any suit is instituted under the provisions of this Act, or an order of the court is obtained, all invoices, accounts, books and papers relating to any imported goods to which such suit or order relates shall be produced in court, or to any person whom the court directs, and, if the same are not so produced within such time as the court prescribes, the allegations on the part of the Crown shall be deemed to be proved, and judgment shall be given as in case by default; but this provision shall not relieve the person disobeying any such order from any other penalty or punishment which he may have incurred by disobedience of any such order. 51 V., c. 14, s. 34.

EVIDENCE,—BURDEN OF PROOF.

Certified copies and extracts of invoices to be evidence.

261. Copies of invoices or extracts from invoices, duly certified by the collector or other proper officer, bearing the stamp of the Custom-house at which such invoices are filed, shall be considered and received as *primâ facie* evidence of the contents thereof. R. S., c. 32, s. 48.

Certified copies of official papers to be evidence.

262. Certificates and copies of official papers, certified under the hand and seal of any of the principal officers of the Customs in the United Kingdom, or of any collector of colonial revenue in any of the British possessions, or of any British consul or vice-consul in a foreign country, and certificates and copies of official papers made pursuant to this Act or any Act in force in Canada relating to the Customs or revenue, shall be received as *primâ facie* evidence. R. S., c. 32, s. 156.

If two different invoices of goods exist—Primâ facie evidence of fraud.

263. The production or proof of the existence of any invoice, account, document or paper made or sent by any person or by his authority, wherein the goods or any of them are charged or entered at or mentioned as bearing a greater price than that set upon them in any other invoice, account, document or paper intended to cover the same goods or any part thereof, made or sent by the same person or by his authority, or in which the goods or any of them are given a different name or description from that stated in any other such invoice, account, document or paper, or in which the goods are falsely described, shall be *primâ facie* evidence that the invoice, account, document or paper wherein is stated a lesser price, or the false or incorrect name or description of the goods, was intended to be fraudulently used for Customs purposes; but such intention or the actual fraudulent use of such invoice, account, document or paper may be proved by any other legal evidence. 51 V., c. 14, s. 39.

Burden of proof—Generally—Particularly.

264. The burden of proof that the proper duties payable with respect to any goods have been paid, and that all the requirements of this Act with regard to the entry of any goods have been complied with and fulfilled shall, in all cases, lie upon the person whose duty it was to comply with and fulfil the same; and, without restricting the generality of the foregoing provision, if any prosecution or suit is brought for any penalty or forfeiture for the recovery of any duty under this Act, or any other law relating to the Customs, or to trade or navigation, or if any proceeding is taken against the Crown or any officer for the recovery of any goods seized or money deposited under the authority of this Act, or any other such law, and if any question arises as to the identity or origin of the

goods seized, or as to the payment of the duties on any goods, or as to the lawful importation thereof, or as to the lawful lading or exportation of the same, or as to the doing or omission of any other thing by which such penalty or forfeiture or liability for duty would be incurred or avoided, the burden of proof shall lie on the owner or claimant of the goods seized or money deposited, and not on the Crown or on the party representing the Crown. R. S., c. 32, s. 167; 51 V., c. 14, s. 43; 52 V., c. 14, s. 13.

1. *Revenue—Customs law—Importation in original packages—False entry—Burden of proof.*—Where a seizure is made of goods imported into Canada, on the ground that while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if the claimant declines to accept the Minister's decision confirming the seizure and obtains a reference of his claim to the court, the burden of proof is upon the claimant to show the *bona fides* of the entry in dispute. *Crosby v. The King.* 11 Ex. C. R. 74.

See also annotation under sec. 180 hereof.

PROCEDURE.

In Exchequer Court or other superior court—If penalty does not exceed $200.

265. All penalties and forfeitures incurred under this Act, or any other law relating to the Customs or to trade or navigation, may, in addition to any other remedy provided by this Act or by law, and even if it is provided that the offender shall be or become liable to any such penalty or forfeiture upon summary conviction, be prosecuted, sued for and recovered with full costs of suit, in the Exchequer Court of Canada, or in any superior court having jurisdiction in that province of Canada where the cause of prosecution arises, or wherein the defendant is served with process.

2. If the amount of any such penalty or forfeiture does not exceed two hundred dollars, the same may also be prosecuted, sued for and recovered in any court having jurisdiction to that amount in the place where the cause of prosecution arises, or where the defendant is served with process. 51 V., c. 14, s. 41.

1. *Smuggling—Penalties—The Customs Act, secs.* 192, 236, 246—*Averments in information—Sufficiency of—Demurrer—Jurisdiction.*—In an information for smuggling, laid under the provisions of sec. 192 of *The Customs Act*, it is a sufficient averment to allege that "the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Custom-house." It is not necessary to charge the defendant with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section.

In such an information where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found". The offender

is only liable to forfeit twice the value of the goods, when the goods are not found but their value has been ascertained.

The penalty "not exceeding two hundred dollars and not less than fifty dollars," mentioned in sec. 192 of *The Customs Act* as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace", cannot be sued for in the Exchequer Court of Canada. (*Barraclough v. Brown* [1897] A. C. 615 referred to). *The King v. Lovejoy et al.* 9 Ex. C. R. 377.

2. *Revenue laws—The Customs Act, sec.* 192—*Penalties—Jurisdiction of Exchequer Court—Discretion of Judge—Remission of penalty.*—The penalty enforceable under the provisions of sec. 192 of *The Customs Act* in the Exchequer Court is a pecuniary one only, the other remedies open to the Crown thereunder cannot be prosecuted in this court. And the court has no discretion as to the amount of the penalty recoverable under such enactment. *The Queen v. Fitzgibbon & Co.* and *The Queen v. Thouret et al.*, 6 Ex. C. R. 683.

3. *Construction of statute.*—Section 197 of *The Customs Act*, as amended in 1888, is to be construed as making the punishment of fine or imprisonment, therein provided to be in addition to any other penalty, applicable as well where the goods unlawfully imported into Canada are found and are thereupon liable to be forfeited and seized, as where they are not found, in which latter event the offender forfeits the value thereof. *O'Grady v. Wiseman.* 3 C. Cr. Cas. 332.

See also annotation under Sec. 180 hereof.

Proceedings to be by Attorney-General or officer of Customs.

266. All penalties and forfeitures imposed by this Act, or by any other Act relating to the Customs or to trade or navigation shall, unless other provisions are made for the recovery thereof, be sued for, prosecuted and recovered with costs by His Majesty's Attorney-General of Canada, or in the name or names of the Commissioner of Customs, or any officer or officers of the Customs, or other person or persons thereunto authorized by the Governor in Council, either expressly or by general regulation or order, and by no other person R. S., c. 32, s. 223.

In Quebec.

267. All penalties and forfeitures imposed by this Act, or by any other law relating to the Customs or to trade or navigation may, in the province of Quebec, be sued for, prosecuted and recovered with full costs of suit, by the same proceedings as any other moneys due to the Crown, and all suits or prosecutions for the recovery thereof shall, in that province, be heard and determined in like manner as other suits or prosecutions in the same court for moneys due to the Crown, except that in the Circuit Court the same shall be heard and determined in a summary manner; but nothing in this section shall affect any provisions of this Act, except such only as relate to the form of proceeding and of trial in such suits or prosecutions as aforesaid. R. S., c. 32, s. 224.

Procedure according to practice of the court.

268. Every prosecution or suit in the Exchequer Court of Canada, or in any superior court or circuit court or court of competent jurisdiction, for the recovery or enforcement of any penalty or forfeiture imposed by this Act, or by any other law relating to the Customs or to trade or navigation, may be commenced, prosecuted and proceeded with in accordance with any rules of practice, general or special, established by the court for Crown suits in revenue matters, or in accordance with the usual practice and procedure of the court in civil cases, in so far as such practice and procedure are applicable, and, whenever the same are not applicable, then in accordance with the directions of the court or a judge. R. S., c. 32, s. 225.

Venue.

269. The venue in any such prosecution or suit may be laid in any county in the province notwithstanding that the cause of prosecution or suit did not arise in such county. R. S., c. 32, s. 226.

Arrest of defendant if he is leaving the province.

270. Any judge of the court in which any prosecution or suit is brought for the recovery or enforcement of any penalty or forfeiture as aforesaid may, upon being satisfied by affidavit that there is reason to believe that the defendant will leave the province without satisfying such penalty or forfeiture, issue a warrant under his hand and seal for the arrest and detention of the defendant in the common gaol of the county, district or place until he has given security, before and to the satisfaction of such judge or some other judge of the same court, for the payment of such penalty with costs, in case judgment is given against him. R. S., c. 32, s. 227.

Averments in pleadings.

271. In any declaration, information, statement of claim or proceeding in any such prosecution or suit, it shall be sufficient to state the penalty or forfeiture incurred, and the Act and section of the Act, or the rule or regulation under which it is alleged to have been incurred, without further particulars: and the averment that the person seizing or suing was and is an officer of Customs, shall be sufficient *primâ facie* evidence of the fact alleged. 51 V., c. 14, s. 42.

Costs—Penalties and costs, how levied.

272. In every prosecution, information, suit or proceeding brought under this Act for any penalty, or to declare or enforce any forfeiture, or upon any bond given under it, or in any matter relating to the Customs or to trade or navigation, His Majesty, or those who sue for such penalty or forfeiture, or upon such bond, shall, if they recover the same, be entitled also to recover full costs of suit.

2. All such penalties and costs, if not paid, may be levied on the goods and chattels, lands and tenements of the defendant, in the same manner as sums recovered by judgment of the court in which the prosecution is brought may be levied by execution; or payment thereof may be enforced by *capias ad satisfaciendum* against the person of the defendant under the same conditions and in like manner. R. S., c. 32, s. 229.

Nolle prosequi by Attorney-General.

273. If, in any case, the Attorney-General of Canada is satisfied that the penalty or forfeiture was incurred without intended fraud, he may enter a *nolle prosequi* on such terms as he sees fit, which shall be binding on all parties; and the entry of such *nolle prosequi* shall be reported to the Minister with the reasons therefor. R. S., c. 32, s. 230.

Averment as to place where any act was done—Sufficient evidence.

274. In any prosecution, suit or other proceeding for the recovery of any penalty or in respect of any forfeiture as aforesaid, or for an offence against this Act or any other law relating to the Customs, or to trade or navigation, the averment that the cause of prosecution or suit arose, or that such offence was committed within the limits of any district, county, port or place, shall be sufficient evidence of the fact without proof of such limits, unless the contrary is proved. R. S., c. 32, s. 231.

Probable cause—No costs to claimant.

275. If, in any information, action, prosecution or other proceeding respecting any seizure made under this Act, or any law relating to the Customs, it is adjudged that any goods or property seized by or under the authority of any officer has been so seized unlawfully, or that the seizure cannot be justified, and, if the judge before whom the said information, action, prosecution or other proceeding is heard or tried certifies that there was probable cause for the seizure, the claimant shall not be entitled to any costs of suit, and the person who made or authorized such seizure shall not be liable to any action, suit, indictment or prosecution on account of such seizure. R. S., c. 32, s. 232.

Idem—Twenty cents damages.

276. If any action, suit, indictment, prosecution or other proceeding is brought against any person on account of his making or being concerned in the making of any such seizure as in the last preceding section mentioned, and if the judge before whom such action, suit, indictment, prosecution or other proceeding is heard or tried, certifies that there was probable cause for the seizure, the plaintiff or prosecutor shall not be entitled to more than twenty cents damages, or to any costs; and the defendant in any such indictment, prosecution or other proceeding, shall not be subject to any penalty beyond a fine of ten cents. R. S., c. 32, s. 232.

Claims to be filed—What to state—Affidavit.

277. Every person who desires to claim any thing seized after proceedings for condemnation thereof have been commenced shall file his claim in the office of the clerk, registrar or prothonotary of the court.

2. Such claim shall state the name, residence and occupation or calling of the person making it, and shall be accompanied by an affidavit of the claimant or his agent having a knowledge of the facts, setting forth the nature of the claimant's title to the thing seized. R. S., c. 32, s. 238.

Claimant to give security.

278. Before any such claim can be filed, the claimant shall give security, to the satisfaction of the court or a judge thereof, by bond in a penal sum of not less than two hundred dollars, or by a deposit of money not less than that sum, for the payment of the costs of the proceedings for condemnation. R. S., c. 32, s. 239.

Limitation of actions—Three years.

279. All seizures, prosecutions or suits for the recovery or enforcement of any of the penalties or forfeitures imposed by this Act, or any other law relating to the Customs, may be made or commenced at any time within three years after the offence was committed, or the cause of prosecution or suit arose, but not afterwards. 51 V., c. 14, s. 45.

Seizure to be commencement of action.

280. Whenever, under any provision of this Act, any penalty may be recovered or any forfeiture may be enforced by action, suit or proceeding, the seizure by an officer of Customs, or person acting in his aid, of the goods in respect of which the penalty has been incurred or the forfeiture has accrued, shall be deemed to be a commencement of such action, suit or proceeding. 51 V., c. 14, s. 44.

1. *Prescription—Customs.*—While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under sec. 240 of *The Customs Act*, where the goods have been seized by a Customs Officer, such seizure is to be deemed a commencement of the proceeding within the meaning of sec. 236. *The King v. Lovejoy et al.* 9 Ex. C. R. 377.

2. *Limitation.*—As to limitation of actions for "additional penalties" under sec. 206 of *The Customs Act*, see *Vacuum Oil Co. v. The Queen.* 2 Ex. C. R. 234.

Appeal from convictions by justices of the peace—Security.

281. An appeal shall lie from a conviction by any magistrate, judge, justice or justices of the peace under this Act, in the manner provided by the Criminal Code, from convictions in cases of summary conviction, in that province in which the conviction was had, on the appellant furnishing security by

bond or recognizance with two sureties to the satisfaction of such magistrate, judge, justice or justices of the peace, to abide the event of such appeal. R. S., c. 32, s. 241.

Appeal from Exchequer and superior courts—Appeal from Circuit Court in Province of Quebec.

282. An appeal shall also lie from the Exchequer Court of Canada, the superior courts and county courts respectively, in cases where the amount of the penalty or forfeiture is such that if a judgment for a like amount was given in any civil case, an appeal would lie; and such appeal shall be allowed and prosecuted on like conditions, and subject to like provisions, as other appeals from the same court in matters of like amount.

2. An appeal shall lie from the Circuit Court to the Court of King's Bench in the Province of Quebec, to be allowed and prosecuted in like manner and on like conditions as appeals from the Superior Court in that province. R. S., c. 32, s. 242.

No security by Attorney-General.

283. If the appeal is brought by His Majesty's Attorney General, or a collector or officer, it shall not be necessary for him to give any security on such appeal. R. S., c. 32, s. 243.

Restoration of goods not prevented by appeal if security is given.

284. In any case in which proceedings have been instituted in any court against any vessel, vehicle, goods or thing, for the recovery or enforcement of any penalty or forfeiture under this Act, or any law relating to the Customs, trade or navigation, the execution of any decision or judgment for restoring the thing to the claimant thereof, shall not be suspended by reason of any appeal from such decision or judgment, if the claimant gives sufficient security, approved of by the court or a judge thereof, to render and deliver the thing in question or the full value thereof to the appellant, in case the decision or judgment so appealed from is reversed. R. S., c. 32, s. 244.

Procedure for contravention of regulations.

285. Any penalty or forfeiture incurred or imposed for contravention of any order or regulation of the Governor in Council, made pursuant to the authority of this Act, may be enforced and shall be recoverable in the same manner, and before the same court or tribunal, as if incurred or imposed for contravention of a provision of this Act. 51 V., c. 14, s. 37.

Combines and Conspiracies.

PART OF "AN ACT RESPECTING THE DUTIES OF CUSTOMS"
6-7 ED. VII., CHAP. 11.

Short Title.

1. This Act may be cited as *The Customs Tariff*, 1907.

Combines and conspiracies—Powers of Governor in Council—Inquiry by judge—Evidence—Report of judge—Powers of Governor in Council therefrom.

12. Whenever, from or as a result of a judgment of the Supreme Court or Exchequer Court of Canada, or of any superior court, or circuit, district or county court in Canada, it appears to the satisfaction of the Governor in Council that with regard to any article of commerce there exists any conspiracy, combination, agreement or arrangement of any kind among manufacturers of such articles or dealers therein to unduly promote the advantage of the manufacturers or dealers at the expense of the consumers, the Governor in Council may admit the article free of duty, or so reduce the duty thereon as to give the public the benefit of reasonable competition in the article, if it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of Customs imposed on a like article.

2. Whenever the Governor in Council deems it to be in the public interest to inquire into any conspiracy, combination, agreement or arrangement alleged to exist among manufacturers or dealers in any article of commerce to unduly promote the advantage of the manufacturers or dealers in such article at the expense of the consumers, the Governor in Council may commission or empower any judge of the Supreme Court, or of the Exchequer Court of Canada, or of any superior court or county court in Canada, to hold an inquiry in a summary way and report to the Governor in Council whether such conspiracy, combination, agreement or arrangement exists.

3. The judge may compel the attendance of witnesses and examine them under oath and require the production of books and papers, and shall have such other necessary powers as are conferred upon him by the Governor in Council for the purpose of such inquiry.

4. If the judge reports that such conspiracy, combination, agreement or arrangement exists in respect of such article, the Governor in Council may admit the article free of duty, or so reduce the duty thereon as to give to the public the benefit of reasonable competition in the article, if it appears to the Governor in Council that such disadvantage to the consumer is facilitated by the duties of Customs imposed on a like article.

The Government Railway Act.*

PART OF CHAPTER 36 OF THE REVISED STATUTES OF CANADA, 1906.

CHAPTER 36.

An Act respecting Government Railways.

Short Title.

1. This Act may be cited as the Government Railways Act. R. S., c. 38, s. 1.

INTERPRETATION.

Definitions — Minister — Deputy — Secretary — Department — Superintendent — Engineer — Lands — Toll — Goods — County—Highway—Railway—Constable.

2. In this Act, unless the context otherwise requires,—

(*a*) 'Minister' means the Minister of Railways and Canals;

(*b*) 'Deputy' means the Deputy of the Minister of Railways and Canals;

(*c*) 'Secretary' means the Secretary of the Department of Railways and Canals;

(*d*) 'Department' means the Department of Railways and Canals;

(*e*) 'superintendent' means the superintendent of the Government railway or railways of which he has, under the Minister, the charge and direction;

(*f*) 'engineer' means any engineer or person permanently or temporarily employed by the Minister to perform such work as is ordinarily performed by a civil engineer;

(*g*) 'lands' includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown;

(*h*) 'toll' includes any rate or charge or other payment payable for any passenger, animal, carriage, goods, merchandise, matters or thing conveyed on the railway;

(*i*) 'goods' includes things of every kind that may be conveyed upon the railway, or upon steam or other vessels connected therewith;

(*j*) 'county' includes any union of counties, county, riding or like division of a county in any province, or any division thereof into separate municipalities, in the province of Quebec;

* For jurisprudence and decisions bearing upon this Act, see annotations *supra*, under both the *Exchequer Court* and *The Expropriation Acts*.

(*k*) 'highway' means any public road, street, lane or other public way or communication;

(*l*) 'railway' means any railway, and all property and works connected therewith, under the management and direction of the Department;

(*m*) 'constable' means a railway constable appointed under this Act. R. S., c. 38, s. 2; 50-51 V., c. 16, sch. A.

Powers Exercised by Deputies.

3. Whenever the powers herein given to the Minister are exercised by the superintendent, or by any other person or officer, employee or servant of the Department thereunto specially authorized by the Minister, or his Deputy, or an acting deputy, the same shall be presumed to be exercised by the authority of the Minister, unless the contrary is made to appear. R. S., c. 38, s. 3.

Application of Act.

4. This Act applies to all railways which are vested in His Majesty, and which are under the control and management of the Minister. R. S., c. 38, s. 4.

Powers.

Powers of Minister—To explore—Enter upon lands—Fix the site of railway—Fell timber—Construct necessary works—Make conduits or drains—Cross or unite with other railways—Carry railway across streams—Make and work railway—Erect necessary buildings, etc.—Carry persons and goods—Erect snow fences on adjoining lands—Change location in certain cases—Compensation in cases of crossing of another railway.

5. The Minister may by himself, his engineers, superintendents, agents, workmen and servants,—

(*a*) explore and survey the country through which it is proposed to construct any Government railway;

(*b*) enter into and upon any public lands or the lands of any corporation or person whatsoever for that purpose;

(*c*) make surveys, examinations or other arrangements on such lands necessary for fixing the site of the railway, and set out and ascertain such parts of the lands as are necessary and proper for the railway;

(*d*) fell or remove any trees standing in any woods, lands or forests where the railway is to pass, to the distance of six rods on either side thereof;

(*e*) make or construct in, upon, across, under or over any land, streets, hills, valleys, roads, railways or tramroads, canals, rivers, brooks, streams, lakes or other waters such temporary or permanent inclined planes, embankments, cuttings, aqueducts, bridges, roads, sidings, ways, passages, conduits, drains, piers, arches or other works as he thinks proper;

(*f*) make conduits or drains into, through or under any

lands adjoining the railway, for the purpose of conveying water from or to the railway;

(*g*) cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection;

(*h*) construct, maintain and work the railway across, along or upon any stream of water, watercourse, canal, highway or railway which it intersects or touches; but the stream, watercourse, highway, canal or railway so intersected or touched, shall be restored to its former state, or to such state as not to impair its usefulness;

(*i*) make, complete, alter and keep in repair the railway, with one or more sets of rails or tracks, to be worked by the force and power of steam, or of the atmosphere, or of animals, or by mechanical power, or by any combination of them;

(*j*) erect and maintain all necessary and convenient buildings, stations, depots, wharfs and fixtures, and from time to time, alter, repair or enlarge the same, and purchase and acquire stationary or locomotive engines and carriages, wagons, floats and other machinery necessary for the accommodation and use of the passengers, freight or business of the railway;

(*k*) take, transport, carry and convey persons and goods on the railway, and construct, make and do all other matters and things necessary and convenient for making, extending and using the railway;

(*l*) enter into and upon any lands of His Majesty, or into and upon the lands of any person whomsoever, lying along the route or line of railway between the first day of November in any year and the fifteenth day of April next following, and erect and maintain temporary snow fences thereon, subject to the payment of such land damages, if any, as are thereafter established, in the manner by law provided, to have been actually suffered: Provided that all such snow fences so erected shall be removed on or before the fifteenth day of April next following the erection thereof;

(*m*) change the location of the line of railway in any particular part at any time, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage; and all the provisions of this Act shall relate as fully to the part of such line of railway so at any time changed or proposed to be changed, as to the original line.

2. Where the Minister, in the execution of any of the powers vested in him, effects a crossing, intersection, junction or union of the railway with any other railway at any point on its route, and upon the lands of such other railway, the Exchequer Court of Canada shall in the event of disagreement upon the amount of compensation to be made therefor or as to the point or manner of such crossing or connection, determine the same. R. S., c. 38, s. 5; 50-51 V., c. 16, s. 58.

1. *Boundary ditches—Flooding of farm.*—The Crown cannot he held liable for damages caused by the accumulation of surface water on land crossed by the I. C. Ry. since 1879, unless it is caused by acts or omissions of the Crown's servants. As the damages on the present case appear, by the evidence relied upon, to have been caused through the non-maintenance of the boundary ditches of claimant's farm,—which the Crown is under no obligation to repair or keep open,—the claim for damages must be dismissed. *Morin v. The Queen.* 20 S. C. R. 515, affirming 2 Ex. C. R. 396.

2. *Boundary ditches—Damages.*—The Crown is not bound to keep in repair the boundary ditches between farms crossed by the I. C. Ry. in the Province of Quebec. *Simoneau v. The Queen.* 2 Ex. C. R. 391.

Branch lines, etc.—Powers in such cases—Branches not exceeding one mile in length.

6. The Minister may, by and with the authority of the Governor in Council, build, make and construct, and work and use, sidings or branch lines of railway, not exceeding in any one case six miles in length for the purpose of,—

(*a*) connecting any city, town, village, manufactory, mine, or any quarry of stone or slate, or any well or spring, with the mainline of the railway, or with any branch thereof; or,

(*b*) giving increased facilities to business; or

(*c*) transporting the products of any such manufactory, mine, quarry, well or spring.

2. The Minister and those acting under him shall, for every such purpose, have and may exercise all the powers given them with respect to the main line; and all provisions of this Act which are applicable to extensions shall extend and apply to every such siding or branch line of railway.

3. If the branch or siding does not exceed one mile in length, the Minister may construct such branch or siding without an order in council; and in the event of his so constructing a branch or siding not exceeding one mile in length, all the provisions of this Act which are applicable to extensions, as aforesaid, shall likewise apply in the manner aforesaid. R. S., c. 38, s. 6.

Navigation not to be impeded.

7. The Minister shall not cause any obstruction in or impede the free navigation of any river, stream or canal, to or across or along which the railway is carried. R. S., c. 38, s. 7.

Provisions in case railway crosses navigable river or canal.

8. If the railway is carried across any navigable river or canal, the Minister shall leave openings between the abutments or piers of the bridge or viaduct over the same, and shall make the same of such clear height above the surface of the water, or shall construct such drawbridge or swingbridge over the channel of the river, or over the whole width of the canal, as will prevent the free navigation of the river or canal from being obstructed or impeded, subject to such regula-

tions as to the opening of such swingbridge or drawbridge as the Governor in Council makes from time to time. R. S., c. 38, s. 8.

Proper flooring of bridge.

9. No train shall be allowed to pass over any canal, or over the navigable channel of any river, without such proper flooring being first laid under and on both sides of the railway track over such canal or channel as the Minister deems sufficient to prevent any thing falling from the railway into such canal or river, or upon the boats or vessels, or craft or persons navigating such canal or river. R. S., c. 38, s. 9.

10-22. These sections 10 to 22 deal with the Running powers on Grand Trunk and Canada Atlantic and Highways and Bridges.

FENCES.

Fences on each side of railway with gates and crossings—Cattle-guards at all public road crossings—Hurdle gates, when to be proper fastenings.

22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

4. Every railway gate at a farm crossing shall be of sufficient width for the purpose for which it is intended. R. S., c. 38, s. 16; 50-51 V., c. 18, s. 2.

1. *Railway company—Fencing—Culvert—Negligence—Cattle on highway*—51 V. c. 29, *s.* 194—53 V. c. 28, *s.* 2.—A railway company is under no obligation to erect or maintain a fence on each side of a culvert across a watercourse and where cattle went through the culvert into a field and from thence to the highway and straying on to the railway track were killed, the company was not liable to their owner. *The Grand Trunk Railway Co. v. James.* 31 S. C. R. 420.

2. *Fences—Injury to person.*—Under section 22 and 23 of *The Government Ry. Act*, the Crown is not liable in damages for any injury suffered by a person for want of putting up fences as required by such section. *Viger v. The King.* No. 1621, 10th April 1908. (Not reported at this date.)

3. *Straying animals—Negligence—Duty as regards trespassers—Herding stock—Evidence—Inferences.*—A railway company is not charged

with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered. *C. P. Ry. Co. v. Eggleston.* 36 S. C. R. 641.

Liability in default of fences and cattle-guards.

23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards. R. S., c. 38, s. 17.

Liability when erected and maintained.

24. After the fences or guards have been duly made, and while they are maintained, no such liability shall accrue for any such damages, unless negligently or wilfully caused. R. S., c. 38, s. 18.

Crossings to be fenced.

25. At every road and farm crossing on the grade of the railway, the crossing shall be sufficiently fenced on both sides so as to allow of the safe passage of trains. R. S., c. 38, s. 19.

INJURIES TO CATTLE.

Cattle not to be at large on highway within a certain distance of railway.

26. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway within a half mile of the intersection of such highway with any railway on grade, unless such cattle are in charge of some person to prevent their loitering or stopping on such highway at such intersection. R. S., c. 38, s. 20.

Injury to cattle.—The Crown will be liable for the killing of a horse on the railway track if the accident resulted from excess of speed and negligence of the engineer. *Gilchrist v. The Queen.* 2 Ex. C. R. 300.

May be impounded.

27. All horses, sheep, swine or other cattle found at large in violation of the next preceding section may, by any person finding the same at large, be impounded in the pound nearest to the place where the same are so found and the pound keeper with whom the same are so impounded shall detain the same in like manner, and subject to the like regulations, as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property. R. S., c. 38, s. 21.

If killed, etc., His Majesty not liable—Exception.

28. If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions hereinbefore contained, are killed or injured by any train at such point of

intersection, such person shall not have any right of action or be entitled to compensation in respect of the same, unless they are killed or injured through the negligence or wilfulness of some officer, employee or servant of the Minister. R. S., c. 38, s. 22

See *Gilchrist v. The Queen.* 2 Ex. C. R. 300.

It is perhaps well to mention here that, at the time of going to press, a bill has been introduced before Parliament, by the Minister of Railway and Canals, seeking to amend the above section 28 by inserting, at the end thereof, the following:—

Cattle killed or injured on railway—Burden of Proof—Right to Recover preserved.

"28A. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the railway and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against His Majesty in any action in any court of competent jurisdiction, unless His Majesty establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent.

"2 The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the railway, and not at the point of intersection with the highway, deprive the owner of his right to recover."

Where animals are killed through negligence of owner.

"29. When any cattle or other animals at large upon the highway or otherwise get upon the railway and are killed or injured by a train, the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury unless His Majesty, in the opinion of the court trying the case, establishes that the animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of the animal, or his agent; but the fact that the animal was not in charge of some competent person shall not, for the purpose of this section, deprive the owner of his right to recover."

As amended by sec. 1, ch. 31 of 7-8 Ed. VII.

At the time of going to press, a bill has been introduced before Parliament seeking to repeal the above section 29 and substitute therefor the following, viz:—

No right of action if gates not closed—or wilfully left open—or fence taken down—or cattle turned within railway enclosure or railway used without consent.

"29. No person whose horses, cattle, or other animals are killed or injured by any train shall have any right of action or be entitled to compensation in respect of such horses, cattle, or other animals being so killed or injured, if they were so killed or injured by reason of any person—

"(*a*) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed, when not in use; or

"(*b*) wilfully leaving open any gate on either side of the railway provided for the use of any farm crossing, without some person being at or near such gate to prevent animals from passing through the gate on to the railway; or,

"(*c*) other than an officer, employee or servant of His Majesty while acting in the discharge of his duty, taking down any part of a railway fence; or,

"(*d*) turning any such horse, cattle, or other animal upon or within the inclosure of any railway, except for the purpose of and while crossing the railway in charge of some competent person using all reasonable care and precaution to avoid accidents; or,

"(*e*) except as authorized by this Act, without the consent of His Majesty, riding, leading or driving any such horse, cattle, or other animal, or suffering them to enter upon any railway, and within the fences and guards thereof.

WORKING OF RAILWAY.

Sections **30 to 45,** both inclusive, treat of the "Working of the Railway."—

"*Train of cars*"—*Meaning of.*—An engine and tender do not constitute a "train of cars" within the meaning of sec. 29 of *The Government Railway Act* (R. S. C. c. 38). (*Hollinger v. Canadian Pacific Railway Company* [21 Ont. R. 705] not followed.) *Harris v. The King.* 9 Ex. C. R. 206.

Watchman at level crossing.

33. An employee shall be stationed at each point on the line crossed on a level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof that the way is clear. R. S., c. 38, s. 27.

Reduced speed through cities, etc.

34. No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles per hour, unless the track is properly fenced. R. S., c. 38, s.28.

1. *Undue rate of speed—Injury to person—Liability of Crown.*—When a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight. *Connell v. The Queen.* 5 Ex. C. R. 74.

2. *Crown—Common carrier.*—Upon the question of the Crown being a common carrier and its liability in carrying goods and animals on the I. C. R., and the Regulations made in pursuance of this Act with respect to the same, See *Lavoie v. The Queen.* 3 Ex. C. R. 96. The Crown's limited liability with respect to the carriage of goods under special circumstances. *Nicholls Chemical Co. v. The King.* 9 Ex. C. R. 272.—

With respect to the carriage of goods and the powers of an agent, acting for the Crown, to bind the latter in making a contract for the same, see *Wheatley v. The King*. 9 Ex. C. R. 222, and with respect to injury to the person in a railway accident, see *Dubé v. The Queen* 3 Ex. C. R. 147, and to boarding moving trains and standing on platforms, resulting in accident, see *Martin v. The Queen* 2 Ex. C. R. 328 and 20 S. C. R. 240.—By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. *Coombs v. The Queen*. 26 S. C. R. 13 affirming 4 Ex. C. R. 321.

3. *Railway—Negligence—Passenger alighting from train—Platform.*—A railway company having a platform at a station is bound to bring the passenger cars up to it to permit the passengers to step down on it in alighting or to provide some other safe means for passengers to alight. *Guay v. C. N. Ry. Co.*, 15 M. R. 275.

4. *Railway company—Assault on passenger—Duty of conductor.*—If a passenger on a railway train is in danger of injury from a fellow passenger, and the conductor knows, or has an opportunity to know, of such danger, it is the duty of the latter to take precautions to prevent it and if he fails or neglects to do so the company is liable in case the threatened injury is inflicted. *C. P. Ry. Co. v. Blain*, 34 S. C. R. 74.

5. *Joint operations of railway—Master and servant—Negligence—Responsibility for an act of joint employee—Traffic agreement*—62 & 63 *Vic. c.* 5 (D).—Where by the negligence of the train despatcher engaged by the Grand Trunk Ry. Co., and under its control and directions, injuries were caused by a collision of two Intercolonial Railway trains on the single track of a portion of the Grand Trunk Railway operated under the joint traffic agreement, ratified by the Act, 62 & 63 Vict. ch. 5 (D), the company is liable, notwithstanding that the train despatcher was declared by the agreement to be in the joint employ of the Crown and the railway company and the Crown was thereby obliged to pay a portion of his salary. *Grand Trunk Ry. Co. v. Huard. Grand Trunk Ry. Co. v. Goudie.* 36 S. C. R. 655.

6. *Railways—Farm crossings—Jurisdiction of Board of Railway Commissioners for Canada—Jurisdiction.*—Orders directing the establishment of farm crossings over railways subject to *The Railway Act*, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 Vict. ch. 37 (Can.) incorporating the Grand Trunk Company Railway of Canada. *The Grand Trunk Railway Co. v. Perrault.* 36 S. C. R. 671.

This decision would not, it appears, apply to Government Railways. The question of farm crossings on a Government Railway is regulated by sec. 22 of ch. 36, R. S., 1906.

7. *Operation—Connecting lines.*—For liability of Railway Companies for carriage of goods over connecting lines, see *Grant v. North Pacific Ry. Co.*, 24 S. C. R. 546.

Precautions when moving reversely.

35. Whenever any train of cars is moving reversely in any city, town, or village, the locomotive being in the rear, a person

shall be stationed on the last car in the train, who shall warn persons standing on or crossing the track of the railway, of the approach of such train. R. S., c. 38, s. 29.

On this question of moving a train reversely in a negligent manner resulting in an accident for which the Crown was held liable, see *Harris v. The King*. 9 Ex. C. R. 206.

Bell and whistle.

36. Every locomotive engine shall be furnished with a bell of at least thirty pounds weight, and with a steam whistle. R. S., c. 38, s. 35.

How and when to be used—Failure entails liability to damages—Liability of engineer.

37. The bell shall be rung or the whistle sounded at the distance of at least eighty rods from every place where the railway crosses any highway, and shall be kept ringing or be sounded, at short intervals, until the engine has crossed such highway.

2. His Majesty shall be liable for all damages sustained by any person by reason of any neglect to comply with this provision.

3. One-half of such damages shall be chargeable to and be deducted from any salary due to the engineer having charge of such engine, and neglecting to sound the whistle or ring the bell as aforesaid, or shall be recoverable from such engineer. R. S., c. 38, s. 36.

RULES AND REGULATIONS.

Governor in Council may make regulations.

49. The Governor in Council may, from time to time, make such regulations as he deems necessary,—

(*a*) for the management, proper use and protection of all or any of the Government railways, including station houses, yards and other property in connection therewith;

(*b*) for the ascertaining and collection of the tolls, dues and revenues thereon;

(*c*) to be observed by the conductors, engine drivers and other officers and servants of the Minister, and by all companies and persons using such railways;

(*d*) relating to the construction of the carriages and other vehicles to be used in the trains on such railways. R. S., c. 38, s. 43.

See *Lavoie v. The Queen*. 3 Ex. C. R. 96.

* *

Sections **50, 51 and 53** deal with the right to impose fines, the detention of carriages, animals, timber or goods in certain cases, the sale of such detained goods etc., and the recovery of tolls by action.

Regulations as part of this Act.

54. All such regulations made under this Act shall be taken and read as part of this Act. R. S., c. 38, s. 44.

GENERAL.

Railways to be public works.

55. All Government railways are and shall be public works of Canada. R. S., c. 38, s. 45.

Sections **56, 57, 58 and 59,** deal with the construction of telegraph lines, the use of companies' telegraphs by the Government, the conveyance of H. M.'s force, mails etc., and gives the Minister the power to investigate and inquire into any railway accident and to examine witnesses on oaths with respect to the same.

Notice, etc., not to relieve from liability.

60. His Majesty shall not be relieved from liability by any notice, condition or declaration, in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister; nor shall any officer, employee or servant be relieved from liability by any notice, condition or declaration, if the damage arises from his negligence or omission. R. S., c. 38, s. 50.

Cleared land adjoining railway to be free from weeds, etc.—Liability of His Majesty for fire from locomotive—Proviso—Compensation.

"61. The cleared land or ground adjoining the railway and belonging to the railway shall at all times be maintained and kept free from dead or dry grass, weeds, thistles and other unnecessary combustible material.

"2. Whenever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shown that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this subsection shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines."

As amended by sec. 2 of ch. 31, 7-8 Ed. VII.

See *Price v. The King*. 10 Ex. C. R. 105, and cases therein cited. See also *Alliance Assurance Co. v The Queen*, 6 Ex. C. R. 126.

Publication of proclamations, etc.

62. All proclamations, regulations and orders in council made under this Act shall be published in the *Canada Gazette*. R. S., c. 38, s. 52.

PROTECTION OF OFFICERS.

Limitation of actions against employees.

63. No action shall be brought against any officer, employee or servant of the Minister for anything done by virtue of his office, service or employment, unless within three months after

the act is committed, and upon one month's previous notice thereof in writing; and the action shall be tried in the county or judicial district where the cause of action arose. R. S., c. 38, s. 53.

Officer—Employee.—A contractor engaged in the building and constructing of a branch of the I. C. Ry. is not an employee of the Crown. *Kearney v. Oakes.* 18 S. C. R. 148, reversing 20 N. S. R. 30.

See also *Grenier v. The Queen.* 30 S. C. R. 42, 6 Ex. C. R. 276 and especially *Miller v. The G. T. R.* (1906) A. C. 187.

Sections **64 to 82,** to the end, deal with railway constables, penalties and forfeitures, while the three last sections deal with the I. C. Ry., defining the same and remedying certain defects in expropriations with respect to the same.

Rule of Court—Practice—Copy for registrar—When order rescinded or changed.

46. Any decision or order made by the Board under this Act may be made a rule, order or decree of the Exchequer Court, or of any superior court of any province of Canada, and shall be enforced in like manner as any rule, order or decree of such court.

2. To make such decision or order a rule, order or decree of any such court, the usual practice and procedure of the court in such matters may be followed; or, in lieu thereof, the Secretary may make a certified copy of such decision or order, upon which shall be made the following endorsement signed by the Chief Commissioner and sealed with the official seal of the Board:—

'To move to make the within a rule (order *or* decree, *as the case may be*) of the Exchequer Court of Canada (*or as the case may be*).

'Dated this day of A.D. 19

'A. B.

[SEAL]. 'Chief Commissioner of the Board of Railway Commissioners for Canada.'

3. The Secretary may forward such certified copy, so endorsed, to the registrar, or other proper officer of such court, who shall, on receipt thereof, enter the same as of record, and the same shall thereupon become and be such rule, order or decree of such court.

4. When a decision or order of the Board under this Act, or of the Railway Committee of the Privy Council under the Railway Act, 1888, has been made a rule, order or decree of any court, any order or decision of the Board rescinding or changing the same shall be deemed to cancel the rule, order or decree of such court, and may, in like manner, be made a rule, order or decree of such court. 3 E. VII., c. 58, s. 35.

See also on this subject secs. 32 to 34, both inclusive.

1. *Railways—Order of Railway Committee of Privy Council—Making same rule of Exchequer Court—Condition—Ex parte order—Practice.*—By section 29 of *The Railways Act*, 51 Vict. c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of court; but where there are proceedings depending in another court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend its execution until further directions.

The court refused to make the order of the Railway Committee in this case a rule of court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same. *Metropolitan Ry. Co. and The C. P. Ry. Co.* 6 Ex. C. R. 351.

2. *Railway Committee—Notice.*—Under sec. 17 of 51 Vic. ch. 29, "*The Railway Act*", an order of the Railway Committee of the Privy Council may be made an order of the Exchequer Court. Under the provisions of that statute, an application was made by the Canadian Pacific Railway Co., without notice, as all parties had agreed to the order before the Railway Committee, to have an order of the Railway Committee allowing C. P. R. to build a siding from a point on its main line between Halifax and Mile End, into the premises of the St. Lawrence Sugar Refining Co. The application was granted without notice and upon the filing of a copy of the order of the Railway Committee duly signed and certified by the Secretary of the said Railway Committee. This order is not to be taken as a precedent that such an application might be made in all cases without notice. *Ex parte Canadian Pacific Ry. Co.* Dec. 6th, 1897, No. 1034.

3. *Railway Committee of the Privy Council—Construction of subway—County road and city street—Cost of construction—Ultra vires—Merits of order.*—The Municipal Corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a county road, the works being adjacent to a city street but not within the city limits, and it was *held*, that the city was interested within the meaning of the term as used in the 188th section of the *Railway Act*, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company and "any person interested therein."

On an application to make an order of the Railway Committee of the Privy Council a rule of court, the court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.

Semble, that while the Railway Committee of the Privy Council has jurisdiction in such a case, to impose upon the party interested an obligation to bear part of the expense, it has no jurisdiction to compel a party or other than the railway company to execute the works. *In re The Grand Trunk Ry. Co. et al.* 8 Ex. C. R. 349.

SCHEMES OF ARRANGEMENT.

Insolvent Companies.

Scheme may be filed in Exchequer Court—May affect shareholders and capital—Declaration to be filed—Affidavit—Court may restrain action—Notice of filing—No execution without leave.

365. Where a company is unable to meet its engagements with its creditors, the directors may prepare a scheme of arrangement between the company and its creditors, and may file it in the Exchequer Court.

2. Such scheme of arrangement may or may not include provisions for settling and defining any rights of shareholders of the company as among themselves, and for the raising if necessary of additional share and loan capital.

3. There shall be filed with such scheme of arrangement,—

(*a*) a declaration in writing under the common seal of the company to the effect that the company is unable to meet its engagements with its creditors; and,

(*b*) an affidavit made by the president and directors of the company, or by a majority of them, that such declaration is true to the best of their respective judgments and beliefs.

4. After the filing of the scheme, the Exchequer Court may, on the application of the company, on summons or motion in a summary way, restrain any action against the company on such terms as the Exchequer Court thinks fit.

5. Notice of the filing of the scheme shall be published in the *Canada Gazette*.

6. After such publication of notice, no execution, attachment, or other process against the property of the company shall be available without leave of the Exchequer Court, to be obtained on summons or motion in a summary way. 3 E. VII., c. 58, s. 285.

1. *Scheme of arrangement—Motion to restrain pending action—Grounds for refusal.*—In proceedings taken to confirm a scheme of arrangement filed by a railway company under the provisions of sec. 285 of *The Railway Act*, 1903, an application was made, on behalf of the railway company, for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement but which had not proceeded to judgment. And it was *held*, that as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. *In re Cambrian Railway Company's Scheme.* (L. R. 3 Ch. App. 280 n. 1) referred to. *In re The Atlantic and Lake Superior Ry. Co.* 9 Ex. C. R. 283.

2. *Motion to restrain—Sec.* 285—*The Railway Act* 1903.—A motion having been made on behalf of the Baie des Chaleurs Ry. Co., under the provisions of sub-section 2 of sec. 285 of "*The Railway Act*, 1903", to restrain certain parties, interested in the Scheme of Arrangement filed by said company, from proceeding with an action instituted in the Superior Court of the Province of Quebec, wherein C. N. Armstrong, one of the alleged creditors herein was plaintiff, and some bondholders of the company were defendants, and the said Baie des Chaleurs Ry. Co. were *mis en cause*, and wherein the Scheme of Arrangement filed herein between the Baie des Chaleurs Ry. Co. and its creditors was attacked, and a demand was made to set aside certain transfers of shares. It being further alleged that the Baie des Chaleurs Ry. Co. had been so *mis en cause* merely that the company might know what was going on between the plaintiff and the defendant in the said action, and that the action had not actually been taken against the said company.

The court under the circumstances, refused the application for the time being, upon the ground that the issues in the two cases were not the same; that the issue with respect to setting aside the transfer of shares could only be tried before the Provincial Court, this court having no control over that question and in that respect could give no relief whatever. Adding further that the time might come, however, when counsel would have occasion to renew the application, but it could not be granted at the present time. *Re Baie des Chaleurs Ry. Co.*, 12th Dec. 1904.

Assent to scheme—By bondholders—By debenture holders—By charge holders—By preference shareholders—By ordinary shareholders—Assent of leasing company—Bondholders—Preference—Shareholders—Ordinary shareholders—No assent required from class not interested.

366. The scheme shall be deemed to be assented to,—

(*a*) by the holders of mortgages or bonds issued under the authority of this or any Special Act relating to the company, when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds;

(*b*) by the holders of debenture stock of the company, when it is assented to in writing by three-fourths in value of the holders of such stock;

(*c*) by the holders of any rent charge, or other payment, charged on the receipts of or payable by the company in consideration of the purchase of the undertaking of another company, when it is assented to in writing by three-fourths in value of such holders;

(*d*) by the guaranteed or preference shareholders of the company, when it is assented to in writing by three-fourths in value of such shareholders, if there is only one class of such shareholders, or three-fourths in value of each class, if there are more classes of such shareholders than one;

(*e*) by the ordinary shareholders of the company, when it is assented to by a special meeting of the company called for that purpose.

2. Where the company is lessee of a railway, the scheme shall be deemed to beassented to by the leasing company when it is assented to,—

(*a*) in writing, by three-fourths in value of the holders of mortgages, bonds and debenture stock of the leasing company;

(*b*) in writing, by three-fourths in value of the guaranteed or preference shareholders of the leasing company, if there is only one such class, and by three-fourths in value of each class, if there are more classes than one of such shareholders; and,

(*c*) by the ordinary shareholders of the leasing company, at a special meeting of that company called for that purpose.

3. The assent to the scheme of any class of holders of mortgages, bonds or debenture stock, or of any class of holders of a rent charge or other payment as aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company. 3 E. VII., c. 58, s. 286.

Were these Schemes only a short document, a form might be inserted here, but it is too long a document, as a rule, to do so. For forms of same, however, reference may be had to these files of record in this Court, viz.: *The Baie des Chaleurs Ry. Co.* (2), *The Atlantic & Lake Superior Ry. Co.* (2), *The Quebec Southern Ry. Co.* and *The Great Northern Ry. Co.*

Application for confirmation of scheme—Notice of application—Confirmation by court—Enrolment in court—Notice thereof.

367. If, at any time within three months after the filing of the scheme, or within such extended time as the Exchequer Court, from time to time, thinks fit to allow, the directors of the company consider the scheme to be assented to, as by this Act required, they may apply to the Exchequer Court by petition in a summary way for confirmation of the scheme.

2. Notice of any such application shall be published in the *Canada Gazette*.

3. The Court, after hearing the directors, and any creditors, shareholders or other persons whom it thinks entitled to be heard on the application, may confirm the scheme, if satisfied that the scheme has been assented to, as required by this Act, within three months after the filing of it, or within such extended time, if any, as the court has allowed, and that no sufficient objection to the scheme has been established.

4. The scheme when confirmed shall be enrolled in the Exchequer Court, and thenceforth it shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all persons assenting thereto or bound thereby, have the like effect as if they had been enacted by Parliament.

5. Notice of the confirmation and enrolment of the scheme shall be published in the *Canada Gazette*. 3 E. VII., c. 58, s. 287.

1. *Scheme of arrangement—The Railway Act*, 1903, *sec.* 285—*Unsecured creditor not assenting—Opposition by another railway whose rights were sought to be affected thereby—Confirmation where creditors of same class receive unequal treatment.*—An unsecured creditor who does not assent to a scheme of arrangement filed under section 285 of *The Railway Act*, 1903, is not bound thereby.

It is however a good objection to such scheme that it purports in terms to discharge the claim of such creditor.

By a scheme of arrangement, between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The railway company, the trustees for whom bondholders were in possession of the railway objected to the scheme of arrangement. Its rights therein had not been determined or foreclosed and it was *held* that the railway company was entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway.

No scheme of arrangement under *The Railway Act*, 1903, ought to be confirmed if it appears or is shown that all creditors of the same class

are not to receive equal treatment. *In re The Baie des Chaleurs Ry. Co.* 9 Ex. C. R. 386.

2. *Scheme of arrangement—The Railway Act*, 1903, *sec.* 285—*Petitioners not in possession of railway—Application to confirm.*—Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of *The Railway Act*, 1903, *sec.* 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re The Atlantic and Lake Superior Ry. Co.* 9 Ex. C. R. 413.

3. *Scheme of arrangement—Application to confirm—Enrollment where no objections made.*—Where no objections are made to the confirmation of a Scheme of Arrangement, the same will be confirmed and enrolled forthwith by the Registrar. In re *The Great Northern Railway Co.* 9 Ex. C. R. 337. On this question see also In re *The Baie des Chaleurs Ry. Co.* 10th June, 1907.

4. *Scheme—Amendment.*—A Scheme of arrangement may be amended after it has been filed in Court, provided resolutions of the company authorizing the same are duly filed of record. The same power that can make a Scheme can also amend it. In re *The Baie des Chaleurs Ry. Co.* and in re *The Atlantic & Lake Superior Ry. Co.* 10th June, 1907.

Rules of Practice.

368. The Judge of the Exchequer Court may make general rules for the regulation of the practice and procedure of the Court under the three last preceding sections of this Act, which rules shall have force and effect when they are approved by the Governor in Council. 3 E. VII., c. 58, s. 289.

Rules of court have been made under the provisions of the above section and they will be found, with annotations thereunder, with the General Rules and Orders of this Court regulating the practice.

Copies of the scheme to be kept for sale.

369. The company shall at all times keep at its principal or head office printed copies of the scheme when confirmed and enrolled, and shall sell such copies to all persons desiring to buy them at a reasonable price, not exceeding ten cents for each copy. 3 E. VII., c. 58, s. 288.

Schemes of Arrangement with Creditors.

Failure of company to keep or sell copies—Penalty.

424. If any company fails to keep at all times, at its principal or head office, printed copies of any scheme of arrangement between the company and its creditors, after such scheme has been confirmed and enrolled as provided by this Act, or to sell such copies to all persons desiring to buy them at a reasonable price, not exceeding ten cents for each copy, the company shall incur a penalty not exceeding one hundred dollars, and a further penalty not exceeding twenty dollars for every day during which such failure continues after the first penalty is incurred. 3 E. VII., c. 58, s. 288.

The Canada Evidence Act.

CHAPTER 145, R. S., 1906

An Act respecting Witnesses and Evidence.

Short Title.

1. This Act may be cited as the Canada Evidence Act. 56 V., c. 31, s. 1.

PART I.

APPLICATION.

Applies to all matters within legislative jurisdiction of Canada.

2. This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf. 56 V., c. 31, s. 2.

WITNESSES.

No incompetency from interest or crime.

3. A person shall not be incompetent to give evidence by reason of interest or crime. 56 V., c. 31, s. 3.

Accused and wife or husband competent witnesses for defence—Wife or husband competent and compellable witnesses for prosecution—Disclosure of communications during marriage not compellable—Saving—Failure to testify not to be commented on.

4. Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

2. The wife or husband of a person charged with an offence against any of the sections two hundred and two to two hundred and six inclusive, two hundred and eleven to two hundred and nineteen inclusive, two hundred and thirty-eight, two hundred and thirty-nine, two hundred and forty-four, two hundred and forty-five, two hundred and ninety-eight to three hundred and two inclusive, three hundred and seven to three hundred and eleven inclusive, three hundred and thirteen to three hundred and sixteen inclusive of the Criminal Code, shall be a competent and compellable witness for the prosecution without the consent of the person charged.

3. No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

4. Nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at com-

mon law be called as a witness without the consent of that person.

5. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution. 6 E. VII., c. 10, s. 1.

1. *Husband and wife—Competency of witness—Directions by legal advisers.*—The husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify.

Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which *The Canada Evidence Act* forbids to testify.

Communications between husband and wife, contemplated by this Act, may be *de verbo*, *de facto* or *de corpore*. Sexual intercourse is such a communication and evidence of this nature, under the circumstances of the case, which ought not to have been received. *Gosselin v. The King*. 33 S. C. R. 255.

2. *Evidence.*—In an action to revendicate the moneys seized with gaming implements, under the Criminal Code, the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke *The Canada Evidence Act*, so as to be a competent witness in his own behalf in the Province of Quebec. *O'Neil v. Atty.-Gen. of Canada*. 26 S. C. R. 122.

3. *Evidence—Right of Judge to comment on not giving evidence.*—The prisoner and one F. were jointly indicted and a true bill found against them. The prisoner was ordered to be tried separately and apart from F., whose trial went over to another sitting. At the trial of the prisoner, the presiding Judge commented on the fact that F. was not called as a witness, and it was held, on appeal, that F. was not a person charged under sec. 4 of *The Canada Evidence Act*, for that section only referred to the person actually on trial. F. was a competent witness, but his competency did not depend on this Act and therefore the Judge had the right to comment as he did. *Regina v. Payne* (1 C. C. R. 340) and *Regina v. Gosselin* (33 S. C. R. 255) commented on. *The King v. Blais*, 11 Ont. L. R. 345.

4. *Evidence—Comment upon failure to testify.*—A direction to the jury that an accused has failed to account for a particular occurrence, when the *onus* has been cast upon him to do so, does not amount to a comment on his failure to testify within the meaning of *The Canada Evidence Act*. *Rex v. Aho*, 11 B. C. R. 114.

5. *Failure of prisoner to testify—Comment by Judge.*—On the trial of a prisoner, the Judge, in his charge to the jury, called attention to the fact that the prisoner was not called to testify on his own behalf and warned the jury that they were not to take that fact to his prejudice; but added, if he were an innocent man he could have proved that at the time of the offence he was not in the vicinity, and it was held that this was 'comment' within the meaning of *The Canada Evidence Act*. *The King v. Maguire*. 36 N. B. R. 609.

Incriminating questions—Answer not receivable against witness.

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to

criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence. 61 V., c. 53, s. 1; 1 E. VII., c. 36, s. 1.

1. *Incriminating questions—Coroner's Court—Privilege not claimed.*—The Coroner holding an inquest is sitting as a court, and since *The Canada Evidence Act*, 1893, the evidence of a witness heard before him cannot subsequently be used against the witness, notwithstanding the privilege was not claimed by him at the inquest. *Regina v. Hendershott et al.*, 26 Ont. R. 678. See *contra*, *Regina v. Connolly*, 25 Ont. R. 151, and *Regina v. Williams*. 28 Ont. R. 583. This last case overruled *Regina v. Hendershott* cited *supra*.

2. *Present to official—Fictitious tenders*—Evidence of a present being made to an engineer in charge of the works, with the knowledge of one of the contractors, was proper to be considered as casting light on the relations between the firm and that officer. The use of fictitious tenders is a deceit and if done to evade fair competition in giving contracts is unlawful. *Regina v. Connolly et al.*, 25 Ont. R. 151.

3. *Criminating questions—Privilege not claimed—Abolition of privilege.*—Sec. 5. of *The Canada Evidence Act* (1893, 56 Vict. ch. 31) which abolishes the privilege of not answering criminating questions, and provides that no evidence so given shall be receivable in evidence in subsequent criminal proceedings against the witness, other than perjury in respect thereof, applies to any evidence given by a person under oath, though he may not have claimed privilege. *The Queen v. Hammond*. 29 Ont. R. 211.

4. *Criminating question—Examination on discovery.*—The provisions of sec. 5 of *The Canada Evidence Act*, apply to examination on discovery. *Regina v. Fox*, 18 Ont. P. R. 343.

5. *Criminating answers—Examinations.*—A defendant, in a libel action, will not be excused from answering proper questions because the answer might tend to criminate him and the same rule obtains with respect to examination on Discovery. His answers are within the protection of sec. 5 of *The Canada Evidence Act*. *Chambers v. Jeffray*, 12 Ont. L. R. 377.

6. *Perjury—Criminating answers.*—On trial for perjury it was held that evidence of criminating answers to questions, at preliminary hearing before Coroner, was improperly received, though privilege not claimed. (But see now ch. 145 R. S. 1906). *The Queen v. Thompson*. 2 N. W. T. R. 383.

7. *Criminating answers—Examination of judgment debtor.*—Sec. 5 of *The Canada Evidence Act* applies in Ontario, to the examination of judgment debtor as to his means. *The King v. VanMeter*. 11 C. C. 207.

Evidence of mute.

6. A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible. 56 V., c. 31, s. 6.

Expert witnesses—Not more than five without leave—When leave to be obtained.

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding.

2. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave. 2 E. VII., c. 9, s. 1.

1. *Expert witnesses — Limitation of—Objection.*—The objection being taken at the argument of an appeal from the report of a referee that the suppliant could not support the award of the referee by relying on the evidence of more than five expert witnesses (as limited by the provisions of sec. 6 (a) of *The Evidence Act*); *per Burbidge, J.*:—I think it is too late to take those objections now. The objection to more than five of such witnesses being heard should have been taken before the referee while proceeding with the reference. In re *The King v. Dodge et al.* 20th Feb. 1906, (Exchequer Court).

2. *Expert witnesses—Number of.*—By 2 Edw. VII. ch. 9, s. 1. only five expert witnesses can be called by either side on the trial of a case without leave. *Quære:* If more are so called without objection by the opposite party is the testimony of the extra witness valid? *Dodge v. The King.* 38 S. C. R. p. 149.

Hand-writing, comparison.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. 55-56 V., c. 29, s. 698.

Adverse witnesses may be contradicted—Previous statements.

9. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. 55-56 V., c. 29, s. 699.

Cross-examination as to previous statements in writing—Deposition of witness in criminal investigation.

10. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him: Provided that, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and that the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

2. A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *primâ facie* to have been signed by the witness. 55-56 V., c. 29, s. 700.

Cross-examination as to previous oral statements.

11. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. 55-56 V., c. 29, s. 701.

Examination as to previous conviction—How conviction proved.

12. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing,—

(*a*) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(*b*) proof of identity. 55-56 V., c. 29, s. 695.

OATHS AND AFFIRMATIONS.

Who may administer oaths.

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence,

shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. 56 V., c. 31, s. 22.

Affirmation by witness instead of oath—Effect.

14. If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:—

'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.'

2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath. 56 V., c. 31, s. 23.

Affirmation by deponent—Effect.

15. If a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit such person, instead of being sworn, to make his solemn affirmation in the words following, viz.: 'I, A. B., do solemnly affirm, etc.,'; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the last preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn. 56 V., c. 31, s. 24.

Evidence of child—Must be corroborated.

16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence. 56 V., c. 31, s. 25.

JUDICIAL NOTICE.

Imperial Acts, etc.

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony which, or some portion of which, now forms or hereafter may

form part of Canada, and of all the acts of the legislature of any such province or colony, whether enacted before or after the passing of *The British North America Act*, 1867. 56 V., c. 31, s. 7.

Acts of Canada.

18. Judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded. R. S., c. 1, s. 7.

DOCUMENTARY EVIDENCE.

Copies by King's Printer.

19. Every copy of any Act of the Parliament of Canada, public or private, printed by the King's Printer, shall be evidence of such Act and of its contents; and every copy purporting to be printed by the King's Printer shall be deemed to be so printed, unless the contrary is shown. R. S., c, 1, s. 7.

Imperial proclamations, etc.

20. Imperial proclamations, orders in council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved,—

(*a*) in the same manner as they may from time to time be provable in any court in England; or,

(*b*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof; or,

(*c*) by the production of a copy thereof purporting to be printed by the King's Printer for Canada. 56 V., c. 31, s. 11.

Proclamations, etc., of Governor General.

21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada, may be given in all or any of the modes following, that is to say:—

(*a*) By the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such proclamation, order, regulation, or appointment or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the King's Printer for Canada; and,

(*c*) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the King's Privy Council for Canada; and in the case of any order, regula-

tion or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides. 56 V., c. 31, s. 8.

Proclamations, etc., of Lieutenant-Governor—In the case of the Territories.

22. Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the modes following, that is to say:—

(*a*) By the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or King's printer for the province;

(*c*) By the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.

2. *Primâ facie* evidence of any proclamation, order, regulation or appointment made by the lieutenant governor or lieutenant governor in council of the Northwest Territories, as constituted previously to the first day of September, one thousand nine hundred and five, or of the commissioner in council of the Northwest Territories as now constituted, or of the commissioner in council of the Yukon Territory, may also be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof. R. S., c. 50, s. 111; 56 V., c. 31, s. 9.

Evidence of judicial proceedings, etc.—Certificate if court has no seal.

23. Evidence of any proceeding or record whatsoever of, in, or before any court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, or before any justice of the peace or coroner in any province of Canada, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without

any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever.

2. If any such court, justice or coroner, has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of such signature, or other proof whatsoever. 56 V., c. 31, s. 10.

Official documents of Canada.

24. In every case in which the original record could be received in evidence,—

(*a*) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed; or,

(*b*) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof;

shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. 56 V., c. 31, s. 12.

Books and documents.

25. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted. 56 V., c. 31, s. 13.

Entries in books of Government departments.

26. A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof. 56 V., c. 31, s. 17.

Notarial acts in Quebec.

27. Any document purporting to be a copy of a notarial act or instrument made, filed or enregistered in the province

of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved: Provided that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of the province of Quebec, be taken before a notary or be filed, enrolled or enregistered by a notary in the said province. 56 V., c. 31, s. 18.

Notice of production of book or document—Not less than 10 days.

28. No copy of any book or other document shall be received in evidence, under the authority of any of the last five preceding sections, upon any trial, unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention.

2. The reasonableness of the notice shall be determined by the court or judge, but the notice shall not in any case be less than ten days. 56 V., c. 31, s. 19.

Notice—Document—Registers Civil status.—Section 19 (Now sec. 28) of *The Canada Evidence Act*, which requires that ten days' notice shall be given to the prisoner before the trial, of the intention to produce certain documents, does not apply to certified extracts from registers of acts of civil status, which were produced merely to explain the alias of the person killed. Such extracts are admissible without notice. *The King v. Long*, Q. R. 11 K. B. 328.

Order signed by Secretary of State.

29. Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor General, shall be received in evidence as the order of the Governor General. 56 V., c. 31, s. 15.

Copies printed in Canada Gazette.

30. All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be *primâ facie* evidence of the originals, and of the contents thereof. 56 V., c. 31, s. 16.

Proof of handwriting of person certifying not required—Printed or written.

31. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document.

2. Any such copy or extract may be in print or in writing, or partly in print and partly in writing. 56 V., c. 31, s. 14.

Attesting witness—Instrument how proved.

32. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite.

2. Such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. 55-56 V., c. 29, s. 696.

Forged instrument may be impounded.

33. Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the instrument seems meet. 55-56 V., c. 29, s. 720.

Construction of Act.

34. The provisions of this part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute, or existing at law. 56 V., c. 31, s. 20.

PROVINCIAL LAWS OF EVIDENCE.

How applicable.

35. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings. 56 V., c. 31, s. 21.

Evidence—Conflict—Dominion—Province.—In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail. *The Queen v. O'Bryan et al.*, 7 Ex. C. R. 19.

STATUTORY DECLARATIONS.

Solemn declaration.

36. Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or Dominion courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form following, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:—

I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

Declared before me
at this day of A.D. 19
56 V., c. 31, s. 26, and sch. A.

INSURANCE PROOFS.

Affidavits, etc., may be taken before commissioner.

37. Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any justice of the peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration. 56 V., c. 31, s. 27.

PART II.

APPLICATION.

Foreign courts.

38. This Part applies to the taking of evidence relating to proceedings in courts out of Canada.

INTERPRETATION

Definitions.

39. In this Part, unless the context otherwise requires,—

(*a*) 'court' means and includes the Supreme Court of Canada, and any superior court in any province of Canada;

(*b*) 'judge' means and includes any judge of the Supreme Court of Canada and any judge of any superior court in any province of Canada;

(*c*) 'cause' includes a proceeding against a criminal;

(*d*) 'oath' includes affirmation in cases in which by the law of Canada, or of the province, as the case may be, an affirmation is allowed instead of an oath. R. S., c. 140, ss. 1 and 6.

Construction.

40. This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof. R. S., c. 140, s. 8.

PROCEDURE.

Order for examination of witness in Canada in relation to foreign suit, etc.

41. Whenever, upon an application for that purpose, it is made to appear to any court or judge, that any court or tribunal of competent jurisdiction, in any other of His Majesty's dominions, or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to such matter, of any party or witness within the jurisdiction of such first mentioned court, or of the court to which such judge belongs, or of such judge, such court or judge may, in its or his discretion, order the examination upon oath upon interrogatories, or otherwise, before any person or persons named in such order, of such party or witness accordingly, and by the same or any subsequent order may command the attendance of such party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in such order, and of any other writings or documents relating to the matter in question that are in the possession or power of such party or witness. R. S., c. 140, s. 2.

Enforcement of such order.

42. Upon the service upon such party or witness of such order, and of an appointment of a time and place for the examination of such party or witness signed by the person named in such order for taking the same, or, if more than one person is named, then by one of the persons named, and upon payment or tender of the like conduct money as is properly payable upon attendance at a trial, such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge. R. S., c. 140, s. 3.

Expenses and conduct money.

43. Every person whose attendance is required in manner aforesaid shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial. R. S., c. 140, s. 4.

Who shall administer oath.

44. Upon any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one, then by one of such persons. R. S., c. 140, s. 6.

Right of refusal to answer or produce document—Same as upon trial of cause.

45. Any person examined under any order made under this Part shall have the like right to refuse to answer questions

tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, such order is made.

2. No person shall be compelled to produce, under any such order, any writing or other document that he could not be compelled to produce at a trial of such a cause. R. S., c. 140, s. 5.

Court may make rules—Letters rogatory sufficient evidence.

46. The court may frame rules and orders in relation to procedure, to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

2. In the absence of any order in relation to such evidence, letters rogatory from any court of justice in any other of the dominions of His Majesty, or from any foreign tribunal, in which such civil, commercial or criminal matter is pending, shall be deemed and taken to be sufficient evidence in support of such application. R. S., c. 140, s. 7

RULES AND ORDERS

OF

The Exchequer Court of Canada.

Exchequer Court Rules.

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All General Rules and Orders, regulating the practice and procedure in the Exchequer Court of Canada, made and published before the date of the present Rules, viz.: the 11th day of January, 1909, have been repealed, and the following Rules and Orders, made and published on the said date, and as printed herein, are the Rules and Orders now in force in this Court.

In the Exchequer Court of Canada.

GENERAL RULES AND ORDERS.

In pursuance of the provisions contained in the 87th section of *The Exchequer Court Act* (R. S., 1906, ch. 140), in the 2nd section of an *Act to Amend the Exchequer Court Act*, ch. 27, 7-8 Ed. VII., and sec. 368 of *The Railway Act* (R. S., 1906, ch. 37), it is hereby ordered that all General Rules and Orders of the Exchequer Court now in force be rescinded and that the following rules and orders be substituted therefor and be in force for the purpose of regulating the practice and procedure in the Exchequer Court of Canada:—

GENERAL PROVISIONS.

RULE 1.

Mode of practice and procedure in cases not provided for by any Act of Parliament or by these Rules.

(1) In all suits, actions and matters in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall:—

(*a*) If the cause of action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's High Court of Justice in England; and

(*b*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's High Court of Justice in England.

The rules made under the provisions of sec. 368 of *The Railway Act*, (R. S., 1906, ch. 37), have been approved by an order in council bearing date the 8th February, 1909, in compliance with the requirements of that section.

In the Rules, as now in force, the distinction between Revenue and Common Law cases has been done away with.

By the *Supreme Court of Judicature Act*, 1873, (Imp.) secs. 16 and 31, the Court of Exchequer as a Court of Revenue, as well as a Common Law Court, has been merged in His Majesty's High Court of Justice in England, and by sec. 18, sub-sec. 4 of the same Act, the jurisdiction and powers of the Court of Exchequer Chamber have been transferred to the Court of Appeal.

In dealing with the law and practice before this Court in cases originating in any of the Provinces of the Dominion, excepting the Province of Quebec, one must first read the Statute; secondly, these Rules; thirdly, the Rules of His Majesty's High Court of Justice in England. For cases in which the cause of action has arisen in the Province of Quebec, one must first read the Statute; secondly, these Rules; thirdly, the practice of His Majesty's Superior Court for that Province when the Exchequer Court Rules do not apply; and fourthly, the Rules of His Majesty's High Court of Justice in England, when neither these Rules nor the rules of practice for the Superior Court of the Province of Quebec make provision for the practice and procedure in suits, actions or matters coming within the jurisdiction of the Court.

The present Rules would, apparently, under the three following decisions, apply to actions pending in this Court when the Rules came into force. The canon of these decisions is that when the effect of an enactment is to take away a right, *primâ facie* it does not apply to existing rights; but when it deals only with procedure, *primâ facie* it applies to all actions, pending as well as future. In other words, the Rules dealing with procedure only, have a retroactive effect.

1. *Security for costs—Proceedings begun before rule in force.*—On the 22nd January, 1900, the plaintiff filed a statement of claim to annul the Defendant's patent of invention, of which service was accepted on the 25th of the same month. On the 25th January, 1900, a general rule and order was made and published by the Court reading as follows:

"6. In any proceeding by statement of claim to impeach or annul "a patent of invention, the plaintiff shall give security for the defend- "ant's costs therein in the sum of $1000."

On the 19th Februray, 1900, the defendants applied, under the provisions of the foregoing rule, for an order on the plaintiff to give security for the defendant's costs in the sum of $1000. *Held*, that the principles upon which the case of *Kimbray v. Draper* (L. R. 3 Q. B. 160) and other similar cases were decided is applicable to the present case and circumstances. The plaintiff is accordingly ordered to give security for costs in the sum of $1000, the proceedings herein being stayed until such security is given to the satisfaction of the Registrar. Per *Burbidge, J., Hambly v. Albright & Wilson, Limited* (No. 1140), 27th February, 1900.

2. *County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 10—*Giving Security for costs in an action of Tort—Retrospectice Enactment.*—By 30 & 31 Vict. c. 142, s. 10, it shall be lawful for any person against whom an action of tort may be brought in a superior court, to make affidavit that the plaintiff has no visible means of paying costs, and thereupon a judge of the court shall have power to make an order that, unless the plaintiff within a time named give security for costs to the satisfaction of a master, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed, or the cause be remitted for trial before a county court to be named:—*Held*, on the authority of *Wright v. Hale* (6 H. & N. 227; 30 L. J. (Ex.) 40), that the section was to be construed as retrospective,

and applied to an action commenced before the passing of the statute. *Kimbray v. Draper*, L. R. 3, Q. B. 160.

3. *Statutes—Retroactive effect.* The 23 & 24 Vict. c. 126, s. 34, which provides that when the plaintiff in any action for an alleged wrong recovers by the verdict of a jury less than £5, he shall not be entitled to any costs, if the Judge certifies to deprive him of them, enables a Judge to certify in an action commenced before the passing of that Act. *Wright v. Hale.* 6 H. &N, 227.

4. *Practice—New Jurisdiction*—In the absence of General Orders regulating the practice in matters of new jurisdiction, the *cursus curiæ* (ordinary practice of the Court) will prevail. See judgment of *Wood*, V. C. in *The Cambrian Ry. Co.'s Scheme*, L. R. 3 Ch. App. 290 cited in *Irish North Western Railway Company's Scheme. Ir. Rep.* 3 Eq. at p. 205.

INFORMATIONS IN SUITS BY THE CROWN, PETITIONS OF RIGHT AND STATEMENTS OF CLAIM.

RULE 2.

Suits on behalf of the Crown to be by Information—How signed.

All suits on behalf of the Crown in the interest of the Dominion of Canada are to be instituted by information filed in the name of the Attorney-General of Canada, and signed by the Attorney-General of Canada, or by some person duly authorized to affix thereto the signature of the said Attorney-General.

1. *Style of cause—Information.*—The defendants in all personal informations must be described as well by their proper names and additions, as also by the parishes, towns and places where they respectively live. *Manning, the Practice of the Court of Exchequer*, 169, 174.

2. *Practice—Representation of Attorney-General by attorney ad litem.*—The Attorney-General for the Province of Quebec, acting on behalf of Her Majesty the Queen and instituting legal proceedings in that capacity, may be represented therein by attorneys at law, just as any other party to a suit may be so represented. Such representation by attorney is not a delegation of the power conferred on the Attorney-General by law to institute such proceedings.

Attorneys at law, appearing for and instituting proceedings on behalf of the Attorney-General, are presumed, in the absence of disavowal, to be duly authorized by him, and under such presumed authorization all proceedings signed by them as attorneys for the Attorney-General are considered the acts of the Attorney-General.

The fact that it is stated in an action, brought by the Attorney-General, that the proceeding is instituted upon the petition of an individual named, and that the said individual has been authorized to use the name of the Attorney-General, does not affect the regularity of the proceeding. *Casgrain, ès-qual., v. La Cie. de Carosserie.* Q. R. 9 S. C. 383.

3. We find in Manning's *Exchequer Practice* (page 142) the following definition of an information, viz:—

"An information in the Exchequer is a statement in writing made to "the court of some matter of fact, in general not appearing of record, "whereby it is shown that the King is entitled:

"First, to an adjudication in his favour in respect of the property in "lands or goods which have been taken into his possession, or in respect of

"goods to which the Crown is entitled, and which have come into the "hands of the defendant. This is called an information *in rem*, and might "at common law be exhibited, either by the Attorney-General or by the "party making the seizure or discovery.

"Or, secondly, to recover a debt, or satisfaction in damages for some "personal wrong.

"The third species of information demands compensation and security "on account of some injury done to the real property of the Crown. This "corresponds with the real or mixed action of the subject, and is called an "information of intrusion."

From the above it will be seen that Informations are of three principal kinds:—1st, the information *in rem*; 2ndly, the information *in personam*; and 3rdly, the information of *intrusion*.

The information of *devenerunt* lay also when personal property belonging to the Crown, either by forfeiture or otherwise, had found its way into the hands, or was under the control, of a subject; this kind of information was, however, always either wholly or partly *in rem*. *Ibid*, p. 165; 3 Bl. 261; Chitty Prer. 332; *The Crown's Suits, etc., Act*, 1865, ss. 31 *et seq*.

There was also a proceeding called an English Information in the Exchequer Division, under the equitable jurisdiction of the Court of the Exchequer, so called because it was in the nature of a bill of complaint in equity, which was formerly called an English bill. *Sweet, Law Dictionary*, 429.

The English information is now almost invariably employed by the Crown in cases relating to foreshore. *Moore & Hall, On Foreshore*, 614.

For the law and practice upon the subject of English information see *The Crown Suits, etc., Act*, 1865 (28-29 Vict., ch. 104 (U. K.) Part II); *Attorney-General v. Halling*, 15 M. & W. 687; *Corporation of London v. Attorney-General*, 1 H. L. C. 440; *Wilson's Judicature Acts*, pp. 128, 509; *Annual Practice*, 1895, p. 214.

The rules regulating procedure in suits by English Information, issued by the Barons of the Exchequer in Easter Term, 1866, in pursuance of *The Crown Suits, etc., Act*, 1865, will be found in L. R. 1 Exchequer, p. 389.

4. The Attorney-General of Canada may also under ch. 143, R. S., 1906, cause an Information to be exhibited in the Exchequer Court of Canada in any case in which land or property is taken and expropriated for the construction of a public work.

For further particulars and forms respecting expropriation proceedings see *ante* p. 266.

RULE 3.

Form of information.

The information shall conclude with a claim for the relief sought, and the commencement and conclusion thereof may be in the form given in Schedule A to these orders.

See Schedule L for form of informations of intrusion; and for forms of informations and pleadings in expropriation cases see notes under sec. 26 of *The Expropriation Act, ante* p. 266.

For endorsement on information or statement of claim hereinbefore mentioned, see Schedule J.

RULE 4.

Joinder of proceedings in rem and in personam.

Where, by reason of the commission of any offence, any thing is liable to condemnation, and the offender is also liable to a penalty, such condemnation and penalty may be enforced and recovered in one and the same proceeding; but no judgment for any such penalty shall be given against any person who has not been served with the information.

RULE 5.

Joinder of causes of action in information of intrusion.

Proceedings to recover profits or damages for intrusion may be joined to proceedings to remove persons intruding upon the King's possession of lands or premises.

1. *Practice—Information of intrusion—Possession and mesne profits—Joinder of claims—Judgment—Costs.*—Rule 21 of the General Rules of Practice on the Revenue Side of the Court of Exchequer in England, made on the 22nd June, 1860, providing that the mode of procedure to remove persons intruding upon the Queen's possession of lands or premises shall be separate and distinct from that to recover profits or damages for intrusion, governed the practice of the Exchequer Court of Canada in such matters until May 1st, 1895, when a general order was passed by that court permitting the joinder of such claims.

Rule 36 of the English rules above mentioned providing that in cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown,is still in force in the Exchequer Court of Canada. *The Queen v. Kilroe*, 6 Ex. C. R. 80.

2. The Rules and Orders referred to in the above case are to be found in 6 *Hurlstone and Norman* and are still in force in the Exchequer Court of Canada, so far as applicable, unless repealed by any rule or order of the Court or by necessary implication therefrom.

3. *Information of intrusion—Crown out of possession—Grant.*—The decision of the Courts of New Brunswick and Nova Scotia to the effect that when the Crown has been out of actual possession for twenty years it could not make a grant until it had first established its title by information of intrusion, was overruled. *Emmerson v. Maddison*, 1906, A. C. 569.

4. *Venue.*—In an information of *intrusion* the venue may be laid in any district. *Attorney-General v. Dockstader*, 5 U. C. K. B. (O. S.) 341.

3. *Appropriate remedy in information of intrusion.*—An order directing a defendant to recover the land is not an appropriate part of the remedy to be given upon an information of intrusion. *The Queen v. Farwell*, 3 Ex. C. R. 271.

RULE 6.

Suits to be instituted by information, petition of right, reference or statement of claim.

1. Actions, suits or proceedings in this Court, on behalf of the Crown and in the name of the Attorney-General of Canada, may be instituted by filing an information in the name of the Attorney-General.

2. Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, or in any case where there is a Reference of a claim against the Crown by the Head of any department, by filing a statement of claim.

3. Any other actions, suits or proceedings in this Court, unless otherwise specially provided for, may be instituted by filing a statement of claim, which may be according to the form given in Schedule B to these Rules and Orders, and shall conform to the rules of pleading herein prescribed.

This Rule originally contemplated only the class of cases in which suits could be brought for His Majesty in the name of one of His officers under the provisions of special statutes; such as, for instance, the case of the Postmaster-General, who, under subsection (m) of section 9 and section 140 of chapter 66 of *The Revised Statutes of Canada*, 1906, is authorized and empowered to sue for, and recover, in his name, all sums of money due for debt, postage or for penalties under the said Act. Similar provisions are also made under special statutes, with respect to the Minister of Finance and the Minister of the Interior. It also covered the cases in the nature of *qui tam* actions. A form of statement of claim in *qui tam* actions will be found in schedule J hereto. For *qui tam* actions, see subsec. (a) of sec. 17 of 50-51 Vict., ch. 16; *Baxter's Jud. Act*, 485-6 & App. A. (10) for forms, and Arts 5716 to 5719 of R. S. Q.

The Rule as now amended covers as well the class of cases above mentioned as also the cases between subject and subject coming within the jurisdiction of the court in respect of Insolvent Railways, Patents of Invention, Copyrights, Trade-marks and Industrial Designs or the like, and where it is provided that an action is to be instituted by statement of claim.

This Rule has been made applicable to the Province of Quebec and no action can now be instituted before this court by writ of summons.

REFERENCE OF CLAIM BY HEAD OF DEPARTMENT.

RULE 7.

When reference made, statement of claim to be filed by claimant.

Whenever a claim is referred to the Court by the Head of any Department of the Government of Canada, the claimant shall file with the Registrar a statement of his claim, as provided for by Rule 6, and shall leave at the office of His Majesty's Attorney-General of Canada, an office copy thereof with an endorsement thereon in the form given in Schedule 'C,' and the pleading and procedure subsequent thereto shall be regulated by and conform to, as near as may be, the mode of pleading and procedure in proceedings against the Crown by petition of right.

See section 38 of *The Exchequer Court Act*. and notes thereunder *ante* p. 184.

DISPENSING WITH PLEADING.

RULE 8.

Dispensing with pleadings by consent in cases instituted by reference.

Whenever a claim is referred to the court by the Head of

any Department of the Government of Canada, a consent in writing, signed by the parties or their attorneys, that such claim shall be heard without pleadings may be filed with the Registrar, and an order of court in the terms thereof may thereupon be made. The claim shall thereupon be deemed ripe for trial.

RULE 9.

Order to dispense with pleadings.

The Court may, on the application of any party, order that any such claim shall be heard without pleadings.

RULE 10.

When order taken out claim may be heard.

Every such claim shall be ripe for hearing as soon as such order is taken out.

The order must be taken out in the class of cases provided for as well in Rule 8 as in Rule 9.

REFERENCES UNDER THE 179TH AND 180TH SECTION OF 'THE CUSTOMS ACT' (R. S., 1906, CH.48).

RULE 11.

Customs reference to be heard in manner provided by Rule 7.

Every Reference to the Court of any matter in pursuance of the 179th section of *The Customs Act* (R. S., 1906, ch. 48) shall be heard in the manner provided for in Rule No. 7; but any question of law arising upon any such reference may, as in other cases, be stated in the form of a special case for the opinion of the Court.

RULE 12.

Procedure on Customs Reference.

Every such matter so referred by the Minister of Customs shall be regulated by and conform to, as near as may be, the procedure in proceedings against the Crown by Petition of Right.

See annotations under *The Customs Act* at p. 344 *et seq.* herein, for the jurisprudence upon this subject.

EXTENTS.

RULE 13.

Writs of immediate extent and diem clausit extremum may issue on affidavit of debt and danger and debt and death.

A commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an Immediate Extent or a writ of Diem Clausit Extremum; and an Immediate Extent may be issued on an affidavit of debt and danger, or a writ of Diem Clausit Extremum may be issued on an affidavit of debt

and death, and, in either case, on the *fiat* of the Judge of the Exchequer Court of Canada. 28-29 Vict. (U. K.), ch. 104, sec. 47 and following. (*For forms of affidavit, order and writ, see Schedule D hereto.*)

1. *Extent—Debt—Penalties and forfeitures.*—A writ of Extent will only issue for a debt due to the Crown, and while it will issue for Customs-duties mentioned in sections 7 and 8 of *The Customs Act*, as amended by 51 Vict., ch. 14, it will be refused for penalties and forfeitures under section 192 of the said Act. *The Queen v. Boyd*, October 13th, 1893.

2. *Extent, writ of—Bond to Queen—Prerogative of Crown—Priority.*—A bond given by a County Secretary-Treasurer to the Queen for the due performance of his duties as such officer, is a first lien on all the real estate of the obligor from the date of the execution of the bond, and takes precedence of executions and mortgages issued or executed respectively at the date or dates subsequent to that of the bond.

The rights and remedies of mortgagees and execution creditors, whose mortgages, judgments or executions were executed, signed, issued, or handed to the sheriff respectively after the making of or breach of said bond, are postponed until all moneys due by virtue of the bond and in consequence of a breach have been fully paid and satisfied.

The writ of extent is a proper and effectual proceeding for enforcing the rights of the Crown on such a bond.

Whenever a demand may be properly sued for in the name of the Queen, the prerogative right of the Crown attaches in all portions of the British Empire subject to English law, irrespective of the locality in which the debt arose and of the Government in right of which it accrued. *The Queen v. Sivewright.* 34 S. C. R., N. B. 144.

3. *Opposition à distraire—Practice—Execution—Fi. Fa.—Garnishment—Writ of extent—Costs.*—The Crown, seeking to levy the amount of a judgment obtained against a defendant warehouse-keeper, had seized in his warehouse, under a writ of Fi. Fa. de bonis, a quanity of goods belonging to a third party who immediately filed an *opposition à distraire* for the release of such goods. *Held*, maintaining the opposition, with costs, that the seizure of the warehouse commission due the defendant by such third party should have been made by garnishment or by writ of Extent. *The Queen v. Finlayson, & Villeneuve, Opposant*, No. 993, February 11th, 1898.

A similar opposition *à distraire* having been filed by another party upon the same ground as in the above opposition of Villeneuve, the Court found as upon the Villeneuve opposition, but refused costs, on the ground that at the trial it was established that the defendant, acting as agent for opposant, had passed as his own, through the Custom-House, goods actually belonging to opposant, thus leading the plaintiff to believe he was the right owner of such goods. *The Queen v. Finlayson, & Arens, Opposant.* No. 993, February 11th, 1898.

4. *Crown—Priority—Custom-duties—Preference of Crown over subject—Extent.*—It is usual to say in England that the Crown is preferred for its debts over all other creditors, but the nature of this preference was not a tacit right to payment, independently of execution, following the debtor's property after it has gone out of his hands; but a prerogative right to anticipate other creditors proceeding to execution, and get before them. 1 *Co. Lit.* 131; 2 *Co. Lit.* 32. The manner in which the Crown might exercise this right was limited by 33 H. VIII, ch. 39, sec. 74, the foundation of the present execution by extent, and unless

the Crown adopt the means of anticipating the subject, there and in other statutes provided, it obtains no preference. *Clarkson v. Attorney-General of Canada.* 16 Ont. A. R. 209.

5. *Extent—Writ of—Right of Crown to.*—The right to an immediate extent is given to the Crown by the stat. 33 H. VIII, ch. 39, sec. 55. It may be issued "if need should require, or otherwise, as unto the said "several courts should be thought by their discretion expedient for the "speedy recovery of the King's debts".

The words, "if need should require" have given rise to the affidavit of danger, as it is commonly called, which contains a statement to the effect, that unless some method more speedy than the ordinary course of proceedings at law be had against the Crown debtor, the debt is in danger of being lost. *The Queen v. Port Whitby Road Co.*, 13 U. C. C. P. 240. See also *Attorney-General v. Edmunds.* 22 L. T. N. S. 667.

6. *Extent—Affidavit.*—The Crown may proceed by *Writ of Extent* to recover a debt due from a person indebted to the Crown debtor. *The King v. Bell*, 11 *Price* 160;—This case, which is one for an Extent in chief in the second degree, states further that the affidavit upon which the writ issues need not negative collusion nor aver insolvency of the Crown debtor. See also 5 *Eng. Ency. of Law*, 254 *et seq.*

RULE 14.

Sheriffs executing extents need not enquire by the oaths of Jurors.

The Sheriff in executing a writ of Immediate Extent or a writ of Diem Clausit Extremum need not enquire by the oaths of good and lawful men in his bailiwick, but shall execute the said writ or writs in the same manner as is provided for the execution of writs of *Fieri-Facias*, against goods and lands, or of Sequestration.

PATENTS OF INVENTION, COPYRIGHTS, TRADE-MARKS AND INDUSTRIAL DESIGNS.

INFRINGEMENT.

RULE 15.

Actions for infringement.

Any action or proceeding for the infringement of a Patent of Invention may be instituted by filing a statement of claim.

IMPEACHMENT OF LETTERS PATENT OF INVENTION.

RULE 16.

Action to impeach or annul Patent of Invention.

Any action or proceeding to impeach or annul any patent of invention may be instituted:—

(*a*) By Information in the name of the Attorney-General of Canada; or,

(*b*) By a Statement of Claim filed by any person interested; or,

(*c*) By a writ of *scire facias* as provided in the 35th section of the *Patent Act.*

See the observations of *Burbidge J.*, at p.p. 336, 337 in the case of *The Queen v. The General Engineering Co.*, (6Ex. C. R.) upon the practice contemplated by the above Rule. See also Frost *On Patents*, 3rd Edn. p 291, and 46-47 Vict. (Imp.) ch. 57, sec. 26.

When a draught of the writ of *Sci. fa.* has been prepared, a fair copy of it is laid before the Attorney-General of Canada, together with a short statement of the facts containing the date of the patent sought to be cancelled, the title of the inventor, the prosecutor's name and address, and mentioning whether the validity of the patent has already been tried and the result of any proceedings which may have been taken. A certified copy of the patent in question should also be produced. The permission to sue out the writ is usually granted as a matter of course, but as it means suing in the name of the King, the *fiat* is only granted upon the condition that the prosecutor give security.

The reason for requiring the security is, that patentees may not be vexatiously harassed by action of *scire facias*, in which they could not recover costs against the prosecutor, and the condition of the bond is that if the defendant obtains a judgment in his favour, the prosecutor shall pay him the amount of his costs after taxation thereof. See *Hindmarch, On Patent privileges.*

The Attorney-General's *fiat*, which is to be endorsed on the back of a copy of the writ, is usually in the following form, viz:—

DEPARTMENT OF JUSTICE.

Ottawa day of 19 .

Upon the within named petitioner A. B. giving security to His Majesty The King by bond (or deposit of money, *as the case may be*), in the penal sum of One thousand dollars for the payment of the costs of the defendant, within named, in the form usual in like cases and to the satisfaction of the Registrar of the Exchequer Court of Canada, let the within writ of *Scire Facias* issue.

A. B.

Attorney-General for Canada.

RULE 17

Certified copy Patent, petition, affidavit, specification and drawings to be filed.

With any Information, or Statement of Claim filed, or on issuing a writ of *Scire Facias*, to impeach or annul a patent of invention, there thall be filed, with the Registrar of the Court, a sealed and certified copy of the patent and of the petition, affidavit, specification and drawings relating thereto.

RULE 18.

Security for costs.

In any proceeding by Statement of Claim to impeach or annul a patent of invention, the plaintiff shall give security for the defendant's costs therein in the sum of one thousand dollars.

The security mentioned in this Rule must be given at, or before, the time when the statement of claim is filed,—without the security, the statement of claim cannot be accepted and filed of record by the Registrar.

RULE 19.

Writ of Scire Facias.

A writ of *scire facias* to impeach or annul a patent of invention may be in the form 'E' in the Schedule hereto. It shall be tested of the day on which it is issued. It may be served in any manner in which an Information or a Statement of Claim may be served, and shall be returnable immediately after service thereof.

See annotations under sec. 35 of *The Patent Act* respecting *Scire Facias*, ante p. 298.

1. *Costs in Sci.-fa. cases.*—Where in a *Sci.-fa.* case, judgment went for the defendant in the following words:—"I find all the issues raised by "the pleadings in this case in favour of the defendant, for whom there will "be judgment with costs," it was on taxation contended, under the practice now in force in virtue of the General Order of December 5th, 1892, and 15-16 Vict., ch. 83, sec. 43 (U. K.) that the costs should be taxed as between attorney and client.—Ruled by the Registrar that as such General Order provided that the practice therein mentioned "shall be followed as near as may be," it meant only so far as applicable and that as there was no provision to tax costs between solicitor and client in the Exchequer Court, such costs should be taxed as between party and party. (*Boak v. Merchants Marine Insurance Co.*, Cassels' Digest, 2nd Edn. 677; and *Bossé v. Paradis*, 21 S. C. R., 419, referred to). On appeal to the Judge—held that the appeal should be dismissed, first on the ground mentioned by the Registrar, and secondly, because section 43 of ch. 83, 15-16 Vict. (U.K.) did not apply to the present case, but merely to a case where an action for infringement of letters patent had been first taken before a Superior Court and where the Judge thereof had then certified on the record that the validity of the letters patent in the declaration mentioned had come in question and that afterwards the record with such certificates had been given in evidence upon a case by *Scire facias* to repeal the said letters patent. *The Queen v. Laforce*, January 27th, 1894.

2. The practice in proceedings by *Scire facias* to impeach a patent of invention having become to some extent obsolete, the following forms of pleadings in such cases may be found convenient:—

(a)—DECLARATION.

IN THE EXCHEQUER COURT OF CANADA.

(*Title of Cause.*)

"Our Sovereign The King sent to His Sheriff of the County of Carleton, or any other of His Sheriffs in the Dominion of Canada, His writ clothed in these words:—

(*The writ of Sci. fa. is here recited.*)

* *

"Whereupon on this present day, that is to say on the day of , A.D. 19 , the Sheriff of the City of Toronto returned to our said Sovereign The King,in His Exchequer Court of Canada,that by C. D. and E. F., good and lawful men of his bailiwick, he had given notice to the said P. L., as he the said Sheriff was by the said writ commanded and thereupon the said P. L., by Messrs. G. H., his solicitors, comes; whereupon A. B. A , Attorney-General of Canada, solicitor of our said Sovereign The King, who for Our said Sovereign The King prosecutes

in this behalf, being present here in court in his own proper person, prays that the said latters patent No. 37,890 may be adjudged to be void, vacated, cancelled, and disallowed upon the grounds in said writ mentioned and also upon the further ground that the said invention, as comprised in said letters patent No. 37,890 as patented, was not, at the time of the alleged invention thereof and is not, of any use, benefit or advantage to the public.

Delivered, &c.,

PARTICULARS OF OBJECTIONS.

(*Title of Cause.*)

"The following are the particulars of the objections upon which the plaintiff will rely at the trial of this action with respect to the validity of the letters patent No. 37,890, granted to the defendant and in question herein:—

"1. That L. did not invent the said alleged invention comprised in said letters patent No. 37,890, inasmuch as the said alleged invention had been invented by others prior to his invention thereof, particularly by said J. in the writ of *scire facias* herein mentioned.

"2. That the said L. was not the true and first inventor of the alleged invention comprised in letters patent No. 37,890, inasmuch as the said alleged invention had been invented prior to his invention thereof, by the said J. who was and is the true and first inventor thereof.

"3. That the said alleged invention comprised in said letters patent No. 37,890, as patented, was not at the time of the alleged invention thereof and is not of any use, benefit or advantage to the public.

"4. That the specifications and drawings annexed to said letters patent and dated the 30th of August, 1891, do not correctly and fully describe the nature of the said alleged invention, or the mode or modes of operating the same, inasmuch as the said specification does not describe in what manner or by what means the strips mentioned therein are to be attached to the said covering mentioned therein, or whether the said strips are to meet in the centre of the felloe or otherwise, or whether the inflatable rubber tube is required to be larger or smaller in diameter than the said outer covering, or how or in what manner the said rubber tube is to be inflated, and in other respects the said specifications are insufficient, ambiguous and misleading, so that an ordinary skilled artisan reading the said specification could not, with the sole aid thereof, and without directions and information other than that contained in the said patent, manufacture the said alleged invention; and further, that the said specifications do not state clearly and distinctly the contrivances and things claimed as new, and for the use of which the patentee claims an exclusive property and privilege in the said alleged invention.

"Delivered, &c.

PLEAS.

(*Title of Cause.*)

"The day of . in the year of Our Lord one thousand nine hundred and

"1. And the said P. L., by his solicitor, G. H., as to the first suggestion in the writ of *scire facias* issued, herein contained, whereby it is suggested and alleged that L., in the said writ named, did not invent the said invention in the said writ mentioned, says that the said L. did invent the said invention, and that the several allegations contained in the petition and affidavit filed by the said L., referred to in the said writ, were respectively true and correct.

"2. And as to the second suggestion in the said writ contained, whereby it is suggested and alleged that the said L. was not the true and first inventor of the said alleged invention, but that one J. was the true and first inventor thereof, the defendant, P. L. says that the said L. was the true and first inventor of the said invention, and that the said J. was not the true and first inventor thereof.

"3. And as to the third suggestion in the said writ contained, whereby it is suggested and alleged that the specification to the said letters patent granted to the said P. L. does not correctly and fully describe the nature of the invention claimed to be patented thereby, the defendant, P. L., says that the said specification does correctly and fully describe the nature of the said invention.

"4. As to the fourth suggestion in the said writ contained, whereby it is suggested and alleged that the specification does not correctly describe the mode or modes of operating the said invention in the said letters patent mentioned and claimed, the defendant, P. L. says that the said specification does correctly describe the mode or modes of operating the said invention.

"5. And as to the fifth suggestion in the said writ contained, whereby it is suggested and alleged that no person, from reading the said specification and from perusing and studying the same, would be able to construct the said invention so as to make the same useful, and that with the sole aid of the said specification and without assistance from the patentee, and instruction and information other than that contained in the said letters patent, the article attempted to be patented could not be manufactured, the said P. L. says that any person, with the sole aid of the said specification and without assistance from the patentee, and without instruction and information other than that contained in the said letters patent, could easily manufacture the article thereby patented.

"6. And as to the sixth suggestion in the said writ contained, whereby it is suggested and alleged that the said specification does not fully explain the principle and the several modes in which it is intended to apply and work out the said invention, the said P. L. says that the said specification fully explains the principle and the several modes in which it is intended to apply and work out the said invention.

"7. And as to the seventh suggestion in the said writ contained, whereby it is suggested and alleged that the said specification does not clearly and distinctly state the contrivances and things which are thereby claimed as new, and for the use of which the said P. L. claims an exclusive privilege and property, the said P. L. says that the said specification does clearly and distinctly state the contrivances and things which are thereby claimed as new, and for the use of which he claims such exclusive privilege and property."

Delivered, etc.

JOINDER OF ISSUE.

(*Title of Cause.*)

The day of in the year of Our Lord one thousand nine hundred and .

And the said A. B., the Attorney-General of Canada, who for Our said Sovereign The King prosecutes as aforesaid, for Our said Sovereign The King joins issue upon the defendant 's pleas and every one of them.

Delivered, etc.

RULE 20.

Appearance within fourteen days.

An appearance shall be entered for the defendant within *fourteen days* from the day of service of the writ, inclusive of the day of service.

RULE 21.

If no appearance, judgment may be given.

If the defendant does not appear according to the exigency of the writ, the Court may, on motion therefor, give such judgment, as upon the writ, the plaintiff is considered to be entitled to.

1. *Judgment by default—Patent—Evidence.*—If the defendant does not appear at trial, the plaintiff is not entitled to judgment without any proof of his case; but as the specification was good on its face, and as he proved the infringement, he was entitled to the relief claimed, but not to a certificate that the validity of the patent had come in question.—*Peroni v. Hudson* (1884) 1 R. P. C. 261. However, if the defendant makes default in filing a defence the action may be set down upon motion for judgment by default. But in a case where there are several defendants, some of whom deliver a defence and some do not, judgment cannot be entered against those in default as the patent might be upset at the trial on the other issue. *The Actien Gesellshaft etc. v. Remus*, 1895, 12 R. P. C. 94.

2. *Patent of invention—Action to avoid—Default of pleading—Judgment—Registrar's certificate—Practice.*—Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service.—*August Peterson and The Crown Cork and Seal Company.* 5 Ex. C. R. 400.

RULE 22.

If appearance before judgment signed, defendant served with statement of claim.

If the defendant appears before judgment is signed, he shall be served with a Statement of Claim, and thereafter the action shall proceed in accordance with the practice of the Court in proceedings commenced by a Statement of Claim.

RULE 23.

Right to begin.

On the trial of any action to impeach or annul a patent of invention the defendant shall be entitled to begin and give evidence in support of the patent, and if the plaintiff gives evidence impeaching the validity of the patent the defendant shall be entitled to reply.

1. *Right to begin.*—Under the General Order of the Exchequer Court of Canada, bearing date the 5th December, 1892, and the provisions of sec. 41 of 51-16 Vict. (U. K.) ch. 83, the defendant in an action of *Scire Facias* to repeal a patent for invention is entitled to begin and give evidence in support of his patent, and if the plaintiff produces evidence to impeach the same, the defendant is entitled to reply. *The Queen v. Laforce*, 4 Ex. C. R. 15. See now above Rule 23.

2. *Right to begin.*— At the trial of an action by *Scire Facias* the Defendant will be entitled to begin, and if any evidence is adduced on behalf of the relator, the defendant will be entitled to reply. General Order of December 5th, 1892 and 15-16 Vict., ch. 83, sec. 41 (U. K.) cited in support. *The Queen v. Fane et al.*, October 6th, 1893. See now Rule 23.

3. *Patent—Burden of proof.*—The burden of proof in the infringement of a patent of invention is upon the plaintiff,—he has the right to begin and to reply; but where the defendant raises the issue of true and first inventors the *onus* is upon him. (*Ward v. Hill* 1901 18 R. P. C. 481) When the only issue in the case is as to the validity of the patent the defendant must begin.

4. *Evidence—Nature of—Patent cases.*—The construction of the patent and specification is for the Court alone, but the meaning of technical or commercial expressions or terms of art may be explained by evidence. *Hill v. Evans* 1863 31 L. J. (N. S.), ch. 457; *Neilson v. Harford* 1841, 1 W. P. C. 370. Evidence may be adduced to show that a workman of ordinary skill in the trade could understand and carry out the invention from the specifications.—*Edison-Bell v. Smith*, 1894, 11 R. P. C. 474. Expert evidence may show what the patentee's invention consists of. *Batische v. Levonstein* 1885, 2 P. C. R. 112, 113; 1887, 4 R. P. C. 465.

Expert evidence may be heard upon the question as to whether the defendant's variations are not merely mechanical equivalents.—*Ticket Punch Co. v. Colley's Patent.* (1895) 12 R. P. C. 186.

A witness cannot be asked whether he considers the defendant's device is an infringement of the plaintiff's patent, that is a question exclusively for the Court. *Parkinson v. Simon* (1894) 11 R. P. C. 506.

Law officer's opinion upon a patent cannot be read at trial. *Siddell v. Vickers Co.*, 1888, 5 R. P. C. 436.

Particulars in Action to Impeach a Patent, or for Infringement.

RULE 24.

Particulars with information or statement of claim.

With an Information or Statement of Claim to impeach or annul a patent the plaintiff must deliver particulars of the objections on which he means to rely.

RULE 25.

Particulars with action for infringement.

In an action for infringement of a patent the plaintiff must deliver with his Statement of Claim particulars of the breaches complained of.

RULE 26.

Particulars with statement in defence.

The defendant must deliver with his Statement in defence particulars of any objections on which he relies in support thereof.

RULE 27.

What particulars must be delivered by defendant if validity of patent disputed.

If the defendant disputes the validity of the patent, the particulars delivered by him must state on what ground he disputes it, and if one of those grounds is want of novelty, he must state the time and place of the previous publication or user alleged by him.

1. *Particulars.*—The rule of practice established in patent cases by *Edison Telephone Co. v. India Rubber Co.*, 17 ch. D. 137, to the effect that where a defendant asks to amend his particulars of objection, he can only be allowed to do so on the terms of the plaintiff having the right to elect to discontinue his action, the defendant paying the costs subsequent to the delivery of his first particulars,—applies also to actions to restrain the infringement of copyright designs. See North, J., in *Morris v. Coventry Machinist Co.*, (1891) 3, ch. 418.

2. *Particulars in action for infringement of patent—Application by defendant.*—Where, in an action for the infringement of a patent for a process of incandescent lighting, the defendant applied for an order for the delivery by plaintiff of particulars of infringement, the Judge confined the order to particulars of the time and places of the alleged acts of infringements, declining to order particulars of the nature of such acts. *Auer Incandescent Light Mfg. Co. v. O'Brien.* May 22nd, 1895.

3. *Particulars—Application for—Close of pleadings—Affidavit—Necessity—Trial.*—After issue joined, plaintiff cannot obtain particulars unless he can show they are required for the trial. *Smith v. Boyd* (1897), 17 P. R. 463 followed: *Bank of Toronto v. Insurance Co. N. A.*, 18 Ont. A. R., p. 27.

