CA

DIGEST

CANADIAN CASE LAW

1900-1911

COMPILED BY

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Abbreviations used in this Digest.

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

Digest

OF

CANADIAN CASE LAW

1900-1911

VOLUME 3

SAILOR.

See SHIP.

SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

SAISIE-CONSERVATOIRE.

Affidavit — *Grounds — Sufficiency.*] — Where the plaintiff alleges in his affidavit in support of a motion for a *saisie-conservatoire* that the defendant is indebted to him in a certain amount for balance of salary; that he has a lien for this sum upon the price of chattels of the defendant; and that the latter is so acting as to cause him to lose his remedy thereupon—an exception to the form complaining of an irregularity in the affidavit and the declaration will be dismissed. *Gladu* v. *Hurtubise*, 10 Que. P. R. 123.

Affidavit — *Insufficiency — Irregularity —Setting aside seizure — Grounds—Pleading —Prejudice — Waiver.*]—An affidavit which mentions facts giving rise to an action for revocation of a gift, without indicating the nature of the action which the plaintiff intends to bring, is irregular, and a *saisie-conservatoire* based upon it will be annulled. —2. The Court, in order to judge of the validity of a *saisie-conservatoire*, may look at the allegations of the affidavit only, and may not consider whether the declaration sufficiently sets forth the remedy which the plaintiff desires to obtain, nor whether the defendant is prejudiced by the insufficiency of the affidavit, nor whether he has waived his objection to the insufficiency by pleading to the merits of the action. *Cusson* v. *Cusson*, 9 Que. P. R. 174.

Affidavit — *Service of copy — Irregularity—Exception to form.*]—It is not necessary to serve upon the defendant in a *saisie-conservatoire* a certified copy of the affidavit; it is sufficient to leave a copy for him at the office of the Court within 3 days of the service of the writ.—An exception to the form based upon such pretended irregularity will be struck out of the record upon motion. *Zarossi* v. *Diodati*, 8 Que. P. R. 435.

Lex fori—*Action for salary—Withdrawal of property.*]—The law governing a *saisie-conservatoire* is the law of the place where the seizure is made. 2. A *saisie-conservatoire* cannot be granted in an action for salary even upon the allegation that the defendant has ceased to do business in the provinces of Quebec and Ontario and has withdrawn all his valuables therefrom, thereby depriving the plaintiff of his recourse. *Sexton* v. *Violett*, 6 Que. P. R. 325.

Right to—*Preservation of part of claim.*] —*A saisie-conservatoire* may be joined with an ordinary action in order to preserve a part only of the total sum which is claimed in the action. *Laporte* v. *Robert*, 8 Que. P. R. 53.

Setting aside—*Defendant in default for pleading—Creditor's remedy—Lien.*]—A defendant, notwithstanding that the pleadings are noted closed against him, has a right to demand the setting aside of a *saisie-conservatoire* brought against him with the action. —A *saisie-conservatoire* can only be issued in the three cases mentioned in Art. 955, C. P., and a creditor who has no special lien upon the goods of his debtor cannot exercise that remedy. *Mélancon* v. *Archambault*, 7 Que. P. R. 474.

See ATTACHMENT OF DEBTS — DISTRIBUTION OF ESTATES—HUSBAND AND WIFE — LIEN—PARTNERSHIP—SHIP—TIMBER.

SAISIE-GAGERIE.

Formalities — *Report — Irregularities —Description of goods—Practice—Contestation — Exemptions — Privilege.*]—Article 935, C. P. C., to which Art. 954 relates, applies only to the formalities of a *saisie-gagerie.*—2. Irregularities in the report of seizure, such as the insufficiency of the description of the goods seized, must be moved against by special motion, by virtue of Rule of Practice No. 73.—3. The contestation on the merits of the *saisie-gagerie* must be made according to the ordinary rules of procedure, seeing that there are no special provisions on this subject in the Code of Procedure.—4. Paragraph 8 of Art. 598, C. P. C., does not apply specially and only to farmers, but every debtor may invoke the privilege which it confers and ask by his defence to the *saisie-gagerie* that he shall be allowed to retain at his choice 1 cow, 2 pigs, etc. *Peloquin* v. *Dunn*, 10 Que. P. R. 11.