4. *Particulars—Time.*—The Plaintiff in an action for the infringement of a patent of invention may obtain an order for particulars after he has filed his reply and issue has been joined. Per *Burbidge, J. Davey Pegging Machine Co. v. Duplessis Pegging Machine Co.*, October 4th, 1899.

5. *Particulars—Patent—After reply.*—The plaintiff in an action for the infringement of a patent of invention may obtain an order for particulars after he has filed his reply and issues have been joined. *Per Burbidge, J.* In re *Davey Machine Co. v. Duplessis Pegging Machine Co.* October 4th, 1899.

6. *Particulars by defendants—Patent of invention—Novelty—Patentable Invention.*—The Defendants by their statement of defence allege, *inter alia*, (Par. 3) that the Patent of Invention in question herein is null and void for want of novelty, lack of patentable invention and by reason of the applicants claiming more than they were entitled to at the time of the invention, etc., etc. Upon the application by Plaintiffs for particulars of the above, the Defendants were ordered to furnish particulars showing in what respect the applicants claimed more than they were entitled to claim, and further, in so far as the word "novelty" here implies a defence of prior publication or user, the time and place of the

previous publication or user by the Defendants.—Particulars as to the lack of patentable invention were refused, because it is a question of law for the Court to decide. And as to paragraphs 5 and 6 particulars stating the names and address of the person or persons by whom the said invention is alleged to have been known at or prior to the date of the Plaintiff's patent and particulars of the patents alleged to embody the Plaintiff's invention, stating the counties in which the said Patents were issued, with date, number and title of said patents, and the alleged use by the public of the said patents, etc. *Per Burbidge, J.—The General Engineering Co. of Canada Ltd. v. The Dominion Cotton Mills Co. Ltd.* et al., No. 1055, December 28th, 1898.

7. *Trade-Mark—Particulars by Plaintiff.*—Upon application by Defendants, the plaintiffs were ordered to give the date of the first user in England of the word "Royal" as applied to Baking Powder and the names and places other than England where it was used and the dates of user in such places. *Wright, Crossly & Co. v. Royal Baking Powder Co.* June 28th, 1898.

RULE 28.

Further particulars.

Further and better particulars may be ordered to be delivered as the Court or a Judge may see fit.

RULE 29.

Amendment of particulars.

Particulars delivered may be from time to time amended by leave of the Court or a Judge.

RULE 30.

No evidence of objection or infringement of which no particulars, except by leave.

At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any allegations of which particulars are not so delivered.

RULE 31.

Costs when particulars delivered not proven.

The Court or a Judge may disallow any costs of, or connected with, the particulars delivered, by either party if it appears that such particulars were unnecessary or have not been proven; and the Court or Judge may, notwithstanding the result of the action, order either the plaintiff or the defendant, whether or not successful in the action, to pay to the opposite party any costs occasioned thereby.

For jurisprudence generally see:—

1. *Infringement.*—Defence not raised in pleadings—Judgment on—Amendment: *Servis Railroad Tie-Plate Co. v Hamilton Steel & Iron Co.* 8 Ex. C. R. 381.

2. *Infringement*—Particulars—Order for—Disregard of—Excision of pleading—Evidence: *Noxon Bros. Mfg. Co. v Patterson & Brother Co.*

1894, 16 Ont. P. R. 40. And see *Smith v. Greey*, 11 Ont. P. R. 169; *Mills v. Scott* 1849, 5 U. C. Q. B. 360.

3. *Infringement*—Production of documents—Privilege: *Toronto Gravel Road Co. v. Taylor* (1875), 6 Ont. P. R. 227.

4. *Infringement*—General denial—Evidence of want of novelty: *Patric v. Sylvester* (1876), 23 Gr. 573; *Emery v. Iredale, Emery v. Hodge*, (1860), 11 U. C. C. P. 106. See also *Barter v. Howland* (1878), 26 Gr. 135.

5. *Infringement*—Costs in infringement cases: *Patric v. Sylvester* (1876), 23 Gr. 573; *Huntingdon v. Lutz* (1864), 10 U C. L. J. 46; *Hunter v. Carrick* (1881), 28 Gr. 489.

6. *Disclosing witnesses*: *Smith v. Greey* (1884), 10 Ont. P. R. 482.

7. *Judgment by default in proceedings to avoid patent—Certifying judgment to Commissioner*: *Peterson v. Crown Cork & Seal Co.* (1897), 5 Ex. C. R. 400.

8. *Sequestration to enforce compliance with judgment*—Refusal to order —Grounds: *Sharples v. National Mfg. Co.* (1905), 9 Ex. C. R. 460.

9. *Infringement*—Production of documents—Privileges: *Guelph C. Company v. Whitehead* (1883), 9 Ont. P. R. 509. See also *Barter v. Howland* (1878), 26 Gr. 135; *Toronto Auer Light v. Colling* (1898), 31 Ont. R. 18.

10. *Infringement*—Interim injunction—Condition that claim for more than nominal damages be waived: *Bonathan v. Bowmanville Furniture Mfg. Co.* (1870), 5 Ont. P. R. 195. And see *Hessin v. Coppin* (1874), 21 Gr. 253.

11. *Infringement*—Making injunction perpetual: *Huntingdon v. Lutz* (1863), 13 U. C. C. P. 168; *Gillies v. Colton* (1875), 22 Gr. 123.

RULE 32.

Order for injunction, inspection or account in action for infringement.

In an action for infringement of a patent the Court or a Judge may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or Judge may see fit.

See Rule 270 respecting injunctions.

COPYRIGHTS, TRADE-MARKS AND INDUSTRIAL DESIGNS.

RULE 33.

Proceedings for registration of copyright, trade-mark or industrial designs or to expunge, vary or rectify same may be instituted by filing petition.

Any proceeding in the Exchequer Court for the registration of any copyright, trade-mark or industrial design, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified, may be instituted by filing a petition in the Court.

For particulars, see annotations under Rule 27.

FORM.

The following form of petition may be found convenient, viz:—

In the Exchequer Court of Canada

In the matter of the petition of

A. B., of the City of etc. manufacturer.

AND

In the Matter of

The Trade-Mark " " as applied to

Filed on the day of 19 .

To the Honourable the Judge of the Exchequer Court of Canada.

The petition of A. B., of the City of etc., manufacturer, humbly sheweth:—

1. That your petitioner for many years sold throughout the various Provinces of the Dominion of Canada

(*State concisely and in numbered paragraphs the facts of the case, concluding*)

Your petitioner therefore prays,

(*a*) That the entry in the register of Trade-Mark No. folio , of the said Trade-Mark, by , be expunged. (*as the case may be.*)

(*b*) That the petitioner's Trade-Mark, as applied to be registered in the Trade-Mark Register in the Department of Agriculture of Canada, at Ottawa, in accordance with the provisions of *The Trade-Mark and Design Act* (*as the case may be.*)

(*c*) Such further and other relief as to this Honourable Court may be deemed fit.

And your petitioner will ever pray.

Dated at , this day of 19 .

E. F.

of Counsel for the petitioner.

RULE 34.

Notice of filing petition to be published in 'Canada Gazette.'

A notice of the filing of the petition, giving the object of the application and stating that any person desiring to oppose it must, within *fourteen days* after the last insertion of the notice in the *Canada Gazette*, file a statement of his objections with the Registrar of the Court and serve a copy thereof upon the petitioner, shall be published in four successive issues of the *Canada Gazette*.

The following form of *notice*, as required by Rule 34, may be used, viz:—

NOTICE

In the Exchequer Court of Canada

In the matter of the petition of

A. B. of the City of , manufacturer.

AND

In the matter of

The Trade-Mark consisting of called"....."

NOTICE is hereby given that, on the day of 19 there was filed, in the Exchequer Court of Canada, a petition of A. B. of the City of etc., manufacturer, praying that the entry in the Register of Trade-Mark, made on the day of , 19 , on the application of one C. D., of the City of

merchant, registering a certain specific Trade-Mark described in the said application of C. D., as consisting of (*here give description*) may be varied by striking out from the said (label,*as the case may be*) registered as a Trade-Mark as aforesaid (or that Trade-Mark No. Folio be expunged, *as the case may be*.)

Any person desiring to oppose the said petition must, within *fourteen* days after the last insertion of the present notice in the *Canada Gazette* (the date of the last insertion being the day of 19 .) file a statement of his objections with the Registrar of the Exchequer Court of Canada, at Ottawa, and serve a copy thereof upon the petitioner or his solicitor.

Dated this day of 19 .

E. F.
No. Street,
Ottawa.
Solicitors for the Petitioners.

RULE 35.

Upon whom copy of petition and notice to be served.

A copy of such petition and notice shall be served upon the Minister of Agriculture and upon any person known to the petitioner to be interested and to be opposed to the application.

RULE 36.

If application not opposed, may move for order upon petition.

If no one appears to oppose the application, the petitioner may file with the Registrar an affidavit in support of the application, and upon *ten days* notice to the Minister of Agriculture, and upon serving him with a copy of any affidavit so filed, may move the Court for such order as upon the petition and affidavit he may be entitled to.

RULE 37.

Statement of objections to be filed fourteen days after last publication.

If any person appears to oppose the application he shall, within *fourteen* days after the last publication of the said notice in the *Canada Gazette*, file with the Registrar, and serve upon the petitioner, a statement of his objections to the application.

RULE 38.

Application to expunge, vary or rectify may be joined in action for infringement—By plaintiff in statement of claim—By defendant by counter-claim.

An application to have any entry, in any register of copyrights, trade-marks or industrial designs, expunged, varied or rectified, may be joined with or made in an action for infringement:

(1) By the Plaintiff in his statement of claim, where such entry has been made at the instance of the Defendant, or some-

one through whom he claims, and the Plaintiff is aggrieved thereby; or

(2) By the Defendant by counter-claim, where such entry has been made at the instance of the Plaintiff, or some one through whom he claims, and the Defendant is aggrieved by such entry.

RULE 39.

When reply to be filed and served.

The petitioner may, within *fifteen days* after service of the statement of objections, file and serve a reply thereto; and thereupon any issue or issues raised may be set down for trial or hearing in accordance with the practice of the Court.

RULE 40.

To whom notice of trial to be given.

Notice of trial shall be given as well to the Minister of Agriculture as to the opposite party.

GENERAL.

RULE 41.

Practice and procedure in Patent, Copyright, Trade-mark and Industrial Design cases not provided for by any Act of Parliament or by these rules.

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade-mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's High Court of Justice in England.

SCHEMES OF ARRANGEMENT UNDER THE RAILWAY ACT. (R. S., 1906. CH. 37, SEC. 365.)

SCHEMES OF ARRANGEMENT—PREPARATION AND FILING OF SCHEME.

RULE 42.

How entitled.

Every scheme to be filed in this Court, pursuant to *The Railway Act*, R. S., 1906, chapter 37, section 365, and every declaration, affidavit, petition, summons, notice or other proceeding relative thereto shall be entitled in the Court, and in the matter of the company in question.

See ante p. 375 for the sections of *The Railway Act* bearing upon this subject and the annotations thereunder.

The Rules made in respect of Schemes of Arrangement, under the *Railway Act* (R. S., 1906, ch. 37), were approved by Order in Council of the 8th February, 1909, in pursuance of section 368 of the said Act.

RULE 43.

Scheme to be printed.

Every scheme to be filed as aforesaid shall be printed in the manner prescribed for the printing of pleadings and other proceedings in this Court.

RULE 44.

How to be filed.

Every such scheme shall be filed in the office of the Registrar of the Court, and the declaration and affidavit required by section 365 of the said Act shall be annexed to such scheme and filed at the same time therewith, and the Registrar shall not file any such scheme, unless accompanied by such declaration and affidavit.

RULE 45.

How to be endorsed.

There shall be endorsed upon every scheme so filed as aforesaid the name and address of the solicitor and Ottawa agent (if any) of the company.

RULE 46.

Certified copy of written scheme to be obtained for printing.

Where a written scheme is filed, the person bringing the same to be filed shall, at the same time, leave with the Registrar a fair copy thereof, and the Registrar shall examine such copy with the scheme filed, and return it so examined with a certificate thereon that it is correct and proper to be printed.

RULE 47.

Printed copy of written scheme to be filed within five days.

The directors shall cause the scheme to be printed from such certified copy, and before the expiration of five days from the filing of the scheme, shall leave a printed copy thereof with the Registrar, with a written certificate thereon by the solicitor of the company that such print is a true copy of the scheme so certified, and after the expiration of such five days no evidence of the scheme having been filed shall be admissible until such printed copy thereof has been filed.

COPIES OF SCHEME.

RULE 48.

Five days after filing of scheme, any person may demand copy thereof.

At any time after the expiration of five days from the filing of a scheme, whether printed or written, any person may demand, by a requisition in writing, delivered at the principal office of the company, or at the office of their solicitor, or of his Ottawa agent (if any), any number, not exceeding ten, of printed copies of the scheme, and the copies so required shall on such

demand be delivered to the person so requiring the same, with a written certificate thereon by the solicitor of the company that they are true copies of the scheme filed.

RULE 49.

Cost of such copy.

Every such copy is on delivery to be paid for at the rate of one cent per folio, except in the case provided for by the 369th section of the said Act, in which case it is to be paid for at the rate of ten cents for each copy as therein provided.

NOTICE OF FILING SCHEME.

RULE 50.

How notice to be signed and what it shall contain.

The notice to be published in the *Canada Gazette*, of the filing of the scheme shall be signed by the solicitor of the company, or his Ottawa agent, and shall state whether the scheme contains any provisions for settling and defining any rights of shareholders among themselves, or for raising any and what amount of share or loan capital, and which, and shall set forth the name and address of the solicitor and Ottawa agent (if any) of the company, and may be in the form of Schedule F hereto, with such variations as the circumstances of the case may require.

RULE 51.

Certificate of filing.

When a scheme has been filed the Registrar shall, at the request of any person, give and sign a certificate of the filing thereof or of the filing of a printed copy thereof; and such certificate may be in the form of schedule G hereto, with such variations as the circumstances of the case may require.

RULE 52.

Restraining actions after scheme filed.

No order under section 365 of the said Act for restraining an action against the company, by reason of a scheme having been filed, shall be made, except on an undertaking by the company to be answerable in such damages (if any) as the Court or Judge may think fit to award in the event of the plaintiff being ultimately held entitled to proceed with such action; and on such further terms (if any) as the Court or Judge may think reasonable.

See annotations on this subject under sec. 365 of *The Railway Act*, ante p. 375.

RULE 53.

Petition for confirmation of scheme.

Every petition for confirmation of a scheme shall be presented by the directors or the major part of them. Such petition shall not set forth the scheme, but only refer thereto; and may be in the form given in the Schedule H hereto, with such variations as the circumstances of the case may require.

RULE 54.

Petitioners to be treated as representing company, etc.

The petitioners presenting such petition as aforesaid, shall, for the purposes of such petition, be treated as representing the company, and the company shall not otherwise appear on the hearing of such petition.

RULE 55.

How day for hearing appointed.

When any petition to confirm a scheme is presented, the directors, or the major part of them, shall apply to the Judge in Chambers to appoint the day on which the same may come on for hearing, such day not to be before the expiration of three weeks, from the time of such application, and shall cause a notice of the presentation thereof to be inserted in the *Canada Gazette* and in two newspapers circulating in the province or district wherein the principal office of the company is situate, as the Judge may direct. Such notice shall state the day on which the scheme is filed, and the day on which the petition was presented and the day on which the same is directed to come on for hearing, and the name and address of the solicitor and Ottawa agent (if any) of the company, and may be in the form given in Schedule I hereto, with such variations as the circumstances of the case may require.

RULE 56.

When petition to come on for hearing.

The petition shall not come on to be heard until at least twenty-one clear days after the last insertion of such notice as aforesaid. Such notice shall, at least once in every week which shall elapse between the time of the first insertion thereof and the day on which such petition is directed to come on for hearing, be again inserted in the *Canada Gazette* and in such two newspapers as aforesaid on such day or days as the Judge may direct.

RULE 57.

Appearance and objections to be filed seven days before hearing.

Any creditor, shareholder, or other party whose rights or interests are affected by such scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least seven clear days before the day on which the petition for confirmation is directed to come on for hearing, enter an appearance at the office of the Registrar and file a printed statement of his objections thereto, and, in default of so doing, he shall not be entitled to be heard, unless by the special leave of the Court or a Judge.

RULE 58.

Any person appearing deemed submitting to jurisdiction of Court as to costs.

Any person so entering an appearance shall be deemed to have submitted himself to the jurisdiction of the Court as to the payment of costs and otherwise.

CONFIRMATION OF SCHEME.

RULE 59.

Scheme not deemed confirmed until enrolled.

No scheme shall be deemed to have been confirmed by the Court until such scheme and the order for confirming the same have been enrolled.

See annotations under sec. 82 of *The Exchequer Court Act*, No. 13, ante, p. 226.

RULE 60.

What procedure to take when either confirmation of scheme is not opposed, or when it is opposed.

If the order for the confirmation of a scheme is not opposed, the scheme and such order may be enrolled forthwith. If the order is opposed, notice of the order shall, at least once in every week which shall elapse between the pronouncing of such order and the expiration of thirty days from the pronouncing thereof, be inserted in the *Canada Gazette* and two such newspapers as shall have been appointed by the Judge for the insertion of advertisements under the 55th rule hereof. And such scheme and order shall not be enrolled until the expiration of thirty days from the day of the order having been pronounced, nor until the *Canada Gazette* and the newspapers containing such notices are produced to the Registrar.

Scheme of arrangement—Onus—Right to begin.—The party objecting to the confirmation of the Scheme of Arrangement shall file his objections in writing and he shall thereupon in respect to such question become plaintiff, and the *onus* will be upon him to proceed and begin. He will also have the right to reply. Re *The Baie des Chaleurs Ry. Co.*, December 12th, 1904.

GENERAL PROVISIONS.

RULE 61.

How orders drawn up.

All orders made in Chambers, under *The Railway Act*, R. S., 1906, ch. 37, shall be drawn up in Chambers, unless specially directed to be drawn up by the Registrar, and shall be entered in the same manner as other orders drawn up in Chambers.

The following form of judgment confirming Scheme of Arrangement may be used, viz:—

In the Exchequer Court of Canada

.....day, the.....day of.....A.D. 190 .

PRESENT.

THE HONOURABLE Mr. Justice.....

IN THE MATTER OF.....and.....

section 365 and subsequent sections of *The Railway Act*, Ch. 37, R. S. 1906.

UPON MOTION made unto this Court on the.....day of.....A.D. 190 , by Counsel on behalf of the Directors of.....

.....for an order confirming the Scheme of Arrangement between .....and its creditors filed in this Court on the .....day of.....A.D., 190 ; upon hearing read the petition of the said Directors of the said company, the affidavits of.....and the exhibits therein referred to, filed, the minutes of a special general meeting of the shareholders of the said company duly called and held at the Head Office of the said Company, on the.....day of.....A.D. 190 , duly certified by the Secretary of the said company under the seal of the company, and the assents in writing to the confirmation of the said Scheme of Arrangement by bondholders of the said company, filed in this Court; and upon hearing what was alleged by Counsel for the said Directors and by Counsel for.....

THIS COURT DOTH ORDER AND ADJUDGE that the said Scheme of Arrangement between the..... and its creditors, which is in the words and figures following:—(*Here recite the Scheme.*)

be, and the same is hereby confirmed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Scheme of Arrangement be forthwith enrolled in this Court.

(*Or if the order be opposed, say*:—be enrolled in this Court in conformity with Rule 60 of the General Rules and Orders of this Court).

By the Court,

L. A. A.,

Registrar.

RULE 62.

Mode of practice and procedure in cases not provided for by 'The Railway Act' and these rules respecting said schemes.

In cases not expressly provided for by the said Act or by these rules, the practice of the Court shall, so far as applicable and not inconsistent with the said Act or these rules, apply to all proceedings in the Court under the said Act.

PRINTING PLEADINGS.

RULE 63.

What pleadings to be written and what printed.

Every pleading which shall contain less than three folios of one hundred words each (every figure being counted as one word) may be either printed or written, or partly printed and partly written, and every other pleading shall be printed.

E. O. xix., R. 5.

RULE 64.

How to be printed.

Pleadings and other proceedings required to be printed, shall be printed on foolscap size paper of good quality, in small pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches wide.

Rules regulating procedure in suits by English information, will be found in L. R. 1 Ex. 389.

RULE 65.

Written copies may be filed in case of urgency.

In any case which may appear to the Registrar to be one of urgency he may permit a written copy of a pleading to be filed, upon the party so filing the same giving a written undertaking to file a printed copy within *five days* thereafter.

RULE 66.

Printed copy to be furnished opposite party.

The party printing any pleading or other proceeding shall, on demand in writing, furnish to any other party, his Attorney or Solicitor, any number of printed copies, not exceeding ten, upon payment therefor at the rate of five cents per folio for one copy, and three cents per folio for every other copy.

SERVICE OF INFORMATION, STATEMENT OF CLAIM OR PETITION OF RIGHT.

RULE 67.

Petitions of Right, how to be served.

Petitions of Right are to be left at the office of His Majesty's Attorney-General, and served as prescribed by the statute in such case made and provided.

See *The Petition of Right Act* and the forms in the schedules at the end of the Act, ante p.p. 241, 242.

RULE 68.

Office copy of information or statement of claim to be served—How to be endorsed.

In suits instituted by information, or by filing a statement of claim, no writ or process to appear, plead or answer, shall issue; but an office copy of the information or statement of claim duly certified by the Registrar, shall be served on the defendant, with an indorsement thereon in the form or to the effect set forth in Schedule J to these orders appended.

A notice of motion may be served along with the information, petition of right, or statement of claim under the provisions of Rule 284.

It was thought of some convenience to offer a form of affidavit of service of an office copy of information, which, *mutatis mutandis*, could also be used for the service of statements of claim and petitions of right.

AFFIDAVIT OF SERVICE OF OFFICE COPY OF INFORMATION, ETC.

In the Exchequer Court of Canada.

Between

His Majesty The King, on the information of the Attorney-General of Canada,

Plaintiff,

and

C. D.,

Defendant.

I,
of in the County of
and Province of
make oath and say:—

1. I did on the day of
A. D. 19 , personally serve
the above named defendant with a paper which purported to be an Office Copy of the Information filed in this cause in this Honourable Court on the day of A.D. 19 , by delivering to and leaving the said Office Copy with the said defendant .
That annexed hereto marked A is a copy of the said information.

2. I further say, that the said Office Copy purported to be authenticated by the signature of L. A. A., Registrar of the said Court, and was stamped with the seal of the said Court.

3. I further certify that upon the said Office Copy at the time of the service thereof there was endorsed the following memorandum:

Notice to the Defendant within named.

You are required to file with the Registrar of the Exchequer Court of Canada, at his office, at the City of Ottawa, your plea, answer, exception, or otherwise make your defence to the within information (or statement of claim *as the case may be*) within four weeks from the service hereof. If you fail to file your plea, answer, exception or otherwise make your defence within the time above limited you are to be subject to have such judgment, decree or order made against you as the Court may think just upon the informant's (or plaintiff's) own showing; and if this Notice is served upon you personally you will not be entitled to any further notice of the further proceedings in the cause.

NOTE.—This information (or statement of claim) is filed by A. B., etc., His Majesty's Attorney-General of Canada, on behalf of His Majesty (*or* by of Solicitor for the within named plaintiff.)

A. B.,
Solicitor of the Attorney-General

4. And, I further say, that to effect such service, I necessarily travelled miles.

Sworn before me at
of in the county and Province of
this
day of A. D. 19 .
C. D.

A Commissioner for taking affidavits in and for the Province of

RULE 69.

Service of office copy information or statement of claim to be personal; need not exhibit original.

Service upon a defendant of an office copy of the information or statement of claim is to be effected personally, except in the cases hereinafter otherwise provided for; but it shall not be necessary to produce the original information, statement of claim or petition of right at the time of service.

RULE 70.

Service upon a Corporation.

Service of an information, statement of claim or petition of right, writ, summons, or other process, notice, proceeding or document required to be served, within the jurisdiction of the Court, upon a Corporation aggregate is to be effected by personal service of an office copy thereof on the Warden, Reeve, Mayor, or Clerk in case of a Municipal Corporation, or on the President, Manager or other head officer, or the Cashier, Treasurer or Secretary at the head office, or at any branch or agency in the Dominion of Canada, or on any other person discharging the like duties, in the case of any other corporation.

Taylor's C. Chy. O. 91.

RULE 71.

Service upon partners.

When partners are sued in respect of any partnership liability, the information, statement of claim or petition of right may be served either upon any one or more of the partners, or at the principal place (within the jurisdiction) of the business of the partnership upon any person having, at the time of service, the control or management of the partnership business there; and such service shall be deemed good service upon all the partners composing the firm.

E. O. ix., R. 3.

SUBSTITUTIONAL SERVICE.

RULE 72.

Substitutional service.

If it be made to appear to the Court or to a Judge, that from any cause prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service as may seem just.

Substitutional service—Information—Order for interim injunction.—Where it was shown upon affidavit that the Defendant Co. had no officers in the Dominion of Canada further that a legal firm of the City of Toronto were their general solicitors, it was ordered that the service, upon the said solicitors, of an office copy of the information and of a copy of the order for an interim injunction against the said Defendants would be a good and sufficient service of both the information and the order. *Per Burbidge, J., The Queen v. The Ontario & Belmont & Northern Railway Co.* (No. 1046), May 30th, 1898.

SERVICE ON PARTICULAR DEFENDANTS.

RULE 73.

On husband and wife.

When husband and wife are both defendants, service on the husband shall be deemed good service on the wife; but the Court or a Judge may order that the wife shall be served with or without service on the husband.

E. O. ix., R. 2.

RULE 74.

On infant.

When an infant is defendant to an information, statement of claim, or is required to be served with a copy of the petition in an action instituted by petition of right, service on his or her father or guardian or tutor, or, if the father be dead and there is no guardian or tutor, then upon the person with whom the infant resides, or under whose care he or she is, shall, unless the Court or a Judge otherwise orders, be deemed good service on the infant; provided that the Court or a Judge may order that service made or to be made on the infant shall be deemed good service.

E. O. ix. R. 4.

RULE 75.

On lunatic.

When a lunatic, so found by inquisition, or (in the Province of Quebec) a lunatic or person of unsound mind, or one who, for other causes, has been judicially interdicted, or subjected to judicial advisers, is a defendant to any suit, service of the information, petition of right or statement of claim on the committee of the lunatic, the curator of the interdicted person, or any one of the judicial advisers shall be deemed good service

RULE 76.

On lunatic not interdicted, etc.

When a person of unsound mind, not so found by inquisition or judicially interdicted, or subjected to judicial advisers, is a defendant to any suit or is to be served, service of the information, petition of right or statement of claim on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or a Judge otherwise orders, be deemed good service on such defendant or person of unsound mind.

E. O. ix., R. 5.

PROCEEDINGS IN REM.

RULE 77.

Service of information in proceedings in rem.

In any proceeding *in rem* for the condemnation of any thing, the information shall be served by posting up one office

copy thereof in the office of the Registrar of the Court, and by taking one of the following steps, that is to say:—

(*a*). If such thing is in the custody of any Collector of Customs, or of Inland Revenue, or other officer or person for the Crown, one office copy of such information shall be posted up in the office of such collector, officer or person, as the case may be, and another such copy thereof;

(1) On the door or some conspicuous part of the warehouse or building in which such thing is stored or kept; or,

(2) In the case of a vessel, railway carriage, car, or other thing not so stored or kept, on some conspicuous part thereof;

(*b*). If such thing has been delivered up to the owner or any person for him an office copy of the information shall be served upon such owner or person in like manner as in other cases;

(*c*). If such thing has been sold under any law authorizing such sale, an office copy of the information shall be posted up in the office of the collector, officer, or person in whose custody the same was at the time of such sale.

RULE 78.

Service of information in proceedings in rem in cases not provided for in preceding rule.

In any case not provided for in the rule next preceding, the Judge may make such order for service as to him seems just.

RULE 79.

When person, after commencement of proceedings for condemnation of the res, desires to claim the same.

Every person who, after proceedings for the condemnation of any such thing have been commenced, desires to claim the same shall:

(*a*). Give security to the satisfaction of the Judge by a bond in a penal sum of not less than four hundred dollars, or by a deposit of a sum of money not less than such amount, for the payment of the costs of the proceedings for condemnation; and

(*b*). File a statement of his claim with the Registrar of the Court, and serve an office copy thereof upon His Majesty's Attorney-General of Canada, and such statement of claim shall disclose the name, residence and occupation or calling of the person making it, and be accompanied by an affidavit of the claimant, or of his agent having knowledge of the facts, setting forth the nature of the claimant's title to such thing.

RULE 80.

In default of security judgment may be obtained.

If within one month after the service of the information security for costs is not given and a claim made, as hereinbefore mentioned, the Attorney-General may set down the action on motion for judgment, and such judgment shall be given upon

the information as the Court or Judge considers the Attorney-General entitled to.

RULE 81.

Service out of jurisdiction.

When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

See Sec. 75 of *The Exchequer Court Act* (ch. 140, R. S., 1906), *ante* p. 224.—See also Rule No. 140, and *Wilson's Judicature Act*, 7th Edition, p. 151.

The original Rule upon this subject has been amended (Rule 4, of General Order, May 1st, 1895), by substituting the service of a notice of the information, &c., in lieu of an office copy thereof as formerly provided for.

The following forms, in connection with Rule 81, may be used:—

No. 1.

Order for service out of jurisdiction.

(*Style of Cause* (*Short*).)

Upon hearing.....and upon hearing read the affidavit of ....., filed on the.....day of.....19....., and....., I do order that the plaintiff,.....be at liberty to issue a notice of the.....(Information, Statement of Claim or Petition of Right, *as the case may be*) for service out of the jurisdiction against.....; and I further order that the time within which the said defendant is to file his statement in defence, plea, answer, exception or otherwise make his defence according to the practice applicable to this case, be within.....days after the service thereof and the costs of this application be.....

Dated at.....this .....day of.....A.D. 19..

No. 2.

Notice in lieu of service to be given out of the jurisdiction.

(*Style of Cause* (*Full*).)

To G. H. of.....

Take notice that A. B., of.....has commenced an action against you, G. H., in the Exchequer Court of Canada, by an Information (Petition of Right or Statement of Claim, *as the case may be*), filed in the said court on the .....day of.....A. D. 19.., which said Information (Petition of right *or* Statement of Claim, *as the case may be*) reads as

follows:—(*Recite here the office copy of the Information, Petition of Right or Statement of Claim, as the case may be, duly certified by the Registrar as provided by Rule* 68), and you are hereby required within.....days after the receipt of this notice, exclusive of the day of such receipt, to defend the said action by causing a statement in defence, plea, answer, exception to this action or otherwise make your defence according to the practice applicable to this case, and in default of you so doing, the said A. B. may proceed therein, and judgment may be given in your absence.

(Signed), L. M.,
Solicitor.

RULE 82.

Service by advertisement in case of a defendant not to be found.

In case it appears to the Court or a Judge by sufficient evidence that a defendant cannot be found, after due and diligent search, to be served with an office copy of the information, petition of right, or statement of claim, the Court or a Judge may order the defendant to file his plea, answer or exception, or otherwise make his defence according to the procedure applicable to the case, within a time to be limited in the order, and may direct a copy of the order together with a notice to the effect set forth in Schedule K to these orders appended, to be published in such manner as the Court or a Judge thinks fit; and in case the defendant does not file any plea, answer or exception, or otherwise make his defence within the time limited by such order, the Court or a Judge, upon proof that advertisements have been duly published according to the requirements of the order, may direct that the case shall thereafter proceed as though the defendant had filed a plea, answer or defence traversing or denying the allegations contained in the information, petition of right or statement of claim, and the action shall thereafter proceed accordingly.

Taylor's C. Chy. O. 100.

RULE 83.

Judge may also order copy of information, etc., and copy of order to be mailed.

In any case provided for by the last preceding rule, the Court or a Judge may, in addition to the advertisement therein mentioned, direct that an office copy of the information, petition of right or statement of claim, and an office copy of the order shall be forthwith mailed, with the postage prepaid, to the address of the defendant or person to be served, at such place as the Court or a Judge may direct, in which case proof by affidavit, of due compliance with such requirement, shall be produced before any order is made permitting the plaintiff to proceed as provided for by the next preceding rule.

NO APPEARANCE REQUIRED—PLEADINGS.

RULE 84.

No appearance required—How pleadings are to be filed.

No appearance to any information, petition of right or statement of claim shall be required except when otherwise provided

by these rules; but a defendant who is served with an information, petition of right or statement of claim, shall file his statement in defence or answer to the information, petition of right or statement of claim conformably to the procedure and mode of pleading hereby provided for as the first step in his defence.

RULE 85.

Time for filing statement in defence to information and statement of claim.

The statement in defence or answer shall be filed within four weeks after the service of the information or statement of claim, or within such further extended time as the Court or a Judge may order.

The original Rule, as already amended by Rule 6 of the General Order of May 1st, 1895, provided that the service of the defence, etc., should be made within one month, if the defendant resided in either of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick or Prince Edward Island,—and within two months if residing in Manitoba or British Columbia. In view of the easy railway communication now existing in Canada between the several provinces, the above distinction has been done away with and a uniform rule resorted to.

FORM OF PLEADINGS IN PETITIONS OF RIGHT.

RULE 86.

Petition of Right, pleadings in.

In suits by Petition of Right the pleadings subsequent to the Petition shall be regulated by and conform to the procedure and mode of pleading hereinafter prescribed.

RULE 87.

Time for filing defence to petition of right.

The Attorney-General shall file his statement in defence or answer to a petition of right within four weeks after an office copy of the petition, with the endorsement thereon required by the statute in that behalf made, shall have been left at his office in the City of Ottawa.

See sec. 6 of *The Petition of Right Act, ante* p. 239, which also provides that the Attorney-General is to file his defence within four weeks after the service of an office Copy of the Petition of Right.

PLEADING GENERALLY.

RULE 88.

All pleadings to be concise statements of material facts, but not of evidence, divided into numbered paragraphs—Dates, sums and numbers to be in figures—Signature of Counsel.

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence; such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums and

numbers shall be expressed in figures and not in words. Signature of Counsel shall not be necessary, except as regards informations, petitions or right and statements of claim. Forms similar to those in Schedule L hereto may be used.

E. O. xix., R. 4.

See Rule 165.

1. *Crown—Set off—Petition of right.*—Set off cannot be pleaded against the Crown without having recourse to a petition of right. *Coté v. Drummond*, Q. R. 15 S. C. 561; *Fortier v. Langelier*, Q. R. 5 K. B. 107.

2. *Plea of set-off against the Crown.*—Where the dealings of the parties under a contract were so continuous and inseparable that the claims on one side could not properly be investigated apart from those of the other, the rule forbidding a subject to plead set-off against the Crown did not apply. *The Queen v. Whitehead*, 1 Ex. C. R. 135.

3. *Forbearance to sue.*—A promise of forbearance to sue cannot be successfully pleaded in bar of an action between subject and subject, nor would such a defence be available against the Crown. *Ibid.*

4. *Counter-claim or incidental demand.*—A substantive cause of action cannot be pleaded as an incidental demand or counter-claim to an information by the Crown. *The Queen v. The Montreal Woollen Mill Company*, 4 Ex. C. R. 348.

5. *Joinder of several plaintiffs having separate rights of action arising out of same cause.*—A number of plaintiffs having been joined in the action, each having a separate claim for losses by the same fire, at the trial, defendants' counsel claimed that they could only proceed by separate actions, and that their counsel must elect for which one he would proceed and strike out the other names from his pleadings. The separate claims of the respective plaintiffs appeared on the face of the statement of claim, and the defendants had taken no steps to have it amended, but filed a statement of defence and it was held, without deciding whether Rule 218 of "The King's Bench Act" (Man.) justified the joining of the plaintiffs in this case, that defendants, if they thought it did not, should have moved to strike out all but one of the claims before filing a statement of defence, and had lost the right to take such objection afterwards. *Tait v. C. P. Ry. Co.* 42 C. L. J. 399.

6. *Exception à la forme, Arts 52 and 116, C. C. P. L. C., and Arts 1498 and 1571, C. C. L. C.*—Where the cause of action had arisen in the Province of Quebec, the Crown pleaded to a petition of right by demurrer, *défense au fonds en droit*, alleging (1) that the description of the limits and position of the property claimed in such petition was insufficient in law; (2) that the conclusions of the petition were insufficient and vague; (3) that in so far as respects the rents, issues and profits, there had been no signification to the Government of the gifts or transfers made by certain heirs to the suppliant. These demurrers were dismissed and it was held that the objections taken should have been pleaded by *exception à la forme* pursuant to Art 116, C. C. P., and as the demurrer was to all the rents, issues and profits indiscriminately, its conclusion was too large and the demurrer should be dismissed. *Chevrier v. The Queen*, 1 Ex. C. R. 350.

7. *Qui tam actions.*—For *qui tam* actions in the Province of Quebec, see Arts. 5716 to 5719 of R. S. Q.

8. *Particulars.*—Where in his petition the suppliant alleged in general terms that the injuries he received in an accident on a Government railway in the Province of Quebec resulted from the negligence of the servant of the

Crown in charge of the train, and from defects in the construction of the railway, an order was made for the delivery to the respondent of particulars of such negligence and defects. *Dubé v. The Queen*, 2 Ex. C. R. 381.

9. *Particulars—Land taken by Crown.*—The delivery of particulars will be ordered in cases involving the value of land to show how the amount claimed is arrived at. No. 1571, *Morgan v. The King*, and No. 1589 *Richelieu & Ont. Navign. Co. v. The King*, December, 1906.

10. *Particulars.*—The suppliant will be ordered to deliver particulars in a case against the Crown for injury to property by fire alleged to have been caused by engines or locomotives on the Intercolonial Railway. *Chamberlin v. The King*, (No. 1620), April 16th, 1907.

11. *Particulars in expropriation matters.*—Where in an expropriation for lands taken by the Crown, for a Rifle Range, at Ottawa, the proprietor did not in his statement in defence claim any specific amount, but confined himself to saying the amount tendered was insufficient and inadequate,—he was ordered to deliver particulars showing separately the amount claimed for the lands taken, for the damages resulting from the severance to lands held in unity with the piece taken, for taking away his access to, and the price of land adjoining the River, for the interference with his further access to the River by a public road which has also been expropriated, as alleged in his said statement in defence. (Similar orders made in several other cases taken out in connection with the same public work.) *The King v. Keefer*, November 29th, 1898.

12. *Practice—Particulars in action of tort—What must be shown to get order for particulars.*—The statement of claim alleged negligence by defendants in the construction of a ditch along the highway in front of plaintiff 's land and neglect to keep such ditch in repair, and that in consequence a larger quantity of water was brought on to plaintiff 's land and crops than would otherwise have naturally flowed thereon. Defendants applied for an order for particulars of such negligence and of the damages resulting therefrom, upon an affidavit of their solicitor proving service of a demand for such particulars and refusal to furnish same, and stating that defendants could not prove their statement of defence without them. *Held*, that this affidavit did not show sufficient grounds to entitle defendants to the order asked for, that special grounds must be shown, and that at least such facts must be shown as would satisfy a judge that defendants would be embarrassed in their defence without such particulars and that justice requires their delivery. *Brown v. G. W. Ry. Co.*, 26 L. T. N. S., 398 followed, although perhaps it goes further than would be required in every case. *Miller v. Westbourne*, 36 C. L. J. 574.

13. *Practice—Particulars—Discovery.*—A defendant may be ordered to give particulars of documents referred to in his pleadings, even though he has in an affidavit of documents effectually claimed for those documents privilege from production. The right to particulars and the right to production are distinct and independent rights. *Milbank v. Milbank*, (1900) 1 ch. 376.

See also annotations under Rule 27, respecting particulars in patent cases.

RULE 89.

A copy of every pleading to be served on opposite party.

Every pleading is to be filed, and a copy thereof is to be served on the opposite party or on his Attorney or Solicitor, if

he has one, or left at the office of the Attorney-General, as the case may be.

RULE 90.

How pleadings to show date of filing and be entitled.

Every pleading shall on its face be entitled of the day and year on which it is filed, and shall also be entitled in the cause.

RULE 91.

No plea or defence to be pleaded in abatement.

No plea or defence shall be pleaded in abatement.

RULE 92.

When an allegation of fact in a pleading is to be taken as admitted.

Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated.

E. O. xix r. 17, (1875), and E. O. xix r. 13 (*Act* of 1883), *Wilson's Judicature Act*, Ed. 1888, p. 209.

This Rule has been borrowed from the English Judicature Act 1883. The principles consecrated therein, that every allegation of fact not denied is taken to be admitted, has always been in England a fundamental doctrine of Common Law pleading. For cases under this Rule, see *Wil. Jud. Act*, 7 Ed. p. 209.

RULE 93.

Every party must allege all facts on which he means to rely—and all grounds of defence and reply which might take opposite party by surprise, or raise new issues.

Each party in any pleading, not being an information, petition of right, or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings.

E. O. xix., R. 18.

RULE 94.

No pleadings to be inconsistent with previous pleadings of same party.

No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation or fact inconsistent with the previous pleadings of the party pleading the same.

E. O. xix r. 19, (1875), and E. O. xix r. 16 (*Act*. of 1883), *Wil. Jud. Act*, Edn. 1888, p. 210.

This is the rule which now prevails in England both at Common Law and in Chancery.

The rule, however must be read subject to the provisions of Rules 96 and 114 respecting replying matters.

RULE 95.

Allegations of fact must not be denied generally.

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

E. O. xix., R. 20.

RULE 96.

Issue may be joined on defence by reply—Effect of joinder of issue.

The Attorney-General, petitioner or plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

E. O. xix., R. 21.

See Rules 94 and 114.

RULE 97.

Allegations not to be denied evasively.

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

E. O. xix., R. 22.

RULE 98.

Sufficient to state effect of document.

Whenever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

E. O. xix., R. 24

RULE 99.

Sufficient to allege notice as a fact.

Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of such notice be material.

E. O. xix., R. 26.

RULE 100.

Sufficient to allege contract arising from letters or conversations as a fact—and contracts arising therefrom may be stated in the alternative.

Wherever any contract, or contractual relation between any persons, does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative.

E. O. xix., R. 27.

RULE 101.

Not necessary for party to allege matters of fact which law presumes in his favour.

Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

E. O. xix., R. 28.

PLEADING MATTERS ARISING PENDING THE ACTION.

RULE 102.

Pleading matters arising pending the action, by defendant before delivering defence or time for its delivery expired.

Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement in defence, and before the time limited for his so doing has expired, may be pleaded by the defendant in his statement in defence, either alone or together with other grounds of defence.

E. O. xx., R. 1.

RULE 103.

After delivery of defence or time for its delivery expired.

Where any ground of defence arises after the defendant has delivered a statement in defence, or after the time limited for his doing so has expired, the defendant may, within *fourteen days* after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence setting forth the same.

E. O. xx., R. 2.

RULE 104.

On confessing defence arising after commencement of action plaintiff may sign judgment for costs.

Whenever any defendant, in his statement in defence, or

in any further statement in defence as in the last rule mentioned alleges any ground of defence which has arisen after the commencement of the action, the Attorney-General, petitioner of plaintiff may deliver an admission of such defence, which admission may be in the form in Schedule M hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a Judge shall, either before or after the delivery of such admission, otherwise order.

E. O. xx., R. 3.

OFFER TO SUFFER JUDGMENT BY DEFAULT.

RULE 105.

Offer by defendant to suffer judgment for specific amount.

If the defendant in any action files in the office of the Registrar an offer and consent in writing, signed by himself or his attorney of record, to suffer judgment by default, and that judgment shall be rendered against him for a sum by him specified in the said writing, the same shall be entered of record, together with the time at which it was tendered, and the plaintiff or his attorney may, at any time within fifteen days after he has received notice of such offer and consent, file a memorandum in writing of his acceptance of judgment for the sum so offered, and judgment may be signed accordingly with costs; or, if after such notice, the Judge, for good cause, grants the plaintiff a further time to elect, then the latter may signify his acceptance as aforesaid at any time before the expiration of the time so allowed, and judgment may be rendered upon such acceptance as if the acceptance had been within fifteen days as aforesaid.

Con. S. N. B., 255.

RULE 106.

Effect of offer as to costs.

If in the final disposition of any such action, wherein such offer and consent have been made by the defendant, the plaintiff does not recover a larger sum than the one so offered, not including interest from the date of such offer, the defendant, whatever the result of the action, shall be entitled to his costs by him incurred after the date of such offer.

Con. S. N. B., 256.

RULE 107.

Such offer or consent, if not accepted, shall not be evidence against the party making the same.

No such offer or consent made, as above mentioned, which has not been accepted shall be evidence against the party making the same, either in any subsequent proceeding in the action in which such offer is made, or in any other action or suit.

Con. S. N. B., 256.

STATEMENT IN DEFENCE.

RULE 108.

First pleading to be called 'Statement in Defence,' when to be filed.

The first pleading by a defendant is to be termed the statement in defence, and it shall be filed within the time hereinbefore or by the said Petition of Right Act prescribed, and a copy of it shall also be served as hereinbefore provided for pleadings generally.

See Rules 63 to 66, as to printing pleadings and Rules 84 to 104 for pleading generally.

For forms of statement in defence in several classes of cases, see *Table of forms.*

DISCONTINUANCE.

RULE 109.

Discontinuance.

The Attorney-General, petitioner or plaintiff may, at any time before receipt of the defendant's statement in defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the Attorney-General, petitioner or plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

REPLY AND SUBSEQUENT PLEADINGS.

RULE 110.

The reply.

The pleading of the Attorney-General, petitioner or plaintiff in answer to the defence shall be called the reply.

For form of reply see Schedule L.

RULE 111.

When to be filed and served.

The Attorney-General, petitioner or plaintiff shall file and serve his reply, if any, within fourteen days after the defence or the last of the defences have been served, unless the time shall be extended by the Court or a Judge.

E. O., xxiv., R. 1.

See Rules 96 and 114, respecting the effect of joinder of issue or the effect of not replying within the time limited by these Rules.

RULE 112.

No pleading subsequent to reply except joinder, without order of Judge.

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

E. O., xxiv., R. 2.

RULE 113.

Time for delivery of pleadings subsequent to reply.

Subject to the last preceding Rule, every pleading subsequent to reply shall be filed and served within fourteen days after the service of the previous pleading, unless the time shall be extended by the Court or a Judge.

RULE 114.

Default in replying within time limited—Effect of.

If the Attorney-General, petitioner or plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of facts in the pleading last delivered shall be deemed to have been denied and put in issue.

See also Rules 94 and 96.

The practice in force under this rule is the one now in existence in England under the Judicature Act 1883.

RULE 115.

Close of pleadings.

As soon as either party has joined issue upon any pleading of the opposite party simply without any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

E. O. xxv.

ISSUES.

RULE 116.

Issues.

Where in an action it appears to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between

the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

E. O. xxvi.

AMENDMENTS.

RULE 117.

Amendment of pleadings.

The Court or a Judge may at any stage of the proceedings allow either party to alter his information, petition of right, statement of claim, defence, reply or any other pleadings, or may order to be struck out or amended any matter in such pleadings or statements respectively which may be impertinent or irrelevant, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties.

E. O. xxvii., R. 1.

1. *Amendment of Petition of Right—Damages resulting from construction of Public Work must be assessed once for all.*—Where a petition of right to recover contingent damages resulting from the defective construction of a culvert, part of a Public Work of Canada, had been proceeded with only with respect to past damages, it was held, confirming the Registrar's report, that such damages should be assessed *once for all* and should cover past, present and future damages and the matter was accordingly sent back to the Registrar to assess damages once for all.

Whereupon the suppliant moved to amend his petition of right so as to cover future damages and the Crown objected to such amendment on the ground that the claim of the petition of right itself could not be amended, as then the suppliant would be proceeding with part of his claim for which he had no fiat; that the fiat had only been given for the past damages and further, that, if amended, the petition would not be one for which the *fiat* had been granted:—*Held*, that the granting of the fiat had placed the suppliant's claim on its merits before the Court where it had to be disposed of according to law and the law directed that such damages must be assessed *once for all*. Amendment allowed with costs to the Crown in any event. Per *Burbidge, J. Davidson v. The Queen.* January 24th, 1898.

2. *Amendment of Petition of right.*—Upon an application by the suppliant to amend his petition the court declined to grant the same until a draft of the proposed amendments was submitted, and the court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition. *Montgomery v. The King*, 11 Ex. C. R. 158.

3. *Amendment of Petition of right.*—On an application to amend a Petition of Right (already demurred to) by inserting allegations, *inter alia*, that the suppliants and the Crown had been authorized, by Order in Council and by Act of Parliament, to enter into a contract and further by adding that the suppliants had been notified, by the Crown, that the Government denied the agreement between said parties, the Crown opposed the application, upon the grounds that the amendment asked was too radical, that it changed the nature of the action and further that

it could not be compelled to submit to the jurisdiction of the Court beyond the scope of the fiat.

Held:—That while an amendment involving a new cause of action had never been allowed by the tribunal one which is merely in the manner of stating the case was invariably allowed, and as, in the present case, the amendment did not state a new cause of action, it should be allowed, the Crown to have the costs of the application including the costs of the demurrer in so far as it is affected by the amendment. Costs to be paid before the amendment is made. Per *Burbidge, J. Atlantic & Lake Superior Ry. Co. v. The King*. November 12th, 1902, No. 1042.

4. *Petition of right—Amendment.*—A petition of right may be amended at the trial. *Smylie v. The Queen*. 27 Ont. A. R. 172.

5. *Amendment—Costs upon Demurrer.*—A demurrer had been made to a petition of right and the suppliant obtained leave to amend his petition in view only of some allegations of the demurrer and the Court allowed the amendment of the petition upon payment, *inter alia*, of the costs of the demurrer so far as it was affected by the amendment, the said costs to be paid forthwith and before the amendment could be made. Whereupon the defendant served the suppliant with a notice withdrawing his demurrer entirely in view of the amendment. *Held* the defendant was then entitled to his full costs upon the whole demurrer. *The Atlantic & Lake Superior Ry. Co. v. The King*. November 29th, 1902.

6. *Amendment—Defence—Counter-claim.*—The amendment of a statement in defence to an Information setting up a counter-claim against the Crown will not be allowed. A substantive claim such as would form the basis of proceeding of that kind requires a fiat before it can be presented to the Court for hearing and determination. *The King v. The Klondyke Government Concession Ltd.* 11 Ex. C. R.

RULE 118.

Attorney-General or plaintiff may amend upon præcipe any time before filing of defence.

The Attorney-General, petitioner or plaintiff may, upon præcipe and without any leave, amend the information, petition of right or statement of claim or any pleading by which a cause or action may be instituted, at any time before the filing of a defence or objections and also once after defence or objections filed before the expiration of the time limited for reply, and before replying.

E. O. xxvii., R. 2.

RULE 119.

Opposite party may apply to disallow amendment.

Where any party has amended his pleading under the last preceding Rule, the opposite party may, within *two weeks* after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same.

E. O. xxvii., R. 4.

RULE 120.

On amendment by one party, either party may apply for leave to plead or amend.

Where any party has amended his pleading under Rule 118, the other party may apply to the Court or a Judge for leave to plead anew or to amend his former pleading within such time and upon such terms as may seem just.

E. O. xxvii., R. 5.

RULE 121.

Further powers of amendment with or without application.

In addition to the foregoing powers of amendment, at any time during the progress of any action, suit or other proceeding in the said Exchequer Court, the Court or a Judge may, upon the application of any of the parties, and whether the necessity of the required amendment shall or shall not be occasioned by the error, act, default or neglect of the party applying to amend, or without any such application, make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties and the real question in controversy, and best calculated to secure the giving of judgment according to the very right and justice of the case, and all such amendments shall be made upon such terms, as to payment of costs or otherwise, as to the Court or Judge ordering the same to be made shall seem meet.

RULE 122.

If amendment not made within time limited order for amendment to become void.

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within *two weeks* from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such *two weeks*, as the case may be, become *ipso facto* void, unless the time is extended by the Court or Judge.

E. O. xxvii., R. 7.

RULE 123.

How pleadings may be amended.

A pleading may be amended by written alterations in the pleading which has been filed, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 50 words in any one case, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by filing a print as amended.

E. O. xxvii., R. 8.

RULE 124.

Amended pleadings to be marked with date of order under which amendment made.

Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made in the manner following, viz., 'Amended day of .'

E. O. xxvii., R. 9.

RULE 125.

When amended pleading to be served.

Whenever a pleading is amended, such amended pleading shall be served on the opposite party within the time allowed for amending the same.

E. O. xxvii., R. 10.

PROCEEDINGS IN LIEU OF DEMURRER.

RULE 126.

Pleading matters of law—Proceedings in lieu of demurrer.

No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial: provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

E. O. xxv., R. 1. (1883).

See Rules 160 *et seq.*

1. *Question of law—Argument—Refused.*—Upon an application to direct argument of a question of law under Rule 112 (now Rule 126) the Court refused to do so before facts were admitted or evidence taken upon which such question could be determined. Per *Burbidge J. Hudson Bay Co. v. The King.* December 4th, 1903.

2. *Question of Law—Right to begin.*—The practice in the Court of Exchequer is for the party first demurring to begin. *Hill v. Cowdery*, 1 H. & N. 360; 25 L. J. (Ex.) 286 (2); *Churchward v. The Queen.* L. R. 1 Q. B. 183.

3. *Points of law—Argument before trial—Refusal.*—Where the defendants, in an action for alleged infringement of a patent of invention, set up by their statement in defence an adjudication by the Circuit Court of the United States upon the said patent, the plaintiffs replied denying the allegation, submitting that such adjudication disclosed no answer in law to their claim, and made an application that the question of law so raised be argued before the trial of the action upon the ground of convenience and of saving time and expense.

Held, that as the defendants might fail to establish the facts as alleged, the Court would then be determining the law upon what might turn out to be a merely hypothetical state of facts,—a course always to be deprecated,—and further that the finding of this Court upon the question of law might be taken, and dealt with, by an appellate Court

while another part of the case would be dealt with elsewhere, a uselessly costly and inconvenient practice,—the application was refused with costs to the plaintiffs in any event, unless otherwise ordered by the trial Judge. Per *Riddell, J.*, Judge of the Exchequer Court of Canada, Pro hac vice. *Berliner Gram-o-phone Co. v. Columbia Phonograph Co.*, December 24th, 1908.

DEFAULT OF PLEADING.

RULE 127.

When default in pleading, action may be set down on motion for judgment.

If the defendant makes default in delivering a defence, the Attorney-General or plaintiff may set down the action on motion for judgment, and the allegations of facts in such information or statement of claim shall be taken as confessed, and such judgment shall be given as upon the information or statement of claim the Court or Judge shall consider the Attorney-General or plaintiff to be entitled to.

E. O. xxix., R. 10.

See Rule 21 and annotations thereunder.

Practice—Judgment by default—Evidence—Reference to registrar.—Upon a motion for judgment in default of pleading to an information by the Crown it appeared that the information while showing that the Crown was entitled to judgment, did not show clearly the amount for which judgment should be entered, and a reference was made to the registrar to ascertain, upon proof, the amount of the claim. *The Queen v. Connolly et al.*, 5 Ex. C. R. 397.

RULE 128.

When one of several defendants makes default.

Where there are several defendants, then, if one of such defendants makes such default as aforesaid, the Attorney-General or plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

E. O. xxix., R. 11.

RULE 129.

Motion for judgment by default.

A motion for judgment by default, pursuant to Rule 127 or 128 of the Exchequer Court, may be made *ex parte* if a copy of the information or statement of claim, with an endorsement as provided by Rule 68 of the Exchequer Court, is served personally upon the defendant.

RULE 130.

Default by Attorney-General.

In case the Attorney-General makes default in filing any pleading in any action or proceeding within the prescribed

time, the plaintiff may apply to the Court or a Judge on motion for an order that the action may be taken as confessed, or for an order giving him liberty to proceed as if the Attorney-General had filed a statement in answer, traversing or denying the case made, and upon either of such orders being made, the case may thenceforth proceed accordingly.

See sec. 9 of *The Petition of Right Act* (ch. 142, R. S., 1906), which deals with the same subject, ante page 240.

For cases of failure to plead on behalf of the Crown see *Clode On Petition of Right*, p. 182.

See Rule 283 as to notice to be served upon a defendant who has failed to file plea.

RULE 131.

Dismissal of action for want of prosecution—Notice of trial.

If the plaintiff does not within three months after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or make such other order and on such terms, as to the Court or Judge may seem just.

E. O. xxxvi., R 12.

1. *Want of prosecution—Dismissal of action—Justification.*—The Defendants moved to dismiss the action for want of prosecution on the ground that the action had not been proceeded with for over two years and a half. The Plaintiff read *contra* several affidavits showing that, during that period, most of the Counsel's time had been taken up with litigation, by the Plaintiff, of similar nature, in the United States, in connection with the same question as the one involved in the present case, and that his American Counsel, who had attended to these suits in the several States, would have to be present at the Canadian trial:—Ordered that the plaintiff will have three months from the date hereof to go to trial, otherwise the action will stand dismissed, with costs of this application to the Defendant in any event. *The Animarium Co. v. The Electropoise Co. et al.* December 7th, 1903.

2. *Want of prosecution.*—Peremption of suits for want of prosecution does not take place against the Crown. C. C. P. Q. *Art.* 281.

3. *Application to dismiss—May be made by summons or motion.*—An application to dismiss for want of prosecution should ordinarily be made by summons. *Freason v. Loe*, 26 W. R. 138. It may, however, be made in Court on motion; and, if the usual notice of motion is given, and the plaintiff does not at once submit to speed the cause, and tender the costs of the notice, the defendant, if the usual order is made, will have his costs of making the motion in court. *Evelyn v. Evelyn*, 13 Ch. D, 138. As to the proper course to adopt, where there are several defendants in respect of some of whom the pleadings are not closed, see *Ambroise v. Evelyn*, 11 Ch. D. 759. (*Wilson Jud. Act*, 293.)

4. *Order to dismiss action.*—Where an order is made dismissing an action unless some act is done within a specified time, if the order be not appealed against, the time for doing the act cannot be enlarged after it

has expired for the action is dead. *Whistler v. Hancock*, 3 Q. B. D. 83; *King v. Davenport*, 4 Q. B. D. 402. But the time for appealing against such an order may in a proper case be enlarged after it has expired. *Burke v. Rooney*, 4 C. P. D. 226; *Carter v. Stubbs*, 6 Q. B. D. 116. (*Wilson Jud. Act*, 237.)

RULE 132.

Judgment by default may be set aside by Court or Judge.

Any party may be relieved against any default under any of these Rules, by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

E. O. xxix., R. 14.

CONSENT ORDER.

RULE 133.

Consent of parties to become an order of Court.

Any consent in writing signed by the parties, or their attorneys, may, by permission of the Registrar, be filed, and the terms thereof may thereupon be made an order of Court.

1. *Practice—Judgment by consent—Mistake—Setting Aside—Motion.*—After a judgment has been passed and entered—even where it has been taken by consent and under a mistake—the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless: (1) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, Order xxviii, r. 11; or (2) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide—in either of which cases the application may be made by motion in the action.

Semble, that different considerations apply to interlocutory orders; but that even if a judgment has not been passed and entered the Court will not always interfere on motion, e.g., where from the nature of the ground relied on conflicting evidence is essential. *Ainsworth v. Wilding*. 1. Ch. Div. 673.

2. *Consent Order—Setting aside—Mistake.*—An order by consent and based upon, and intended to carry out, an agreement come to between the parties, can be set aside on any ground on which an agreement in the terms of the order could be set aside, and one of such grounds is mistake. *Wilding v. Sanderson*. 1897 2 Chan. Div. 534.

3. *Judgment by consent—Effect of—Setting aside.*—A judgment by consent embodying an *ultra vires* contract may be set aside. *Great North West Ry. Co. et al., v. Charlebois et al.*, 1899 A. C. 114.

4. *Appeal—Consent Order—R. S. O.* ch. 51, sec. 72.—There can be no appeal from an order appearing on its face to be made by consent, unless by leave of the Court or Judge making it, even though the appeal is on the ground that no consent was given. R. S. O. ch. 51, sec. 72. Re *Justin, a Solicitor* 18 Ont. P. R. 125.

DISCOVERY.

Examination for Discovery.

RULE 134.

Petitioner, plaintiff or defendant may be examined by opposite party.

After the defence is filed any plaintiff and any suppliant in

a Petition of Right, and any defendant, other than the Crown or the Attorney-General, may, at the instance of the opposite party, and without order, be examined for the purpose of discovery before the Registrar or before some other officer of the Court specially appointed for that purpose, or before a Judge, if so ordered by the Court or a Judge.

E. O. xxxi.

This order for the examination of the party, before some other officer of the Court than the Registrar, is one which must be obtained upon Summons under the provisions of Rule 255 (Now Rule 287) which says that all applications to a Judge in Chambers authorized by these rules must be made in a summary way by summons. Per *Burbidge, J. Atty.-Gen. Manitoba v. Atty.-Gen. of Canada*, January 29th, 1903.

Applications in Chambers can now be made either by summons or by petition, of which notice of two clear days is given. See Rule 287.

The object in view in this finding is to give the parties an opportunity to show cause, before the order for examination is made, respecting the time and place, and the competency of the Examiner to be appointed. And in a case where the Crown is a party, to allow it to show cause as to whether or not the officer sought to be examined and named in the summons or application is the proper officer to be examined under the circumstances.

The above rule must be read in the light of sec. 64 of the Exchequer Court Act, under which the taking of the evidence of any person, including the party to the suit, within or out of Canada is entirely in the discretion of the Court or a Judge thereof, who may appoint as examiner for such purpose either the Registrar of the Court, or any Commissioner for taking affidavits in the Court, or any other person or persons to be named in the order, or may order the issue of a Commission under the seal of the court for such examination.

The party to be examined must be served with a subpœna, as provided by Rules 137, and 139, and a copy of the appointment given by the Examiner must be served upon the Solicitor of the party to be examined.

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1. *Object of discovery.*—The object of discovery is (*a*) to ascertain the facts material to the merits of the case, and not the *law*; (*Finch v. Finch* 2 Ves. 492. *Flight v. Robinson*, 8 Beav. 33.) (*b*) to facilitate the adducing of evidence at trial, and to save expense. *Grumbrecht v. Parry* 32 W. R. 204.

2. *Relevancy—Materiality—Discovery.*—Questions of relevancy or materiality are dealt with great latitude on Discovery. *Lyell v. Kennedy*, 50 L. T. 730.

"At an early stage of the action it is impossible to say precisely what might or might not be material. The Court could not go into the whole merits of the case for this purpose, and, therefore, unless the immateriality of the discovery is clear or it is open to some other objection, the court will not interfere or relieve the defendant from his obligation to make a full answer." *Bray* on Dis. citing *Attorney-General v. Richards*, 6 Beav. 449-451 and other cases.

In order to sustain an objection to the materiality to the action of a question on Discovery it must be so "obviously frivolous" that no state of the case can be supposed in which the Discovery as sought could be

made available. See per *Lord Thurlow in Bishop of London v. Fytche*, 1 Bro. C.C.95,97. L. R. 4, ch. 673; L. R. 4, C. P. 765.

For observations on the question of Discovery, see *Canadian Law Times*, Vol. 12 p.p. 25-73.

3. *Discovery—Examination—Conduct.*—The examination of a party on Discovery is to be conducted as an examination in chief and not as a cross examination. *Carroll v. Goldenback Co.*, 6 B. C. R. 354.

4. *Particulars—Discovery—Difference.*—Particulars are ordered with reference to pleadings, while examination on discovery is used to get at the knowledge of the adverse litigant; it is only in exceptional cases that particulars are ordered after the close of the pleadings. *Smith v. Boyd*, 17 Ont. P. R. 463.

5. *Discovery—Examination of body.*—The person, in respect of whose bodily injury damage or compensation is sought in an action, can be examined by a physician, a medical man, but the latter is not authorized to put questions to the examinee. *Clouse v. Coleman*, 16 Ont. P. R. 496.

6. *Discovery.*—Plaintiff is entitled not only to a discovery of that which constitutes his title, but also to a discovery of everything which may enable him to defeat the title which is expected to be set up against him. *Atty.-Genl. v. Corpn. of London*, 2 Macl. & G. 259.

7. *Patent—Discovery.*—The petitioners may take discovery in a case to repeal a patent of invention. *Hadden's Patent*, (1884) *Griff*, P. C. 109.

8. *Patent—Discovery.*—Examination on Discovery can take place in patent cases. *Birch v. Mather*, 22 Ch. Div. 629.

9. *Discovery—Infant.*—An infant suing by a next of friend may, in the absence of special incapacity, be examined for discovery. *Arnold v. Plater* (1892), 14 P. R. approved. *Flett v. Coulter*, 4 Ont. R. 714.

10. *Discovery—Penalty.*—No discovery in penalty action. *Pickerel River Improvement v. Moore et al.* 17 Ont. P. R. 287.

11. *Examination on Discovery.*—Examination on Discovery in Patent cases is allowed notwithstanding the delivery of particulars. Under special circumstances, the defendant making out a very special case, an order may be made enjoining the plaintiff to be examined on discovery before the delivery of defence. *Woolfe v. Automatic Picture Gallery* (1902), 19 R. P. C. 161.

12. *Discovery—Examination for—Amended pleadings—Second examination, order for—Limitation of.*—Where pleadings have been amended raising matters not before suggested, after examination for discovery has been had, an order may be made in a proper case for a further examination which may be limited to the matters raised by the amendment. Judgment of the Master in Chambers affirmed. *Standard Trading Co. v. Seybold*, 40 C. L. J. 123.

13. *Discovery—Action to restrain infringement—Denial of Right—Details of Business transactions.*—In an action to restrain the defendants from selling a certain drug in violation of the rights of the plaintiffs under a patent, and of the terms upon which the drug was sold to the defendants, and for damages for selling in violation of such rights and terms, and for damages for a trade libel, the defendants admitted that they bought the drug but not from the plaintiffs, and were selling it by their agents, and upon their examination for discovery stated fully their mode of procedure in buying and selling, but in their pleading they denied the plaintiffs' patent right:—*Held*, that there being a *bona fides* contest as to that right, the defendants should not, before the trial, be compelled to afford discovery of the details and particulars of such buying and

selling, so as to disclose their and their customers' private business transactions. Such discovery should be deferred until after the plaintiffs should have established their right, even if a subsequent separate trial of the question of infringement should be necessary. *Dickerson v. Radcliffe*, 17 Ont. P. R. 586.

RULE 135.

Departmental or other officers of the Crown may be examined.

Any departmental or other officer of the Crown may, by order of the Court or a Judge, be examined at the instance of the party adverse to the Crown in any action for the same purposes and before the same officers or before the Court or a Judge, if so ordered.

For authorities upon the above Rule see *inter alia*, *Stephen's Digest of Evidence*, p. 126; *Taylor on Evidence*, pp. 808, 809 and 814.

1. *Discovery—Minister of Crown.*—An application to examine on Discovery the Minister of the Interior was refused on the ground that the Minister is neither a departmental or other officer, as mentioned in Rule No. 87 (now No. 135). *The King v. Bonanza Creek Hydraulic Mining Concession*, 22nd June, 1907.

2. *Discovery by foreign Sovereign.*—Should a foreign Sovereign bring an action here, he will not be exempt from giving discovery (*South African Republic v. La Coupe Franco-Belge*, 77 *L.T. Rep.* 241), and such discovery must be given on the oath of himself, and not on that of an agent. *Priolean v. U. S. A.*, 14 L. T. Rep. 700; 41 C. L. J 551.

RULE 136.

Examination in actions against corporations.

If any party to an action be a body corporate or a joint stock company, or any other body of persons empowered by law to sue or to be sued, either in its own name, or the name of any officer or other person, any member or officer of such corporation, company or body, may, at the instance of any adverse party in the action and without order, be examined for the purposes of discovery before the same officers in the two next preceding Rules mentioned, or before a Judge, if so specially ordered by the Court or a Judge.

The practice followed under the above rule has been to file with the Registrar an affidavit showing that the person desired to be examined, before him, is a member or officer of such corporation, company or body party to the action in question.

1. *Discovery—Examination of Officers of Corporation.*—In an action to recover moneys alleged to have been deposited with the defendants, a banking corporation, at a branch, the plaintiff examined for discovery as officers the persons who were respectively manager and ledger-keeper at the branch at the time the alleged deposits were made. He then sought to examine the general manager:—

Held, that the plaintiff had the right under Rule 487 (Ont.) to examine the general manager as an officer of the corporation, and, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance. *Dill v. Dominion Bank*, 17 Ont. P. R 488.

2. *Discovery—Examination for—Officer of Company—Engine Driver —Consolidated Rule* 439.—On application for leave to examine an engine driver for discovery, under Consolidated Rule 439, as an officer of the defendants, in an action under R. S. O. 1897, ch. 166, *The Fatal Accidents Act*: *Held*, reversing the decision reported 4 O. L. R. 43, that, inasmuch as the engine driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control of the train, so as to make him responsible to the defendants, except for the management of his engine, he was not an officer of the company examinable under that Rule. *Morrison v. The Grand Trunk R. W. Co.*, 5 Ont. R. 38.

3. *Discovery—Officer of corporation—Railway company—Station agent —Section foreman—Chief clerk in office of general superintendent.*—A station agent in the employment of a railway company is an officer thereof within the meaning of Rule 201 and may be examined for discovery under the provisions of that rule. But a section foreman is not such an officer nor is the chief clerk in the office of a general superintendent. *Eggleston v. C. P. R. Co.*, XL. C. L. J., 680.

Discovery—Officer—Evidence.—A non-appearing defendant may be examined on discovery (*Buist v. Currie*, 17 C. L. T. 335). Some evidence may, under certain circumstances, be allowed only at trial (*Dickerson v. Radcliff*, 17 Ont. P. R. 588). The conductor and motorman of a car are officers of a company examinable for discovery (*Dawson v. London St. Ry.*, 18 Ont. P. R. 223). The roadmaster in charge of the section of a line of railway on which an accident occurred, although he is under the control of the Chief Engineer, is an officer of the Company examinable for discovery. *Casselman v. O. & A. P. S. Ry. Co.*, 18 Ont. P. R. 261.

RULE 137.

Subpœna to be issued to enforce attendance.

The attendance of a party, officer or other person, for examination under the three next preceding Rules, may be enforced by a writ of subpœna *ad testificandum* in the same manner as the attendance of witnesses for examination at the trial of an action is to be enforced.

RULE 138.

Production of documents at examination.

Such parties or officers, or other persons liable to examination may be compelled to produce books, documents, and papers by a writ of subpœna *duces tecum*.

RULE 139.

Parties to be examined to be paid.

Parties, officers, or other persons called upon to submit to examination under the preceding rules shall be entitled to be paid the same fees as witnesses subpœnaed to give evidence at the trial of an action.

RULE 140.

Examination of parties without jurisdiction.

Any party, officer or member of a corporation, or other person liable to examination for purposes of discovery, under any of the foregoing rules, who is or resides out of the jurisdiction, shall be liable to be examined for discovery upon service upon his solicitor, or the solicitor of the corporation in the case of an officer or a member of a corporation, of an appointment served by leave of a Court or a Judge upon notice to all parties at a time fixed by the Court or the Judge before the day appointed for said examination, and at the time of the service of the said appointment the proper witness fees shall be paid to or tendered to such solicitor who shall forthwith communicate the appointment to the person required to attend and forward to him the witness fees so paid, and shall not apply the witness fees on any debt due to the solicitor or any other person, or pay the same otherwise than to such person for his witness fees, nor shall such witness fees be liable to be attached.

This Rule constitutes new practice which was borrowed from Ontario.

RULE 141.

Examinations, how to be taken in shorthand.

Examinations on Discovery, whether the same be of parties within or without the jurisdiction shall be taken in shorthand, unless it is otherwise ordered by the Judge or Registrar, and the shorthand writer may be named by the examiner so appointed. It shall not be necessary for such deposition to be read over to, or signed by, the person examined.

RULE 142.

Case of party omitting to answer.

If any person examined omits to answer, or answers insufficiently, the party examining may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be, and an order may be made requiring him to answer, or answer further, either by affidavit or *viva voce* examination, as the Judge may direct.

E. O. xxi., R. 11.

Examination for discovery—Appointment—Attendance on—Voluntarily taking oath—Refusal to answer questions—Liability.—Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn, she is precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she has not been served with a subpœna. *Cook v. Wilson*, 38 C. L. J. 303.

DISCOVERY OF DOCUMENTS.

RULE 143.

Order for production may be made by Court or Judge at any time.

It shall be lawful for the Court or a Judge, at any time during the pendency of any action or proceeding, to order the production by any party thereto, or by any officer of the Crown, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right, and the Court or Judge may deal with such documents when produced in such manner as shall appear just.

E. O. xxi., R. 10.

See *Wilson's Judicature Act*, 6 Edn. p. 260.

1. *Discovery of documents against Crown—Crown against subject.*—The Crown, in a petition of right, is entitled as against the suppliant, to the discovery of documents, *Tomline v. The Queen*, 4 Ex. D. 252: but the case of *Thomas v. The Queen* (10 Q. B. 44) decides that in a petition of right case there is no power to the suppliant to obtain a discovery of document. However, in the case of *Tomline v. The Queen* (supra), *Bramwell, L. J.*, said:—"It is unnecessary to consider whether *Thomas v. "Reg.* was correctly decided; but I will assume that technical reasons "exist which prevent a suppliant from obtaining discovery: do these "technical reasons make the practice as to 'discovery' less applicable "as against a suppliant? I think not: the practice is as much applicable "as to him as to the plaintiff and the defendant in an ordinary action. "I repeat that it is unnecessary to express any opinion as to *Thomas v. "Reg.* (Law Rep. 10 Q. B. 44); but I may remark that if technical "difficulties do exist in the way of obtaining discovery from the Crown, "possibly the legislature has intentionally left those difficulties in existence, "in order that it may be in the discretion of the Crown whether it will "afford the information sought for by a suppliant." *Baggallay and Thesiger*, L. JJ., concurred.

2. *Discovery—Documents—Privilege.*—No valid claim of privilege in regard to production of documents passing between solicitor and client when the transaction impeached is charged to be based upon fraud, *Smith v. Hunt*, 1 Ont. L. R. 334; *Southwark & V. W. Co. v. Quick*, 3 Q. B. D. 315. How the affidavit on production by the Manager of a Bank should be made to afford protection from production. *Hector v. Canadian Bank of Commerre*, 16 C. L. T. 302.

3. *Practice—Discovery—Production of Documents—Privilege—Communications between Solicitor and Client—Evasion of Statute.*—The privilege from production of confidential communications between a solicitor in his professional capacity and his client does not extend to communications which came into existence for the purpose of the client's procuring advice as to the mode in which he might evade the provisions of a colonial statute imposing a duty in respect of property. *The Queen v. Bullivant et al.*, 2 Q. B. Div. 163.

4. *Discovery of documents.*—The Crown has the same right of discovery of documents against a subject as the latter has against a subject in an ordinary action; but the subject has not the same right against the Crown. *Atty.-Gen. v. Mayor of Newcastle*, 1897, 2 Q. B. 384.

RULE 144.

Order for discovery of documents may be obtained from Registrar upon præcipe.

The Attorney-General, plaintiff or petitioner, after the time for delivering the defence has expired, and any party after the defence is delivered, may obtain an order of course, upon præcipe, directing any other party, or any officer of the Crown to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action.

E. O. xxi., R. 12.

FORMS OF PRÆCIPE AND ORDER.

The following forms may be used:

1. *Præcipe for order for discovery.*

(Heading as in Form 2).

I, A. B., solicitor for the [*state whether Suppliant or Respondent*] pray for an order on the Suppliant [*as the case may be*] to make discovery on oath of the documents in his possession.

Dated, at Ottawa, this.....day of .....A.D., 19.....

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2. *Order for discovery of documents.*

IN THE EXCHEQUER COURT OT CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

A. B.

Suppliant

vs.

His Majesty the King,

Respondent.

Upon the application of the.....It is ordered that within ten days after the service hereof on the....., his Attorney or Agent, the.....(*and when the order is against the Crown,* say, the respondent, *as the case may be,* through the proper officer in that behalf), do make discovery on oath by affidavit of the documents which are or have been in his possession or power relating to any matter in question in this action, or what he knows as to the custody they or any of them are in, and whether he objects (and if so on what grounds) to the production of such as are in his possession or power.

Dated at Ottawa, this .....day of.....A.D., 19.....

L. A. A.,

Registrar.

RULE 145.

Affidavit to be made by party upon whom order made.

The affidavit to be made by a party or officer of the Crown against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form in Schedule N hereto, with such variations as circumstances may require.

E. O. xxi., R. 13.

RULE 146.

Production of documents for inspection.

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, solicitor or agent and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court or Judge that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

E. O. xxxi., R. 14.

RULE 147.

Form of notice to produce.

Notice to any party to produce any documents referred to in his pleadings or affidavits shall be in the form in Schedule O hereto.

E. O. xxxi., R. 15.

RULE 148.

Notice when inspection can be made.

The party to whom such notice is given shall, within *two days* from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 146 or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within *four days* from the receipt of such notice, deliver to the party giving the same a notice stating a time within *three days* from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, attorney or agent at Ottawa, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the form in Schedule P hereto, with such variations as circumstances may require.

E. O. xxxi., R. 16.

RULE 149.

Order for inspection may be obtained.

If the party served with notice under Rule 146 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

E. O. xxxi., R. 17.

Patent of Invention—Inspection—Model—Observations and Experiments.—An order, in an action of infringement, for the inspection of the invention may be made at any stage of the proceedings upon a *primâ facie* case of infringement and the Court may impose such terms and

directions respecting the same as it may seem fit. *Brake v. Munts's Co.*, 1886, 3 R. P. C. 43. Samples may be ordered to be taken, observations to be made or experiments to be tried, *Germ Milling Co. v. Robinson*, 1886, 3 R. P. C. 11; *Russel v. Cowley*, 1833, 1 W. P. C. 459; R. S. C., U. C. Ord. 50, r. 33.; *North British Rubber Co. v. Macintosh*, 1894, 11 R. P. C. 477-487.

RULE 150.

Application for inspection of documents to be to a Judge upon affidavit.

Every application for an order for inspection of documents shall be to a Judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party or of an officer of the Crown.

E. O. xxxi., R. 18.

RULE 151.

Judge may order any question or issue to be first determined.

If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

E. O. xxxi., R. 19.

RULE 152.

Consequences of not appearing to comply with subpœna or order for viva voce examination and for discovery and inspection of documents.

If any party or officer of the Crown fails to comply with any subpœna or order for *vivâ voce* examination, to answer interrogatories, or for discovery or inspection of documents he shall be liable to attachment. He shall also, if a plaintiff, or petitioner in a petition of right, be liable to have his action dismissed for want of prosecution, and if a Defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party examining or interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

E. O. xxxi. R. 20.

1. *Discovery—Examination—Default.*—One of the defendants (M. C.) having failed to appear to be examined for the purpose of discovery, the plaintiff applied to have his defence struck out. It having been shown,

however, that the said defendant had an understanding with the Attorney-General personally that the examination would not take place on the day appointed: the Judge then fixed a day for the examination and ordered the said defendant to appear before the Registrar to be so examined, failing which his defence would be struck out. *Per Burbidge*, J., No. 979. *The Queen v. Connolly, et al.*, 4 January, 1900.

2. *Contempt of Court—Witness—Local Manager of Bank—Production of Bank Books—Disclosure of Bank Accounts—Inconvenience—Privilege—Motion to commit—Service of Papers.*—The local manager of a branch in this Province of a chartered bank, when served with a subpœna *duces tecum* to attend as a witness before the Court, or a Master upon a reference in an action, is bound, whether the bank is a party or not, to produce the bank books specified in the subpœna which are in his custody or control, containing any entry relevant to the matters in question in the action, and to give evidence as to such entries; and inconvenience to the bank is no ground for refusing to produce the books, which *primâ facie* are to be deemed in his custody and control and their production within the scope of his authority.

Re Dwight and Macklam (1887), 15 O. R. 148, approved and followed. Evidence as to a customer's account is not privileged at common law, and sec. 46 of *The Bank Act* is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts save by a director.

Discussion of the English Bankers' Books Evidence Act, 1879. Where a motion to commit is made, it is not necessary to serve with the notice of motion copies of the affidavits on which it is based. *Hannum v. McRae et al.*, 18 Ont. P. R. 185.

RULE 153.

How service of order for discovery or inspection may be made.

Service of an order for discovery or inspection made against any party on his Attorney, Solicitor or Agent shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

E. O. xxxi., R. 21.

RULE 154.

Using at trial examination for discovery.

Any party may, at the trial of an action or issue, use in evidence any part of the examination for the purposes of discovery of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Where any departmental or other officer of the Crown, or an officer of a corporation has been examined for the purposes of discovery, the whole or any part of the examination may be used as evidence by any party adverse in interest to the

Crown or corporation; and if a part only be used, the Crown or corporation may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.

ADMISSIONS.

RULE 155.

Notice of admission.

Any party to a cause or matter may give notice, by his pleading or otherwise, that he admits the truth of the whole or of any part of the case of any other party.

E. O. xxxii., R. 1.

RULE 156.

Notice to admit and costs of refusing.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

E. O. xxxii., R. 2.

RULE 157.

Form of notice.

A notice to admit documents may be in the Form in Schedule Q hereto.

E. O. xxxii., R. 3

RULE 158.

Affidavit as to admissions.

An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

E. O. xxxii., R. 4.

INQUIRIES AND ACCOUNTS.

RULE 159.

Inquiries and accounts.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

E. O. xxxiii.

QUESTIONS OF LAW.

RULE 160.

Special case may be stated for opinion of court.

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial.

E, O. xxxiv., R. 1.

See Rule 126 and notes thereunder.

RULE 161.

Questions of law may be first tried.

If it appears to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court or Judge may make an order accordingly, and may direct such questions of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

E. O. xxxiv., R. 2.

RULE 162.

Special case to be printed.

Every special case shall be printed by the Attorney-General or plaintiff, in the same form and manner as hereinbefore provided with reference to pleadings, and shall be signed by counsel for all parties, and shall be filed by the Attorney-General or plaintiff. Printed copies for the use of the Court shall be delivered by the party printing the same at the time of setting down the case for argument.

E. O. xxxiv., R. 3.

RULE 163.

Special case in actions where married woman, infant or lunatic is party.

No special case in an action to which a married woman, infant or person of unsound mind is a party shall be set down for argument without leave of the Court or a Judge; the application for which must be supported by sufficient evidence that

the statements contained in such special case, so far as the same affect the interest of such married woman, infant or person of unsound mind, are true.

E. O. xxxiv., R. 4.

RULE 164.

Entry of special case for argument.

Either party may enter a special case for argument by delivering to the proper officer a præcipe, in the form in Schedule R hereto, and also if any married woman, infant or person of unsound mind be a party to the action, by producing a copy of the order giving leave to enter the same for argument.

E. O. xxxiv., R. 5.

RULE 165.

Particulars in expropriation proceedings—Change in tender—Undertaking—Costs.

Where the Attorney-General, on behalf of the Dominion of Canada, institutes proceedings to ascertain the value of lands expropriated, the owner of such land, if dissatisfied with the amount of compensation tendered, shall in his statement in defence set out the particulars both of his objections to the amount tendered and of the amount claimed. If the Crown, upon the receipt of such particulars, desires to amend the expropriation proceedings by varying or limiting the quantity of land or estate to be expropriated, it will, within 15 days after the delivery of such statement in defence, be at liberty to amend and tender a further or other sum, and if the case proceeds to trial, or if the owner accepts such amended tender, the costs of the action, or any portion thereof, will be in the discretion of the Court or a Judge.

See annotations under Rule 88.

TRIAL.

RULE 166.

Order fixing time and place of trial—Setting down for trial without order at special sittings.

When any action is ready for trial or hearing, a Judge may, on application of any party and after summons or notice served on all parties to the suit, fix the time and place of trial or hearing, and may direct when and in what manner and upon whom notice of trial or hearing, together with a copy of the Judge's order, is to be served, and such notice and order shall be forthwith served accordingly.

Sittings of the Exchequer Court of Canada may be held at any time and place appointed by a Judge, of which notice shall be published in the *Canada Gazette*, and at which any action ready for trial or hearing may be set down for trial by either party thereto, upon giving the opposite party ten days' notice of trial, or by consent of parties, and without taking out any summons, or obtaining any directions as hereinbefore provided.

Such sittings shall be continued from day to day until the business coming before the Court be disposed of.

On the first day of each such sittings the Court will hear arguments of points of law raised by any pleading, special cases, motions for judgment, appeals from the Report of the Registrar or other officer of the Court, or other motion, application or business which cannot be transacted by a Judge in Chambers.

See sec. 41, ch. 140, R. S., 1906.

The usual length for the notice of trial is ten days, unless the party to whom it is given has consented, or is under terms or has been ordered to take short notice of trial. Short notice of trial is four days unless otherwise ordered. E. O. xxxvi., R. 14.

1. *Venue.*—The plaintiff's right to select the place of trial is not lightly to be interfered with, when it has not been vexatiously chosen. *Halliday v. Township of Stanley*, 16 Ont. P. R. 493.

2. *Venue—Petition of Right.*—See form A, under *The Petition of Right Act*, (R. S., 1906 ch. 142), which provides for the selection of the place of trial by the petition itself. The whole, of course, subject to the approval of the Court or Judge, after hearing both parties.

3. *Notice of trial—To whom given—Proof of.*—The notice of trial should be served upon the opposite party or his solicitor appearing of record. The proof of the service of the notice of trial was formerly exacted from the plaintiff at the opening of the trial. *Cockshott v. London General Cab Co.*, 26 W. R. 31. However, this proof does not seem to be now required. *Chorlton v. Dickie*, 13 Ch. D. 160.

4. *Venue—Trial.*—Upon an application in the Exchequer Court to fix the time and place of trial, in a Patent case, it was *inter alia*, contended that under sec. 31 of *The Patent Act* (Ch. 69 R. S., 1906), the *venue* must be in the Province in which the infringement is alleged to have taken place. The Court held the section cited did not apply to the Exchequer Court, but only applied to Provincial Courts. The section goes to show that a New Brunswick case cannot be tried in Ontario and *vice versa*. In the Exchequer Court it is a question of convenience where a case can be tried and with least expenses. *Sylvester Mfg. Co. Ltd. v. The Fairchild Co. Ltd.*, 25th Feby., 1907.

The following form of *præcipe* setting case down for trial may be used, viz.:—

IN THE EXCHEQUER COURT OF CANADA.

(*Short style of cause*)

To the Registrar Exchequer Court—

Enter this action for trial at in the City of , in the Province of , on the day of 19 , at o'clock in the noon.

Dated at this day of 19 .

When the issues are joined and the action ready for trial, any party may apply by summons to fix the time and place of trial. (For forms of summons and order see post under this Rule).

When, however, a special sitting has been fixed by a General Order, of which notice has been given in the *Canada Gazette*, the party desiring to proceed to trial with his case may set down the same upon præcipe and give the opposite party ten days notice thereof, unless such delay is dis-

pensed with by consent. Such special sittings are annually fixed for the whole Dominion with the view of affording the subject an opportunity to have his case tried within the province in which he resides. See sections 35 and 41 of *The Exchequer Court Act*. Supra pp. 183 and 186.

5. *Civil suit not fixed for trial pending criminal proceedings.*—Not withstanding section 534 of *The Criminal Code*, 1892, the Judge of the Exchequer Court, pending the existence of criminal proceedings against the defendant in respect of the subject at issue in a case before the Exchequer Court, refused to entertain an application to fix the trial, holding that as a matter of propriety the criminal case should be disposed of before proceeding with the civil suit. *The Queen v. St. Louis*, January 14th, 1895.

6. *Trial—Practice—Expropriation—Crown's prerogative right to general reply.*—The practice invariably followed at the trial of an expropriation case, under 52 Vict., ch. 13 (now ch. 143 R. S., 1906), has been for the Crown to prove the expropriation, unless the defence has, by its pleadings, admitted the same and further to produce a certified copy of the plan and description of the lands taken (sec. 12). The evidence on the question of the value of the lands expropriated is adduced by the defendant the Crown follows *contra* and the defendant is entitled to the reply. (See now Rule 168). The defendant opens argument, the Crown follows and the reply is given to the defendant. It is, however, contended that the King cannot be deprived of His right to a general reply in all cases. *Re The Parlement Belge*, L. R. 4 P. D. 144.

7. *Title.*—Where the claimant is plaintiff he must show his title. Sutherland *on Damages*, Vol. 3, p. 448.

8. *Fixing trial.*—The application to be made in pursuance of the first paragraph of the above rule should be to a judge at Chambers by way of summons. And as the proceeding by way of summons and order is one not known in the procedure of all the provinces, it has been thought advisable to give a form both of summons and order granted under the rule.

SUMMONS TO FIX TRIAL, &c.

IN THE EXCHEQUER COURT OF CANADA.

Before the Honourable Mr. Justice .....,

In Chambers.

IN THE MATTER of the Petition of Right of

A. B.

Suppliant

and

His Majesty the King,

Respondent.

Let the Attorney-General of Canada, his attorney or agent attend on behalf of His Majesty before the Judge at Chambers, in the City of Ottawa, on.....the.....day of.....instant (or next) at.....o'clock in the forenoon or as soon thereafter as Chambers may be held, to show cause why the trial in the matter of the above petition should not be fixed to take place at the City of..... .....in the Province of.....on the.....day of .....A.D. 19....., or at such other time and place as to the said Judge may seem best; and why the said Judge should not also direct when and in what manner and upon whom notice of trial or hearing, together with a copy of the order to be made by the said Judge, is to be served.

Dated at Ottawa, this.....day of.....A.D. 19....

ORDER FIXING TRIAL, &c.

(Style of cause as in summons.)

Upon reading the summons granted herein (and the affidavit of service thereof, if any) and upon hearing Counsel for all parties;

I do order that the trial or hearing of this matter do take place before this Court, at the Court House in the City of.....on.....day of.....A.D. 19....., at eleven o'clock in the forenoon.

And I do further order that notice of trial at the time and place aforesaid, together with a copy of this order be within three days from the date hereof, served on His Majesty's Attorney-General of Canada, by leaving such notice and copy of said order at the office of the said Attorney-General, in the City of Ottawa, and also served within the time aforesaid on A. F. M., the Solicitor for the said Attorney-General, by leaving such notice and copy of said order at the office of the said A. F. M. This order to be without prejudice to any application that may be made to the presiding Judge at the trial of this matter by any of the parties hereto to have part of the evidence taken or the matter determined at some place other than that hereinbefore appointed, under the provisions of the Statute in that behalf.

Dated at Ottawa, this.....day of.....A.D. 19....

9 *Expropriation—Trial.*—In an action for expropriation, under 52 Vict., ch. 13, (now ch. 143 R. S., 1906), the Crown must first prove the expropriation by filing a certified copy of the plan and description of the property taken and file also the tender, if any; and it is for the defendant to open on the question of value of the land expropriated and the damages thereto, if any. *Per Burbidge, J. The Queen v. Armour*, June 21st, 1898. See now Rule 168.

RULE 167.

Printed copies of pleadings to be furnished for use of Judge.

The party who gives notice of trial shall furnish for the use of the Judge a printed copy of the pleadings, issues and order for trial; and where the trial is holden at any place outside of the City of Ottawa the same shall be certified by the Registrar of the Court.

RULE 168.

Right to begin and reply as to questions of compensation and title in proceedings by information.

Whenever on the trial of any proceeding by information in respect of land or property acquired or taken for, or injuriously affected by, the construction of any public work, any question of compensation or title arises, the defendant shall in respect of such questions begin and give evidence in support of his claim, and if in respect thereof evidence is adduced on the part of the Crown, the defendant shall be entitled to the reply.

RULE 169.

Countermand of notice of trial.

No notice of trial shall be countermanded except by consent or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs as may be just.

E. O. xxxvi., R. 13.

See Rule 173.

Countermand of notice of trial.—After an action had been, by the suppliant, set down for trial and notice thereof given to the respondent, a summons was issued, returnable on the day fixed for such trial, for an adjournment of the same upon the ground of convenience to Counsel, suppliant and witnesses The respondent's Counsel appeared at trial with his witnesses, and the Court adjourned the trial to a named date upon the condition precedent that the suppliant pay the costs of the day before he could again proceed to trial. *Robillard v. The King*, 18th March, 1907.

RULE 170.

Sitting or trial stand adjourned when Judge unable to attend.

In case the Judge is unable from any cause to attend on the day fixed for any sitting or for the trial of any issue, such sitting or trial shall stand adjourned from day to day until he is able to attend.

RULE 171.

Default by defendant in appearing at trial.

If, when an action is called on for trial the Attorney-General, plaintiff or petitioner appears, and the defendant does not appear, then the Attorney-General, plaintiff or petitioner may prove his claim as far as the burden of proof lies upon him.

E. O. xxxvi., R. 18.

RULE 172.

Default of Attorney-General or petitioner in appearing at trial.

If, when an action is called on for trial, the defendant appears and the Attorney-General, plaintiff or petitioner does not appear, the defendant shall be entitled to judgment dismissing the action.

E. O. xxxvi., R. 19.

RULE 173.

Postponement of trial.

The Judge may, if he thinks it expedient for the interest of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

E. O. xxxvi., R. 21.

See Rule 169.

1. *Practice—Postponement of trial—Professional engagements.*—A case will not be postponed on the sole ground of professional engagement elsewhere in another case. The work before the courts could not be carried on if that ground were held good to obtain an enlargement of a trial. This case was, however, enlarged for one week, but upon the terms and conditions that any additional expense the defendant may be put to by this postponement would be borne by the plaintiff in any event. (*Encyclopedia of Pleadings*, Vol. 4, p. 841; *Stewart v. Gladstone*, 7 Chy. Div. 394 cited.) *Re Sylvester v. Cockshutt*, 29th Nov. 1905.

2. *Trial—Adjournment—Terms.*—Where defendants, expecting certain witnesses, whose evidence was material to the defence, would be called by the Crown, did not subpœna such witnesses and they were not in court, an adjournment of the hearing was allowed after plaintiff had rested so

that such witnesses might be subpœnaed by the defendants, upon terms that plaintiff have costs of the day, and that the same be paid before the case be proceeded with on adjournment. *The Queen v. Black et al.*, 6 Ex. C. R. 238.

3. *Costs of the day—Postponement of trial—Counsel fees.*—An action came on for trial, and a postponement was applied for by the defendant, and was ordered upon payment of the costs of the day. *Held*, that counsel fees were chargeable and taxable according to the discretion of the taxing officer, and not according to any arbitrary limit. *Hogg v. Crabbe*, 12 P. R. 14, dissented from. *Outwater v. Mullett*, 13 P. R. 509.

4. *Trial—Postponement—Judge's discretion.*—An order made under the foregoing Rule is entirely within the discretion of the Judge, and such discretion will not be interfered with by the Court of Appeals. *Boucicault v. Boucicault*, 4 T. R. 195; Rule 34, O. 36; *Annual Practice*, 1904, p. 487.

RULE 174.

Directions by Judge at trial

Upon the trial of an action the Judge may at, or after, such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move, to set aside, or vary the same, or to enter any other judgment upon such terms, if any, as he shall think fit to impose, or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial, without the order of the Court or a Judge.

E. O. xxxvi., R. 22.

RULE 175.

Acting Registrars of the Exchequer Court of Canada.

(*a*) The Judge of the Court may from time to time, by General Order, name and appoint a person at any place who shall, if the Registrar, or his Deputy, is not present thereat, act as Registrar of the Court at any sitting held at such place.

(*b*) The District Registrars on the Admiralty side of the Exchequer Court shall, within their respective Admiralty Districts, be Acting Registrars of the Exchequer Court.

(*c*) Until further order, the following persons shall be Acting Registrars of the Exchequer Court for sittings of the Court to be held at the following places, that is to say:—

W. S. Walker, Esquire, Deputy Prothonotary of the Superior Court of the District of Montreal and Deputy Registrar of the Quebec Admiralty District, at Montreal, in the Province of Quebec, for sittings of the Court to be held at the city of Montreal;

Geoffrey Henry Walker, Esquire, Prothonotary of the Court of Queen's Bench for the Province of Manitoba, for sittings of the Court to be held at any place in the Province of Manitoba.

C. H. Bell, Esquire, Clerk of the Supreme Court of the Province of Saskatchewan, for the Judicial District of Western Assiniboia, for sittings of the Court to be held at the town of Regina, in the said Province;

Lawrence John Clarke, Esquire, Clerk of the Supreme Court of the Province of Alberta, for the Judicial District of North Alberta, for sittings of the Court to be held at the town of Calgary, in the said Province; and

Arthur B. Pottenger, Esquire, District Registrar, of the Supreme Court of British Columbia, for the Vancouver Judicial District, and Deputy District Registrar of the British Columbia Admiralty District, for sittings of the Court to be held at the cities of Vancouver and New Westminster, in the Province of British Columbia.

(*d*) Whenever any sitting of the Exchequer Court is held at any place other than the city of Ottawa, and the Registrar of the Court at Ottawa, or his Deputy, is not present, the Acting Registrar for the District or place shall act as Registrar at such sitting, and if there be no such Acting Registrar, or if he be not in attendance, the Court may appoint any other person to act as Registrar at such sitting, and in any case the person so acting as Registrar at such sitting shall, for the purposes thereof, have all the powers and authorities of the Registrar of the Court.

INSTRUCTIONS TO ACTING REGISTRARS.

(Outside of Ottawa).

1. It would be advisable to post up in your office, some six weeks before the sitting of the Court a copy of paragraph (d) of the above Rule 175, which makes provision for your guidance in the performance of your duties, and also a notice of the day at which the prospected sitting is to take place.

The only fees the Acting Registrar is entitled to, under the above Rule, are those mentioned in Schedule S hereto and no more; if any fee for evidence is collected by him he has to remit the same to the Registrar's office at Ottawa.

It would also be well to call the Barristers' attention to Rule 167 to enable them to get certified copies of the pleadings in time for trial.

2. Writs of Subpœna *ad testificandum*, when required, will also be issued from the Registrar's office at Ottawa.

3. Full minutes of the sitting of the Court are to be duly kept; mention being made of the date, the time of the opening and adjourning of the sitting and of the recess (if any), of the swearing of the shorthand writer, the witnesses, and by whom examined and cross-examined, of every important consent of the parties, of all the rulings of the Court and of all filings.

4. All papers and documents of any description filed at the trial are to be regularly docketed by mentioning the style of cause, the general description of such paper, the party filing the same and the date of filing.

5. By the 170th Rule of this Court it is provided that: "in case the "Judge is unable from any cause to attend on the day fixed for any sitting "or for the trial of any issue, such sitting or trial shall stand adjourned "from day to day until he is able to attend."

6. It is desirable that you should be in a position to give the Judge the name of a competent shorthand writer, in case he is required at trial.

Your attention is also directed to Schedule Z 6 hereto, regulating the practice and fees in respect of evidence taken by shorthand writer.

Where the evidence is transcribed from day to day, as may be directed by the Court, a copy of the same may be handed to the plaintiff's and defendant's solicitors respectively upon payment of the fee due by them for the evidence adduced in their behalf; but when the evidence is not so transcribed from day to day, it would be advisable that the shorthand writer should be instructed by you to transmit to the Registrar's office at Ottawa, as soon as possible after the trial, the four copies of the evidence, with his account in duplicate, when a cheque will be sent to him in payment of the same. The money levied by you in pursuance of the above mentioned rules and schedule should be transmitted to the Registrar's office at Ottawa, and the shorthand writer will be, in every case, paid by an official cheque issued from Ottawa.

7. All papers and documents filed before you at trial, together with the minutes of the sitting, should be transmitted to the Registrar's office at Ottawa, immediately after the conclusion of the trial.

8. On application to the Registrar at Ottawa, the Sheriff can obtain forms of account for his services before the Court.

RULE 176.

Seals.

Acting Registrars of the Exchequer Court, who are at the same time District Registrars of the Court on the Admiralty Side thereof, shall, in proceedings in the Exchequer Court, use respectively the seals provided for use in the several Admiralty Districts, and other Acting Registrars shall use such seals as the Judge of the Exchequer Court may from time to time direct.

RULE 177.

Subpœnas.

Subpœnas to witnesses to attend at any place other than the City of Ottawa, may be issued under the hand of the Registrar of the Court and the seal of the Court, according to the existing practice of the Court, or under the hand of the Acting Registrar at the place where the attendance of the witness is desired, and under the seal prescribed for the use of such Acting Registrar.

RULE 178.

Fees.

The Acting Registrars shall be entitled to and shall take to their own use respectively the fees prescribed in the schedule hereto marked S.

RULE 179.

Findings of fact and directions of Judge to be entered by Acting Registrar.

Upon every trial, where the officer present at trial is not the Registrar by whom judgments ought to be entered, the Acting Registrar shall take down all such findings of facts as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and shall, forthwith after trial, transmit such

notes, duly certified under his signature, to the Registrar of the Court, at Ottawa.

E. O. xxxvi., R. 23.

RULE 180.

When Judge directs the Acting Registrar to enter judgment in favour of any party absolutely.

If, under the circumstances mentioned in Rule 179 hereof, the Judge directs that any judgment be entered for any party absolutely, the minutes of trial, duly certified by the Acting Registrar to that effect, shall be a sufficient authority to the Registrar to enter judgment accordingly.

E. O. xxxvi., R. 24.

RULE 181.

Where Judge directs judgment to be entered subject to leave to move.

If the Judge directs that any judgment be entered for the party subject to leave to move, judgment shall be entered accordingly upon the production of the officer's certificate.

E. O. xxxvi., R. 25.

RULE 182.

Evidence generally.

Witnesses at the trial of any action shall be examined *vivâ voce* and in open Court; but the Court, or a Judge, may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient reason to be dispensed with be examined *vivâ voce* by interrogatories or otherwise before a Commissioner or other officer of the Court, provided that where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

E. O. xxxvii., R. 1.

See annotations under sec. 36 of *The Exchequer Court Act*, (R. S., 1906) ante p. 184.

For the law on the question of proof and evidence in the Province of Quebec, see Arts. 1208 to 1256 of the Civil Code for that Province: and for the practice and procedure relating to the same subject, see Arts. 220 to 321 of the Civil Code of Procedure L. C.

1. *Burden of proof—Accident on Government railway.*—On the trial of a petition of right claiming damages, for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence. *Dubé v. The Queen*, 3 Ex. C. R. 147.

2. *Receipt—Error—Parol evidence—Arts.* 14, 1234 *C. C. L. C.*—The prohibition of Art. 1234 C. C. against the admission of parol evidence to contradict or vary a written instrument, is not *d'ordre public*, and if such evidence is admitted without objection at the trial it cannot subsequently be set aside in a court of appeal. Parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Insurance Company v. Brodie*, 5 S. C. R. 1 followed. *Schwersenski v. Vineberg*, 19 S. C. R. 243.

3 *Examination of same witness twice.*—There is nothing illegal in examining the same witness twice on behalf of the same party. It is a matter of discipline entirely in the discretion of the court. *St. Denis v. Grenier*, 2 L. C. J. 93.

4. *Parol testimony—Commencement of proof in writing—Admission—Arts.*1233, 1243 *C. C.*—60 *V. c.* 50,*s.* 20 (*Que.*)—Where a contract is admitted to have been entered into, by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the adduction of evidence by parol as to the amount of the consideration or as to the conditions of the contract. In such a case, the rule that admissions cannot be divided against the party making them does not apply. *Campbell v. Fraser et al.*, 32 S. C. R. 547.

5. *Right to contradict one's own witness on facts material to issue.*—Where a witness (whether a party to the action or not) is called by the Plaintiff to prove a case, and his evidence disproves the case, the Plaintiff may yet establish his case by other witnesses called not to discredit the first, but to contradict him on facts material to the issue, and the right to contradict by other evidence exists, though the Judge may not grant his permission. *Stanley Piano Co. v. Thomson*, 32 Ont. R. 341.

6. *Evidence—Affirmative and negative testimony—Interested witnesses.*—In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.