Petition to quash — *Deposit — Irregularities—Prejudice.*]—A petition to set aside a *saisie-gagerie* need not be accompanied by a deposit.—Where a person complains of irregularities in the seizure, he must not only allege but prove prejudice. *Coristine* v. *Dominion Deforest Wireless Telegraph Co.*, 8 Que. P. R. 428.

See ATTACHMENT OF GOODS—BANKRUPTCY AND INSOLVENCY — LANDLORD AND TENANT—PLEADING—SALE OF GOODS.

SALARY.

See ATTACHMENT OF DEBTS — CONTRACT COSTS—CROWN—MASTER AND SERVANT —PRINCIPAL AND AGENT — SCHOOLS — SET-OFF.

SALE A REMERE.

See SALE OF GOODS — VENDOR AND PURCHASER.

SALE OF CROPS.

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SALE OF GOODS.

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1. ACCEPTANCE OR NON-ACCEPTANCE.

Acceptance of part — Depreciation in quality. *Belanger* v. *Leduc*, 3 E. L. R. 213.

Action for price—*Contract—Failure to fill requirements—Tests — Acceptance of goods by conduct—Retention—Right to reduction from price—Reference.*]—Action for price of machinery supplied on conditional sale contract:—*Held*, that defendant's continued user of machinery was inconsistent with intention to rescind contract. There is nothing to prevent plaintiffs suing for price and retaining and using their other rights under the contract. Reference limited to substantial defects in machines, and to be in general terms, eliminating any inquiry as to making machines conform to contract. *Royal Electric Co.* v. *Hamilton Electric Light and Cataract Power Co.*, 13 O. W. R. 791.

Action for price — *Contract — Goods not delivered in time—Refusal to accept—Right to reject the whole because part not delivered—Trade custom—Delivery of larger quantity than ordered—Bill of lading—Retention—Man. Sales of Goods Act, s. 30.*]—Action for price of goods sold. Trade custom allowing shipment of larger quantity than ordered in certain lines established, but that in other cases as more than ordered shipped, and different goods shipped than ordered in certain other instances, defendants justified under above section in rejecting the whole. Having so elected and notified plaintiffs retention of bill of lading creates no liability. *Schweiger* v. *Vineberg* (1909), 12 W. L. R. 515.

Action for price—Deduction for inferior quality—Costs. *Vair* v. *United Fruit and Produce Co.* (Man.), 2 W. L. R. 54.

Action for price — *Denial of contract—Implication of contract from acceptance of goods—Ownership of vendor—Notice of purchaser—Evidence — Depositions taken on foreign commission—Refusal of witness to answer questions—Saskatchewan Rule 274.*]—Action for price of cars and car wheels. It was objected that on plaintiff's examination under commission he had refused to answer some questions:— *Held*, that the questions had been abandoned. The cars and wheels had been ordered from K., who turned the order over to the plaintiff, and so notified the defendants.—*Held*, that defendants are liable, there being an implied contract with

plaintiff from the acceptance of the goods by defendants. *Allen* v. *Inter-Ocean*, 11 W. L. R. 393.

Action for price—*Failure of carriers to deliver.*]—Plaintiff shipped goods to defendant at a station on the Canadian Northern, but the goods never reached there:—*Held*, that the buyer has the right to examine goods, that there has been no acceptance, and therefore the property in the goods remained in the seller, who is the proper party to bring an action against the railway company, which failed to deliver the goods. Action dismissed. *Stevens* v. *Burch*, 9 W. L. R. 329. Appeal dismissed, 10 W. L. R. 400.