Evidence of common rumour is unsatisfactory and should not generally be admitted. *Lefeunteum v. Beaudoin.* 28 S. C. R. 89.

7. *Evidence—Appreciation of.*—In an action for damages for personal injuries, the trial judge, who heard the case without a jury, and before whom the witnesses were examined, held that the evidence of the witnesses for the defence was best entitled to credit and dismissed the action. This judgment was sustained on appeal to the Supreme Court because the judgment at the trial was supported by evidence. *Ménard v. Village of Granby*, 31 S. C. R. 14.

8. *Practice—Motion for further evidence when case is standing for judgment—Leave reserved—Irregular affidavits—Indulgence of Court to indigent suitor.*—When at trial leave had been reserved to move, as for a new trial, for an order to take further evidence in a case where the suppliant, in whose behalf such leave had been so reserved, was not taken by surprise and who instead of asking for a postponement and paying the costs thereof, had taken the risk of proceeding with his case, it being shewn upon the motion under leave reserved that the reason why the suppliant had taken the risk of proceeding to trial without the further

evidence was his probability to pay the costs of a postponement,—his client being unable to do so.—The Court exercising its discretion in favour of the indigent suitor, with some hesitation, granted his application, notwithstanding the fact that the affidavits in support of the motion did not comply with the terms of leave upon the terms that suppliant should pay in any event all costs of further inquiry and of this motion. (Cases cited in support *Bourgoine v. Taylor*, 9 Ch. D. 1. Contra, *Shedden v. Patrick et al.*, 1 L. R. (Sc. Ap.) 548), *MacDonald v. The Queen*, January 13th, 1896.

9. *Expert witness—Fees.*—An expert witness is not entitled to refuse until he has been paid his fee for the opinion he is to give, to testify as to any matter revelant to the issues as to which he is competent to speak though it be requested of him to use his technical knowledge or skill in order to answer the question put to him. *Butler v. The Toronto Mutoscope Co.* 21 Ont. L. R. 12.

RULE 183.

Evidence by affidavit in certain cases subject to cross-examination.

Upon any motion, petition or summons, evidence may be given by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

E. O. xxxvii., R. 2.

RULE 184.

Copy of Judge's notes, when to be made.

After the trial of any action or issues by a Judge, the Registrar shall, if so directed by the Judge, cause a copy of the Judge's notes of the evidence to be made, and after careful examination of the same he shall cause such copy to be filed with the other papers in the cause.

RULE 185.

What affidavits to contain.

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies or extracts from documents shall be paid by the party filing the same.

E. O. xxxvii., R. 3.

RULE 186.

Court or Judge may order any person to be examined.

The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or

matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

E. O. xxxvii., R. 4.

See sec. 64 *et seq.* of *The Exchequer Court Act*, *ante* p. 221.

For similar practice in the Province of Quebec, see Art. 240 of the Civil Code of Procedure, L. C.

1. *Examination before trial.*—An application for the examination *vivâ voce*, of a person before trial is premature when made before issues joined; but when an affidavit in support shows the witness is about to leave the Dominion, that the voyage is not a mere pretence for evading examination and that the matter is pressing, the order will be made. *Fischer v. Hahn*, 13 C. B. N. S. 659 followed. *The Queen v. Suitor*, March 21st, 1892.

2. *Evidence on Commission.*—A defendant may be allowed to have his evidence taken on commission outside of the Province, as witness in his own behalf, for use at the trial of the action; but upon terms advantageous to the plaintiff as to the expense of executing the commission. *Ferguson v. Millican*, 21Ont. L. R. 35.

3. *Commission—Evidence—Preventing return.*—A party to an action who procures a commission for taking evidence has no right to prevent its return and is in contempt for interfering with an order of the Court. *Hesse v. St. John Ry. Co.*, 30 S. C. R. 218.

RULE 187.

Order for Commission.

An order for a commission to examine witnesses shall be in the Form No. 1 of Schedule T., and the writ of commission shall be in the Form No. 2 of the said Schedule, with such variations as circumstances may require.

E. O. 488.

RULE 188.

Deponents on affidavit may be cross-examined.

Any person making an affidavit to be used in any action may be required to appear before the Registrar, or any other person specially appointed for that purpose, to be cross-examined thereon. The attendance of such person may be enforced by Subpœna *ad testificandum*. Any person served with a subpœna for such purposes shall be entitled to the same fees as a witness at trial. *Two clear days'* notice of such cross-examination is to be given by the cross-examining party to the opposite party.

Taylor's C. Chy. O. 268-269.

RULE 189.

How affidavits to be drawn.

Affidavits are invariably to be drawn in the first person, and in numbered paragraphs, and no costs are to be taxed for any affidavits not so drawn.

Gen. Rules (Ont.) T. T. 1856, 112.

1. *Affidavit—Made in first person—Costs.*—The Rules of court provide that affidavits are to be made in the first person, and it was held,

upon objection being taken, that if they are not so made that they may be read, but that no cost would be allowed thereunder. *New York Herald Co. v. Ottawa Citizen Co. Ltd.* September 17th, 1907.

2. *Affidavit—Sworn to before institution of action.*—Upon an application for an *interim* injunction in a Trade-Mark case, objection having been taken to the reading of an affidavit sworn to before the institution of the action; the affidavit was allowed to be read upon the undertaking to have the the same re-sworn to and that until compliance thereto, no action would be taken thereunder. *New York Herald Co. v. Ottawa Citizen Co. Ltd.* September 17th, 1907.

3. Under sec. 63 of *The Exchequer Court Act, ante* p. 220, no informality in the heading or other formal requisites, of any affidavit, shall be an objection to its reception in evidence in this Court, if the Court or judge thinks proper to receive it, and no such informality shall be set up to defeat an indictment for perjury.

RULE 190.

When to be filed and served.

Affidavits to be used in support of any motion or application are to be filed when the order *nisi* or summons is moved or applied for, or, if the motion is to be made upon notice, before notice of motion is served, and such affidavits are to be served two clear days before the return of the summons and before the motion is made. Affidavits in reply are to be filed before the application comes on to be heard.

Affidavits in support of an application for interlocutory injunction or other application must be served, according to the practice of the Court, within reasonable time before the application comes on to be heard.

However, an affidavit which has not been served with a summons might be allowed to be read on the return of the summons, with leave to the opposing party to answer within reasonable time if it is seen fit; but if such party has nothing to say in reply, the affidavit would be allowed to be read unconditionally.

JUDGMENT.

RULE 191.

Motion for judgment—Dispensing with trial.

After the pleadings are closed, any party to the cause may apply to the Court or a Judge, upon due notice of such application to the opposite party, for an order dispensing with trial and permitting the cause to be set down forthwith on motion for judgment with liberty to prove documents and facts by affidavits on the motion for judgment, and the Court or a Judge may grant such application.

1. *Order—Judgment—Distinction between same.*—An accepted definition of the word "judgment" in the United States seems to be the following:—"The final determination of the rights of the parties in an action or proceeding." The class of judgments and decrees formerly called interlocutory is included in the definition of the word "order." "Every direction of the court or a judge made or entered in writing and not included in a judgment is an order." *Freeman on Judgment*, pp. 14-15.

2. For the distinction between an order and a final judgment, see the case of *Loring v. Illsby*, 1 California Rep. Ben. 1850, p. 28.

3. *Final and Interlocutory judgments.*—When a judgment, apparently interlocutory, really decides the contention between the parties, it is held to be a final judgment. A judgment which fixes the division line between the properties of the plaintiff and the defendant is a final judgment. *Singster v. Lacroix*, Q. R. 14 S. C. 89.

RULE 192.

Judgment to bo obtained on motion.

Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

E. O. xl., R. 1.

RULE 193.

Subject to leave to move for judgment granted at trial—Setting down on motion for judgment and giving notice.

Where at the trial of an action the Judge has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or if no time has been limited, within *fourteen days* after the trial; the notice of motion shall state the grounds of the motion and the relief sought, and that the motion is pursuant to leave reserved.

E. O. xl., R. 2.

RULE 194.

Setting down on motion for judgment where issues or questions of fact ordered to be determined.

Where issues have been ordered to be tried or issues or questions of fact to be determined in any manner, the Attorney-General, plaintiff or the petitioner may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down and give notice thereof to the other parties within *fourteen days* after his right to do so has arisen, then after the expiration of such *fourteen days* any defendant may set down the action on motion for judgment and give notice thereof to the other parties.

E. O. xl., R. 7.

RULE 195.

Where some only of such issues have been tried.

Where issues have been ordered to be tried or issues or questions of fact to be determined in any manner, and some only of such issues or questions of facts have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply

to the Court or Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

E. O. xl., R. 8.

RULE 196.

No action to be set down for motion for judgment after the expiration of one year.

No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of *one year* from the time when the party seeking to set down the same first became entitled so to do.

E. O. xl., R. 9.

RULE 197.

Proceedings on motion for judgment—May direct matter to stand over and order issues or questions to be first determined—New trial.

Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit; and so soon as the issues are tried, or the report filed, as the case may be, the motion may be brought on again for further consideration on *ten days'* notice by any party, and any application for a new trial of the issues, or to vary or refer back the report of the Judge, Registrar, or other officer, or to reverse the findings therein contained, shall come on and be heard at the same time as the further consideration of the motion for judgment: Provided at least *eight days'* notice of such application shall have been given.

1. *Application to re-open case.*—After an action had been tried and judgment delivered finding in favour of suppliant on an alleged breach of contract, it was referred to an officer of the Court to assess the damages, if any, suffered by the suppliant. Subsequently a motion was made on behalf of the Crown to re-open the case with leave to adduce further evidence. Affidavits were read in support of the application, showing, *inter alia*, that the Crown had material evidence to adduce by which it would be shown there was no contract at all, and further that Counsel had been in possession of such evidence at the time of the trial. *Held*, that the application should be granted upon the Crown paying in any event all costs incurred on the reference, costs of this application and of the further evidence to be adduced respecting the contract, with leave to suppliant to adduce evidence *contra*. *Humphrey v. The Queen*, January 9th, 1891.

2. *Application to re-open case.*—Where an action had been tried and was standing for judgment, an application was made for leave to re-open the case for the purpose of issuing a commission to Holland to adduce

further and material evidence in respect of the trade-mark in question in the action. The application was allowed upon granting both parties leave to join in the commission and to adduce evidence respectively. *DeKuyper v. Van Dulken*, June 26th, 1893.

3. *Practice—Motion to re-open trial—Affidavit meeting evidence produced at trial—Grounds for refusal.*—An application was made after the hearing and argument of the cause but before judgment, for the defendants to be allowed to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purposes before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing. And the application was refused. *Humphrey v. The Queen* and *DeKuyper v. VanDulken* (Audette's Ex. C. Pr. 276) distinguished. *General Engineering Co. v. Dominion Cotton Mills Co. et al.*, 6 Ex. C. R. 306.

4. *Practice—Judgment—Motion to vary.*—An error having been made by the trial judge in his reasons for judgment as to the manner of working out a certain device contained in the claim of a patent, an application was made to vary the judgment. The judge was pleased to have an opportunity to make the correction, but as it did not affect the final result of the judgment, the application was dismissed. *Copeland-Chatterson Co. v. Paquette*, 10 Ex. C. R. 425.

5. *Vary Final Judgment.*—Where a final judgment does not give the party the full benefit of a right which the Court intended he should have, the final judgment will be so varied in this behalf. *Per Burbidge, J. The Queen v. St. Louis*, 22nd March, 1897.

6. *Application to set aside judgment—Re-open case.*—A judgment was set aside and a new trial ordered where the notice of trial given by the suppliant was not served upon the attorney of record or any person authorized to accept service. In this case the statement in defence was signed by the Deputy Minister of Justice as solicitor for the Attorney-General of Canada, and the service upon the secretary of the Solicitor General was held insufficient. *Rogers v. The King*, 3 February, 1909.

RULE 198.

Order may be applied for on admission of facts.

Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

E. O. xl., R. 11.

RULE 199.

Entry of judgment, form of.

Every judgment shall be entered by the proper officer in the book to be kept for the purpose. An office copy of the

judgment stamped with the seal of the Court shall be delivered to the party entering the same. The forms of Schedule U may be used with such variations as circumstances may require.

1. *Decree—Settling.*—Before a decree is passed, there is a succession of regular proceedings before the Registrar; the parties ought to have notice to attend and to have every opportunity of protecting their interests, and if, upon the communications and discussions which may take place, they should consent to any alteration, which the Registrar has reason to believe the Court would sanction, he permits such alteration to be made, and the delay and expense which an application to the Court would occasion are avoided, I do not say that this course of proceeding is regular. Strict regularity would, I conceive, require that every word of the decree should be pronounced or dictated by the Court, and that without a subsequent order of the Court, or at least without personal communication with the Judge, no alteration should be made. *Davenport v. Stafford*, Beavan's Reports (Rolls Court) 311.

2. *Judgment—Amending and varying minutes.*—Where the action was against a partnership and on appeal by the plaintiff, they were represented by a surviving partner only and the Court inadvertently directed that judgment be entered for the plaintiff against the surviving defendant, the minutes of judgment were allowed to be amended by providing that the judgment should be entered against the said defendants instead of against the surviving defendant. *Jackson v. Drake et al., Cout. Cases*, 384; *Leahy v. Town of North Sydney, Cout. Cases*, 404.

3. *Practice—Amending judgment after entry.*—The minutes of judgment, as settled by the registrar, directed that the appellants' costs should be paid out of certain moneys in court, and in this form the judgment was duly entered and certified to the clerk of the court below. Subsequently it was made to appear that there were no moneys in court available to pay these costs, and upon the application of the appellants the Court amended the judgment directing that the costs of the appellants should be paid by the respondents forthwith after taxation. *Letourneau v. Carbonneau*, 35 S. C. R. 701.

4. *Practice—Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge.*—The plaintiffs' action was maintained with costs in the Courts below; but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 S. C. R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences and the minutes were varied accordingly. *United States Savings and Loan Company v. Rutledge*, 38 S. C. R. 103.

5. *Judgment—Vary.*—Where the order for judgment has been erroneously taken, the Judge has the power to amend the minutes of judgment. Settled accordingly. *MacDougall v. Mullin*, 33 C. L. J. 571.

6. *Vary final judgment.*—Where a final judgment does not give the defendant the full benefit of a right which the Court intended he should have, the final judgment will be so varied in that behalf. *The Queen v. St. Louis*, 22 March, 1897.

RULE 200.

Settling of judgment.

Any party to the action may obtain an appointment from

the Registrar for settling the minutes of judgment, and shall serve a copy of the draft minutes and a copy of the appointment upon the solicitor for the opposite party two clear days at least before the time fixed for settling the judgment. The Registrar shall satisfy himself in such manner as he may think fit that service of the minutes of judgment and of the notice of appointment has been duly effected.

When judgment has been delivered, the party desirous of taxing costs, of settling and entering judgment should, through his agent, apply to the Registrar's Office for an appointment. The general practice is to obtain but one appointment for settling the judgment and taxing costs, so that both may be done at one time. A draft of the judgment and the bill are prepared and served on the opposite party with a copy of the appointment. On the return of the appointment the parties attend before the Registrar, and the settlement of the minutes of judgment and the taxing of costs are proceeded with. If any party is dissatisfied with the Registrar's ruling he may appeal to the Judge at Chambers to review the same.

RULE 201.

Minutes settled in absence of party duly served.

If any party fails to attend the Registrar's appointment for settling the draft of any judgment, the Registrar may proceed to settle the draft in his absence.

RULE 202.

When to be dated.

Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced and the judgment shall take effect from that date, unless the Court shall otherwise order or direct that the judgment be antedated or postdated.

E. O. xli., R. 2.

1. *Nunc pro tunc.*—Where on appeal to the Supreme Court of Canada, the judgment of the Exchequer Court had been varied and the case ordered to be sent back to the latter Court with special directions, the judgment of the Exchequer Court given in pursuance of such directions was ordered to be dated of the day of the first judgment appealed from. *Young v. The Queen*, April 12th, 1892.

2. *Nunc pro tunc.*—Where an amendment is ordered to be made to a judgment with the view of expressing the intention of the court, the judgment will be dated *nunc pro tunc*. *Cassels' Digest, S. C. C.* p. 689.

3. *Nunc pro tunc.*—Where parties to an action had died between the date of hearing and the date of judgment, on application it was ordered to date the judgment of the day of hearing. *Cassels' Digest, S. C. C.* p. 688.

RULE 203.

Effect of judgment of non-suit.

Any judgment of non-suit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but, in any case of mistake, surprise or accident, any judgment of non-suit may be set aside,

on such terms as to payment of costs or otherwise, as to the Court or a Judge shall seem just.

E. O. xli. R 6.

The practice of non-suit at common law applies to the suppliant in a petition of right, and upon the question as to whether such non-suit is peremptory, see Clode, *on Petition of Right*, p. 181.

REFERENCES.

RULE 204.

Interpretation.

Unless the context otherwise requires, the expression 'Judge,' as hereinafter used, means a Local Judge in Admiralty of the Exchequer Court; and the expression 'Referee' includes any such Judge and the Registrar or any officer of the Court, or any official or special referee to whom any cause, matter or question is referred.

RULE 205.

A cause may be referred.

Whenever any cause or matter is at issue, and at any stage of the proceeding thereafter, the Court may for the determination of any question or issue of fact, or for the purpose of taking accounts or making inquiries, refer such cause or matter or any question therein to a Judge or other referee for inquiry and report.

See sec. 42 of *The Exchequer Court Act*, (R. S., 1906, ch. 140), *ante* p. 186.

RULE 206.

Proceedings on a reference to a Judge or the Registrar.

Whenever any cause or matter, or any question therein, is referred to a Judge or to the Registrar, he shall, on the application of any party thereto, fix the time and place of the hearing of the reference, of which due notice shall be given to the opposite party, and he shall proceed with the hearing thereof in like manner as at a trial before the Judge of the Exchequer Court. Officers of the Court in attendance at such hearing, and the Solicitors and Counsel of the parties shall be entitled to the like fees on such hearing as at a trial before the Judge of the Exchequer Court.

RULE 207.

Proceedings on a reference to other referees.

Whenever any cause or matter, or any question therein, is referred to any referee other than a Judge or the Registrar, the referee shall, on the application of any party thereto, make an appointment to proceed with the hearing of the reference, of which due notice shall be given to the opposite party. At the time and place appointed such hearing shall be proceeded with *de die in diem*, but may, for good cause, be from time to time adjourned to some other day.

RULE 208.

Copy of pleadings and order of reference to be furnished.

The party who applies to a referee to fix a time and place, or to make an appointment, for the hearing of any reference, shall furnish to the referee for his use a copy of the pleadings, issues and order of reference, certified by the Registrar of the Court.

RULE 209.

Evidence taken on reference.

Evidence shall be taken upon a reference before the referee, and the attendance of witnesses may be enforced by subpœna in the same manner, as nearly as may be, as at a trial before the Judge of the Exchequer Court. In any case of a reference the testimony of any witness may be taken down in shorthand by a stenographer, who shall be previously sworn to faithfully take down and transcribe the same.

RULE 210.

Power of referee.

A referee shall have the same authority in the conduct of the reference as the Judge of the Exchequer Court, when presiding at any trial before him, and the same power to direct that judgment be entered for any or either party as the said Judge; but nothing herein contained shall authorize him to commit any person to prison, or to enforce any order by attachment.

E. O. xxxvi., R. 50.

See sec. 42 of *The Exchequer Court Act* and annotation thereunder, p. 186.

RULE 211.

Referee may reserve questions for decision of Court.

A referee may, before the conclusion of any hearing before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct, and the Court shall have power to require any explanations or reasons from the referee and to remit the cause or matter, or any part thereof, for further inquiry to the same or any other referee.

RULE 212.

Report, &c., to be filed.

The report of a referee, with a copy of the evidence taken on the reference, and the exhibits and other papers and documents filed with the referee, shall be transmitted by him to the Registry of the Court as soon as possible after the report is signed, and the Registrar, on receipt of the same, shall forth-

with give notice to all the parties. Thereupon any party to the proceeding may cause such report, evidence, exhibits and other papers and documents to be filed, and shall give notice of such filing to the other parties to the proceeding.

1. *Referees' Report—Fees to be taxed and paid before Report handed to Plaintiff's solicitor.*—By a judgment of this Court three Special Referees were appointed to enquire and report to the Court upon matters of account in the said judgment mentioned. Some time after, the Referees transmitted to the Registrar of the Court a sealed document purporting to be their Report and, under another cover, an account for their fees and charges in connection with the reference, together with a letter requiring the Registrar not to deliver the report to the parties or permit it to be filed until after their fees and charges had been paid. The Referees also notified the parties of the above. Whereupon the Plaintiffs moved for an order that the Referees be directed to deliver to them their report without previous payment of the fees demanded by them for delivery of the same, and it was ordered that the Report be handed back to one of the Referees, that the Referees' bill be taxed and that upon payment of the same, as taxed, the Report be handed over to the Plaintiff's solicitor. *McLean et al., v. The Queen* (No. 538), October 21st, 1892.

2. *Referees' Report—Remuneration—Taxation—Report held until fees paid.*—This case was referred to three special Referees to ascertain the value of the bridge across the Chambly River. They made their report and notified the parties that their report was now in the hands of one of the Referees under sealed envelope and that it could be taken up at any time by either party upon payment of their fees and charges,—a copy of their bill being transmitted to the parties at the same time. An appointment was taken by the plaintiff to tax the Referees' costs, whereupon the Defendant applied to the Judge for an order to compel the Referees to open and file the report without having to pay their fees. *Held* that as the Report was not filed into Court, the application pertained of an extrajudicial proceeding and the Judge refused to entertain the same. March 3rd, 1899.

Whereupon and subsequently thereto a summons having been taken out to show why the Referees' report should not be filed unconditionally and why the Referees' remuneration should not be taxed. On the return of the same it was ordered that the Referees' report be filed and opened unconditionally and that their costs be taxed and paid before any adjudication be made upon the Report. *Yule et al., v. The Queen* (No. 991), March 17th, 1899.

RULE 213.

Appeal from report.

Within *fourteen days* after service of the notice of the filing of any report, any party may, by a motion, setting out the grounds of appeal, of which at least *eight days'* notice is to be given, appeal to the Court against any report, and upon such appeal, the Court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report.

E. O. xl., R. 6.

1. *Award—Arbitrator—Average estimate—Wrong principle.*—Where an award for land expropriated had been arrived at by taking an average

of the different estimates made on behalf of both parties according to the evidence, the same was properly set aside, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded. *Grand Trunk Ry. Co. v. Coupal*, 28 S. C. R. 531.

2. *Evidence—Error—Interference.*—When it does not appear from the evidence that there was error in the judgment appealed from, the appellate court will not interfere with the decision of the Court below. *The Queen v. Armour*, 31 S. C. R. 499.

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

4. *Expropriation—Excessive damages—Reference back to Special Referees.*—Where upon an appeal from the report of special Referees, it appeared to the Court that the amount of damages reported by them was excessive, the court thought it expedient to refer the matter back to them with special directions. *The King v. Shives et al.*, 9 Ex. C. R. 200.

5. *Submission to official Arbitrators—Claim heard and reported upon by two Arbitrators—Void.*—Prior to the making of the above Rule a claim had been referred to the official arbitrators for investigation and award. The enquiry had been proceeded with and heard before two of such arbitrators only, and a report upon the claim duly made by them in favour of the claimant. On motion for judgment by claimant upon such report it was held that the hearing of the claim by two of the official arbitrators only was not a hearing within the meaning of the Rule and that judgment could not be entered on the report. *Rioux v. The Queen* 2 Ex. C. R. 91.

6. *Appeal—Evidence.*—When an award of the Official Arbitrators, in an expropriation matter, was not excessive in view of the evidence before them, the Court sitting on appeal declined to interfere with it. *The Queen v. Carrier*, 2 Ex. C. R. 101.

RULE 214.

Report becoming absolute—Judgment on Report.

The report of a Judge, or the Registrar, or any other officer of the Court, to whom a reference has been made, shall become absolute if not appealed against within *fourteen* days after the service of notice of filing of the same. Unless otherwise directed by the order of reference, judgment on such report will not be entered without an order thereupon, obtained upon motion for judgment of which at least *eight* days' notice shall be given.

1. *Report absolute—Court bound to adopt same.*—If the Report of a Referee is not appealed from within the time limited by the Rules, it becomes absolute and confirmed by lapse of time and the Court, on motion for judgment, is not at liberty to go into the whole case upon the evidence, but is bound to adopt the Referee's report. *Freeborn v. Vandusen*, 15 Ont. P. R. 264.

2. *Referee's Report—Confirmation by lapse of time.*—When the Referee's report has been confirmed by lapse of time and not appealed against, the Court, on motion for judgment, is not at liberty to go into the whole case upon the evidence, but is bound to adopt the Referee's

finding and to give the judgment which these findings call for. *Valad v. Township of Colchester South*, 24 S. C. R. 622.

3. *Appeal—Jurisdiction—Final judgment—Time for appealing—Exchequer Court Act, R. S.* 1906 *c.* 140, *s.* 82—*Exchequer Court rules.*—Notwithstanding that no appeal has been taken from the report of a referee within the fourteen days mentioned in Rules 19 and 20 of the General Rules and Orders of the Exchequer Court of Canada (12th December, 1899),* an appeal will lie to the Supreme Court of Canada from an order by the judge confirming the report, as required by the said sections, within the thirty days limited by section 82 of *The Exchequer Court Act*, R. S. 1906 ch. 140. *A. & L. S. Ry. Co. v. Royal Trust Co.*, 41 S. C. R. 1.

*The rule has since been amended and is now Rule 214.

RULE 215.

Proceedings where judgment against the Crown directing payment of money.

No execution shall issue on a judgment against the Crown for the payment of money. Where in any proceeding there is a judgment against the Crown directing the payment of money, for costs or otherwise, the Judge or the Registrar may, on application, certify to the Minister of Finance the tenor and purport of the judgment, and such certificate shall be by the Registrar transmitted to, or left at, the office of the Minister of Finance.

On consideration of the question of issuing a certificate to the Minister of Finance of the tenor and purport of a judgment under the provisions of the above rule, it appearing that the practice had not hitherto been the one way and it being desirable that such practice should be uniform,it was ordered and directed that as a matter of practice no such certificate should be issued before the costs are taxed, except by consent of both parties to the action. *Per Burbidge, J.*

The certificate of judgment referred to in the above Rule 215, will not be issued until after t he expiry of thirty days from the delivery of the judgment, unless a declaration to the effect that the unsuccessful party does not intend appealing, be filed of record.

Notice of appeal must be given to the Registrar of the Exchequer Court by the party appealing. See Rule 298.

The following form of certificate to the Minister of Finance and Receiver General may be used:—

IN THE EXCHEQUER COURT OF CANADA.

Between

His Majesty the King on the information of the Attorney-General of Canada,

Plaintiff;

AND

A. B. and C. D.,

Defendants.

To the Honourable the Minister of Finance and Receiver-General for the Dominion of Canada:

I hereby certify that on the.....day of.....A.D. ....., it was by the said Court ordered and adjudged that the above named defendants were entitled to recover from His Majesty the King

the sum of $.....with interest thereon at the rate of five per centum per annum from the.....day of.....A.D.,..... to the.....day of.....A.D.....(*the date of the judgment*), and the costs of the action, which have been taxed and allowed at the sum of.....(*if any other direction insert here*)

Dated at Ottawa this.....day of.....A.D. 19....

J. E. C.

See also form of similar certificate in actions instituted by Petition of Right, at the end of *The Petition of Right Act*, ante, pp. 241, 243.

Under sec. 53 of *The Exchequer Court Act* (*ante*, p. 216) the Minister of Finance is invested with the discretionary power to allow interest upon the moneys or costs, recovered under judgment, at a rate not exceeding four per centum from the date of such judgment until such moneys or costs are paid.

WRITS OF EXECUTION.

RULE 216.

Judgment for payment of money against any party other than Crown may be enforced by fi. fa. or sequestration.

A judgment or order for the payment of money against any party to a suit other than the Crown may be enforced by writs of *fieri facias* against goods, *fieri facias* against lands, or sequestration.

See sections 54, 55, 56 and 57 of *The Exchequer Court Act* (R. S., 1906, ch. 140), *ante*, p. 217.

RULE 217.

Judgment for payment of money into Court may be enforced by sequestration.

A judgment for the payment of money into Court may be enforced by writ of sequestration.

E. O. xlii., R. 1.

See Rules 245 and 246 for form of writ of sequestration.

Sequestration is in the nature of contempt proceedings:—It is not a "final" order, but implementary to final judgment.

When a man does not obey an order of the Court, made in some civil proceeding, to do or to abstain from doing something: as where an injunction is granted in an action against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt of Court, *that is really only a procedure to get something* done in the action. Per Cotten, L.J., in *O'Shea v. O'Shea*, 15 Prob. Div. at p. 62.

"Interlocutory Order" is not confined to an order made between writ of final judgment, but means an order other than final judgment." *Smith v. Cowell*, 6 Q. B. D. 75, and see *Manchester &c. Bank v. Parkinson*, 22 Q. B. D. 175.

Sequestration is "a remedy by writ for the taking of property, and the rents and profits thereof, either to enforce a decree, or to preserve the subject-matter of the suit." 3 *Black, Com.* 444.

The Supreme Court will not entertain an appeal from a judgment or order dealing with a mere matter of procedure. *O'Donohoe v. Beatty*, 19 S. C. R. 356; *South Colchester v. Valade*, 24 S. C. R. 622.

An order for attachment for contempt is not a final judgment from which an appeal lies. *Ellis v. Baird*, 16 S. C. R. 147.

As to the origin and true nature of sequestration see *Daniell's Practice*, 7 Ed. (1901), Vol. 1, p. 727:—

"A decree of the Court of Chancery, unless it was for land, originally operated only *in personam*, and the only method of enforcing it was by process of contempt. It was also competent to the party claiming the benefit of the decree, where the disobedient person either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration, directing the Commissioners to sequester the personal property of the defendant and the rents and profits of his real estate, and to keep him from the enjoyment of them till he had cleared his contempt. It was only a personal proceeding, and did not alter the nature of the decree."

Clearly then upon this exposition of the nature of sequestration, it is not a substantive judicial proceeding, or cause, but merely an interlocutory proceeding for the purpose of enforcing a judgment or decree already pronounced in a judicial proceeding between the parties. It is quite clear from *Daniell's Chancery Practice*, Vol. 1, Chap. 15, p. 729, that the subject is entitled to enforce judgments and orders by writ of sequestration.

"A writ of sequestration is a process for contempt, used by Chancery Courts to compel a performance of their orders and decrees." *Roberts v. Paton*, 18 Mo. 484.

No attachment lies against a corporation in contempt, the mode "of compulsion is by sequestration." *Rex v. Windham, Cowp.* 377.

"It is a process of contempt *in rem*." *Holmstead and Langton's Jud. Act*, p. 1036.

"Sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree." *Black. Com.* iii, p. 444.

"Sequestration is a means of enforcing obedience to a judgment or order requiring a person to do an act." *Sweet's Law Dict.*, p. 751. See also 1894, 1 Q. B. 102; 34 Ch. D. 691; 37 Ch. D. 104.

In McDermott v. Judges of British Guiana (L. R. 2 P. C. 341) the Privy Council held that the exercise of the power of a Court of Record to commit for contempt being discretionary was not the subject of appeal.

"Where an order for a sequestration has been made by a master and confirmed by the Court, the exercise of that discretion ought not to be interfered with unless it is clear that he has proceeded on some erroneous principle." *Per Lord Herschell* in *Hulbert v. Cathart* (1896), A. C. at p. 474. See also *Lord Davey* at p. 476. See also *Holmstead and Langton* at p. 1037.

An order for a writ of sequestration is not a final order because it is not "a final decision of the claim on the merits". See *in re Compton, Norton v. Compton*, 27 Ch. D. at p. 394.

Sequestration—Writ of—Patent—Infringement.—A writ of sequestration having been applied for in a patent case for an alleged contempt of Court in continuing to infringe the plaintiff's patent after the order for an injunction restraining such infringement had been entered, upon the grounds: 1st. That since the order for the injunction the defendant company had sold separators containing steadying devices or drags identical with those that were held to be infringements of the plaintiffs' device; and secondly, that the company had since the hearing and

judgment adapted another form of such device or drag that is, it was argued, an infringement of the plaintiffs' patent, and within the terms of the injunction order mentioned.

The Court found upon the first ground that no sale had been brought home to the company or to any of its officers as to justify the conclusion that there was a wilful disobedience of the order of the Court and that the case was not one which called for the exercise of the authority of the Court to punish for contempt. On the second ground the Court held that the device used by the Defendant Co. and complained of in this application was not an infringement of the patent. The plaintiff by not obtaining in Canada a patent for the device first used by them gave or dedicated to the public all that was involved in it and the Defendant Co. were free to use it. Application refused. *Sharples v. The National Mfg. Co.*, 9 Ex. C. R. 469.

RULE 218.

For recovery or delivery of possession of land by writ of possession.

A judgment for the recovery or the delivery of possession of land may be enforced by writ of possession.

E. O. xlii., R. 3.

See Schedule Y for form of writ of possession.

RULE 219.

Where judgment for recovery of any property other than land or money.

A judgment for the recovery of any property other than land or money may be enforced—

By writ for delivery of the property.

By writ of attachment;

By writ of sequestration.

E. O. xlii, R. 4.

See Rules 243, 244, 245, 246, and 247.

For form of writ of delivery, see Schedule YY.

For form of writ of sequestration, see Schedule X.

Writ of attachment:—The following form may be used:—

IN THE EXCHEQUER COURT OF CANADA.

Between

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of .....

Greeting.

WE COMMAND YOU to attach C. D., so as to have him before Us in Our Exchequer Court of Canada, wheresoever the said Court shall then be, there to answer to Us, as well touching a contempt which he, it is alleged, hath committed against Us, as also such other matters as shall

be then and there laid to his charge, and further to perform and abide such order as Our said Court shall make in this behalf, and hereof fail not and bring this writ with you.

WITNESS the Honourable.....Judge of Our Exchequer Court of Canada, at.....this.....day of .....in the year of Our Lord, one thousand nine hundred..... and in the.....year of Our Reign.

Registrar.

RULE 220.

Where judgment requires the doing of, or abstaining from, any act.

A judgment requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by writ of attachment or by committal.

E. O. xlii., R. 5.

RULE 221.

No attachment to issue to compel payment of money.

No writ of attachment or other writ or process against the person is to issue to compel the payment of money.

See sec. 55 of *The Exchequer Court Act*, ante p. 217.

RULE 222.

Meaning of terms 'writ of execution' and 'issuing execution' against any party.

In these rules the term 'writ of execution' shall include writs of *fieri facias* against goods and against lands, sequestration and attachment and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution' against any party shall mean the issuing of any such process against his person or property as under the preceding rules shall be applicable to the case.

E. O. xlii., R. 6.

RULE 223.

No execution to be issued without production of judgment.

No writ of execution shall be issued without the production to the officer, by whom the same should be issued, of the judgment upon which the writ of execution is to issue, or an office copy thereof shewing the date of entry, nor without leaving with such officer a copy of the said writ. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

E. O. xlii., R. 9.

See Rule 229. No writ of *fi.-fa.* to issue before the expiry of 15 days from the date of judgment.

RULE 224.

Præcipe to be issued.

No writ of execution shall be issued without a *præcipe* being filed for that purpose.

E. O. xlii., R. 10.

RULE 225.

When writ to be dated.

Every writ of execution shall bear date of the day on which it is issued.

E. O. xlii., R. 12.

RULE 226.

Poundage fees and expenses of execution may be levied.

In every case of execution the party entitled to execution may levy the interest, poundage fees and expenses of execution over and above the sum recovered.

E. O. xlii., R. 13.

RULE 227.

How writ to be endorsed.

Every writ of execution shall be endorsed with the name and residence of the attorney or solicitor who issues the same, and if issued through an agent the name and residence of the agent also.

E. O. xlii., R. 11.

RULE 228.

Directions to sheriff on.

Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other officer to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of five per cent. per annum from the time when the judgment was entered up.

E. O. xlii., R. 14.

Semble that when the writ of Fi. Fa. seeks execution for an amount less than the judgment debt, that remittance or credit should accordingly be endorsed on the back of the writ. C.C.P. L.C. Art. 555: Chitty's Arch. 801. *The Queen v. Larkin et al.* January 20th, 1896.

RULE 229.

Writs of fi. fa. may be issued fifteen days after judgment except in certain cases.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, after the expiration of 15 days from the time when the judgment was duly rendered, be entitled to sue out one or more writ or writs of *fieri facias* against goods and against lands to enforce payment thereof, subject nevertheless as follows:—

(*a*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b*) The Court or a Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any

time after the expiration of the periods hereinbefore prescribed.

E. O. xlii., R. 16.

Writs may be amended, see rule 306.

1. *Writ of execution—Should be for amount of judgment—Amendment.*—After proceeding with the trial during several days, the parties hereto arrived at a settlement and judgment by consent was ordered to be entered against the defendants for a given sum and was so entered by the Registrar of the Court. By a private agreement between the parties, no minute of the same being filed of record, it was arranged that certain defendants were to be looked to for a fixed portion of the judgment debt. Subsequently writs of Fi. Fa. against the goods and lands were issued by the Plaintiff, but instead of directing execution for the full amount due under the judgment, the amount claimed in the writs was the amount fixed by the private agreement. Upon an opposition to annul being filed to set aside the writs as being irregular, *inter alia*, in not seeking execution for the whole amount due under the judgment. *Held*, upon an application by the plaintiff for leave to amend the writs, that while the writs were irregular in not seeking execution for the full amount of the judgment yet an order was given maintaining the opposition, but allowed the amendment of the writs under Rule 270 (Now Rule 306), with costs to the opponents.

Semble, that where the writ of fi. fa. seeks execution for an amount less than the judgment debt, that remittance or credit should accordingly be endorsed on the back of the writ. (C. C. P. L. C. Art. 555; Chitty's Archibold's, Q. C. 807.) *The Queen v. Larkin et al.* January 20th, 1896.

2. *Effect of Sovereign's demise on un-executed fi. fa. against Crown's debtor.*—We find at p. 1000 of *Tidd's Practice*, that as the "sheriff is deriving his authority from the writ it has been holden that if the plaintiff die after a fi. fa. is sued out, it may be executed notwithstanding and his executor or administrator shall have the money."

That is also the law to-day. See *Chitty's Arch.* 959.

By the English Crown Office rules of 1886, Orders XLII of the Rules of the Supreme Court 1883 (Execution) are applied to all proceedings on the Crown side of the Queen's Bench Division. (See *Short & Mellor's Crown Office Prac.* pp. 541-557).

The Exchequer Court Rule 2 of the 13th November, 1891, now embodied in Rule No. 1 involves the English practice; but that question is made clear by sec. 21 of *The Exchequer Court Act.*

Under 4 Will. & Mary ch. 18 s. 6 and Anne stat. 1 ch. 8, writs of fi. fa. remain in force notwithstanding the demise of the Sovereign and both criminal and civil processes are continued in force in such an event. These two statutes are in force and form part of what might be styled the Federal Common Law of Canada.

Although the Crown is not bound by statutes of procedure unless expressly named, yet it may take advantage of their provisions, if it elects to do so. (*Chitty's Prerog.* 382.)

3. *Demise of Crown.*—On this question in Canada, see now ch. 101 R. S., 1906.

4. *Damages—Personal injury—Exempt from seizure.*—The damages allowed for bodily injury constitutes a right exclusively attached to the debtor's person and are therefore exempt from seizure. *Cochrane v. McShane et al.*, Q. R. 25 S. C. 188.

RULE 230

Renewing writs.

A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof.

E. O. xlii., R. 26.

The following form of renewal may be used:—

Writ renewed this.....day of October, A.D. 19...., in pursuance of leave given under order of the Honourable Mr. Justice.....bearing date the.....day of .....19.....

Witness my hand and the seal of the Exchequer Court of Canada, at Ottawa, this .....day of.....A.D. 19....

L. A.,
Registrar.

RULE 231.

Evidence of Renewal.

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

E. O. xlii., R. 17.

Writ fi. fa.—Lost.—Upon being shewn a writ of fi. fa. had been lost in the mail, a new writ *nunc pro tunc* was issued to have the same force and effect as the original writ. *Fairchild v. Crawford*, 16 C. L. T. 359.

RULE 232.

Execution may issue within six years.

As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

E. O. xlii., R. 18.

RULE 233.

After that time by leave of Court or Judge.

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue

execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall seem just.

E. O. xlii., R. 19.

RULE 234.

Every order of Court or Judge may be enforced in the same manner as judgment.

Every order of the Court or a Judge, whether in an action, cause or matter, may be inforced in the same manner, as a judgment to the same effect, and it shall in no case be necessary to make a Judge's order a rule or order of the Court before enforcing the same.

E. O. xlii., R. 20.

RULE 235.

Enforcing order or judgment against person not being party to an action.

Any person not being a party in an action who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process is if he were a party to the action, and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

E. O. xlii., R. 21.

1. *Garnishee—Crown as.*—Garnishee process cannot issue against the Crown. Under Ord. XLV. r. 1 of the English Jud. Act, any person who has obtained a judgment or an order for payment of money may obtain an order for attachment or garnishee against moneys in the hands of a third person due to the attaching creditors (See *Chitty's Arch. Prac.* 14 Ed. p. 927); but no garnishee order or order for attachment can be made against the Crown. *Gidley v. Lord Palmerston* 3 B. &. B. 275; *McBeath v. Haldimand.* 1 T. R. 172.

This is also the law in the United States, see *Rood on Attachment*, sec. 25. The whole question is elaborately discussed in 18 Am. Decisions at p. 200.

2. Garnishee process cannot be issued against the Crown. *Gidley v. Lord Palmerston* 3 B. & B., 275; *McBeath v. Haldimand* 1. T. R. 172; Am. Dec. 200; *Chitty's Archibold* 14 Ed. 927.

3. *No Garnishee order against Crown.*—A garnishee order cannot be made against the Crown. *Stewart v. Jones*, 19 Ont. P. R. 230.

4. *Garnishee process, Crown seeking the same—English Order* 45, *Rule* 1—*Practice—Extent.*—Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by Information by the Crown. The Crown's remedy is by writ of Extent. *The Queen v. Connolly et al.*, 7 Ex. C. R. 32.

RULE 236.

Application for stay of execution.

Any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded, and the Court or Judge may give such relief and upon such terms as may be just.

E. O. xlii., R. 22.

WRITS OF FIERI FACIAS.

RULE 237.

Forms of writs of fi. fa.

Writs of *fieri facias* against goods and lands may be in the form given in Schedule V, and shall be executed according to the exigency thereof.

RULE 238.

What interests may be sold under such writs.

Any interest equitable as well as legal of an execution debtor in goods or lands may be sold under writs of *fieri facias*.

RULE 239.

Lands may not be sold until after lapse of time enacted by laws of Province within which lands are situate.

Lands shall not be sold under a writ of *fieri facias* within a shorter period than that provided for by the laws of the Province within which the lands are situate; but such period may be either enlarged or shortened by the Court or a Judge.

RULE 240.

Lands and goods to be bound from delivery of writ.

Lands and goods respectively shall be bound for the purposes of execution from the date of the delivery of writs of *fieri facias* to the sheriff or other officer.

RULE 241.

Writ of venditioni exponas may issue, form of.

Upon the return of the sheriff or other officer, as the case may be, of 'lands or goods on hand for want of buyers' a writ of *Venditioni Exponas*, in the form in Schedule W, may issue to compel the sale of the property seized.

See secs. 54, 56 and 57 of *The Exchequer Court Act* (R.S., 1906, ch. 140) *ante* p. 217.

RULE 242.

Sheriff to follow laws of his province as to mode of selling.

In the mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer shall, except in so far as the exigency of the writ otherwise requires or as is other-

wise provided by these Rules, follow the law of his province applicable to the execution of similar writs issuing from the Superior Court or Courts of original jurisdiction therein.

See secs. 54 to 58 of *The Exchequer Court Act*, (R. S., 1906, ch. 140) *ante* p. 183.

WRIT OF ATTACHMENT.

RULE 243.

Writ of attachment to be executed according to exigency thereof.

A writ of attachment shall be executed according to the exigency thereof.

See annotations under Sec. 68 of *The Exchequer Court Act*, (ch. 140, R. S., 1906), *ante* p. 222 and under Rule 152.

Under the provisions of sec. 870 of ch. 146 R. S., 1906, the Judge may direct the prosecution of a person guilty of perjury before him and commit said person to be prosecuted at the next term of the Criminal Court; he may also permit him to enter into a recognizance conditioned for his appearance at said next term. The Judge may further require any person to enter into a recognizance conditioned to prosecute or give evidence against such person directed to be prosecuted.

For contempt of court respecting comments by newspaper on pending proceedings see *Crown Bank v. O'Malley*, 44 Ch. D. 649.

RULE 244.

No writ of attachment to be issued without leave of Court or Judge.

No writ of attachment shall be issued without the order of the Court or a Judge.

See Rule 247.

WRIT OF SEQUESTRATION.

RULE 245.

When writ of sequestration may issue.

When any person is by any judgment or by any order of the Court or Judge directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining an order for that purpose, to issue a Writ of Sequestration against the estate and effects of such disobedient person.

E. O. xlvii.

See annotations under Rule 217.

RULE 246.

Form and effect of.

Such Writ of Sequestration may be in the form given in Schedule X hereto, and it shall have the same effect as the Writ of Sequestration in use in His Majesty's High Court of Justice

in England has, and the proceeds of the sequestration, subject to the provisions of these Rules, may be dealt with in the same manner as the proceeds of Writs of Sequestration are dealt with according to the practice in that behalf, from time to time in force in His Majesty's said High Court of Justice.

RULE 247.

Court or Judge may order proceeds of to be paid into Court.

The Court or a Judge may, in its or his discretion, order the proceeds of any Writ of Sequestration, whether the same be lands, goods or other property, to be sold and the money produced by the sale to be paid into Court.

WRIT OF POSSESSION.

RULE 248.

When writ of possession may issue.

A judgment that the Crown or any other party do recover possession of any land may be enforced by Writ of Possession, in the form given in Schedule Y, and in the manner from time to time in force in actions for the recovery of the possession of land in His Majesty's High Court of Justice in England.

E. O. xlviii., R. 1.

RULE 249.

May issue on affidavit.

Where by any judgment any person therein named is directed to deliver up possession of any lands to the Crown or some other party, the party prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a Writ of Possession on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.

E. O. xlviii., R. 2.

WRIT OF DELIVERY.

RULE 250.

Writ of delivery.

A writ for delivery of any property, other than land or money, may be in the form in Schedule YY hereto and may be issued and enforced in the manner from time to time in use in actions of *detinue* in His Majesty's High Court of Justice in England.

E. O. xlix

CHANGE OF SOLICITORS.

RULE 251.

Change of attorney or solicitor.

A party suing or defending by an attorney or solicitor shall be at liberty to change his attorney or solicitor in any action, cause, or matter, without an order for that purpose, upon notice of such change being filed in the Office of the Registrar, and

upon payment of his attorney's or solicitor's costs; but until such notice and some document evidencing such payment are filed, the former attorney or solicitor shall be considered the attorney or solicitor on the record of the party.

RULE 252.

Death, &c., of attorney or solicitor.

Upon the attorney or solicitor of one of the parties ceasing to act as such, either in consequence of being appointed to a public office incompatible with his profession, or of suspension or death, notice must be given to the opposite party of the appointment of the new attorney or solicitor before the latter can proceed in the action. If the party who employed the deceased attorney or solicitor neglects to appoint a new one after notice, the opposite party may proceed in the action as if the party were acting in his own behalf in the action.

E. O. vii, R. 44; Wilson's Judicature Act, p. 143, and C. C. P. L.[C., Art. 200 *et seq.*

CHANGE OF PARTIES BY DEATH.

RULE 253.

Action not to be abated by marriage, etc.

An action shall not become abated by reason of the marriage, death or insolvency of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*.

E. O. L., R. 1.

RULE 254.

Addition of parties in certain cases.

In case of the marriage, death or insolvency or devolution of estate by operation of law, of any party to an action, the Court of a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, assignee, or other successor in interest, if any, of such party, be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just and shall make such order for the disposal of the action as may be just.

RULE 255.

Continuation of action in case of assignment or change of estate or title.

In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

E. O. L., R. 3.

RULE 256.

Adding or changing parties in certain cases.

Where by reason of marriage, death or insolvency, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, or for any other cause, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

E. O. L., R. 4.

Under the provisions of the foregoing Rule, in case of the demise of the Sovereign, an order of revivor should be taken out, before continuing the action.

1. *Adding party by consent.*—The consent under which an order is taken to add a party to an action must be signed by the party himself, the signature of the solicitor will not be sufficient. *Fricker v. VanGrutten* (1896), 2 Ch. 649.

2. *Contract—Demise of Crown.*—A contract between a subject and the executive authority of the Dominion will not be affected or defeated by the demise of the Crown. *Johnson v. The King*, 8 Ex. C. R. 360.

3. *Adding party after judgment.*—An application to add party by amendment after final judgment will be refused. *Johnson et al., v. Consumer's Gas Co.*, 17 Ont. P. R. 297.

4. *Added party—Trial—Petition of Right—Title—Husband and wife—* Art. 1483, C.C.—Where a case had been referred to the Exchequer Court by the Head of a Department, pursuant to sec. 23 of *The Exchequer Court Act*, it appeared, after evidence had been adduced, on a reference of the matter to the Registrar of the Court that the wife of the plaintiff had some interest in the property in connection with which damages were claimed,—the plaintiff, while expressing through his Counsel his willingness to have his wife added as a party plaintiff, undertook to have her intervene and give jointly with him the receipt or release required if damages were allowed, and the Registrar ordered accordingly to make the money recoverable payable subject to the undertaking. On appeal from the Registrar's Report, the Court ordered, *inter alia*, that the wife be added as a party plaintiff to the action. *Price v. The King*, 10 Ex. C. R. 133.

It will appear from the above decision that a party can be added as a party plaintiff either in a case instituted by Petition of Right or in a case instituted by a Reference by the Head of a Department under the provisions of sec. 23 of *The Exchequer Court Act*.

5. *Adding parties—Patent case—Consent—Signed by party.*—Order 16, Rule 11, as to adding parties applies equally to Patent cases as well as to others. *Vangelder v. Sowerly*, L. R. 44, Ch. Div. 374. This rule will apply as well to adding a plaintiff or a defendant, at the application of either

party. A consent in writing allowing to add parties must be signed by the party himself, the consent given in writing and signed by the solicitors is not sufficient. *Fricker v. Van Grutten* (1896), 2 Ch. 649.

6. *Adding parties—Co-contractors.*—When there are several joint contractors and that the action is brought only against one of them, the defendant is entitled as of right to have his co-contractors joined as defendants. *Pilley v. Robinson*, L. R. 20 Q. B. 155, and cases therein cited.

RULE 257.

Service of order for.

An order so obtained shall, unless the Court or Judge should otherwise direct, be served upon the continuing party or parties to the action, or their attorneys or solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith, who is not already a party to the action, shall be bound to file his defence thereto within the same time and in the same manner as if he had been served with a copy of the information, petition of right, or statement of claim, as the case may be.

E. O. L., R. 5

RULE 258.

Application may be made to discharge or vary such order.

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within *twelve days* from the service thereof.

E. O. L., R. 6.

RULE 259.

When person served is under any disability.

Where any person being under any disability other than coverture, and not having a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within *twelve days* from the appointment of a guardian or guardians *ad litem* for such party, and until such period of *twelve days* shall have expired such order shall have no force or effect as against such last-mentioned person.

E. O. L., R. 7.

RULE 260.

Persons appointed to represent a class.

In any case in which the right of an heir-at-law, or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such

heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense or for some other reason it will be convenient to have the questions of construction determined before such heir-at-law, next of kin or class shall have been ascertained by means of inquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, next of kin or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin or class so represented.

E. O. R. 154.

Under the Winding Up Act, as amended by ch. 51 6-7 Ed. VII.,the Court is given power to appoint and nominate Solicitor and Counsel to represent a class of creditors, claimants or shareholders.

1. *Adding parties—Class—Representatives.*—Where in a case, in which persons not before the Court might be interested and where the Court is of opinion it might decide in favour of the parties asking for judgment, it was ordered that such persons, or class of persons, be added parties before the final disposition of the case and the hearing or trial. *Hogaboom v. The Queen* (17th May, 1901). (See evidence, p. 9).

2. *Adding parties—Class—Representation.*—When on appeal to the Supreme Court of Canada it appeared that the interest of other bondholders than those who were parties to the case was involved, Counsel were not allowed to proceed any further with their argument and the Court ordered the matter to be remitted to the Court below for the purpose of having representation therein of all necessary parties before judgment should be given by the Court thereon. *The King v. Quebec, N. S. Turnpike Road Trustees, Cout. Cases* 316.

RULE 261.

Conduct of action—Costs.

The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as it or he may think fit, and may make such order in any particular case as it or he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

E. O. R. 170,

THIRD PARTY PROCEDURE.

RULE 262.

Notice to third party in cases of contribution, etc.

Where a defendant claims to be entitled to contribution, or indemnity, over against any party not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal of the Court. A copy of such notice shall be filed with the Registrar and served on such person according to the rules of this Court relating to services. The notice shall state the nature and ground of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time

limited for delivering his defence. Such notice may be in the form given in Schedule Z, with such variations as circumstances may require, and therewith shall be served a copy of the information, petition of right or statement of claim, as the case may be.

E. O. R. 161.

See *Wilson's Jud. Act*, 7 Edn. p. 188.

1. *Third party notice—Crown—Subject.*—There seems to be authority, under the decisions of the Court, for one to say that an order for a third party notice can be obtained in a case where the Crown is plaintiff; but that it will be refused in an action instituted by a Petition of Right,because in the latter case it would be practically allowing the subject to sue the Crown without having previously obtained a fiat or a reference by the Department under the provisions of sec. 23 (now sec. 38, R. S., 1906, ch. 140) of *The Exchequer Court Act*. There might, however, be circumstances which would vary the rule. For instance, if the application in a case of a Petition of Right were made by the Crown itself and that the third party were represented and consenting, as in the case of *Magee v. The Queen*, (see No. 2 following annotation), the order prayed for might then go as a matter of course under special circumstances.

2. *Third party notice—Petition of Right.—Application by Crown.*—A Petition of Right was brought to recover damages alleged to have been sustained by reason of the construction, by Her Majesty, of a certain trestle work and the extension of the I. C. Ry. track from the Government wharf, in the City of St. John, N.B., over, across and along certain wharf property, streets, wharves in the said City, to a place called Corporation Pier. The Crown claimed to be fully indemnified by the said City of St. John against all liabilities for damages in respect of the said extension of the I. C. Ry., under certain articles of agreement, and applied for an order making the said City of St. John a third party in the action—the suppliants and the City of St. John, by their respective Counsel, consenting thereto, it was ordered as prayed. *Magee et al., v. The Queen*, No. 985, 31st December, 1896.

3. *Third party procedure—Crown suit—Jurisdiction—Costs.*—In an action by the Crown upon two Customs export bonds the defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof. And the Court *held* that it had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event. *The Queen v. Finlayson et al.*, 5 Ex. C. R. 387.

4. *Practice—Third party notice.—Semble*: That under the Rules of Court now in force, and under the 7th section of *The Petitions of Right Act*, 1860, (23-24 Vict. (U. K.) ch. 34) the Attorney-General might, in a proper case, make use of the procedure of the High Court of Justice to bring in as third-party any person against whom the Crown claimed to be entitled to contribution or indemnity, and if so it is possible that the same course is open to the Attorney-General here under section 21 of *The Exchequer Court Act*. *Hall v. The Queen*, and *Goodwin*, third-party. March 2nd, 1903. E. O. XVI R. 48, *Wilson's Judicature Acts*, 188 *et seq.*

RULE 263

Appearance by third party—Default.

If a person, not a party to the action, who is served as mentioned in Rule 262 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within *eight days* from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice. Provided always, that a person so served and failing to appear within the said period of *eight days* may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.

E. O. R. 171.

RULE 264.

Default by third party—Judgment against third party.

Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice suffers judgment by default, he shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a Judge, to enter judgment against the third party to the extent of the contribution or indemnity claimed in the third party notice. Provided that it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

E. O. R. 172.

RULE 265.

Default by third party—Judgment on trial of action.

Where a third party makes default in entering an appearance in the action, in case the action is tried and results in favour of the plaintiff, the Judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant giving notice against the third party; provided that execution thereof be not issued without leave of the Judge until after satisfaction by such defendant of the judgment against him. And if the action is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a Judge may, on application by motion or summons, as the case may be, order such judgment, as the nature of the case may require, to be entered for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.

E. O. R. 173.

RULE 266.

Trial as between defendant and third party—Judgment.

If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

E. O. R. 174.

RULE 267.

Liberty to third party to defend.

The Court or a Judge upon the hearing of the application mentioned in Rule 266, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action.

E. O. R. 175.

RULE 268.

Costs upon third party notice.

The Court or a Judge may decide all questions of costs, as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to the costs as the justice of the case may require.

E. O. R. 176.

RULE 269.

Contribution etc., against co-defendant.

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

E. O. R. 177.

INTERLOCUTORY ORDERS AS TO INJUNCTIONS, RECEIVERS AND PAYMENT INTO COURT.

RULE 270.

Injunction and receivers.

An injunction may be granted or a receiver appointed by an interlocutory order of the Court or a Judge in all cases in which it shall appear to the Court or Judge to be just or convenient that such order should be made, and any such order may be made *ex parte* or on notice, and either unconditionally or upon such terms and conditions as the Court or Judge shall think just. The form or order in Schedule ZZ hereto may be used when the interlocutory injunction for infringement is refused on terms.

1. *Injunction.*—On motion for an *interim* injunction to restrain the defendant company from allowing refuse water mingled with tar and ammoniacal water to be discharged from their works through their drains into the Harbour of St. John, N.B., it being shown that this state of things had been in existence for a number of years, that there was no fishing before the spring, and the allegation of injury being negatived by a number of affidavits, the court refused the motion upon the defendant company undertaking that no discharge of such water should take place except during the ebbing of the tide and at such time during such ebbing as the Common Council of the city might direct. Costs to defendants. *The Queen v. St. John Gas Light Co.*, January 23rd, 1891. (An injunction was subsequently ordered after trial. See 4 Ex. C. R. 326.)

2. *Injunction.*—An *interim* injunction being asked, and no urgency therefor being shown, the application was ordered to be continued until the hearing of the case upon the merits. *The Queen v. Thuot*, September 17th, 1891.

3. *Injunction.*—An information at the suit of the Attorney-General to obtain an injunction to restrain a defendant from doing acts that interfere with, and tend to destroy the navigation of a public harbour is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vict. ch. 16, Sec. 17. *The Queen v. Fisher*, 2 Ex. C. R. 365.

4. *Interlocutory Injunction—Doubtful grounds.*—An application for interlocutory injunction was refused when the grounds upon which it was asked were too doubtful, and the parties were forbidden to make use of the order by way of advertising. *Per Burbidge, J., Kleinert v. A. Stein & Co.* (No. 1574). 9th January, 1907.

5. *Crown—Interlocutory Injunction—Undertaking in damages.*—In granting an interlocutory injunction at the instance of the Attorney-General on behalf of the Crown, the Court will not, as a general rule, require the Attorney-General to give the undertaking in damages usually required from an ordinary plaintiff as a condition of his obtaining such an injunction. *Attorney-General v. Albany Hotel Co.* (1896), 2 Ch. 696. See also *Re Ayers*, 123 U. S. R. 443, against collector of taxes, 114 U. S. R. 270 and American Law Review, Vol. 34, p. 700 *et seq.*

6. *Interim injunction—Foreign Defendants.*—Where an information had been filed, and an affidavit read in support of the allegations therein contained, showing that the Defendant Railway Co. had been subsidized by both the Government of the Dominion and of Ontario: that the portion of the road for which subsidy was received had been duly built

but not operated or equipped in any way. Further that the Defendant Co. threatened to take up, and were making arrangements to take up, the rails of that portion of the road so subsidized and constructed with a view to selling the same and the rents and permanently discontinuing any operation of the said road—upon an application made by the plaintiffs, the Court ordered the issue of the usual *interim* injunction before trial. *The Queen v. The Ontario Belmont & Northern Railway Co.* (No. 1046). May 30th, 1898.

(See Rule 72 for service of same).

7. *Motion for interim injunction—Ex-parte.*—Seems that leave to serve any notice of motion for interim injunction with statement of claim or before plea filed may be obtained ex-parte. See *Annual Practice*, 1900, p. 714, No. 704.

8. *Patent—Interlocutory Injunction—Jurisdiction—Undertaking—Warning to public.*—The plaintiffs applied for the usual interlocutory injunction to restrain the defendants from infringing their patent of invention for a Cream Separator. However, in view of the fact that the case disclosed a new patent involving serious contest, the plaintiffs declared they would be satisfied with an undertaking that the defendants keep an account of the machines manufactured and sold, and the moneys received by them; but that the undertaking be given by a person outside of the company. The Plaintiffs on the other hand offering to be held responsible for any damages resulting therefrom if defendants ultimately succeeded.

The defendants opposed the application, and, on the other hand, moved for an order restraining the plaintiffs from interfering with their business, and from issuing, or circulating statements or writings or articles in any way reflecting upon the legality or validity of the Cream Separators manufactured and sold by them and warning possible purchasers from buying the defendants' machines. *Held*, that the Exchequer Court had no jurisdiction to restrain the plaintiffs in the manner asked for by the defendants, and that Section 32 of the English Act (46-47 Vict. ch. 57) was not in force in Canada. The Court, however, thought it had power to take the defendants' application into consideration inasmuch as it would offer and did offer the plaintiffs to grant their application for the undertaking asked for, provided they would also undertake to discontinue interfering with the defendants' business and issuing warnings in the manner above mentioned. The plaintiffs having declined to so discontinue, the Court dismissed both applications with costs to the opposing party in any event. *Sharples et al., v National Mfg. Co. Ltd.* January 23rd, 1905.

9. *Injunction—Copyright.*—For injunction in the case of offences mentioned in *The Copyright Act*, 1842 s. 17 (Imp.) for importing for sale and selling knowingly foreign piracies of copyright, see *Cooper v. Whittingham* (188Q), 15 Ch. D. 501.

10. *Interlocutory injunction.*—An interim injunction may be granted on a *primâ facie* case of infringement where the validity of the patent is not in question and when the defendant is estopped from attacking it or does not do so. *Jackson v. Needle*, 1884, 1 R. P. C. 174; *Dudgeon v. Thomson*, 1874, 30 L. T. (N. S.) 244; *Clark v. Ferguson*, 1859, 1 Giff. 184; *Neilson v. Fothergill*, 1841, 1 W. P. C. C. 287.

Where the patentee has been in long and undisturbed enjoyment of his patent and where the courts have already passed upon its validity, there exists a presumption in favour of the validity of the patent. *Dudg-*

eon v. Thomson, 1874, 30 L. T. (N. S.) 244. An injunction would be refused when the above requirements have not been complied with:—*British Tanning Co. v. Groth*, 1890, 7 R. P. C. 1; Where the plaintiff has been dilatory in making his application, (*Crossley v. Derby Gas Co.*, 1829, 1 W. P. C. 120); when the plaintiff, being aware the defendants were at great expense preparing an apparatus for the purpose of manufacturing the invention, permitted them to go on, under the expectation of exacting royalties, did not interfere. (*Neilson v. Thompson* (1841) 1 W. P. C. 285). Where no benefit derived to plaintiff therefrom and great inconvenience resulting to the defendant. *Idem and Morgan v. Seaward*, (1835), 1 W. P. C. 168.

The injunction when granted is usually issued upon the plaintiff giving an undertaking to make good all damages, should it ultimately turn out the injunction should not have been granted or any other undertaking such as discontinuing advertisements, etc. *Fenner v. Wilson*, 10 R. P. C. 287.

11. *Infringement of patent—Actions taken in different courts—Dismissal of application for interim injunction—Nemo bis vexari debet pro unâ et eâdem causâ.*—Where the Judge of the Exchequer Court was asked to grant an *interim* injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a provincial court of concurrent jurisdiction, which had not been discontinued at the time of such application being made, this court refused the application upon the principle that a defendant ought not to be doubly vexed for one and the same cause of action. *Auer Incandescent Light Mfg. Co. v. Dreschel*, 5 Ex. C. R. 384.

12. *Interim Injunction—Trade-mark—Undertaking—Keeping accounts.*—Where on an application for an interim injunction to restrain the defendants from using a number of trade-marks upon celluloid cuffs and collars, it appeared that defendants upon the service of notice of such application discontinued to use three of the said trade-marks complained of and on the return of the motion gave undertaking not to use the other trade-marks complained of. An order was made directing the defendants not to use the three above mentioned trade-marks already abandoned—and with respect to the other trade-marks complained of to give undertaking either not to use them or if they choose to use them then to keep an account of the sale of such goods until trial. Costs to be costs in the cause. *Per Burbidge, J., Mitchell v. Millars.* November 26th, 1901.

13. *Application for Interim Injunction—Affidavit in support—Sufficiency thereof.*—Where the affidavit upon which was based an application for an injunction to restrain the infringement of a patent did not show: 1st, the rights the several plaintiffs had in the patent; 2nd, where the alleged acts of infringement occurred (the patent running through only a given territory); 3rd, and also failed to state where the defendant had his place of business at the time of such alleged acts of infringement,—the affidavit was held insufficient and the application was refused without costs. Leave being, however, reserved to the plaintiff to renew the application on sufficient affidavits. (No one appeared for Defendant on this application.) *The Welsbach Incandescent Light Co. et al., v. Shenbein.* March 15th, 1897.

14. *Interim Injunction—Undertaking for damages—Foreign Plaintiff.*—Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must

also file the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction. *Delap v. Robinson et al.*, 18 Ont. P. R. 231.

RULE 271.

Conservatory orders.

The Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be paid into Court or otherwise secured.

E. O. lii., R. 1.

RULE 272.

How money to be paid into Court.

Any party directed by any order of the Court or a Judge to pay money into Court must apply at the office of the Registrar for a direction so to do, which direction must be taken to the Ottawa Branch or agency of the Bank of Montreal or to such other Bank as may be named by the Court or a Judge, and the money there paid to the credit of the cause or matter, and after payment the receipt obtained from the Bank must be filed at the Registrar's Office.

RULE 273.

Order for payment of money out of court.

If money is to be paid out of Court an order of the Court or a Judge must be obtained for that purpose upon notice to the opposite party.

RULE 274.

How money to be paid out of Court.

Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, countersigned by a Judge.

MOTIONS AND OTHER APPLICATIONS TO THE COURT.

RULE 275.

Sittings of Judge in Court.

The Judge, when not otherwise engaged, will sit in open Court at Ottawa every Tuesday, or on the next juridical day, in the event of any Tuesday being a holiday, for the purpose of hearing the argument of special cases, motions for judgment, points of law raised by any pleading, appeals from the Report of the Registrar or other officer of the Court, and all other motions, applications and business which cannot be transacted by a Judge in Chambers.

RULE 276.

Setting down of special cases and motions.

Special cases, motions for judgment, argument of points of law raised by any pleading, ordinary motions on notice, and petitions, are to be set down to be heard at least *two days* before

the hearing, unless the Court or a Judge shall otherwise order, or unless it is otherwise provided by these Rules, and are to be called on in the order in which they are set down.

The notice of motion should be filed at the same time the motion is set down for hearing.

For form of præcipe setting down points of law for hearing, see Schedule R, *mutatis mutandis*.

RULE 277.

Last rule not to apply to ex parte motions.

The last foregoing rule is not to apply to *ex parte* motions.

RULE 278.

Application to be made to a Judge in Court by motion.

Where by these Rules any application is authorized to be made to the Court or a Judge in an action, such application, if made to a Judge in Court, shall be made by motion.

E. O. lii., R. 1.

RULE 279.

Motions to be on notice.

Unless authorized by these Rules to be made *ex parte* motions are to be on notice unless the Court or a Judge shall think fit in the interests of justice to dispense with notice.

E. O. lii., R. 3.

RULE 280.

Notice of motion to be served and filed two clear days before hearing.

Unless the Court or Judge give special leave to the contrary there must be at least two *clear days* between the service and the filing of a notice of motion and the day named in the notice for hearing the motion.

E. O. lii., R. 4.

RULE 281.

Proceedings where notice not given to proper parties.

If on the hearing of a motion or other application the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the notice or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose.

E. O. lii., R. 5.

RULE 282.

Hearing of any motion may be adjourned.

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

E O. lii., R. 6.

RULE 283.

Notice may be served without special leave in certain cases.

The Attorney-General, plaintiff or petitioner shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with the information, petition of right or statement of claim, has not answered within the time limited for that purpose.

E. O. lii., R. 7.

RULE 284.

May be served with or after filing of information, petition of right or statement of claim.

The Attorney-General, plaintiff or petitioner may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the information, petition of right, or statement of claim, or at any time after a service of the information, petition of right or statement of claim, and before the time limited for the answer of such defendant.

E. O. lii., R. 8.

See Rule 68.

RULE 285.

Sitting of Judge in Chambers.

The Judge, when not otherwise engaged and except during the vacations of the Court or legal holidays, will sit in Chambers, at Ottawa, at 11 o'clock in the forenoon, on Monday and Friday, in each week.

RULE 286.

Sitting of Registrar in Chambers.

The Registrar, except during the vacations of the Court or legal holidays, or unless prevented by necessary cause, will sit in Chambers, at Ottawa, on every Monday, Tuesday, Wednesday and Friday, at 11 o'clock in the forenoon, or at such other hour he may specify from time to time by notice posted in his office.

APPLICATIONS IN CHAMBERS.

RULE 287.

Application in Chambers.

Every application to a Judge in Chambers or to the Registrar in Chambers, as authorized by these Rules, shall be made in a summary way either by summons or by petition, of which notice of two clear days shall be given.

RULE 288.

Judge or Registrar may rescind his own order.

The Judge or Registrar may respectively rescind his own order made in Chambers.

COSTS.

RULE 289.

Costs may be awarded against the Crown.

Costs may be awarded against the Crown, subject to the provisions of these rules, that no execution shall issue on a judgment or order for the payment of money by the Crown.

See sec. 79 of *The Exchequer Court Act* (R. S., 1906, ch. 140), *ante* p. 225.

See Rule 215 which provides how costs awarded against the Crown are payable.

RULE 290.

Provisions as to costs.

The costs, of and incident to all proceedings in the said Exchequer Court, shall be in the discretion of the Court or a Judge and shall follow the event unless otherwise ordered. The Court or a Judge may also direct the payment of a fixed or lump sum in lieu of taxed costs.

E. O. lv.

See Rule 295, and notes thereunder, as to the manner of proceeding to tax costs.

Under the provisions of sec. 32 of ch. 143, R. S., 1906, the costs of and incident to any proceedings under *The Expropriation Act* are in the discretion of the Exchequer Court which may direct the whole or any part thereof to be paid by the Crown or by any party to such proceedings.

Costs may also be awarded to the suppliant in a Petition of Right under the provisions of section 12 of *The Petition of Right Act*.

Provisions are also made under sections 79 of *The Exchequer Court Act* for the payment of costs awarded to any person against the Crown.

No fee or costs are allowed before the Court of Claims in the United States of America. 7 *Southern Review*, 805.

The original Rule, as made in 1876, was amended in 1895 and embodied in the present Rule in its entirety conferring upon the Court or a judge the power of allowing a fixed or lump sum in lieu of taxed costs. This provision has proved very satisfactory, especially in interlocutory matters, whereby sometimes vexed questions of costs are greatly simplified. The same practice obtains on the Admiralty Side of the Court.

1. *Principle of party and party taxation.*—"It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. The costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them": *Smith v. Buller*, 19 Eq. 473, at p. 475, per Malins, V.-C. See also *Simmons v. Storer*, 14 Ch. D. 542; *Warner v. Moses*, 19 Ch. D. 72. See also *Morgan & Wurtzburg*, pp. 482, *et seq.* *Wilson's Judicature Practice*, Edn. 1888, p. 495.

2. *Refusal or neglect to bring in costs for taxation.*—There is no rule of practice in the Exchequer Court of Canada in respect of a party refusing or neglecting to bring in costs for taxation. Under Rule 1 of the Court

and sec. 37 of *The Exchequer Court Act* (ch. 140 R. S., 1906,) the English practice must then obtain in such a case and the following, being an excerpt from Order LXV, r. 27, must be taken to be in force: it reads as follows:—"When any party entitled to costs refuses or neglects to "bring in his costs for taxation, or to procure the same to be taxed, and "thereby prejudices any other party, the taxing officer shall be at liberty "to certify the costs of the other parties, and certify such refusal or neglect, "or may allow such party refusing or neglecting a nominal or other sum "for such costs, so as to prevent any other party being prejudiced by "such refusal or neglect. *Wilson's Judicature Practice*, Edn. 1888, p. 495.

3. *Costs on appeal from Admiralty District.*—Where on appeal from a Local Judge in Admiralty further evidence was ordered to be taken before such Local Judge to dispose of an issue raised on appeal, the question of cost was reserved and came up again on motion by appellant for his costs on such appeal after the Local Judge had so heard further evidence and increased his first award, and the Exchequer Court allowed the appellant his costs of the appeal, including the cost of printing a case; adding that it was formerly the practice of the Privy Council in Admiralty Appeals not to give costs to the successful party, but that since the appeals have gone to the Court of Appeal the costs have been usually allowed to such party. Citing *The Berlin*, 2 P. D. 187; *The Accomac* (1891) *Prob.* 349. *Re The Ship "Abbey Palmer"*. April 10th, 1905.

4. *Solicitor—Agreement for compensation—Champerty—Exchequer Court—Taxation.*—An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void.

Per Moss and Lister, JJ. A.—A solicitor of the Supreme Court of Judicature for Ontario who as such does business in carrying on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors' Act, with regard to delivery and taxation of his bill of fees, charges or disbursements in respect of such business. *O'Connor v. Gemmill*, 26 Ont. A. R. 27.

5. *Practice—Costs—Deeds.*—The cost of the copy of a deed, which forms part of the titles of the party who files it, cannot be taxed against the adverse party, except, however, in the case where that copy has been prepared for the purposes of the suit. The several vacations of a notary in making searches for deeds to be filed in a suit are not taxable. *Lavoignat v. Mackay et al.*, Q. R. 17 S. C. 382.

6. *Cost—Defence not raised in pleadings.*—Where judgment proceeded upon a defence not raised in the pleadings, but in respect of which defendant was allowed to amend after trial, he was not allowed costs. *Servis Railroad Tie Plate Co. v. Hamilton Steel and Iron Co.*, 8 Ex. C. R. 381.

7. *Costs—Practice.*—Where the Court declared the clause of the Statute, upon which the plaintiff relied, involved so much doubt that it had to dismiss the action, no costs were allowed to either party *American Stoker Co. v. General Engineering Co.*, 6 Ex. C. R. 328.

8. *Costs—Recovery of part of claim.*—When a suppliant succeeded as to part of the amount claimed and failed on the main issue in controversy each party was ordered to bear his own costs. *Nicholls Chemical Co. v. The King*. 9 Ex. C. R. 272.

9. *Practice — Costs— Taxation —Co-Defendants—Judgment against One Defendant—Liability of one Defendant for all Plaintiffs' Cost.*—In an action against two defendants to restrain an infringement of copyright the plaintiffs obtained an injunction with costs against one defendant,

G., but failed to obtain any order against the other defendant, to whom however, no costs were given. By the order as drawn up the defendant G. was directed to pay to the plaintiffs "their costs of this action". The taxing master allowed the plaintiffs all the costs of the action, including those incurred against the second defendant; the defendant G. objected that in this way he was unfairly made to pay the costs of the plaintiffs' unsuccessful attempt to fix his co-defendant with liability. The taxing master overruled this objection, on the ground that the order did not direct him to make any deduction on account of the joinder of the second defendant. On a summons to review:—*Held*, that the order was clear, that the taxing master's view was correct, and that the defendant G. must pay all the plaintiffs' costs of the action. *Kelly's Directories, Ltd. v. Gavin & Lloyds*, (1901), 2 Ch. D. 763.

10. *Costs—Taxation—Interlocutory Order directing Payment of Costs —Interest as from date of Order.*—An interlocutory order directing payment of costs by one person to another comes within sect. 18 of *The Judgment Act*, 1838, and carries interest on the costs thereby awarded as from the date of such order. *Taylor v. Roe*, 1894, 1 Chan. Div. 413.

11. *Costs of day.*—A fee of $20.00 to first Counsel and $15.00 to second Counsel was allowed on an adjournment of the trial, when three cases, in which the same Counsel were engaged, were to proceed at the same time and one case was adjourned, all Counsel being present. *Davidson v. The Queen*, No. 925, March 14th, 1896.

12. *Settlement of Action—Setting Aside—Counsel—Solicitor—Costs.*—Where counsel, acting upon the instructions of the plaintiff's solicitor, effected a compromise of the action not authorized by the plaintiff and contrary to the express instructions given by her to the solicitor, the compromise was set aside and the plaintiff allowed to proceed to trial, but, as the plaintiff and defendant were innocent parties, without costs to either against the other. *Stokes v. Latham* (1888), 4 Times L. R. 305, followed. *Benner v. Edmonds*, 19 Ont. P. R. 9.

13. *Costs—Taxation—Issues found both ways—Expert Accountants—Allowance—Appeal.*—The Suppliant claimed damages in the nature of loss of profits resulting from a breach of contract, extending over a period of seven years. He was successful for the first five years, and failed with respect to the other two years, and the Crown was given costs on this branch of the case. On taxation, the Registrar allowed the Suppliant general costs, including the costs of pleadings and other incidental proceedings during the five years for which he was successful: The Respondent was also allowed the costs of all proceedings necessary for the purpose of setting forth the contentions in respect to the two years for which the Crown was successful, including all pleadings. On appeal to the Judge from the taxation of the Respondent's costs the Suppliant contended that the Respondent was only entitled to such costs as were incurred while proceeding with the reference. *Held*, confirming the Registrar's finding, that the bill had been properly taxed.

While proceeding with the reference, Counsel for both parties assenting thereto (*Robertson v. Robertson*, 24 Grant, Chy. 555), the Referee, with a view of doing away with expensive and protracted sittings, directed (Rule 189, *Audette's Practice*, p. 280; *Mackay v. Keefer*, 12 Ont. P. R. 256; *Ex parte Viscount Curzon*, 6 *Weekly Reporter*, 141; *Wilson's Judicature Practice*, 7th ed., p. 411), that certain statements should be prepared by expert accountants, and on taxation, the Suppliant claimed $3,000 for such work. The Registrar, under the circumstances, only

allowed the accountants $1.00 per hour, and 50 cents per hour to their help or amanuenses (*Morgan on Costs*, p. 487). On appeal by the Respondent, on the ground that the Registrar had no power to tax such fees, and on appeal by the Suppliant, on the ground that the amount allowed was too small,—the Judge held that the taxation was right and refused to interfere with the Registrar's finding.

Quære:—Was the Referee justified in making such a direction? *Woodburn v. The Queen*, No. 527, 19th April, 1899.

14. *Taxation—Examination before Examiner—Depositions not used at the Trial.—Discretion*—In the taxation of the costs of an action, in which the examination of a witness under the common order before trial has not been used at the trial for some reason, such as the attendance of the witness at the trial or the taking of a judgment by consent, the costs of the examination should not be disallowed under Order LXV., r. 27 (29), merely on the ground that the use of the examination had become unnecessary. The true test in exercising the discretion given to the taxing master by the rule is whether the costs of the examination were "necessary or proper for the attainment of justice" under the circumstances existing at the time the examination was ordered, irrespective of the eventful state of circumstances at the trial.

There is no hard and fast rule of taxation that the costs of a proceeding should not be allowed unless it has been actually used for some purpose. *Delaroque v. S. S. Oxenholme & Co.* (1883), W. N. 227, approved. *Ridley v. Sutton* (1863), 1 H. & C. 741; 32 L. J. (N. S.) (Ex.) 122, disapproved. *Bartlett v. Higgins* (1901), 2 K. B. 230.

15. *Costs—Commission not used at trial—Counsel fee—Discretion of taxing office—Review.*—Where the defendant obtained a Commission to examine certain witnesses residing out of the jurisdiction and that the evidence of such witnesses was not used, at trial, owing to the plaintiff being called as defendant's witness at trial and admitting substantially what was stated by the witnesses examined under Commission, the defendants having obtained judgment in their favour, the costs of the Commission was taxed against the plaintiff. The practice of the Court is not to interfere upon appeal with the discretion of the taxing officer as to question of Counsel fee. *Rondot v. Monetary Times Printing Co.*, 18 Ont. P. R. 141.

16. *Costs—Attorney—Business.*—Items not appertaining to the business of an attorney cannot be taxed. *Jones v. Ketchum*, 3 U. C. L. J., 167; *Allen v. Aldridge*, 5 Beav. 405.

17. *Costs—Liability.*—If the client be not liable to pay costs to his solicitor, he cannot recover these costs against the opposite party. *Walker v. Gurney-Tilden Co.*, 19 Ont. P. R. 12.

18. *Costs where Crown a party.*—In future the Board will adhere to the practice of the House of Lords, and the rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is governed by some local statute, or there are exceptional circumstances justifying departure from the ordinary rule. *Johnson v. The King*, 1904, A. C. 817. See sec. 79, ch. 140 R. S., 1906.

19. *Taxing costs to the Crown—Fees to counsel and solicitor—Salaried officer representing the Crown.*—As the statutes of Canada defining the duties and salaries of the Attorney-General and his Deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper to allow counsel fees

or solicitor's fees in respect of services rendered in such capacities by either of these officers on the taxation of costs awarded in favour of the Crown. *Jarvis v. The Great Western Railway Co.* (8 U. C. C. P. 280), and *The Charlevoix Election Case* (Cout. Dig. 388), followed. *Hamburg-American Packet Co. v. The King*, 39 S. C. R. 621.

20. *Costs—Crown successful party—Fee to Counsel—Salaried officer representing Crown.*—In this case the taxing officer, following the decision of Maclennan, J., at Chambers, in *The Hamburg-American Packet Co. v. The King* (39 S. C. R. 621, *supra* No. 19), declined to tax a counsel fee to the Deputy Minister of Justice who had acted on behalf of the respondent at the trial. Upon application by the respondent to the Registrar sitting as Judge in Chambers under Rule 312 to review the taxation *quo-ad hoc*, the Registrar thought it a proper matter for the decision of the Judge under the provisions of clause (1) of the said Rule, and so referred it. Upon the argument of the application before the Judge in Chambers, it was shown that the Counsel work so done by the Deputy Minister constituted other and additional duties than those devolving upon him by virtue of his office, that a special arrangement had previously been made by him and the Minister of Justice—whereby he was to be paid for the same out of monies appropriated by Parliament for litigated matters, conducted within the Department of Justice; that on the 14th of February, 1905, an order in counsel was passed confirming the above arrangement and authorizing the Deputy Minister "to retain and appropriate on account of these services, and the costs payable to him, the party and party costs earned by him, awarded to the Government, and paid by the adverse party," and that an appropriation had been made by Parliament for the payment of such services "notwithstanding anything in *The Civil Service Act.*" *Held*, following *The Queen v. Bradley* (27 S. C. R. 657), and distinguishing the case of *The Hamburg-American Packet Co. v. The King* (39 S. C. R. 621), that as the services so performed by the Deputy Minister of Justice were outside the scope of the duties pertaining to his office as such Deputy Minister in respect of which he received his official salary, he was entitled to the Counsel fee sought to be taxed. *Luke et al., v. The King*, 12 Ex. C. R.—.

21. *Quantum meruit.*—According to the law of the Province of Quebec, a member of the Bar, in the absence of special stipulation, can sue for and recover on a *quantum meruit* in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar.

Where a member of the Bar had been retained by the Government as one of their Counsel before the Fisheries Commission sitting in Nova Scotia, *held*, that in the absence of stipulation to the contrary, express or implied, he must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his *status* in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*. *The Queen v. Doutre*, 9 App. Cas. 745.

22. *No tariff between attorney and client.*—There being no tariff as between attorney and client in the Exchequer Court of Canada, an attorney has the right in an action for his costs, to establish the *quantum meruit* of his services by oral evidence. *Bossé v. Paradis*, 21 S. C. R. 419. See also *Boak v. Merchants Mar. Ins. Co., Cassels' Digest*, 677.

23. *Costs—When disallowed.*—Where the amount demanded in the statement of claim, as compensation for lands expropriated, was extravagant and such amount was insisted on at the trial, the court, although

awarding an amount in excess of what was tendered, refused to give costs to claimant. *McLeod v. The Queen*, 2 Ex. C. R. 106, referred to. *Baker v. The Queen*; and *Desrochers v. The Queen*, February 6th, 1893.

24. *Costs—Chamber application.*—Where the Registrar allowed $2 fee on a Chamber application to extend the time for leave to appeal under section 51 of "*The Exchequer Court Act*," the Judge, on an application to review the taxation, refused to interfere with the Registrar's finding on the ground that the tariff of the Court did neither make provision for a higher fee nor gave him the power to increase it. *Clarke v. The Queen*, March 13th, 1893. The tariff has been amended and a larger amount may now be allowed in the discretion of the Registrar.

25. *Distraction of costs.*—In a suit in which the cause of action had arisen in the Province of Quebec and which had come before the Exchequer Court under sec. 59 of 50-51 Vict. ch. 16, upon a report of the Official Arbitrators finding in favour of the claimant, and where the Crown had moved to confirm the report and had obtained judgment accordingly, with costs to the claimant on the proceedings before the Official Arbitrators, a motion for *distraction* of costs by claimant's Counsel being made several months after the delivery of the judgment, and the Crown not opposing the application, the court held that the claimant was entitled to such *distraction* of costs. *The Water Works Co. of Three Rivers v. Dostaler*, 18 L. C. J. 196, referred to. Re, *Libby v. The Queen*, February 24th, 1890.

26. *Costs refused when claim extravagant.*—Where the tender is not unreasonable and the claim very extravagant, the claimant will not be given costs although the amount of the award exceeds somewhat the amount tendered. *McLeod v. The Queen*, 2 Ex. C. R. 106.

27. *Offer to abate cause of injury before action brought—Effect of.*—Where an offer to do certain work, which would abate an injury to suppliant's property caused by a public work, was made in writing by the Crown and its receipt acknowledged by the suppliant before action brought, but such offer was not repeated in the statement of defence (although filed subsequently pursuant to leave given), the Court, in decreeing the suppliant relief in the terms of the undertaking, refused costs to either party. *Fairbanks v. The Queen*, 4 Ex. C. R. 130. (This judgment was affirmed on appeal to the Supreme Court of Canada, 24 S. C. R. 711).

28. *Costs—Party appearing in person.*—A party appearing in person might be allowed his costs as between party and party, but he will be refused all Counsel fees.—A Counsel fee was refused to respondent an advocate who argued an appeal in person before the Supreme Court of Canada. *Valin v. Langlois*. Cassels' Digest, 677.

SECURITY FOR COSTS.

RULE 291.

Security for costs.

In any action, suit, cause, matter or other judicial proceeding in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a Judge shall direct. For form of order see No. 1 Schedule Z1.

E. O. R. 981.

An application for security for costs is made in Chambers by way of summons. Under the present practice of the Court an order for

security for costs may be given at any stage of the proceedings in the cause. *Boston Rubber Shoe Co. v. Boston Shoe Co. of Montreal*, 7 Ex. C. R. 47.

Security for costs may be given either by payment of a sum of money into Court, or by the bond of a Guarantee Company or otherwise.

The usual penalty of the bond in England is £100, and in this Court the usual amount has been $400, unless otherwise ordered. Fresh security might be given upon application, if the $400 become exhausted, or if the surety dies or becomes bankrupt. *Latour v. Halcombe*, 1 Ph. 262. *Republic of Costa Rica v. Erlinger*, L. R. 3, Ch. D. 62; *Standard Trading Co. v. Seybold et al.*, 5 Ont. L. R. 8; *Massey v. Allen*, L. R. 12, Chy. D. 810. *The Minister of Railways and Canals v. The Quebec Southern Ry., etc.*, 21st October, 1907.

The effect of an order for security for costs is to operate as a stay of proceedings until security is given. If the security is not given within the time specified, the defendant may apply to dismiss the action. *La Grange v. McAndrew*, 4 Q. B. 210.

For observations upon the question as to when a party may be ordered to give security for costs, see 37 C. L. J. 334.

1. *Failure to give security in favour of Crown.*—Under sec. 44 of ch. 140 R. S., 1906, if the subject fails to give security when ordered by the Judge, at the request of the Crown, all further proceedings in the case are stayed until otherwise ordered.

2. *Security—Crown.*—The Crown cannot be called upon to give security for costs, *Tomline v. The Queen*, L. R., 4 Ex. Div. 252, at page 254; 48 L. J. Ex. 453; but may call upon the subject to do so. See Clode *On Petition of Right* and authorities therein cited, at page 181.

3. *Security—Time.*—Where in the matter of a petition of right, the Crown, through the Secretary of the Public Works Department, made an offer to a suppliant of the sum of $3,950 in full settlement of his claim, and afterwards made an application for security for costs, the application was refused on the ground that the power of ordering a party to give security for costs is a matter of discretion and not of absolute right, and that the Crown in this case could suffer no inconvenience from not getting security. Further, an application for security for costs in this court must be made within the time allowed for filing the statement of defence, except under special circumstances. *Wood v. The Queen*, 7 S. C. R. 631. This case has been overruled by the case of the *Boston Rubber Shoe Co. v. Boston Shoe Co. of Montreal*, 7 Ex. C. R. 47. See now, however, rule 291 which settles the matter beyond any doubt, leaving the questions of amount, time, manner and form entirely in the discretion of the Court or a Judge.

4. *Security for costs—Order for—Practice.*—Under the present practice of the court an order for security for costs may be given at any stage of the proceedings in a cause. *Wood v. The Queen* (7 S. C. R. 634) referred to. *The Boston Rubber Shoe Co. v. The Boston Rubber Co. of Montreal*, 7 Ex. C. R. 47.

5. *Security for costs.*—Security for costs may be given either by bond or by a cash deposit in Court. *Casgrain v. Cie de Carosserie*, Q. R. 9, S. C. 383.

6. *Security for costs—Customs tax.*—Security for costs will be ordered in a case referred to the Exchequer Court under sec. 179 of *The Customs Act*, R. S., 1906, ch. 48. Re *The Metropolitan Paving Brick Co. v. The King*, 25th February, 1907.

7. *Security for costs.*—Where upon an application for security for the

defendant's costs,in an action for the infringement of a Patent of Invention, it appeared the plaintiffs resided out of the jurisdiction and that the defendants would be put to heavy costs in the necessary issue of commissions outside of the jurisdiction, the amount of security was fixed at the sum of $500, to be satisfied either by bond or deposit into Court. *Deere & Co. v. The Verity Plow Co. Ltd. et al.*, No. 1087. February 6th, 1899.

8. *Security for costs—Proceedings begun before rule in force.*—On the 22nd January, 1900, the plaintiff filed a statement of claim to annul the defendant's patent of invention, of which service was accepted on the 25th of the same month. On the 25th January, 1900, a General rule and order was made and published by the Court reading as follows:

"6. In any proceedings by statement of claim to impeach or annul a patent of invention, the plaintiff shall give security for the defendant's costs therein in the sum of $1,000."

On the 19th February, 1900, the defendants applied, under the provisions of the foregoing rule, for an order on the plaintiff to give security for the defendant's costs in the sum of $1,000. *Held*, that the principles upon which the case of *Kimbray v. Draper* (L. R. 3, Q. B. 160) and other similar cases were decided is applicable to the present case and circumstances. The plaintiff is accordingly ordered to give security for costs in the sum of $1,000, the proceedings therein being stayed until such security is given to the satisfaction of the Registrar. *Per Burbidge, J. Hambly v. Albright & Wilson, Ltd.*, (No. 1140). 27th February, 1900.

9. *Petition of Right—Costs—Application for security by Crown—Limited Company—25-26 Vict. (U. K.) c. 89, s. 69—Practice.*—Section 69 of *The Companies Act*, 1862 (25-26 Vict. [U.K.] c. 89) provides that, where a limited company is plaintiff in any action, any judge having jurisdiction in the matter may, if it appears by any creditable testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

By the 7th section of the English Petition of Right Act (23 & 24 Vict. c. 34), it is, among other things provided, that the statutes and practice in force in personal actions between subject and subject shall, unless the court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.

In a proceeding by Petition of Right in the Exchequer Court, application was made for security for costs under the provision first mentioned. There was nothing to show that it had ever been acted on in a proceeding by Petition of Right in England. And it was held that the question as to whether the provision first mentioned applied to such cases was not sufficiently free from doubt to justify the granting of the application for security. *Atlantic and Lake Superior Ry. Co. v. The King*, 8 Ex. C. R. 189.

10. *Security for costs—Foreign Corporation licensed to do business in Ontario.*—Where the defendants applied for the usual order upon the plaintiffs, a foreign corporation, for security for costs in the sum of $400, the plaintiffs opposed the application on the ground that they were licensed to do business in Ontario, admitting, however, they had no assets in Canada. The application was granted with costs. *Indiana Mfg. Co. v. Smith et al.*, January 16th, 1905.

11. *Security for costs—Evidence of assets in Canada.*—O., one of the defendants, applied for an order on the plaintiff, to give security for costs,

it appearing in the pleadings that the plaintiffs resided in the United States of America. The plaintiffs showing cause *contra*, read affidavit to the effect they had in Montreal "assets available in execution to the value of at least $20,000." O. contended affidavit was insufficient inasmuch as it did not show the assets were of fixed and permanent nature (citing *Ebrard v. Gassier*, L. R. 28, Ch. D. 232; *Sacker v. Bessler*, 4 Times L. R. 17). *Held*, that the application be dismissed, plaintiffs having shown they had in Canada assets available for execution. Costs in the cause. *Per Burbidge, J.*, 1154 *The Animarium Co. v. Langley et al.* February 1st, 1901.

12. *Costs—Security for—Foreign company carrying on business in British Columbia.*—Summons for security for costs from the plaintiff, a company incorporated in the State of Washington, and having its head office in Seattle. The company owned a steamer running between Seattle and Victoria, and had an office in Victoria, managed by a freight and passenger agent, who devoted his whole time to the business of the company in Victoria, and who was paid a salary by the company. Rent and all office expenses were paid by the company, which was not licensed or registered in British Columbia. And it was *held* that the company was a foreign company within the meaning of sec. 144 of *The Companies Act*, and was bound to give security for costs. *La Bourgogne* (1899), P. 1 (1899), A. C. 431, considered. *Alaska Steamship Co. v. Macaulay*, 20 C. L. T. 448.

13. *Security for costs—Foreign corporation—Property.*—The plaintiffs being a foreign company, with an office in the City of Montreal, the defendant applied for an order enjoining them to give security for costs. The plaintiffs objected on the ground that they had property at their Montreal office to an amount exceeding what was necessary to cover the costs in the action; this property consisting of office furniture and some patent medicine in question in the present action. The decision was that a common sense view must be taken of the matter and considering the character of the property, the plaintiffs were ordered to give security, with leave to defendant to plead ten days after having been served with a notice that security has been given. Costs in the cause. No. 1186. *The Animarium Co. v. The Electropoise Co. et al.* 9th April, 1901.

14. *Security for costs—Foreign corporation.*—It has been the practice to accept the duly authenticated bonds of foreign guaranty or security companies doing business in Canada. In *Aldrich v. British Griffin Chilled Iron and Steel Company* (1904), 2 K. B. 850, the Court of Appeal expressed the opinion that there was no general rule in force in England which prevented the acceptance of the bond of a foreign company as a sufficient security for costs.

15. *Security for costs—Bond by foreign company.*—The plaintiffs, residing in the United States, were ordered to give security for costs and in compliance therewith offered as security the bond of The American Surety Company of New York, the same being approved of by the Registrar of the Court. The defendant moved to set aside the bond alleging, *inter alia*, that they were in no better position than before as they had nothing in Canada to answer for the amount of their costs. The motion was refused on the ground that the company had complied with the requirements of *The Insurance Act* (secs. 12, 13 and sec. 49, as amended by Ch. 20, sec. 15 of 57-58 Vict.) and shewn they had the authority and power to do such business in Canada, by filing: 1st, a certified copy of the Power-of-Attorney from the Company to an agent in Canada having

authority to receive service of process in all suits and proceedings; 2nd, a certified copy of the minutes of the Treasury Board fixing the amount of the deposit the Company had to make before doing such business; 3rd, a certified copy of the license authorizing the Company to execute and guarantee bonds, etc.; 4thly, a certificate from the Superintendent of Insurance that the Company has made the required deposit and is authorized to execute and guarantee bonds in suits and proceedings in Canada. *The Indiana Manufacturing Company v. Smith et al.* No. 1376. November 4th, 1903.

16. *Security set aside for want of notice.*—The opposite party is entitled to notice of putting in security, and if it is put in without notice it may be set aside. *Major v. McClelland*, 9 L. N. 394.

17. *Security for costs—Both parties out of jurisdiction—Rival claimants of funds.*—Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of $500, bequeathed by a will, both were required to give security, each to the other, for the costs of an issue directed to be tried. *In re La Compagnie Générale d'Eaux Minérales* (1891), 1 Ch. 451, followed. *Re Société Anonyme des Verreries de l'Etoile*, 10 Pat. Cas. 290, and *Re Miller's Patent*, II Pat. Cas. 55, distinguished. *Sinclair v. Campbell*, 37 C. L. J. 404.

18. *Security for costs—Repeal of patent—Out of jurisdiction.*—A respondent out of the jurisdiction, in a case to repeal a patent, will not be required to give security for costs. *Re Miller's Patent* (1894), R. P. C. 57.

19. *Default in giving security.*—If the plaintiff makes default in giving security he may be ordered to give security within a limited time, and in default the action may be dismissed. (*Camac v. Grant*, 1 Sim. 348; *Giddings v. Giddings*, 10 Beav. 29; and see *La Grange v. McAndrew*, 4 Q. B. D. 210, where action was dismissed after order for security and stay of proceedings meantime. 1902 *Ann. Prac.*, 941.

20. *Default in giving security.*—If the plaintiff makes default in giving security, he may be ordered to give security within a limited time and in default that the action stand dismissed with costs. *Giddings v. Giddings*, 10 Beav. 29.

RULE 292.

When plaintiff ordinarily resident out of jurisdiction.

A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.

See annotations under Rule 291.

RULE 293.

Bond for security to be given to the person requiring the security.

Where a bond is to be given as security for costs, it shall, unless the Court or a Judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court. For form of bond see No. 2 Schedule Z1.

E. O. R. 982.

RULE 294.

How to give security.

Where a party to any action or proceeding has been ordered to give security for costs, or for any other purpose, and desires

to file a bond therefor, he shall first obtain an appointment from the Registrar to approve of such bond, and shall serve the appointment upon the party or parties in whose favour the order for security was made. At the time and place appointed by him the Registrar shall decide as to the sufficiency of such bond and the right of the party tendering it to file the same. From the decision of the Registrar in approving or rejecting such bond an appeal shall lie to the Court or a Judge. Such appeal shall be taken within 10 days from the date of the Registrar's decision.

RULE 295.

Costs—How to be taxed.

All costs between party and party shall be taxed pursuant to the Tariffs contained in Schedules Z2, Z3, Z5 and Z6 appended to these orders. Such costs shall be taxed by the Registrar or by his Deputy, appointed under the provisions of Rule 314; and they shall be the Taxing Officers of the Court, exercising exclusive authority in respect of such taxation; subject, however, to review by a Judge in Chambers.

See annotations under Rule 290.

When judgment has been delivered and costs awarded thereby, the party desirous to tax costs should, through his agent, apply to the Registrar for an appointment both to tax costs and settle the minutes of judgment. The usual practice is to obtain but one appointment for settling the minutes of judgment and taxing costs so that both may be done at one time, unless the case is taken to appeal when the settling of the minutes for judgment is all should be then done.

Drafts of the judgment and of the bill of costs are prepared and served on the opposite party with a copy of the appointment. On the return of the appointment, the parties attend before the Registrar, when the settlement of the minutes of judgment and the taxing of costs are proceeded with. If any party is dissatisfied with the ruling of the Registrar, he may appeal to the Judge in Chambers to renew the same.

If the party served with the appointment, as above mentioned, fails to attend on the return of the same, the Registrar, after having satisfied himself that the service of the drafts of the minutes of judgment and of the bill of costs and of the appointment has been duly effected, may proceed in the absence of such party.

RULE 296.

Taxing Costs of Crown's Solicitor.

The Registrar of the Court shall have authority, at the request of the Minister of Justice, or his Deputy, to tax any bill of costs made against the Crown by any one acting for the Crown in any proceeding in the Court, and in such cases may allow counsel fees in excess of those prescribed in the Tariff now in force.

RULE 297.

Witness fees.

Witnesses shall be entitled to be paid the fees and allowances prescribed by Schedule Z3 annexed hereto.

See annotations under Schedule Z3.

APPEALS TO THE SUPREME COURT OF CANADA.

RULE 298.

Notice to Registrar by party appealing.

Whenever an appeal is taken from a decision of the Exchequer Court to the Supreme Court of Canada in pursuance of the provisions of *The Exchequer Court Act*, the appellant shall, within the time limited in section 82 of the said Act (R. S., 1906, ch. 140) for the deposit of security for costs on such appeal, or such further time as may be allowed under the provisions thereof, give notice in writing to the Registrar of the Exchequer Court, stating that he intends to prosecute an appeal; and if such appeal is thereafter discontinued or abandoned, the appellant shall give notice in writing to the Registrar of the Exchequer Court of the discontinuance or abandonment of such appeal.

This rule should be closely observed, because if the Registrar of the Exchequer Court is not informed that an appeal has been taken, he might transmit the certificate of judgment to the Receiver-General for the payment of the amount of the judgment, or might even issue a writ of execution against the party appealing. However, when there is no order for stay of execution, execution may issue notwithstanding the appeal. *Annual practice*, 1902, and Ency. Laws of England.

RULE 299.

Case in appeal how to be settled and what to contain.

The case in appeal, from the Exchequer Court to the Supreme Court, is, in case the parties differ about the same, to be settled by a Judge upon *one day's* notice of an appointment for that purpose to be served on the opposite party by the party intending to appeal, and it is to contain the pleadings and evidence or such parts thereof as the Judge may think material, and also a copy of any written judgment pronounced by the Judge whose decision is appealed from; or in case no written judgment has been pronounced a note showing the grounds and reasons for the decision.

Case—Affidavits disallowed.—Affidavits were read *pro* and *con* on an application to re-open a trial for leave to adduce further evidence and issue a commission to Holland, and under such commission both parties were at liberty to adduce evidence; and upon an application to the Judge in Chambers for settling the case in appeal; *held* that such affidavits were no part of the evidence of record and accordingly they could not form part of the case in appeal. *DeKuyper v. Van Dulken*, April 12th, 1894.

For information as to what the case in appeal to the Supreme Court of Canada shall contain see *Mr. Cameron's Practice*, S. C. C. pp. 350 and 387, and for rules governing Exchequer appeals see Ibid., pp. 158, 214 and 479.

Form of order settling case.

(Heading.)

Upon the application of the plaintiff (or defendant, *as the case may be*) to settle the Case in Appeal to the Supreme Court of Canada, and upon hearing Counsel for the plaintiff and the defendant,

I do order that the Case in Appeal herein shall be composed of and comprise the following documents and papers, to wit:—

1. The Petition of Right.
2. Statement in Defence.
3. Reply.
4. Suppliant 's exhibits 1, 2 and 3.
5. Respondent 's exhibits A, B and C.
6. Evidence at trial.
7. Judgment.
8. Reasons for judgment.
9. Order settling case.
10. Certificate of Registrar.
11. Etc., etc.

Dated at Chambers, this day of A.D. 19 .

J. E. C.

AGENTS AND SERVICE OF PAPERS.

RULE 300.

The Agent's Book.

There is to be kept in the Registrar's Office a book of the said Exchequer Court to be called the Agent's Book, in which may be entered the names of persons residing at the City of Ottawa and entitled to practice in the said Court, who are to act as agents for attorneys and solicitors residing in other places.

By sections 16, 17 and 18 of ch. 140, R. S., 1906, the class of persons who are entitled to practice before the Exchequer Court of Canada, is clearly defined. See *ante* p. 103.

In *Wallace v. Burkner* (*Cassels' Digest*, 669 and *Cout. Dig.* 1105) it was intimated by the Court that conducting business with the Registrar 's Office by correspondence is an irregular practice. An agent should be appointed at the time of the institution of an action. And under a ruling of the late Chief Justice, Sir William Ritchie, it was decided that (*Cassels' Digest*, 669 and *Cout. Dig.* 1105) when the principal does not himself enter in the Agents' Book the name of his agent, a written authority must be filed with the Registrar. The authority may be either general or limited to any particular case, and the following form may be used:

Place.....

Date.....

To

A. B.,

Barrister, Ottawa.

We hereby authorize you to enter your name as our agent in the Agents' Book of the Exchequer Court of Canada and to act as such agent in said Court.

C. & D.,

Solicitors, etc. etc.

Any authority may be revoked and cancelled by a subsequent authority to that effect.

The omission to appoint an agent may lead to inconvenience in the progress of an action. It is true that Rule 302 permits, in cases where no

agents are appointed, service of certain documents to be effected by posting copies of such documents in the office of the Registrar at Ottawa; but for reasons too obvious to require explanations, it is desirable that solicitors residing out of Ottawa should be represented in all proceedings before the Court by duly qualified agents.

RULE 301.

When the party appears in person.

Any party to any action or suit or other proceeding, not residing at the said City of Ottawa, who appears in person, may also enter in the said book some place within the limits of the said city at which papers may be left for service upon him and which shall be called his address for service.

RULE 302.

Service in case of neglect to enter name but not requiring personal service.

In case the attorney or solicitor in any action, suit or other proceeding, shall have neglected to enter the name of an agent, or a party appearing in person, to enter an address for service in the said book, papers not requiring personal service may be served by affixing them in the office of the Registrar in some conspicuous place therein.

WRITS.

RULE 303.

Writs.

All writs shall be prepared in the office of the Attorney-General or by the attorney or solicitor suing out the same, and the name and address of the attorney or solicitor suing out the same shall be endorsed on such writ, and every such writ shall before the issuing thereof be sealed at the office of the Registrar and a copy of the said writ and a *præcipe* therefor shall be left at the said office, and thereupon an entry of issuing such writ, together with the date of sealing and the name of the attorney or solicitor suing out the same, shall be made in a book to be kept in the Registrar's office for that purpose, and all writs shall be tested of the day, month and year when issued.

See Rules regulating procedure in suits by English information, L. R. 1 Ex. 389.

RULE 304.

Subpœnas.

Subpœna to witnesses may be in the form set forth in Schedule Z4 to these orders annexed.

See Rule 243 and sec. 68 of *The Exchequer Court Act*, ante p. 222

1. *Subpœnas—Costs—Number of persons in one subpœna.*—Costs of two subpœnas, each for one person, objected to. The taxing officer found two were necessary, one for service south and one for service north of McLeod.

English Rule 511 provides that every subpœna, other than a subpœna duces tecum, shall contain three names when necessary or required, but may contain any larger number of names. *Held*, that the rule means that a party may issue one subpœna for each three witnesses; but where witnesses reside in different parts of the country and the same original cannot reasonably be produced to them all, as required by the English Rule 514, the clerk may, in his discretion, allow for extra subpœnas. *Craig v. New Oxley Ranch Co.*, 15 C. L. T. 323.

2. *Subpœna—Cost—Co-plaintiff.*—Costs of subpœna issued by the plaintiff for the purpose of calling his co-plaintiff as a witness, objected to as not taxable against Defendant. At the time of the trial the two plaintiffs were represented by different advocates on the record. *Held*, that Alison was reasonably justified in issuing a subpœna to procure the attendance of his co-plaintiff as a witness. *Alison v. Christie*, C. L. J., Vol. 15 p. 324.

3. *Subpœna—Affidavit of service—Number of witnesses.*—Where eleven witnesses had been subpœnaed for trial and eleven original subpœnas taken out, and one original used for each of them, notwithstanding the fact that the witnesses all resided in the same city or in the neighbourhood, and where also an affidavit of service had been given in respect of each witness, the Registrar, on taxation, refused to allow more than one subpœna and one affidavit for every three witnesses. *The Queen v. Flinn*, January 5th, 1895.

See *Wilson's Judicature Arts*, 6th Edn., p. 316.

E. O. xxxvii. R. 29.

RULE 305.

Writs in revenue causes how to be tested and returned.

All writs in revenue causes are to be tested of the date on which they issue, and shall be made returnable immediately after the execution thereof, or on a day certain to be fixed by a Judge of the Court; and all necessary alterations may be made in the forms of writs in revenue causes to adapt them to the law and practice of the Court; and the Judge of the Court in granting his fiat for any such writ, if any granted, may settle the terms and form in which the writ shall issue.

RULE 306.

Writs may be amended.

Any writ may at any time be amended by order of the Court or Judge upon such conditions and terms as to costs and otherwise as may be thought just, and any amendment of a writ may be declared by the order authorizing the same to have relation back to the date of its issue or to any other date or time.

See annotation under Rule 229.

RECOGNIZANCES.

RULE 307.

Recognizances.

Recognizances in revenue and all other causes may be taken and acknowledged before any Commissioner or other officer having authority to take recognizances of bail in the Exchequer Court.

See sec. 76, ch. 140, R.S., 1906.

Under sec. 76 of *The Exchequer Court Act*, Commissioners for administering oaths in the Exchequer Court of Canada are empowered to take all recognizances in this court.

RULE 308.

May be on paper.

Recognizances may be prepared on paper.

OFFICERS OF THE COURT.

RULE 309.

Registrar's office hours.

The Registrar is to keep his office open each day except Sundays and holidays, from 10 in the forenoon until 4 o'clock in the afternoon, and on Saturdays from 10 in the forenoon until 1 o'clock in the afternoon, and all officers of the Court are to be in attendance during those hours.

RULE 310.

Registrar's office hours in vacations.

During vacations the Registrar's office is to be kept open each juridical day from 11 in the forenoon to 12 o'clock, noon.

RULE 311.

Books to be kept in Registrar's office.

There are to be kept in the Registrar's office all books necessary and proper for recording and entering all proceedings in Court and Chambers, and in which all judgments, reports, orders, rules, filings of pleadings, and other papers are to be entered.

RULE 312.

Jurisdiction of Registrar in Chambers.

The Registrar shall have power to do any such thing and transact any such business as is specified in these Rules, or in any such Rules or orders which may be hereafter made, and to

exercise any such authority and jurisdiction in respect thereof as is now or may be hereafter done, transacted or exercised by the Judge of the Exchequer Court sitting in Chambers in virtue of any statute or custom or by the practice of the Court.

(1) In case any matter shall appear to the said Registrar to be proper for the decision of the Judge, the Registrar may refer the same to the Judge, who may either dispose of the matter or refer the same back to the Registrar with such directions as he may think fit.

(2) Every order or decision made or given by the said Registrar in Chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

(3) All orders made by the Registrar sitting in Chambers are to be signed by the Registrar.

(4) Any person affected by any order or decision of the Registrar may appeal therefrom to the Judge in Chambers, and such appeal shall be made by a petition on notice setting forth the grounds of objection, and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by the Judge or the Registrar.

(5) The petition shall be presented on the Monday or Friday named in the said petition or notice, which shall be either the first Monday or first Friday after the expiry of the delays provided for by the foregoing subsection, or so soon thereafter as the same can be heard by the Judge, and shall be set down, not later than two days before the hearing, in a book kept for that purpose in the Registrar's office.

The above Rule 312, vesting in the Registrar of the Court the jurisdiction of Judge in Chambers, has been made in compliance with the provisions of sec. 87 of *The Exchequer Court Act*, as amended by 7-8 Ed. VII, ch. 27, sec. 2.

RULE 313.

Registrar's ministerial powers.

The Registrar shall have power in revenue causes to do any ministerial act mentioned in these Rules and which the King's Remembrancer in His Majesty's late Court of Exchequer in England could have done in the same class of cases, and when any proceedings in such cases in the said Court of Exchequer were required to be taken in the office of the King's Remembrancer the same proceedings may be taken here in the office of the Registrar.

For information respecting the King's Remembrancer's office, see Introduction, *ante* p. 47.

RULE 314.

Deputy Registrar.

Any Officer of the Court whom the Registrar of the Court, with the approval of the Governor in Council, may appoint to

be his deputy shall, subject to the direction of the Registrar, perform the duties of Registrar, and shall for that purpose have and exercise all the powers, authority and jurisdiction of the Registrar in Chambers.

RULE 315.

Sheriff's fees.

Sheriffs and coroners shall be entitled to the fees and poundage prescribed by Schedule Z5 to these orders annexed.

See Rules 239, 242 and 243, and secs. 58 and 74 of "*The Exchequer Court Act.*"

By sec. 74 of R. S., 1906, ch. 140, it is enacted that the Sheriffs of the respective counties or divisions, throughout the Dominion of Canada, shall be deemed and taken to be ex-officio officers of the Exchequer Court of Canada, and shall perform the duties and functions of sheriffs in connection with the said Court; and in any case where the sheriff is disqualified, such duties and functions shall be performed by the coroners of the county or district.

Pursuant to Orders in Council, of the 19th December, 1876, and 7th June, 1883, the sheriff shall receive:—(1) For his own remuneration the sum of $5 for each day upon which his attendance on the Exchequer Court of Canada is required by notice in writing from the Registrar of the said Court, under direction from the Court or Judge and actually given:—(2) For constables, the amount disbursed not exceeding the rate of $1.50 each for each day on which they are necessarily and actually engaged in attendance on the said Court; the number allowed being according to circumstances and as may be directed in writing by the Registrar of the said Court under authority given by the Court or Judge.

The O. C. of the 7th June, 1883, amending that of the 18th June, 1877, states that: "The minister is informed that practically the attend-"ance is given on each day on which either Court sits, which he believes "was not the intention of Council. The attendance of the Sheriff on the "Supreme Court or the Exchequer Court on argument of demurrer or on "hearings, when the evidence has been taken by Commission is not "necessary except under very special circumstances." This proviso, of course, in so far as it concerns the Exchequer Court, would only apply to the sittings at Ottawa.

The Sheriff's account shall be accompanied by vouchers, and shall be certified by the Sheriff and also by the Registrar of the Court according to the following form, viz:—

IN THE EXCHEQUER COURT OF CANADA.

SHERIFF'S ACCOUNT.

Under O. C. 7th June, 1883, and 50-51 Vict., Chap. 16, Sec. 43.

The GOVERNMENT OF CANADA.

To THE SHERIFF OF ..... DR.

Province of .....

DATE 18....		$	Cts.
Please forward this account to the Registrar, Exchequer Court, Ottawa.	To actual attendance in person or by deputy on Judge.....at the trial of the causes mentioned below..... .....days at $5.00 per day..... .....Constables at $1.50 each per day for each day necessarily and actually engaged in attendance during the sittings of the Court, in all ..... days.....		
	Names of Constables so attending. / No. of days.		
	..... /		
	..... /		
	..... /		
	..... /		
	The causes tried were the following, viz.:		
	.....		
	.....		
	.....		
	.....		
	.....		
	.....		
	$		

I CERTIFY that above Account amounting to $.....is correct.

.....

Sheriff.

I CERTIFY that I have laid this account before Mr. Justice.....
and I have examined it and believe it to be correct.

.....

Registrar.

RULE 316.

Bailiff's fees.

Bailiffs who serve any process or paper by direction of any party to any cause or matter, shall not be paid the fees prescribed for sheriffs and coroners, but the fee or fees allowed to bailiffs for a like service in the Superior Court of the province in which the service is made.

VACATIONS.

RULE 317.

Christmas vacation.

There shall be a vacation at Christmas, commencing on the 15th of December, and ending on the 10th of January.

RULE 318.

Long vacation.

The long vacation shall comprise the months of July and August.

COMPUTATION OF TIME.

RULE 319.

Computation of time.

In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the foregoing rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to fall on a Sunday or on a day appointed by the Governor General for a public fast or thanksgiving, or any other legal holiday or non-juridical day, as provided by the statutes of the Dominion of Canada.

1. *Calendar month—Meaning of.*—A calendar month, when not exactly coterminous with a given calendar month, is from the day of commencement (reckoning that day) to and inclusive of the day in the succeeding month immediately preceding the day corresponding to the day of commencement. *Migotti v. Colvill*, 4 C. P. D. 233, and *Freeman v. Read*, 11 W. R. 802, referred to. *Wright v. Leys*, 10 Ont. P. R. 354.

2. *Word "forthwith"—Meaning.*—Where anything is required to be done "forthwith" the word "forthwith" must be construed with regard to the object of the provision and circumstances of the case. *Ex parte Lamb*, 19 Ch. D. 169.

RULE 320.

Certain days not to be computed.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, or a day appointed as aforesaid for a public fast or thanksgiving, or any other non-juridical day or

legal holiday, shall not be reckoned in the computation of such limited time.

E. O. lvii., R. 2.

RULE 321.

Where time for taking any proceeding expires on a Sunday or a day on which office is closed.

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or procedure shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

E. O. lvii., R. 3.

Under the provisions of sec. 34 of *The Interpretation Act* (R. S., 1906, ch. 1, sub.-sec. 11), the word "holiday" includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birth-day or the day fixed by proclamation for the celebration of the birth-day of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated *Labour Day*, and any day appointed by proclamation for a general fast or thanksgiving.

RULE 322.

No pleadings to be amended, filed or delivered during vacations.

No pleadings shall be amended, filed or delivered during the vacations, unless otherwise ordered or directed by the Court or a Judge.

E. O. lvii., R. 4.

RULE 323.

Vacations not to be reckoned in computation of time.

The time of the long and Christmas vacations shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending or serving any pleading, unless otherwise directed by the Court or a Judge.

E. O. lvii., R. 5.

RULE 324.

Powers of Court or Judge as to enlarging or abridging time.

The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

E. O. lvii., R. 6.

The English rule corresponding to the above is substantially the same, and for cases decided thereunder see *Annual Practice*, 1893, pp. 1024, 1025 and 1026; *Wilson's Judicature Acts*, 6th Edn. p. 469.

As regards cases falling within the application of the above rule, the various decisions must be regarded as instances of the exercise of the discretion vested in the court, and not as laying down any fixed and binding rule. See per Ld. Selborne in *Carter v. Stubbs* 6 Q. B. D. 119.

RULE 325.

Formal objections not to prevail.

No proceeding in the Exchequer Court shall be defeated by any merely formal objection.

Provisions of a similar nature are also made by section 63 of *The Exchequer Court Act*, (R. S., 1906, ch. 140,) which reads as follows:—"No informality in the heading or other formal requisites of any affidavit, "declaration or affirmation, made or taken before any person under any "provision of this or any other Act, shall be an objection to its reception "in evidence in the Exchequer Court, if the Court or Judge thinks proper "to receive it; and if such affidavit is actually sworn to, declared or "affirmed by the person making the same before any person duly authorized "thereto, and is received in evidence, no such informality shall be set "up to defeat an indictment for perjury."

RULE 326.

Effect of non-compliance with rules.

Non-compliance with any of these rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

E. O. lix.

Subject to the provisions of Rule 1 hereof and of sections 36 and 37 of *The Exchequer Court Act*, (R. S., 1906, ch. 140,) the above Rules and Orders made and signed on the 11th January, 1909, apply throughout the Dominion of Canada, irrespective of the place wherein the cause of action has arisen. This will convey to all suitors the benefit of the ample powers of amendment possessed by this court and will make it impossible for them to be prejudiced in any way, or to have any of their rights defeated, by merely formal objections.

INTERPRETATION.

RULE 327.

In the preceding rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:—

1. The terms 'a Judge,' 'the Judge' or 'Judge' mean any Judge of the said Exchequer Court transacting business out of Court and shall also include the Registrar sitting in Chambers under the powers conferred upon him by Rule 312.
2. The word 'Registrar' extends to and includes his deputy lawfully appointed.

3. Words importing the singular number, include the plural number, and words importing the plural number include the singular number.
4. Words importing the masculine gender include females.
5. The word 'party' or 'parties' and words 'Plaintiffs' and 'Defendants' include a body politic or corporate, and also His Majesty and His Majesty's Attorney-General.
6. The word 'affidavit' includes affirmation.
7. The words 'Revenue Causes' include the several classes of cases mentioned in section 31, sub-sec. (*a*) of 'The Exchequer Court Act' (Ch. 140, R.S., 1906).
8. The words 'Non-revenue Causes' include the several classes of cases mentioned in section 31, sub-sec. (*d*) of 'The Exchequer Court Act' (Ch. 140, R.S., 1906), as well as a petition of right.
9. The word 'Petitioner' used alternatively with the words 'Attorney-General' and 'Plaintiff' shall mean the suppliant in any petition of right.
10. The word 'action' shall include a suit or proceeding by information by the Attorney-General as well as a petition of right, a reference by the Head of a Department, or an action by a private suitor.
11. The expression 'plaintiff' occurring in any rule of the Exchequer Court of Canada, includes the Crown or the party prosecuting any proceeding, and the suppliant in a petition of right.
12. The expression 'defendant' occurring in any rule of the Exchequer Court of Canada, includes the Crown or the party defending any proceeding, and the respondent in a petition of right.
13. The word 'month' means calendar month where lunar months are not expressly mentioned.
14. The words 'the Act' means the Exchequer Court Act.

SCHEDULES.

REFERRED TO IN THE RULES.

SCHEDULE A.

Form of information.

(*Rule* 3).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada.

Plaintiff;

AND

JOHN SMITH,

Defendant.

Filed on the....day of....., A.D. 190 .

To The Honourable the Judge of the Exchequer Court of Canada:—

The Information of the Honourable.....His Majesty's Attorney-General of Canada, on behalf of His Majesty, sheweth as follows:—

(*Here state facts concisely*).

CLAIM.

The Attorney-General, on behalf of His Majesty the King, claims as follows:—

(*a.*)

(*b.*)

Dated at , this day of 190 .

(Signature)

A. B. A.,

Attorney-General.

SCHEDULE B.

Form of Statement of Claims in Action on Postmaster's Bond.

(*Rule* 6).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

The Postmaster General for Canada,

Plaintiff;

AND

A. B., C. D. and E. F.,

Defendants.

STATEMENT OF CLAIM.

Filed the....day of.....190 .

1. The defendants, by their bond bearing date the day of A.D. 19 , became jointly and severally bound to His Majesty the King, in the sum of $ to be paid by the said defendants to His Majesty the King, sub-

ject to certain conditions thereunder written, upon fulfilment whereof the said bond was to become void.

2. One of the said conditions was and is that the said A. B. should, from time to time, and at all times when thereunto required, well and truly pay over to the Postmaster General for Canada all sums as might or ought to be had and received by him for the sale and disposal of postage stamps and stamped envelopes, according to the value of the same, respectively, entrusted to him for sale as postmaster at, etc.

3. Postage stamps and stamped envelopes to the value of one thousand dollars were, on day of or thereabouts, entrusted to the said A. B., as postmaster at, etc., for sale, and he has sold the same.

4. The said A.B. has paid over only $100 of the amount received by him on account of such sale, and refuses to account for the balance of the amount received by him for the sale of the said postage stamps and stamped envelopes, although he has been required to do so.

5. A statement of the account of the said A. B. as such postmaster and attested as correct, by the certificate and signature of the accountant of the Post Office of Canada, shows such balance of $900 to be due and unpaid by the said A. B.; and, by virtue of the 'Post Office Act, R.S., 1906, ch. 66,' the plaintiff is entitled to demand judgment against the defendants for double the amount of the said balance.

The plaintiff claims—

1. Judgment against the said defendants, jointly and severally, for the sum of $1,800 and costs of suit.

SCHEDULE C.

Endorsement on Statement of Claim.

(*Rule* 7).

The claimant prays for a statement in defence on behalf of His Majesty the King within four weeks after the date of the service hereof, or otherwise that the statement of claim may be taken as confessed.

SCHEDULE D.

(1) *Form of affidavit for writ of Immediate Extent in chief.*
(*Rule* 13).

IN THE EXCHEQUER COURT OF CANADA.

(*Full style of cause*).

I, A. B. (*insert residence and occupation*), make oath and say as follows:—

1. I am (*state if he is an officer of the Crown, and in what capacity and under what authority he is acting herein*).

2. That the said defendant is indebted to the Crown in the sum of $...., or thereabouts (*state here in what manner it arose, and that it is in danger of being lost; and it should contain not only a general allegation of the defendant's insolvency,*

but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded or that an execution has issued against him. Where against a bond debtor to the Crown, the affidavit should contain a distinct, positive and unequivocal allegation of the breach of the condition of the bond, &c.)

3. The defendant further says he verily believes that unless some method more speedy than the ordinary course of proceeding at law be had against the said defendant,
for the recovery of the sum of $, or thereabouts, the same is in danger of being lost.

Sworn, &c.

(2) *Form of fiat or order for issue of an Immediate Extent.*

IN THE EXCHEQUER COURT OF CANADA.

Before
The Honourable Mr. Justice

In Chambers.

(*Style of cause*).

Upon hearing A. B. of Counsel for His Majesty the King, and upon hearing read the affidavit of C.D., let a writ or writs of Immediate Extent issue against the said defendant,
for the recovery of the sum of $.

Dated at Ottawa, the day of A.D. 19 .

(3) *Form of writ of Immediate Extent.*
(*Full style of cause*).

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of

GREETING:

Whereas, by the affidavit of C. D., it appears that A. B. of is indebted to Us in the sum of $ lawful money of Canada, for which said sum of $ still remains due and unpaid to Us as by reference to the said affidavit filed in Our said Exchequer Court more fully appears.

Now We being willing to be satisfied the said sum of $ so due to Us with all the speed We can, as is just, do command you that you omit not by reason of any liberty, but enter the same and summon the said A. B. to appear in Our said Exchequer Court, at Ottawa, on the day of A.D. 19 , and that you diligently inquire what lands and tenements and of what yearly values that said A. B. now has in your bailiwick, and what goods and chattels, and of what sorts and prices, and what debts, credits, specialties and sums of money the said A. B., or any person or persons to his use or in trust for him now hath or have in your said bailiwick and that all and singular the said goods and chattels, lands and tenements, debts, credits, specialties and sums of money in whose hands soever the same now are, you diligently appraise

and extend, and do take and seize the same into Our hands, there to remain until We shall be fully satisfied the said debt, according to the form of the Statute made for the recovery of such Our debts. And lest this Our command should not be fully executed, We further commend and empower you by these presents to summon before you such persons as you shall think proper and carefully examine them in the premises, and that you distinctly and openly make appear to Our said Exchequer Court immediately (*unless a special day of return is mentioned in the fiat*) after the execution hereof, and in what manner you shall have executed this Our command, and that you then have there this writ; provided that what goods and chattels you shall seize into Our hands, by virtue hereof, you do not sell or cause to be sold until We shall otherwise command you.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of A.D. 19 .

By the warrant of
Mr. Justice

SCHEDULE E.

(*Rule* 19).

(*Writ of Scire Facias*).

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of the County of Carleton, or any other of Our Sheriffs in the Dominion of Canada.—GREETING:

Whereas We lately by Our letters patent sealed with the seal of Our Patent Office, in the City of Ottawa, in Our Dominion of Canada, and signed by the Honourable Our Commissioner of Patents (*or as the case may be*), and bearing date the day of A.D. 19 , and registered in Our said Patent Office, at Ottawa aforesaid, as No. reciting that whereas A. B. (*residence and occupation*) had petitioned the Commissioner of Patents praying for the grant of a patent for an alleged new and useful (*as the case may be*) a description of which invention is contained in the specification of which a duplicate is thereunto attached and made an essential part thereof, and had elected his domicile at (*as the case may be*), and had also complied with the other requirements of 'The Patent Act,' ch. 69 of 'The Revised Statutes of Canada, 1906,' did by Our said letters patent, grant to the said A. B., his executors, administrators, legal representatives and assigns, for the period of years from the date thereof, the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used in Our Dominion of Canada the said invention,—subject nevertheless to adjudication before any Court of competent jurisdiction, and to the conditions contained in the Act aforesaid

And whereas (*set out assignments, if any*).

And whereas E. being desirous, for the reasons hereinafter mentioned, to impeach the recited letters patent bearing date the day of A.D. 19 , granted to the said A. B. (*if assignment*, and assigned to the said) as aforesaid, has obtained a sealed and certified copy thereof, and of the petition, affidavit, specification and drawings relating thereto, and has, in accordance with the provisions in that behalf contained in the said Act, filed the said sealed and certified copies of said letters patent, petition, affidavit, specification and drawings, in the office of the Registrar of Our Exchequer Court of Canada, and the said letters patent and documents aforesaid are now of record in the said Court.

(*Then set out reasons for impeachment, as for example:*)

And whereas We are given to understand that Our said letters patent bearing date the day of A.D. 19 , and numbered issued to the said A. B. (*if assigned*, and assigned to the said) as aforesaid, were and are contrary to the law, in this: that whereas the said A. B. did in the said petition state that he had invented a certain new and useful (*as the case may be*) not known or used by others before his invention thereof, as set forth in the said specification and drawings accompanying said petition.

And whereas the said A. B. in the said affidavit did swear that he verily believed that he was the inventor of the alleged new and useful (*as the case may be*) described and claimed in the said specification, and did swear that the several allegations contained in the said petition were respectively true and correct.

And whereas We are given to understand and be informed that the said A. B. did not invent the said alleged invention in the said petition and letters patent No. mentioned and claimed.

And also, &c., &c.,

By reason and means of which said several premises the said letters patent so granted as aforesaid to the said A. B. were, are and ought to be void and of no force and effect in law.

And We, being willing that what is just in the premises should be done, command you Our Sheriff of Our said County of Carleton or other Our said Sheriffs, that you give notice to the said A. B. (*or as the case may be, if assigned*) that before Us in Our said Exchequer Court of Canada he be and appear within *fourteen days* from the service upon him of a copy of this writ, inclusive of the day of such service, to show if he has or knows anything to say for himself why the said letters patent No. as aforesaid so granted to him (*as the case may be*) ought not, for the reasons aforesaid, to be adjudged to be void, vacated, cancelled and disallowed, and further to do and receive those things which Our said Court shall consider right in that behalf, and that you return this writ immediately after the execution thereof, stating how you have executed the same, and the day of the execution thereof.

WITNESS the Honourable W. G. P. Cassels, Judge of Our Exchequer Court of Canada, at Ottawa, the day of in the year of Our Lord one thousand nine hundred and in the year of Our reign.

L. A. A.,
Registrar.

SCHEDULE F.

Advertisement of Scheme.

(*Rule No.* 50).

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

NOTICE is hereby given, that on the day of 19 , a scheme of arrangement between the above named Company and their creditors (*state here whether the scheme contains or not any provisions for settling the rights of any and what classes of shareholders as among themselves, or for raising additional share or loan capital, and which, and to what extent*) was filed in the Exchequer Court of Canada, and a copy of the said scheme will be furnished to any person requiring the same by the undersigned, or at the office of the company at on payment of the prescribed charges for the same.

A. and B. of (Agents for C. and D. of)
Solicitors for the Company.

SCHEDULE G.

Certificate of Filing Scheme.

(*Rule No.* 51).

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

I DO HEREBY CERTIFY that a (*printed or written, as the case may be*) scheme of arrangement between the above named company and their creditors, under 'The Railway Act,' R.S., 1906, ch. 37, section 365, was, on the day of 19 , duly filed in the Exchequer Court of Canada, together with the declaration and affidavit required by the said statute (and that a printed copy of such scheme was on the day of 19 , duly filed in the said Court pursuant to the general order of Court made in that behalf).

Dated, &c.

L. A. A.,
Registrar.

SCHEDULE H.

Petition to confirm scheme.

(*Rule No.* 53).

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

TO THIS HONOURABLE COURT:

The humble petition of directors of the above named company,

Sheweth:

That on the day of 19 , the directors of the above named company filed in this Court a scheme of arrangement between the above named company and their creditors.

Your petitioners therefore humbly pray that the scheme so filed as aforesaid may be confirmed by the order of this honourable Court. And your petitioners will ever pray, &c.

SCHEDULE I.

Advertisement of a Petition to confirm a Scheme.

(*Rule No.* 55).

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

NOTICE is hereby given that a petition was on the day of 19 , presented to The Exchequer Court of Canada by the directors of the above named company, praying for the confirmation of a scheme of arrangement between the said company and their creditors, filed in the said Court on the day of 19 , and that the said petition is directed to be heard on the day of 19 , and any person whose interests are affected by such scheme, and who may be desirous to oppose the making of an order for the confirmation thereof under the provisions of 'The Railway Act,' R.S., 1906, ch. 37, should enter an appearance and file a printed statement of his objections thereto at the office of the Registrar of the said Court on or before the day of 19 , and appear by himself or counsel at the hearing of the said petition. And a copy of the scheme will be furnished to any person requiring the same by the undersigned, or at the office of the company at , on payment of the prescribed charge for the same

A. and B. of (Agents for C. and D. of).

Solicitors for the petitioners,

SCHEDULE J.

(*Rule* 68).

Indorsement on information or statement of claim.

Notice to the defendant within named.

You are required to file with the Registrar of the Exchequer Court of Canada, at his office, in the City of Ottawa, your plea,

answer or exception, or otherwise make your defence to the within information (*or* statement of claim, *as the case may be*) within four weeks from the service hereof. If you fail to file your plea, answer or exception, or otherwise make your defence within the time above limited, you are to be subject to have such judgment, decree, or order made against you as the Court may think just upon the informant's (or plaintiff's) own showing; and if this notice is served upon you personally you will not be entitled to any further notice of the further proceedings in the cause.

NOTE.—This information (*or* statement of claim) is filed by A. B., &c., His Majesty's Attorney-General of Canada, on behalf of His Majesty (or by of the City of , Solicitor for the within named plaintiff).

SCHEDULE K.

(*Rule* 82).

Advertisement in case a defendant is not to be found.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

(Copy order)

To the defendant C. D.,

Take notice that unless you file your plea, answer, or exception, or otherwise make your defence pursuant to the requirements of the above order, the Court or a Judge may direct that the case shall thereafter proceed as though you had filed a plea, answer or defence traversing or denying the allegations contained in the information (petition of right or statement of claim, *as the case may be*) filed in this cause, and the action will thereafter proceed accordingly.

SCHEDULE L.

FORMS OF PLEADING.

(1) *Form of information of intrusion.*

(*Rule* 88).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada,

Plaintiff;

AND

JOHN SMITH,

Defendant.

Filed day of A.D. 19 .

To this Honourable Court:

The information of the Honourable His Majesty's Attorney-General of Canada, on behalf of His Majesty.

SHOWETH AS FOLLOWS:

1. That certain lands and premises situate in the city of Ottawa, in the County of Carleton, Province of Ontario, and being, &c., on the first day of October, in the year of our Lord, 19 , and long before were and still ought to be in the hands and possession of His Majesty the King.

2. That the Defendant on the said first day of October, in the year aforesaid in and upon the possession of His Majesty the King, of and in the premises, entered, intruded and made entry, and the issues and profits thereof coming received and had and yet doth receive and have to his own use.

CLAIM.

The Attorney-General, on behalf of His Majesty the King, claims as follows:—

1. Possession of the said lands and premises.
2. $ for the issues and profits of the said lands and premises from the said first day of October, A.D. 19 , till possession shall be given.

(Signed) 19 ,

....

(2) *Form of Qui Tam Action.*

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., who sues as well for His Majesty the King as for himself, *Plaintiff;*

AND

C. D.,

Defendant.

Filed day of A.D. 19 .

STATEMENT OF CLAIM.

1. By section of the Act passed by the Parliament of Canada in the year of His Majesty the King, Edward the Seventh's reign, intituled: 'An Act , it is enacted, among others things, as follows: (*Set forth the material part of the Section*).

2. (*Add any other grounds.*)

CLAIM.

The Plaintiff claims:

1. Judgment against the said Defendant for the said sum of , and costs of suit.

(3) STATEMENT IN DEFENCE.

(*Title*).

1. The Defendant, in answer to the Plaintiff's statement of claim, says as follows:—

1. He admits the statements in paragraphs 1, 2 and 3 (*as the case may be*).

2. (*Add any other grounds of defence—each one to be stated concisely in a separate paragraph*).

3. The defendant therefore, &c., &c.

Dated at the day of A.D. 19 .

Solicitor for Defendant

(4) REPLY.

(*Title*).

1. The Plaintiff joins issue upon the Defendant's statement in defence.

(*Add any other grounds of reply in concise separate paragraphs*).

SCHEDULE M.

FORM OF ADMISSION OF DEFENCE.

(*Rule* 104).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

The informant (or Plaintiff) confesses the Defence stated in the paragraph of the Defendant's statement in defence (*or*, of the Defendant's further statement in defence).

SCHEDULE N.

Form of affidavit as to documents.

(*Rule* 145).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

I, the above named defendant, C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That (*here state upon what grounds the objection is made, and verify the facts as far as may be*).

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power (*state when*).

6. That (*here state what has become of the last-mentioned documents, and in whose possession they now are*).

7. According to the best of my knowledge, information and belief, I have not now and never had in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, power or custody of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy or extract from any such document, or of any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the first and second schedules hereto.

Sworn, &c.,

SCHEDULE O

Form of Notice to Produce Documents.

(*Rule* 147).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

AND

C. D.

TAKE NOTICE that the plaintiff (*or* defendant) requires you to produce for his inspection the following documents referred to in your statement of claim (*or* defence, *or* affidavit), dated the day of A.D. . (*Describe documents required*).

Dated at day of 19 .

X. Y.

Solicitor for the

To Z., solicitor for

SCHEDULE P.

Form of notice to inspect documents.

(*Rule* 148).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A B.

AND

C. D.

TAKE NOTICE that you can inspect the documents mentioned in your notice of the day of A.D. 19 , (except the deed numbered in that notice), at my office, on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or that the plaintiff (*or* defendant) objects to giving you

inspection of the documents mentioned in your notice of the day of A.D. 19 , on the ground that (*state the ground*).

Dated day of , 19 .

X. Y.,
Solicitor for

To Z.. solicitor or

SCHEDULE Q.

Form of notice to admit documents.

(*Rule* 157).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

AND

C. D.

TAKE NOTICE that the Plaintiff (or Defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the Defendant (or Plaintiff), his solicitor or agent, at on the day of , between the hours of ; and the Defendant (or Plaintiff) is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed as they purport respectively to have been; that such as are specified as copies are true copies, and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To E. F., Solicitor (or agent) for Plaintiff (or Defendant).
G. H. Solicitor (or agent) for Plaintiff (or Defendant).

Here describe the documents, the manner of doing which may be as follows:—

ORIGINALS.

Description of Documents	Dates
Deed of covenant between A. B. and C. D., first part, and E. F., second part	January 1, 1848,
Indenture of lease from A. B. to C. D.	February 1, 1848.
Indenture of re-lease between A. B., C. D., first part, etc	February 2, 1848.
Letter, Defendant to Plaintiff	March 1, 1848.
Policy of insurance on goods by ship *Isabella*, on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	January 1, 1848.
Bill of Exchange for £100, at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	May 1, 1849.

COPIES.

Description of Documents	Dates	Original or Duplicate served, sent or delivered, when, how and by whom.
Register of Baptism of A. B. in parish of X.....	January 1, 1848	Sent by general post February 2, 1848.
Letter, Plaintiff to Defendant...	February 1, 1848	
Notice to produce papers.....	March 1, 1848	Served March 2, 1848, on Defendant's attorney, by E. F., of, etc.
Record of Judgment of the Court of Queen's Bench, in an action, J. S. *v.* J. N.....	Trin. Term, 10 Vict.	

SCHEDULE R.

Form for setting down special case.

(*Rule* 164).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

Set down for argument the special case filed in this action on the day of .

Dated, &c.

X. Y.,
Solicitor for

SCHEDULE S.

FEES TO ACTING REGISTRARS.

(*Rule* 178).

1. Entering any cause or matter for hearing or trial (to be paid by the plaintiff or applicant)..... $1 00
2. For attendance at any hearing or trial, when hearing or trial does not exceed one hour (to be paid by the plaintiff)..... 1 00

   And

   For every hour additional occupied on such hearing or trial (to be paid by the party whose case or motion is proceeding)..... 1 00
3. Fee on order of reference to special referee or referees..... 1 00
4. Administering oath to special referee..... 0 50
5. Swearing each witness (to be paid by party producing witness)..... 0 20
6. Marking each exhibit (to be paid by party filing same)..... 0 10

7.	On issuing each writ of subpœna.....	1 00
8.	For copy of any document per folio of 100 words....	0 10
9.	Each certificate required from the Acting Registrar (The certificate required under Rule 179 to be paid by plaintiff).....	1 00

SCHEDULE T.

FORM NO. 1.

(*Rule No.* 187).

(*Order for issue of Commission*).

IN THE EXCHEQUER COURT OF CANADA.

BEFORE

THE HONOURABLE MR. JUSTICE.....

In Chambers.

(Style of Cause).

UPON the application of the and upon hearing read the summons issued herein on the day of A.D. 190 , and the affidavit of filed, and upon hearing what was alleged by Counsel as well for the as for the .

I DO ORDER that the be at liberty to issue herein, in the form provided for by the Rules of this Court in that behalf, a Commission for the examination of witness (or witnesses *as the case may be*), on behalf of at .

AND I DO FURTHER ORDER that the Commission may issue directed to Commissioner (or Commissioners, *as the case may be*) for the examination *vivâ voce* (*or* on interrogatories and cross interrogatories, *as the case may be*) on oath, *affirmation* or otherwise of witness (*or* witnesses) on behalf of the said (*or* on behalf of the plaintiff and defendant, respectively, *as the case may be*).

AND I DO FURTHER ORDER that the costs of and incidental to this order and of the Commission to be issued by virtue thereof, and the depositions and affirmations to be taken thereunder be and the same are hereby reserved (*or as the case may be*) costs in the cause.

Dated at Ottawa, this day of A.D. 190 .

J. E. C.

FORM NO. 2.

(*Rule* 187).

Commission to examine Witness.

IN THE EXCHEQUER COURT OF CANADA.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

(Full style of cause).

To of, and of &c.

Commissioner named and appointed on behalf of the said plaintiff (or defendant, *as the case may be*).

GREETING:

KNOW YOU that We, in confidence of your prudence and

fidelity, have appointed you (jointly and severally, *as the case may be*), and by these presents do give unto you (and each of you, *as the case may be*) full power and authority diligently to examine before you, as hereinafter mentioned, at the city of or at such other place in aforesaid as may seem to the said Commissioner (or Commissioners, *as the case may be*) most convenient, A. B. and C. D. (or the witnesses on behalf of the said and respectively) *vivâ voce* (or on interrogatories and cross interrogatories, *as the case may be*) on oath, affirmation or otherwise, according to the religion or belief of the said witness (or witnesses, *as the case may be*) to be produced, sworn and examined, upon the matters in question in a certain suit now pending in Our Exchequer Court of Canada, at the City of Ottawa, in the Province of Ontario, in the Dominion of Canada, wherein is plaintiff, and is defendant, and (*if not on interrogatories*) to cross-examine the said witness (or witnesses, *as the case may be*) *vivâ voce* on oath, on such matters or arising out of the answers thereto, and to re-examine the said witness (or witnesses, *as the case may be*) on matters arising out of such cross-examination.

And we command (*or* request, *when out of the jurisdiction*) you (*or* either of you, *as the case may be*) that without delay on a day or days, and at a certain place or places at aforesaid to be appointed by you (or either of you, *as the case may be*) for that purpose, you cause the said witness (*or* witnesses, *as the case may be*) for the plaintiff (plaintiff or defendant, *as the case may be*) to come before you at the city of , or at such other place as aforesaid, and then and there examine and cross-examine *vivâ voce* (*or* on interrogatories and cross-interrogatories, *as the case may be*) as aforesaid, on their corporeal oaths being first taken before you according to the form of oath first endorsed hereon, upon the Holy Evangelists, or in such other manner as shall be sanctioned by the form of the religion of the person (*or* persons) to be examined, and such as shall be considered by him (*or* them) to be binding on his (*or* their respective) conscience, which oath you are hereby empowered to administer to such witness (*or* witnesses).

And we hereby give you (or either of you, *as the case may be*) full power and authority, if you shall see reasonable occasion after the commencement of the examination under this Commission, to adjourn any meeting or meetings or to continue the same *de die in diem* until the witness to be examined hereunder shall have been examined, without giving any further or other notice of such subsequent meeting or meetings than notice to be given on the occasion of such adjournment or continuation of the meeting.

And we further command (or request *when out of the jurisdiction*) you (or either of you, *as the case may be*) that it shall not be necessary to annex to the said Commission, the depositions or affirmations, or to return with the same, to the office of the Registrar of this Court hereinafter mentioned, any books, documents, letters or other papers produced or read

in evidence before you the said Commissioner and referred to in the evidence of the said witness *or* (witnesses) under and by virtue of the Commission, but that extracts from the said books and copies of the documents, letters or other papers respectively shall be verified under the hand of you the said Commissioner (or either of you, *as the case may be*) as being the document or documents mentioned in such evidence, and as being correct copies of the originals and referred to as being with the letter 'A,' or with any other letter or letters respectively, or in any other manner as to you the said Commissioner shall seem meet. And that you do take such examination, cross-examination or re-examination, if any, in the English language on paper, and when you have so taken the same, that you do within from the date hereof, or such further time as the Judge of the said Exchequer Court of Canada may direct, send and return the same closed up under your seal distinctly and plainly set together with this writ, and together also with any books, documents or other papers and exhibits produced or read in evidence before you and referred to in the evidence of said witness , and together with any extracts from the said books and copies of said documents, letters or other papers, verified and certified as herein provided, to the office of the Registrar of the Exchequer Court of Canada, at the City of Ottawa, in the Province of Ontario, in the Dominion of Canada, to be there filed of record in Our said Court.

And We further command (*or* request, *when out of the jurisdiction*) you that the depositions and affirmations taken under and by virtue of this Commission, if taken down in writing by the Clerk hereinafter mentioned, be subscribed by the said witness (*or* witnesses, respectively, *as the case may be*) and you the said Commissioner ; but if taken down in shorthand by such Clerk, they shall be written out at length and shall be certified to and subscribed by such clerk only.

And We further command (*or* request, *when out of the jurisdiction*) you that all books, papers and documents produced in evidence shall be marked as exhibits by you the said Commissioner .

And We further command (*or* request, *when out of the jurisdiction*) you that before you in any manner act in the execution hereof, you do take and subscribe, before any person authorized under The Exchequer Court Act, ch. 140, section 61, of The Revised Statutes of Canada, 1906, to administer an oath concerning any Court of Canada, the oath hereon secondly endorsed, upon the Holy Evangelists or otherwise, in such manner as shall be sanctioned by the form of your religion and shall be considered by you (or either of you, *as the case may be*) to be binding on your conscience.

And We further command (*or* request, *when out of the jurisdiction*) you that you may appoint a clerk or clerks to take down in shorthand, or otherwise transcribe or engross, the depositions of the witness to be examined before you by virtue hereof.

And We further command (*or* request, *when out of the*

jurisdiction) that the clerk or clerks employed in taking, writing, transcribing or engrossing the deposition or depositions of the witness to be examined by virtue hereof, shall, before he or they be permitted to act therein, take the oath hereby thirdly endorsed, which oath you (or either of you, *as the case may be*) are (or is) hereby empowered to administer to such clerk or clerks upon the Holy Evangelists, or otherwise in such manner as shall be sanctioned by his or their several religions, and shall be considered by him or them, respectively, to be binding on his or their respective conscience.

And We further command (*or* request, *when out of the jurisdiction*) that both the said plaintiff and defendant be at liberty to be represented before you the said Commissioner either by Counsel, Solicitor or Agent.

And We further command (*or* request, *when out of the jurisdiction*) that previous to the execution of this Commission, which is granted by Us at the instance of the and by prosecuted, you the said Commissioner do give or cause to be given unto each of the said parties, their Counsel, Solicitor or Agent, four days' notice in writing under your hand of your intention to examine the said witness to be examined on behalf of the said , and of the time and place or times and places of your so intending to examine the same, by leaving the said notice or causing the same to be left at the place of business of the Counsel, Solicitor or Agent of the said parties.

And We further command (*or* request, *when out of the jurisdiction*) you that if such Counsel, Solicitor or Agent or either party neglects to attend pursuant to such notice, you shall proceed with and take the said examination in his absence *ex parte*.

And We give you (and each of you, *as the case may be*) power and authority to do all such other acts and things as may be necessary and lawfully done for the due execution hereof.

WITNESS THE HONOURABLE , the Judge of Our Exchequer Court of Canada, at the day of in the year of Our Lord one thousand nine hundred and and in the year of Our reign.

Registrar.

Witness' Oath.

You are true answers to make to all such questions as shall be asked you, without favour or affection to either party and therein you shall speak the truth, the whole truth, and nothing but the truth.

SO HELP YOU GOD.

Commissioner's Oath.

You shall, according to the best of your skill and knowledge, truly and faithfully and without partiality to any or either of the parties in this matter, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written.

SO HELP YOU GOD.

Clerk's Oath.

You shall truly and faithfully and without partiality to any or either of the parties in this matter, take down, transcribe and engross the depositions of all and every witness or witnesses produced before and examined by the Commissioner named in the Commission within written, as far forth as you are directed and employed by the said Commissioner to take, write down, transcribe or engross the said depositions.

SO HELP YOU GOD.

SCHEDULE U.

FORMS OF JUDGMENT.

1. *Default of defence in case of liquidated demand.* (*Rule* 199).

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 19 .

Present,

The Honourable Mr. Justice

BETWEEN

A. B.,

Plaintiff;

AND

C. D. AND E. F.,

Defendants.

The defendants not having filed any statement in defence;

This Court doth order and adjudge that the said plaintiff recover from the said defendants the sum of $ and costs to be taxed.

2. *Judgment in default of defence in action for recovery of land.* (*Heading as in Form* 1).

No defence having been filed to the information herein;

This Court doth order and adjudge that the plaintiff recover possession of the land in the information mentioned.

3. *Judgment in default of defence after assessment of damages.* (*Heading as in Form* 1).

The defendants not having filed a statement in defence, and the cause having been referred to to assess the damages which the plaintiff was entitled to recover, and the said having, by his report, dated the day of , 19 , reported that the said damages have been assessed at the sum of $;

This Court doth order and adjudge that the plaintiff recover the sum of $ and the costs to be taxed.

4. *Judgment at trial.* (*Heading as in Form* 1).

This action coming on for trial, at the city of this day (or having come, &c., on the day of , A.D. 19), before this Court, in the presence of counsel for the plaintiff and the defendants (*or if some of the defendants do not appear,*

for the plaintiff and the defendant, C. D., none appearing for the defendants E. F. and G. H., although they were duly served with notice of trial as by the affidavit of , filed on the day of , appears), upon hearing read the pleadings herein (*and such other documents as may be material, or any examination taken before trial, by commission or otherwise*), and upon hearing what was alleged by Counsel aforesaid (*when case reserved add as follows*:—This Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

WHEN JUDGMENT IN FAVOUR OF PLAINTIFF.

This Court doth order and adjudge that the said plaintiff is entitled to recover from His Majesty the King the sum of $ and the costs to be taxed.

WHEN ACTION DISMISSED.

(*Same as above for the first part*).

This Court doth order and adjudge that the said plaintiff recover nothing against the said defendant, and that the defendant recover against the plaintiff her (*or his*) costs of the action to be taxed.

5. *Judgment at trial when action instituted by petition of right.*

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 19 .

Present,

The Honourable Mr. Justice

In the matter of the Petition of Right of
A. B.,

Suppliant;

AND

HIS MAJESTY THE KING,

Respondent.

The Petition of Right of the above named suppliant coming on for trial, at the city of this day (*or as the case may be*, having come, &c., on the day of A.D. 19), before this Court in presence of Counsel for the suppliant and the respondent, upon hearing read the pleadings herein (*or such other documents as may be material, or any evidence taken before trial by commission or otherwise*) and upon hearing the evidence adduced at trial, and what was alleged by Counsel aforesaid (*when case reserved add*:—This Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

WHEN RELIEF GRANTED.

This Court doth order and adjudge that the said suppliant is entitled to recover from His Majesty the King the sum of $ being the relief (or part of the relief, *as the case may be*) sought by his Petition of Right herein, and costs to be taxed.

WHEN RELIEF REFUSED.

(*Same as above for first part*)

This Court doth order and adjudge that the said suppliant is not entitled to the relief sought by his Petition of Right herein, and that His Majesty the King recover from the said suppliant His costs herein, to be taxed.

See sec. 10 of *The Petition of Right Act*, *ante* p. 240.

6. *Judgment on motion generally.*

(*Heading as in Form* 1).

This action having this day (*or as the case may be*, on the day of A.D. 19), come on before this Court on motion for judgment on behalf of and upon hearing Counsel for the (*when motion reserved add*: this Court was pleased to direct that this matter should stand over for judgment, and the same coming on this day for judgment).

This Court doth order and adjudge that, &c.

SCHEDULE V.

(1) *Form of Writ of Fieri Facias.*

(*Rule* 237).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of , Greeting:

We command you that of the goods and chattels of C. D., in your bailiwick, you cause to be made the sum of and also interest thereon at the rate of five per centum per annum, from the day of (*day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be*), which said sum of money and interest were lately before Us in Our Exchequer Court of Canada, in a certain action (*or* certain actions, *as the case may be*), wherein A. B. is plaintiff and C. D. and others are defendants (*or* in a certain matter there depending, intituled 'In the matter of E. F.,' *as the case may be*) by a judgment (*or* order, *as the case may be*) of Our said Court, bearing date the day of adjudged (*or* ordered, *as the case may be*) to be paid by the said C.D. to A. B., together with certain costs in the said judgment (*or* order, *as the case may be*) mentioned, and which costs have

been taxed and allowed, by the taxing officer of Our said Court, at the sum of , as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D., in your bailiwick, you further cause to be made the said sum of (costs), together with interest thereon at the rate of five per centum per annum, from the day of (*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*), and that you have that money and interest, together with the costs incurred upon issuing and executing the present writ, before Us in Our said Court immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said judgment (*or* order, *as the case may be*), and in what manner you shall have executed this Our writ, make appear to Us in Our said Court immediately after the execution thereof, and have there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of in the year of Our Lord one thousand nine hundred and , and in the year of Our reign.

L. A. A.,
Registrar.

(2) *The præcipe for a writ of fieri facias may be in the following form, which can be adapted to other writs also*:

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff;*

AND

C. D., *Defendant.*

Seal a writ of *fieri facias* directed to the sheriff of to levy, of the goods and chattels of C. D., the sum of $ and interest thereon at the rate of five per centum per annum, from the day of (and $ costs).

Judgment (or order) dated day of
(Taxing Master's certificate, dated)
X. Y., Solicitor for (*party on whose behalf writ is to issue*).

SCHEDULE W.

Form of writ of Venditioni Exponas.

(*Rule* 241).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff;*

AND

C. D. and others, *Defendants.*

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British

Dominions beyond the Seas, King, Defender of the Faith, Emperor of India:

To the Sheriff of , *Greeting*:

Whereas by Our writ we lately commanded you that of the goods and chattels of C. D. (*here recite the fieri facias to the end*), and on the day of you returned to Us at Our Exchequer Court of Canada aforesaid, that by virtue of the said writ to you directed, you had taken the goods and chattels of the said C. D., to the value of the money and interest aforesaid, which said goods and chattels remained on your hands unsold for want of buyers (*as the case may be*). Therefore, We being desirous that the said A. B. should be satisfied, his money and interest aforesaid, together with the costs incurred upon the present writ, command you that you expose for sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you, in form aforesaid, taken, and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before Us, in Our said Exchequer Court of Canada, immediately after the execution hereof, to be paid to the said A. B., and have there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of in the year of Our Lord, one thousand nine hundred and and the year of Our reign.

L. A. A.,
Registrar.

SCHEDULE X.

Writ of Sequestration.

(*Rule* 246).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To , Greeting.

Whereas lately, in Our Exchequer Court of Canada, in a certain action there depending, wherein A. B. is plaintiff and C. D. and others are defendants (*or*, in a certain matter there depending, intituled, 'In the matter of E. F., *as the case may be*), by a judgment (*or* order, *as the case may be*) of Our said Court, made in the said action (*or matter*), and bearing date the day of , 19 , it was ordered that the said C. D. should pay into Court, to the credit of the said action, the sum of (*or, as the case may be*). Know ye,

therefore, that We, in confidence of your prudence and fidelity, have given, and by these presents do give to you full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said C. D., and to collect, receive and sequester into your hands not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever, and therefore We command you that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall pay into Court, to the credit of the said action, the sum of (*or, as the case may be*), clear his contempt, and Our said Court make other order to the contrary.

Witness, &c.

SCHEDULE Y.

(*Rule* 248).

Writ of Possession.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India

To the Sheriff of , Greeting.

WHEREAS by a judgment of Our Exchequer Court of Canada, bearing date the day of , 19 , (A. B. recovered.) *or* (C. D. was ordered to deliver to) *or* (We recovered) possession of all that (*insert here description of land and premises*) with the appurtenances in your bailiwick: Therefore, We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said (A. B. *or* Us *when at the instance of the Crown*) to have possession of the said land and premises with all the appurtenances thereof. And in what manner you shall have executed this Our writ make appear to Us in Our said Court immediately after the execution hereof. And have you then there this writ.

WITNESS the Honourable , Judge of Our Exchequer Court of Canada, at this day of in the year of Our Lord, one thousand nine hundred and and in the year of Our reign.

L. A.,
Registrar.

SCHEDULE YY.

Form of Writ of Delivery.

(*Rule* 250).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D. and others,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of , *Greeting*:

We command you that without delay you cause the following chattels, that is to say (*here enumerate the chattels recovered by the judgment, for the return of which execution has been ordered to issue*), to be returned to A. B., lately in Our Exchequer Court of Canada recovered against C. D. (*or* C. D. was ordered to deliver to the said A. B.) in an action in Our said Court.* And We further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said C. D., by all his lands and chattels in your bailiwick, so that neither the said C. D., nor any one for him to lay hands on the same until the said C. D. render to the said A. B. the said chattels; and in what manner you shall have executed this Our writ make appear to Us at Our said Exchequer Court of Canada, at Ottawa, immediately after the execution hereof, and have you there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, the day of , in the year of Our Lord one thousand nine hundred and , and in the year of Our reign.

The like, but instead of a distress until the chattels is returned, commanding the sheriff to levy on the defendant's goods the assessed value of it.

(Proceed as in the preceding form until the*, and then thus:) And We further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D., in your bailiwick you cause to be made (*the assessed value of the chattels*), and in what manner you shall have executed this Our writ make appear to Us at Our Exchequer Court of Canada, at Ottawa, immediately after the execution hereof, and have you there then this writ.

Witness, &c.

SCHEDULE Z.

Third Party Notice.

(*Rule* 262).

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff;*

AND

C. D., *Defendant.*

Notice filed 19 .

To X. Y.:

Take notice that this action has been brought by the plaintiff, against the defendant [as surety for M. N., upon a bond conditioned for payment of $2,000 and interest to the plaintiff].

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him on the ground that you are (his co-surety under the said bond *or* also surety for the said M. N., in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of A.D.).

Or (as acceptor of a bill of exchange for $500, dated the day of A.D. , drawn by you upon and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation).

Or (to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent).

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant C. D., or your liability to the defendant C. D., you must cause an appearance to be entered for you within *eight days* after service of this notice.

In default of your so appearing, you will be deemed to admit the validity of any judgment obtained against the defendant C. D., and your own liability to contribute or indemnify to the extent herein claimed, which may be summarily enforced against you.

(Signed) E. T.,
or X. Y.,
Solicitor for the defendant E. T.

Appearance to be entered at

SCHEDULE ZZ.

(*Rule* 270).

Form of Order when Motion for Interlocutory Injunction of Infringement refused on Terms.

IN THE EXCHEQUER COURT OF CANADA.

day the day of A.D. 190 .

Present:

THE HONOURABLE MR. JUSTICE

Style of cause.

UPON MOTION made unto this Court this day (under special leave, *or as the case may be*) by counsel on behalf of the above named plaintiff , in the presence of counsel for the above named defendant , for an order that the defendant (*here recite the notice of motion*) upon hearing read the notice of motion herein dated the day of 190 , and the affidavits of and the exhibits therein referred to, filed, and upon hearing what was alleged by counsel aforesaid; and the defendants, by their counsel, undertaking until the trial of this action, to keep an account (*here recite the undertaking filed by the defendants*).

THIS COURT DOTH NOT THINK FIT to make any order on the said motion, other than that the costs thereof be costs in the cause (or that the costs thereof be reserved, *as the case may be*)

By the Court,

L. A. A.,
Registrar.

SCHEDULE Z1.

FORM NO. 1.

(*Rule No.* 291).

Order for security for costs.

IN THE EXCHEQUER COURT OF CANADA.

BEFORE:

THE HONOURABLE MR. JUSTICE

In Chambers.

(Style of Cause).

UPON the application of the and upon hearing read the summons issued herein on the day of A.D. 190 , and the affidavit of and upon hearing what was alleged by counsel for both parties.

I do order that the do, within 30 days from the service of this order, give security on behalf in the penal sum of $400 to answer the costs of this action, and that all proceedings be in the meantime stayed.

Dated at Ottawa, this day of A.D. 190 .

J. E. C.

FORM No. 2.

(*Rule No.* 291).

Bond for security for costs.

Know all men by these presents, that we, A. B. of (The plaintiff giving security) and C. D. of, &c., and E. F., of, &c. (bondsmen), are jointly and severally held and firmly bound unto G. H., of, &c. (the defendant or person requiring security) in the penal sum of ($400) four hundred dollars of lawful money of Canada to be paid to the said G. H., his executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves and each of us by himself, our, and each of our heirs, executors and administrators, respectively, firmly by these presents. Sealed with our seals.

Dated at , this day of A. D. 19 .

Whereas by an order dated the day of A.D. 19 , and made in a certain action now pending in the Exchequer Court of Canada, wherein the said A. B. is plaintiff and the said G. H. is defendant, it was ordered that the said A. B. should, within , from the date of said order, give security to the said defendant in the penal sum of four hundred dollars, to answer the defendant's costs of this action.

NOW THE CONDITION OF THIS BOND is such that if the above bounden A. B., C. D. and E. F., or one of them, their, or one of their heirs, executors or administrators, do and shall well and truly pay or cause to be paid to the said G. H., his executors, administrators or assigns, all such costs as may be awarded to him the said G. H. in the said action, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of : A. B. C. D., E. F.,

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SCHEDULE Z2.

(*Rule No.* 295.)

EXCHEQUER COURT TARIFF.

Fees and charges to be allowed to Counsel, Attorneys and Solicitors in the taxation of costs between party and party.

Instructions.

1. Instructions to sue	$5 00
2. Instructions to defend	5 00
3. For informations, statements of claim and petitions of right, motion by way of appeal from Local Judge, or any pleading by which a cause or action may be instituted	5 00
4. For special cases, answers, argument of points of law set down and disposed of before trial, pleas and exceptions	5 00

5. To amend any pleading, when the amendment is proper and not occasioned by error or default of party amending	2 00
6. For brief on interlocutory applications, in the discretion of the Registrar	2 00
7. For interrogatories and *viva voce* examinations of parties or witnesses	2 00
8. For special petitions or motions in interlocutory matters and for issuing summons	2 00
9. For special affidavits, including affidavits on production, in the discretion of the Registrar	1 00
10. For brief in suits coming on for trial or hearing	2 00
11. To revive or add parties	2 00
12. For such other important step or proceeding in the suit as the Registrar is satisfied warrants such a charge	2 00
The preparation of pleadings and other documents.	
13. Drawing informations, petitions of right, statements of claim or any other judicial proceeding by which a cause or action may be instituted, not exceeding 20 folios	5 00
14. Drawing defence, answer or other pleading, not specially mentioned, not exceeding 5 folios in length	2 00
15. Engrossing any pleading so drawn, for printer, or in case of pleading not required to be printed, engrossing fair copy thereof, per folio	0 10
16. For examining and correcting the proof of any pleading or affidavit or other paper required to be printed, per folio	0 05
17. Preparing reply or joinder of issue, not exceeding 3 folios	1 00
18. Suggestion as to the death of parties and the like	1 50
19. Affidavit of service of information, statement of claim, petition of right or any originating judicial proceeding	1 50
20. Special affidavit not exceeding 5 folios	1 50
21. Every bill of costs not exceeding 5 folios	2 00
22. Copies of all documents or papers, per folio	0 10
23. Preparing certified copy of pleadings, or issues, for use of Judge	1 50
24. Drawing particulars, 5 folios or under	2 00
For every additional folio above 5	0 20
25. Notice of motion	1 50
26. Certificate to appoint guardian *ad litem*	1 50
27. Summons to attend Judge's Chambers	1 50
28. Notice for service out of jurisdiction	1 50
29. Advertisements to be signed by Registrar, not exceeding 5 folios in length	1 50
30. Every writ of mesne or final process, not exceeding 5 folios	2 00
31. Suing out subpœna *ad testificandum*	1 00
32. Suing out subpœna *duces tecum*	1 25

33.	For every folio beyond the number provided for in any case, and for drawing or amending every other proceeding, notice, petition or paper in a cause requiring to be drafted, not herein specially provided for, per folio of necessary matter..... (The above charge does not include engrossing or copies to file and serve.):	0 20
	PERUSALS.	
34.	For perusing the print of an information, petition of right, statement of claim or any other judicial proceeding by which any cause or matter may be instituted, not exceeding 20 folios	1 00
35.	For every folio, exceeding 20 folios.....	0 05
36.	For perusing an amended information, petition of right, statement of claim or any other judicial proceeding by which any cause or matter may be instituted, when amended in writing or in print ..	1 00
37.	(The same rate as above for perusing a statement in defence, answers, or replies (not being a mere joinder of issue) and amendments thereof.)	
38.	To the attorney or solicitor for perusing interrogatories, not exceeding 20 folios.....	1 00
39.	For every folio, exceeding 20 folios.....	0 05
40.	(Perusing special cases and all special affidavits filed by opposite party, including, in the discretion of the Registrar, affidavits on production, and examinations of party, at the same rate.)	
41.	For perusing copy of supplemental statement and copy of order to revive, each.....	1 00
42.	In cases where pleadings or papers are printed, the amount actually and properly paid the printer is to be allowed, not exceeding per folio.....	0 50
	ATTENDANCE.	
43.	To inspect or produce for inspection documents pursuant to notice to admit or order for inspection;	
44.	On taxation of costs. Each, per hour.....	2 00
45.	To examine and sign admissions.....	1 00
46.	To obtain or give undertaking to defend. Each.....	1 00
47.	On a reference or examination of witnesses or parties, per hour.....	4 00
48.	On issuing summons.....	2 00
49.	On the return of a summons, and obtaining order thereon at Judge's Chambers, per hour..... To be increased in the discretion of the Registrar.	2 00
50.	In Court on motion, per hour.....	3 00
51.	In Court on argument of points of law raised by any pleading, special petition or application adjourned from Judge's Chambers, when set down for hearing or likely to be heard, per hour.....	4 00
52.	On consultation or conference with counsel, if Registrar think the same reasonable and proper, per hour.....	2 00
53.	On hearing or trial of any cause or matter, per hour.	3 00
54.	To hear judgment when same adjourned.....	2 00

55. For entering order made at Judge's Chambers and having same signed by Judge..... 2 00
56. To settle draft of any judgment, decree or order..... 2 00
57. To pay money into Court..... 2 00
58. Every other proper attendance..... 0 50
59. On approval of Bond for security for costs, or otherwise 2 00

BRIEFS.

60. For drawing brief, per folio, for original and necessary matter..... 0 20
61. For drawing brief, per folio, for matter not original but necessary..... 0 10
62. Copy of document, per folio..... 0 10
63. Copy of brief for second counsel, when fee taxed to him, per folio..... 0 10

(But nothing shall be allowed for any copy of any pleading included in such brief, or of any document which the Registrar thinks was not reasonably and necessarily included therein, and the Registrar may, in any case in which he sees fit, allow a lump sum instead of, but not exceeding, the per folio allowance above provided for).

LETTERS.

64. All necessary letters, in the discretion of the Registrar (besides postage)..... 0 50

COUNSEL.

65. Fee on drawing or settling pleadings, and advising on evidence..... 5 00
66. Fee on motion in Court, not to exceed..... 20 00
67. Fee on argument of points of law raised by any pleading, not to exceed..... 25 00
68. Fee with brief on trial of issues or hearing, or on motion by way of appeal from Local Judge, not to exceed.....100 00
69. (No more than two counsel fees to be taxed without an order of a Judge.)
70. Fee on motion for judgment, not to exceed..... 20 00
71. (The above fees to counsel may be increased by order of the Court or a Judge.)

Costs—Counsel fee on Reference—Advising on evidence—Copy evidence.—When the trial of an action takes place before a Referee, the successful party is entitled to tax a counsel fee, the amount of which will not be reviewed and also a fee for Counsel advising on evidence. On an appeal from the finding of a Referee the costs of a copy of the evidence taken before him will be refused. *Denison v. Woods*, 18 Ont. P. R. 328.

The expenses attending the employment of Counsel at a Reference are allowed on taxation only when the Registrar is of opinion that the attendance of Counsel was necessary. E. O. LVI, Rule 7,844. *Williams & Bruce's Admiralty Practice* 3rd Ed. 472. See now Rule 206.

SERVICES.

72. For services on a party or witness, such reasonable charges and expenses as may be properly incurred.

OATHS AND EXHIBITS.

73.	To Commissioners for oaths	0 20
74.	To the attorney or solicitor for preparing each exhibit	0 20
75.	To Commissioners for marking each exhibit	0 10

DISBURSEMENTS.

76. Besides the Registrar's fees, reasonable charges shall be allowed to attorneys and solicitors for necessary disbursements and postage on services of notices, motions, subpœnas, translations, printing of the same, copies, and other incidental proceedings.

Patent—Models.—In patent cases an allowance may be made for necessary models used at trial. *Batty v. Hynock*, L. R. 20 Eq. 832; *Musgrave v. Hick*, 3 Cut. R. P. C. 49. *Harrock v. Stubbs*, Idem 221.

Plans and Surveys—Cost of.—The cost of plans and surveys of neighbouring properties made with the view of qualifying or briefing a surveyor as witness to give evidence at trial and where the plans were not filed of record, was refused by the Registrar as taxable between party and party, (*McGannon v. Clarke*, 9 O. P. R. 555, referred to).—The reasonable cost, however, of a plan of the premises expropriated and used at trial was allowed. On appeal to the Judge in Chambers to review the first finding and to increase the amount allowed for the plan last referred to, it was held that the Registrar had only exercised his discretion in the finding and the Judge refused to interfere with the same. *The Queen v. Flinn*, January 5th, 1895.

FEES TO SPECIAL EXAMINER.

77.	Every appointment in writing	$0 50
78.	Administering oath or taking affirmation	0 20
79.	Marking and endorsing every exhibit	0 20
80.	Taking deposition or examination, per hour	2 00
81.	Every necessary certificate issued by Examiner, at request of parties	1 00
82.	Making up and forwarding deposition or examination to Registrar, at Ottawa	1 00
83.	For every attendance upon an appointment when solicitor or witness do not attend and Examiner not previously notified	1 00

The charge for the taking and transcribing of the evidence or examination is 10 cents per folio when taken in longhand, and 20 cents per folio supplying four copies when taken in shorthand.

The evidence or examination is to be transmitted by the Examiner to the Registrar, at Ottawa, with the shorthand-writer's account, which is paid by the Registrar and the fees are collected by the latter from the parties in the case.

SPECIAL REFERENCE.

84. In cases of special references, where, by order of the Court or a Judge, the inquiry is to be proceeded with at some place other than Ottawa, or when the referee does not reside at the place where the

inquiry is made, he shall then be allowed his actual travelling expenses, and a per diem sustenance allowance of..... 4 00

85. Every appointment in writing..... 0 50
86. Administering oath or taking affirmation..... 0 20
87. Marking and endorsing every exhibit..... 0 20
88. Every necessary certificate issued by Referee at request of parties..... 1 00
89. Drafting report on reference, per folio..... 0 30
90. Making up and forwarding evidence, reports and all other papers and documents..... 1 00
91. Per diem fee during the time employed on the reference..... 10 00

(This fee may be increased by order of the Court or a Judge.)

The party prosecuting the order, or his solicitor, shall also pay all reasonable expenses, including charges for the room (other than the Examiner's chambers) where the examination is taken.

NOTE.—The fees, No. 85, shall be paid by the party prosecuting the order, or his solicitor, at the time of obtaining the appointment, and may be retained by the Examiner, whether the examination is taken or not. The other fees shall be paid so soon as the examination has been concluded, together with any travelling or other expenses as above mentioned.

Time engaged on Reference.—Arbitrators are not entitled to charge as fees for a day's sitting which extends beyond six hours more than the maximum amount fixed by the schedule for a single day's sitting (by R. S. O. ch. 53). *Armstrong v. Darling* 6 C. L. T. 214; 22 C. L. J. 149 overruled. In *re. Town of Thornbury* etc., 15 Ont. P. R. 192.

GENERAL.

92. In actions under $400, a deduction of one-third of the amount of the fees (other than disbursements) above allowed shall be made by the taxing officer, unless otherwise ordered by the Court or a Judge.
93. In any case where the defendants sever in their defence, the plaintiff's attorney, counsel or solicitor shall receive, on each additional issue, one-half of the sum which he would have received had there been but one issue; the whole amount to be payable in equal proportions, by the party or parties to each issue.
94. When the proceedings are carried on according to the practice of His Majesty's Superior Court in the Province of Quebec, and where the foregoing tariff may not provide for, or be applicable to, any such proceedings, the fees shall be taxed according to the tariff from time to time in force in the said Superior Court.

SCHEDULE Z3.

FEES AND ALLOWANCES TO WITNESSES.

(*Rule* 297).

To witness residing within three miles of the Court House, per diem (not including ferry and meals)..... $1 00

To witness residing over three miles from the Court House (exclusive of meals and ferry)..... 1 25

Barristers, attorneys, physicians, surgeons, engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence in consequence of any professional or technical services rendered by them, or to give professional or technical opinions, per diem..... 5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only.

When witnesses travel over three miles they shall be allowed expenses, according to the sum reasonably and actually paid, which in no case shall exceed 20 cents per mile one way.—Note:—Mileage shall only be allowed where there is no railway or other public conveyance carrying passengers at specific rates or tolls.

Costs—Taxation—Witness fees—Plaintiff travelling from abroad—Expenses—Subsistence money—Plaintiff remaining after trial.—Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf at the trial of this action and in returning to England, and a *per diem* allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario in order to be in readiness to testify at a new trial if one should be ordered. *Tattersall v. People's Life Ins. Co.*, XLII C. L. J. 37.

Witnesses' expenses—Called not heard.—The costs of witnesses whose attendance becomes useless, owing to an admission being made by the opposite party of the matters which they were summoned to prove, are in the Master's discretion. *Davis v. Thomas*, 5 Jus. N. S. 709.

Party examined on his own behalf—Witness fee.—If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99, s. 2, the Master may allow in taxation, for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness and not merely to superintend the cause. *Howes v. Barber.* 18 Q. B. R. 588.

Witness fees.—The uncontradicted affidavit of a solicitor that he verily believes G. travelled a distance of 750 miles for the purpose of giving evidence is not sufficiently positive to warrant taxing such witness fee. *Lovitt v. Snowball*, 16 C. L. J. 356.

Taxation of witness—Revision of—C. P. R. 52, 72, 554.—There is no appeal from the revision by a Judge in Chambers of the taxation of a witness. *Bélanger v. Corporation Montmagny*, Q. R. 15 S. C. 378. See also *Campeau v. Ottawa Fire Insurance Co.*, Q. R. 20 S. C. 239.

Witness—Taxation of—Art. 336 C. C. P.—The taxation of a witness being, under Article 336 C. C. P., equivalent to a judgment on which he is entitled to sue out execution, the Court has no authority to revise or reduce such taxation. *Lessard v. Meunier dit Lagacé, & Chasles*, witness, *mis en cause*. Q. R. 20 S. C. 337.

SCHEDULE Z4.

(*a*) *Subpœna.*

(*Rule* 304.)

IN THE EXCHEQUER COURT OF CANADA.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

1. To
2.
3.
4.

GREETING:

WE COMMAND YOU that all excuses ceasing, you and each of you, do personally be and appear before the at on the day of , at o'clock in the noon to testify the truth according to your knowledge in a certain cause depending in Our Exchequer Court of Cannda, wherein is and is on the part of and hereof fail not at your peril.

WITNESS the Honourable , the Judge of Our Exchequer Court of Canada, at the day of in the year of our Lord One thousand nine hundred and and the year of Our reign.

Registrar.

(*b*) *Subpœna duces tecum.*

The same as the preceding form, adding before the words 'and hereof fail not at your peril *the words* 'and that you bring with you and then and there produce before the said Judge (Registrar, Referee or Commissioner, *as the case may be*) the following documents, viz.:—(*Here state the documents required to be produced*) and show all and singular those things which you know, or which the said paper writing doth import of, in or concerning the present cause now depending in Our said Court.'

(*c*) *Præcipe for Writ of subpœna.*

(*Title of Case*).

Seal (one or two *as the case may be*) Writ of Subpœna on behalf of Dated the day of 19 .

(Signature)

Solicitor for

SCHEDULE Z5.

Sheriff's Tariff.

(*Rule* 315).

EXCHEQUER COURT OF CANADA.

The following fees and allowances shall be taken and

received by the sheriff in suits in the Exchequer Courts of Canada:—

Every warrant to execute any process mesne, or final, directed to the sheriff, when given to a bailiff	$0 75
Arrest, when amount does not exceed $200	2 00
" " " $400	4 00
" " over $400	6 00
Bail or other Bond	2 00
Assignment of the same	1 00
Service of Process, *Scire Facias*, Writ of Revivor, Information, or Statement of Claim, each defendant, (no fee for affidavit of service in such cases to be allowed unless service made or recognized by the sheriff)	1 50
Serving other pleadings, Subpœnas, Rules, Notices, or other papers (beside mileage)	0 75
For each *additional* party served	0 50
For each Summoner on Writ of *Scire Facias* per day, to be paid by sheriff	1 00
Receiving, filing, entering and endorsing all writs, informations, statements, pleadings, rules, notices, or other papers, each	0 25
Return of all process and writs (except subpœna), informations, statements, pleadings, rules, notices, or other papers	0 50
Every search, not being by a party to a cause or his attorney	0 30
Certificate of result of such search, when required (a search for a writ against lands of a party shall include sales under writ against same party and for the then last six months)	0 75
Poundage on executions and on writs in the nature of executions where the sum made shall not exceed $1,000, five per cent.	
When the sum is over $1,000 and under $4,000, two and a half per cent., when the sum is $4,000 and over, one and a half per cent., in addition to the poundage allowed up to $1,000, exclusive of mileage, for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property.	
Schedule taken on execution of other process, including copy to defendant, not exceeding five folios	1 00
Each folio above five	0 10
Drawing advertisements when required by law to be published in the *Official Gazette* or other newspaper, or to be posted up in a Court House or other place, and transmitting same, in each suit	1 50
Every necessary notice of sale of goods, in each suit	0 75
Every notice of postponement of sale, in each suit	0 25
The sum actually disbursed for advertisements required by law to be inserted in the *Official Gazette* or other newspaper.	
Executing writ of possession besides mileage	6 00

Bringing up prisoner on attachment or *habeas corpus*, besides travel, at 20c. per mile	1 50
Actual and necessary mileage from the Court House to the place where service of any process, paper or proceeding is made, per mile	0 13
Seizing estate and effects on attachment against debtor.	3 00
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by order of the Court or a Judge.	
Presiding or attendance on execution of writ of inquiry or under any writ of escheat, or other writ of like nature	5 00
Hire of room, if actually paid, not to exceed $2 per day.	
Mileage from the Court House to the place where writ executed, per mile	0 13
Drawing bond to secure goods seized, if prepared by sheriff	1 50
Every letter written (including copy) required by party or his attorney respecting writs or process, when postage prepaid	0 50
Drawing every affidavit when necessary and prepared by sheriff	0 25
Giving possession of lands, exclusive of mileage and assistance	5 00
All necessary disbursements to surveyors and others for surveying the lands and giving possession, to be allowed to the sheriff.	

Coroners.

The same fees shall be taxed and allowed to coroners for services rendered by them in the service, executions and return of process, as allowed to sheriffs for the same services and above specified.

Tariff of fees to crier.

The following fees shall be taxed to the crier of the Exchequer Court:—

Calling every case	0 50
Swearing each witness or constable	0 15
Proclamation and calling parties connected with proceedings other than witnesses or constables, each person	0 25

The following form of proclamation may be used by the crier when opening the Court, viz.:—

Oyes! Oyez! Oyez! All manner of persons who have anything to do with His Majesty's Exchequer Court of Canada, draw near and give your attendance and you shall be heard.

GOD SAVE THE KING.

SCHEDULE Z6. (a)

The following fees shall be paid to the Registrar of the Exchequer Court of Canada.

1. On filing every information, statement of claim and petition of right, or on any pleading by which a cause or action may be instituted	$2 00
2. On filing every plea, answer and exception to above.	1 00
3. On filing every scheme of arrangement	5 00
4. On filing every document, proceeding or paper not specially provided for	0 10
5. On marking every exhibit filed at trial, on reference or on examinations	0 10
6. On sealing and issuing every writ (besides filing)	2 00
7. On certifying every office copy of information, statement of claim or petition of right, writ of fi-fa, writ of sci-fa and schemes of arrangement, or any pleading by which a cause or action may be instituted, and affixing the seal of the Court when necessary	2 00
8. Enrolling order and scheme of arrangement, not exceeding five folios	2 00
Each additional folio	0 20
9. On issuing third party notice and sealing same	2 00
10. On every renewal of writ	1 00
11. On every writ of subpœna	1 00
12. Præcipe for writ of subpœna or any other præcipe not otherwise provided for	0 10
13. Amending every writ or other proceeding or paper.	0 50
14. Every ordinary rule or order, not exceeding five folios	0 50
Each additional folio	0 20
15. Special rule or order, not exceeding five folios	1 00
Each additional folio	0 20
16. Every judgment or Court order, and entering the same, not exceeding five folios	2 00
Each additional folio	0 20
17. Taxing every bill of costs (besides filing) per hour.	2 00
18. Every allocatur	1 00
19. Every reference, enquiry, examination or other special matter referred to the Registrar, for every meeting not exceeding one hour	2 00
20. Every additional hour or less	2 00
21. For every report made by the Registrar upon such reference, &c	2 00
22. On payment of money into Court, or out of Court, (charge to be made once only) every sum under $200	1 00
23. On $200 to $400	2 00

(*a*) All fees payable to the Registrar are to be paid by means of stamps. See sec. 30 of ch. 140 R. S., 1906.

The Clerk of the Court need not take any notice of a document transmitted to him without the necessary fee to pay for the filing of same. *Parker v. Clarke*, 14 C. L. T. 32.

24. Over $400 to $800	4 00
A percentage on money over $800 at the rate of half of one per cent.	
25. Receipt for money in margin of answer, plea, &c	0 25
26. Every other certificate required from Registrar (including any necessary search), and seal of the Court when necessary	1 00
27. Exemplification or office copy of proceedings, per folio	0 10
(A folio shall consist of 100 words.)	
28. Every search for special paper, or a general search in one cause	0 25
29. Every search in any book	0 25
30. Every affidavit, affirmation or oath administered by Registrar	0 25
31. Every commission or order for examination of witnesses	1 50
32. Entering or setting down any cause for trial or hearing on points of law raised by any pleadings, special case, petition of right, information, statement of claim or otherwise	2 00
33. Setting down a case by default	0 50
34. Every fiat or summons	0 50
35. Every appointment made by a Judge	0 50
36. Every enlargement on application to Judge in Chambers or on return of summons or otherwise.	0 25
37. Every appointment for taxation of costs or otherwise, made by the Registrar	0 25
38. Enlargement of same	0 10
39. Comparing, examining and certifying transcript record on appeal to the Supreme Court of Canada or on transmission of original record, if ordered, each	5 00
40. Comparing any document, paper or proceeding with the original on file or deposited in the Registrar's office, per folio	0 03
41. On each opposition for payment or claim above $1,000	2 50
On each opposition for payment or claim above $400 but under $1,000	1 60
On each opposition for payment or claim of $400 or under	1 40
42. On each opposition to secure charge, to annul, to withdraw or retain—	
In actions above $1,000	2 50
In actions above $400, but under $1,000	1 60
In actions of $400 or under	1 40
43. For drawing a report of distribution	8 00
44. On every opposition or claim collocated in any report of distribution or in any motion to distribute moneys	2 00
45. On any contestation of a report of distribution	2 50
46. For drawing any judgment of distribution	8 00
47. For drawing *procès verbal* upon improbation	2 50

48. On every deposition of every witness taken in writing (long hand), for every folio	0	10
49. Approving or taking bond, or recognizance	4	00
50. Signing, settling, or approving an advertisement	1	50
51. Settling conveyance deed of railway sold under judgment of court and issuing same, not exceeding five folios	15	00
Every additional folio		50

Shorthand Writers.

1. Every shorthand writer employed under the authority of the Court shall, if directed by the Judge, Registrar, Referee or Commissioner before whom the examination of any witness is taken, or if requested by any party to the proceeding, furnish to such Registrar, Referee or Commissioner, four copies of the notes of evidence, one of which shall be handed to the Judge, one filed of record in the Court, and the others given to the plaintiff and defendant respectively when paid.

2. For taking and transcribing such examination or notes of evidence, there shall be paid to the Registrar, Acting Registrar, Referee or Commissioner, per folio $0 20

If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination 2 00

3. If such notes of evidence are furnished as hereinbefore provided by direction of the Judge, Registrar, Referee or Commissioner, the fee last mentioned shall be paid by the party who called the witness, but if furnished at the request of either party, then by such party.

4. If any fee herein mentioned is not paid by the party liable therefor it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

5. Any Acting Registrar, Referee or Commissioner to whom any such fee is paid shall forthwith transmit the same to the Registrar of the Court.

A LIST OF THE CANADIAN STATUTES HAVING IMMEDIATE BEARING UPON THE JURISDICTION OF THE EXCHEQUER COURT OF CANADA. (a.)

(Beginning with The Revised Statutes of Canada, 1906).

Title of Act.	Regnal Year.	Section.
The Interpretation Act.	R. S., 1906, ch. 1...	Section 16. No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, His heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

(a.) This list is by no means exhaustive, as the Exchequer Court is also given concurrent original jurisdiction under the designation of "Court of Competent Jurisdiction" or equivalent words in the several Acts of Parliament in respect of the recovery of fines, penalties, etc., (when not otherwise provided) and for enforcing the execution of certain statutory obligations by banks, assurance companies, railway companies and others, to the public or the Crown; and further as it is a court before which may be brought actions and suits directed under the statutes to be instituted in the name of the Attorney-General for the Dominion of Canada, in the name of the Postmaster-General, in the name of the Minister of the Interior, and in the name of the Minister of Finance and Receiver-General (Bank Act). In view, however, of the undisputed prerogative or privilege of the King to choose His own Court, the Exchequer Court would also be a proper forum for the institution of actions under "The Government Railways Act," "The Public Works Act," etc., and in other words for all civil actions in which the Crown in the name of the Dominion of Canada is either plaintiff or defendant.

By sec. 25 of "*The Exchequer Court Act*" (R. S., 1906, ch. 140), it is also provided that whenever in any Act of the Parliament of Canada, or in any order of the Governor in Council, or in any document, it is provided or declared that any matter may be referred to the official arbitrators acting under the "*Act respecting the Official Arbitrators*," or that any powers shall be vested in, or duty performed by such arbitrators, such matters shall be referred to the Exchequer Court, and such powers shall be vested in, and such duties performed by the Court; and whenever the expression "official arbitrators," or "official arbitrator" occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

Title of Act.	Regnal Year.	Section.
The Consolidated Revenue and Audit Act.	R. S., 1906, ch. 24..	72. The Auditor-General may apply to any Judge of the Exchequer Court of Canada, or to any Judge of a Superior Court of any Province of Canada, for an order that a subpœna be issued from the Court, commanding any person therein named to appear before him at the time and place mentioned in such subpœna, and then and there testify to all matters within his knowledge relative to any account submitted to him, and, if so required, to bring with him and produce any document, paper or thing which he has in his possession relative to any such account as aforesaid; and such subpœna shall issue accordingly upon the order of such Judge.

Title of Act.	Regnal Year	Section.
The Consolidated Revenue and Audit Act. (Continued)	R. S., 1906, ch 24..	2. Any such witness may be summoned from any part of Canada whether within or without the ordinary jurisdiction of the Court issuing the subpœna. 3. Any reasonable travelling expenses shall be tendered to any witness so subpœned at the time of such service Under section 73 the Auditor-General is given the power to issue commission to take evidence, to appoint commissioners vested with the power to issue subpœna in the manner therein prescribed. Section 74 provides for penalties on persons summoned failing to attend or produce papers and for punishment as for contempt of court before the tribunal from which the subpœna issued.
The Bank Act.....	R. S., 1906, ch. 29..	Section 69. The Minister of Finance and Receiver-General may, in his official name, by action in the Exchequer Court of Canada enforce payment, with costs of action, of any sum due and payable by any bank, which should form part of the circulation fund.
The Government Railways Act.....	R. S., 1906, ch. 36..	Partly printed in this book *ante*, p 362.
The Railway Act.....	R. S., 1906, ch. 37..	Partly printed in this book *ante*, p. 374.
The Militia Act.....	R. S., 1906, ch. 41..	Section 96. There shall be paid to any person whose railway or plant is taken possession of in pursuance of this Act, out of the moneys to be provided by Parliament, such full compensation, for any loss or injury he sustains by the exercise of the powers of the Minister under the last preceding section, as is agreed upon between the Minister and the said person, or, in case of difference, as is fixed upon reference to the Exchequer Court of Canada, 4 Ed. VII, c. 23, s. 94.
The Customs and Fisheries Protection Act.	R. S., 1906, ch. 47..	Section 18. Every penalty or forfeiture under this Act may be recovered or enforced in the Exchequer Court of Canada on its Admiralty side, or in any superior court in the province within which the cause of prosecution arose. R. S., c. 94, ss. 7 and 20. See also sections 19, 22, 23, 24, 25, 26, 27, 28 and 29.
The Customs Act.....	R. S., 1906, ch. 48..	Partly printed in this book, *ante*, p. 340.

Title of Act.	Regnal Year.	Section.
The Inland Revenue Act.....	R. S., 1906, ch. 51..	Section 92. The Judge of the Exchequer Court of Canada, or any Judge of any of the superior courts in any of the provinces of Canada, having jurisdiction in the province or place where the application is made, shall grant a writ of assistance upon application made to him for that purpose by His Majesty's Attorney-General of Canada, or by a collector or any superior officer, and such writ shall remain in force so long as any person named therein remains an officer of the Inland Revenue, whether in the same capacity or not. R. S., c. 34, s. 74; 52 V., c. 15, s. 1. Section 132. Every penalty or forfeiture incurred for any offence against the provisions of this Act or any other law relating to excise, may be sued for and recovered or may be enforced— (a) before the Exchequer Court of Canada, or any court of record having jurisdiction in the premises; or, ... Section 133. Any term of imprisonment imposed for any offence against the provisions of this Act, whether in conjunction with a pecuniary penalty or not, may be adjudged and ordered,— (a) by the Exchequer Court of Canada, or any Court of record having jurisdiction in the premises; or, ...
The Dominion Lands Act.....	R. S., 1906, ch. 55..	Section 180. If the payment of the Crown dues on any timber has been evaded by any lessee or other person, by the removal of such timber or products out of Canada, or otherwise, the amount of dues so evaded and any expenses incurred by the Crown in enforcing payment of the said dues under this Act, may be added to the dues remaining to be collected on any other timber cut on any timber berth by the lessee or by his authority, and may be levied and collected or secured on such timber, together with such last-mentioned dues, in the manner hereinbefore provided; or the amount due to the Crown, of which payment has been evaded may be recovered by action or suit in the name of the Minister or his agent, in any court of competent jurisdiction. R. S., c. 54, s. 76.

Title of Act.	Regnal Year.	Section.
The Irrigation Act....	R. S., 1906, ch. 61..	Section 44. The Governor in Council may, if in the public interest it is at any time deemed advisable so to do, take over and operate or otherwise dispose of the works of any licensee authorized under this Act: . . . . . 2. Compensation shall be paid for such works at such value as shall be ascertained by reference to the Exchequer Court, or by arbitration, one arbitrator to be appointed by the Governor in Council, the second by the licensee, and the third by the two so appointed, or, in case these cannot agree as to the third arbitrator, by the Exchequer Court. . . . .
The Post Office Act...	R. S., 1906, ch. 66..	Section 17. The Chief Post Office Superintendent and every post office inspector and assistant post office inspector may, for the purpose of any inquiry or investigation, apply in term or in vacation, to the Judge of the Exchequer Court of Canada, or to any Judge of any superior court . . . . for an order that a subpœna shall issue from such court . . . . commanding any person therein named to appear before the Chief Post Office Superintendent, inspector or assistant inspector, as the case may be, at the time and place mentioned in such subpœna, and then and there to testify to all matters within his knowledge relative to such inquiry or investigation, and, if so required, to bring with him and produce any document, paper or thing which he has in his possession relative to such inquiry or investigation; and such subpœna shall issue accordingly upon the order of any such judge or stipendiary magistrate. . . . .
The Patent Act.....	R. S., 1906, ch. 69..	Such portions of this Act which deal with the jurisdiction, procedure and evidence, are printed in this book, *ante*, p. 274.
The Copyright Act....	R. S., 1906, ch. 70..	Such portions of this Act which deal with jurisdiction, procedure and evidence, are printed in this book, *ante*, p. 309.
The Trade-Mark and Design Act.....	R. S., 1906, ch. 71..	Such portions of this Act which deal with jurisdiction, procedure and evidence, are printed in this book, *ante*, p. 321.

Title of Act.	Regnal Year.	Section.
The Experimental Farm Stations Act.	R. S., 1906, ch. 73.	Section 6. For the acquiring of lands for the purposes of this Act, all the powers respecting the acquiring and taking possession of land conferred by the Expropriation Act are hereby conferred upon the Minister; and all the provisions of the said Act respecting the compensation to be awarded for lands acquired thereunder shall apply to lands acquired under the provisions of this Act. R. S., c. 57, s. 4.
The Indian Act.....	R. S., 1906, ch. 81.	Section 72. Whenever patents for Indian lands have issued through fraud or in error or improvidence, the Exchequer Court of Canada, or a superior court in any province may, in respect of lands situate within its jurisdiction, upon information, action, bill or plaint, respecting such lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said courts shall respectively order, decree such patents to be void; and, upon a registry of such decree in the Department of Indian Affairs, such patents shall be void to all intents. 2. The practice in such cases shall be regulated by orders, from time to time, made by the said courts respectively. R. S., c. 43, s. 53; 53 V., c. 29, s. 5.
The Land Titles Act.	R. S., 1906, ch. 110.	Section 151. Whenever any amount has been paid out of the assurance fund on account of any person who has absconded, or who cannot be found within the Territories, and who has left any real or personal estate within the same, upon the application of the registrar, and upon the production of a certificate signed by the Minister of Finance that the amount has been paid in satisfaction of a judgment against the registrar as nominal defendant, and on proof of service of the writ in any of the modes provided by the ordinary procedure in the Territories, a judge may allow the registrar to sign judgment against such person forthwith for the amount so paid out of the assurance fund, together with the costs of the application. 2. Such judgment shall be final, subject only to the right to have such judgment opened up as may be provided in relation to ordinary procedure in the Territories in cases of judgment by default. 3. The judgment shall be signed in like manner as a final judgment by de-

Title of Act.	Regnal Year.	Section.
The Land Titles Act.. (Continued)	R. S., 1906, ch. 110..	fault in an adverse suit, and execution may issue immediately. 4. If the person has not left real or personal estate within the Territories, sufficient to satisfy the amount for which execution has issued as aforesaid, the registrar may recover such amount, or the unrecovered balance thereof, by information against such person at any time thereafter in the Exchequer Court of Canada at the suit of the Attorney-General of Canada. 57-58 V., c. 28, s. 109.
The Canada Shipping Act.....	R. S., 1906, ch. 113.	Sections 191, 192, 317, 321, 348, 349, 351, 529, 710, 711, 718, 781 and 828 deal with the jurisdiction of the Exchequer Court on its Admiralty side.
The Exchequer Court Act.....	R. S., 1906, ch. 140.	The whole of this Act is printed in this book, *ante*, p. 97.
The Admiralty Act...	R. S., 1906, ch. 141.	This Act confers a twofold jurisdiction on the Exchequer Court. On the one hand it deals with the jurisdiction of the Exchequer Court on its Admiralty Side, and on the other with the jurisdiction of the Exchequer Court as a Court of Appeal from any final judgment, decree or order of any local judge in Admiralty.
The Petition of Right Act.....	R. S., 1906, ch. 142.	The whole Act is printed in this book, *ante* p. 236.
The Expropriation Act	R. S., 1906, ch. 143.	The whole Act is printed in this book, *ante*, p. 244.
The Canada Evidence Act.....	R. S., 1906, ch. 145.	The whole Act is printed in this book, *ante*, p. 380.
The Customs Tariff, 1907	6-7 Ed. VII, ch. 11..	Section 12 of this Act is to be found herein, at page 361.

Title.	Regnal year.	Section.
The National Transcontinental Railway Act.....	3 Ed. VII , ch. 71...	15. The Commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under *The Railway Act* and amendments thereto, or under any General Railway Act for the time being in force, and the said Act and amendments thereto or such General Railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.
The Proprietary or Patent Medicine Act.	7-8 Ed. VII., ch. 56..	16. By section 16 hereof the Exchequer Court is given jurisdiction to adjudge and order any terms of imprisonment for an offence against the provisions of this Act, whether in conjunction with a pecuniary penalty or not.

COURT HOUSES.

Authority of "The Exchequer Court of Canada" for using Provincial Court Houses when Sitting in the Several Provinces.

The Exchequer Court having to hold sittings at various times and places in the Dominion, the Legislatures of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and British Columbia have respectively passed an Act providing for the use of the Provincial Court Houses by the Exchequer Court when holding sittings in any of these Provinces.

Satisfactory arrangements have also been made between the Dominion Government and the other Provinces where such provisions have not been passed by the Legislatures.

ONTARIO.

In Ontario, the use of the Provincial Court Houses by the Exchequer of Canada, is regulated by *The Revised Statutes of Ontario*, 1897, Chapter 49, Section 3, which reads as follows, viz:—

3. "*Authority of Judges of the Court of Exchequer as to the use of Court House, etc.*—In case sittings of the Court of Exchequer of Canada are "appointed to be held in any city, town or place, in which a Court House "is situated, the Judge presiding at any such sittings shall have, in all re- "spects, the same authority as a Judge of the High Court in regard to the "use of the Court House and other buildings or apartments set apart in "the County for the administration of justice."

OTTAWA.

In Ottawa, with regard to the use of the Supreme Court Room for the sittings of the Exchequer Court of Canada, an order in Council has been passed on the 1st December, 1887, which reads as follows, viz:—

"On a Memorandum dated 29th November, 1887, from the Minister "of Justice, recommending, with the concurrence of the Minister of Public "Works, that authority be granted to use the Court Room at present ap- "propriated to the sittings of the Supreme Court of Canada for the sittings "of the Exchequer Court of Canada, when not required for the purpose of "the said Supreme Court, and until further otherwise ordered.

"The Committee advise that the requisite authority be granted "accordingly."

NOVA SCOTIA.

The Revised Statutes of Nova Scotia, 1900, Chapter 24, Section 2, embody the following provisions, viz:—

2. "*Power of presiding Judges to occupy Court Room.*—If sittings "of the Exchequer Court of Canada are appointed to be held in any city, "town or place in which a court house is situated, the Judge presiding "at any such sittings shall have in all respects the same authority as a "Judge of the Supreme Court of Nova Scotia at *nisi prius* in regard "to the use of the Court House, and other buildings or apartments set "apart in the country for the administration of justice: Provided, "however, that nothing in this section shall be construed to deprive the "Supreme Court, or any County Court of Nova Scotia, or any of the Judges

"of said courts, of the use and authority which said court and the judges "thereof, have heretofore had and exercised of and over the court house, "and other buildings mentioned herein, during any sittings of the said "courts respectively."

NEW BRUNSWICK.

By *The Consolidated Statutes of New Brunswick*, 1903, Chapter 25, Section 2, it is provided as follows, viz:—

2. "*Authority of presiding Judge as to Court House—Proviso*:—In "case sittings of the Exchequer Court of Canada are appointed to be "held in any city, town or place, in which a Court House is situated, the "Judge presiding at any such sittings shall have in all respects the same "authority as a Judge of the Supreme Court of New Brunswick at *nisi* "*prius* or upon Circuit, in regard to the use of the Court House and other "buildings or apartments set apart in the County for the administration "of justice: provided, however, that nothing in this section shall be con- "strued to deprive the Supreme Court, or any County Court, of New "Brunswick, or any of the Judges of said Courts, of the use and authority "which said Courts, and the Judges thereof, have heretofore had and exer- "cised of and over the Court House and other buildings mentioned herein, "during any term or sittings of the said Supreme Court or County Courts "of New Brunswick." 51 Vic. c. 9, s. 2.

BRITISH COLUMBIA.

By section 3, Chapter 53, of the Revised Statutes of British Columbia, 1897, it is enacted as follows, viz:—

3. "*Provision in case of Exchequer Court sitting in this Province*:—In "case sittings of the Court of Exchequer of Canada are appointed to be "held in any place in the Province in which a Court House is situated, the "Judge presiding at any such sittings shall have, in all respects, the same "authority as a Judge of the Supreme Court of British Columbia at *nisi* "*prius*, in regard to the use of the Court House and other buildings set apart "for the administration of justice in the Province. C. A. 1888, C. 27 s. 2.

QUEBEC.

By 6 Ed. VII, ch. 6, sec. 2, it is provided as follows, viz:—

"*Provisions for sittings of court in court houses.*—2. In case sittings of "the Exchequer Court of Canada are appointed to be held in any city, "town or place in which a court house is situated, the judge presiding at "any such sittings shall have, in all respects, the same authority as a judge "of the Superior Court in regard to the use of the court house and other "buildings or apartments set apart in such place for the administration "of justice."

MANITOBA.

His Honour, the Lieutenant-Governor, Alexander Morris, by his Despatch of the 2nd day of March, 1877, informs the Honourable the Secretary of State for the Dominion of Canada, that "The Provincial Court "House will be placed at the services of the Court of Exchequer, should it "be required."

PRINCE EDWARD ISLAND.

With his Despatch of the 6th February, 1877, His Honour the Lieutenant-Governor, R. Hodgson, transmitted to the Honourable the Secretary

of State for the Dominion of Canada, the following resolution of the Executive Council, which reads as follows, viz:—

"*Extract from the Minutes of the Executive Council of Prince Edward Island*:—

Council Chamber, February 1, 1877.

"Present:—His Honour, the Lieutenant-Governor-in-Council.

"His Honour laid before the Council a Circular Despatch from the "Secretary of State, dated at Ottawa, the 26th day of December, 1876, "suggesting that the Provincial Court Houses be made available for trials "of causes by Judges of the Court of Exchequer for the Dominion.

"Whereupon, it was ordered that authority be given for the use of "the Court House of Queen's County for the said trials, excepting at such "period as it may be occupied by the Provincial Supreme Court, the "times of the sittings which are prescribed by statute, and that then "when so occupied, one of the Legislative Chambers be prepared for the "use of the Court of Exchequer."

"And it is further ordered that a copy of this minute be transmitted to "the Sheriff of the said County of Queen's County, and that he be required "on requisition of the Court of Exchequer to arrange for its meetings in "terms of this order."

Certified,

William C. Desbrisay,
Clerk Ex. Council.

ALBERTA.

With a Despatch to the Honourable the Secretary of State for the Dominion of Canada, the following resolution of the Executive Council of the Province of Alberta was transmitted, viz:—

"*Copy of an order in Council approved by his Honour the Lieutenant-Governor of Alberta, Tuesday, January* 12*th*, 1909:—Whereas in a despatch received by His Honour the Lieutenant-Governor of Alberta, from the Under Secretary of State at Ottawa, dated the 17th of November, 1908, it is requested that provision be made whereby the Exchequer Court of Canada shall have authority to use for its Sittings, in the Province of Alberta, Provincial Court Houses.

The Honourable the Attorney-General therefore recommends that in case Sittings of the Exchequer Court of Canada are appointed to be held in any city, town or place in which a court house is situated, the Judge presiding at such Sitting shall have in all respects the same authority as a Judge of the Supreme Court of Alberta, in regard to the use of the Court House and other buildings or apartments set apart at such city, town or place for the administration of Justice; provided, however, that nothing contained therein shall be construed to deprive the Supreme Court or any District Court, or any of the judges of the said courts, of the use and authority which said Courts and the Judges thereof, have heretofore had and exercised of and over the Court House and other buildings mentioned herein during any term or sittings of the said Supreme Court or District Court.

The Executive Council concur in the recommendation of the Honourable the Attorney-General and advise that the same be acted upon.

(Certified),

M. J. Macleod,
Clerk Executive Council.

SASKATCHEWAN.

Negotiations are presently pending in respect of the use of the Court Houses in the new Province of Saskatchewan.

Reference to Acts of Parliament.

Passed in the Reign of Her Majesty Queen Victoria.

Reign.	Date.	Reign.	Date.	Reign.	Date
1 Victoria	1837	22 & 23 Vict	1859	43 & 44 Vict	1880
1 & 2 Vict	1838	23 & 24 Vict	1860	44 & 45 Vict	1881
2 & 3 Vict	1839	24 & 25 Vict	1861	45 & 46 Vict	1882
3 & 4 Vict	1840	25 & 26 Vict	1862	46 & 47 Vict	1883
4 & 5 Vict	1841	26 & 27 Vict	1863	47 & 48 Vict	1884
5 & 6 Vict	1842	27 & 28 Vict	1864	48 & 49 Vict	1885
6 & 7 Vict	1843	28 & 29 Vict	1865	49 & 50 Vict	1886
7 & 8 Vict	1844	29 & 30 Vict	1866	50 Vict	1886
8 & 9 Vict	1845	30 & 31 Vict	1867	50 & 51 Vict	1887
9 & 10 Vict	1846	31 & 32 Vict	1868	51 & 52 Vict	1888
10 & 11 Vict	1847	32 & 33 Vict	1869	52 & 53 Vict	1889
11 & 12 Vict	1848	33 & 34 Vict	1870	53 & 54 Vict	1890
12 & 13 Vict	1849	34 & 35 Vict	1871	54 & 55 Vict	1891
13 & 14 Vict	1850	35 & 36 Vict	1872	55 & 56 Vict	1892
14 & 15 Vict	1851	36 & 37 Vict	1873	56 & 57 Vict	1893
15 & 16 Vict	1852	37 & 38 Vict	1874	57 & 58 Vict	1894
16 & 17 Vict	1853	38 & 39 Vict	1875	58 & 59 Vict	1895
17 & 18 Vict	1854	39 & 40 Vict	1876	59 Vict	1896
18 & 19 Vict	1855	40 & 41 Vict	1877	60 & 61 Vict	1896–7
19 & 20 Vict	1856	41 & 42 Vict	1878	61 Vict	1898
20 & 21 Vict	1857	42 & 43 Vict	1879	62 & 63 Vict	1899
21 & 22 Vict	1858	43 Vict	1880	63 & 64 Vict	1900

Acts passed in the Reign of His Majesty King Edward VII.

Reign.	Date.	Reign.	Date.
1 Ed. VII	1901	4 & 5 Ed. VII	1905
2 Ed. VII	1902	6 Ed. VII	1906
3 Ed. VII	1903	6 & 7 Ed. VII	1907
4 Ed. VII	1904	7 & 8 Ed. VII	1908

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