Action for price—*Machinery—Contract—Right of examination and trial—Notice of defects—Failure of vendor to remedy—Right of purchaser to reject—Loss of right by continuing to use machinery—Counterclaim—Breach of warranty—Time—"This year"—Costs.*]—In an action upon promissory notes given for the price of machinery sold by the plaintiffs to the defendant, it appeared that the contract of sale gave the defendant the right, not only to examine the machinery before accepting it, but to make a test or trial:—*Held*, that the defendant had no right to extend the trial over a whole season, and keep on working and using the machinery in the meantime; if the defendant gave the proper notices of defects discovered by him, the contract gave him no right to keep on working the machine pending the appearance of the plaintiff to make it satisfy their warranty; having given a notice of defects, it was the defendant's duty to cease using the machinery until the plaintiffs came and made their attempt to remedy the defects; and, if they did not come within a reasonable time, then it was his duty to reject the machinery entirely and send word to the plaintiffs that he did not propose to accept it.—The defendant counterclaimed for damages for breach of the express warranty given by the plaintiffs in the contract:—*Held*, that the defendant was absolutely met by the clause in the agreement which he signed, to the effect that the warranty given and all liability under it terminated and expired at the close of "this year"—the words quoted meaning the current calendar year, and not a year reckoned from the date of the contract; and, aside from this, the evidence of damage to the defendant was unsatisfactory. —*Held*, therefore, that the plaintiffs were entitled to judgment for the amount of the notes with interest, but without costs, because they did not do what they might have done to make the machine work satisfactorily; and that the counterclaim should be dismissed, also without costs. *Reeves & Co.* v. *Ozias* (1910), 15 W. L. R. 641, Alta. L. R.

Action for price—*Place of delivery—Inspection—Breakages in transit—Action for goods sold and delivered.*]—Inspection should be made at place of delivery. Evidence shewed the care taken by plaintiff to prevent breakages in transit, so these must have been caused by rough treatment in cars or in unloading. *Ramsay* v. *New York Central and Hudson River R. R. Co.*, 13 O. W. R. 431.

Action for price—*Sale by sample—Shipments of part of goods ordered—Saskatchewan Sale of Goods Ordinance—Memorandum in writing—Delivery—Repudiation of contract.*]—Action for price of goods sold and delivered. Plaintiff's traveller took defendant's order but later did not sign it, but received a copy of it. Plaintiff shipped part of the goods, when he received a letter on defendant's behalf to ship no more. Defendants examined the goods on arrival but refused them:—*Held*, that defendants' letter with the order is sufficient memorandum or note under the above ordinance; that there was a sufficient acceptance and delivery to carrier. Judgment for amount claimed. *Steine* v. *Korbin*, 9 W. L. R. 670, 2 Sask. L. R. 6.

Action for price—*Several articles of machinery—Separate lien notes—Entire contract—Sale by description—Parol evidence—Machines not corresponding with description—Saskatchewan Sale of Goods Ordinance, ss. 33 and 34—Acceptance.*]—Action to recover the amount of six lien notes given for a second-hand portable engine, etc., and a quantity of belting, etc., necessary to change a horse-power threshing outfit to a steam power:—*Held*, that as the latter goods were useless without the former, that it was the intention of both parties that the contract was an entire one. That as the defendants had never seen the goods it was a sale by description. Parol evidence admissible to shew the engine meant by the description on the notes. — *Held* further, that the engine did not correspond to the description "recently rebuilt." The plaintiffs were bound to tender an engine answering the description of the one sold, so it makes no difference that it could have been repaired at small cost and that plaintiff offered to repair it. Under the above section there had been no acceptance, nor a competent examination of the engine. Defendant entitled to a return of the freight paid by him. Notes to be cancelled. *J. I. Case Threshing Machine Co.* v. *Fee* (Sask.), 10 W. L. R. 70, 2 Sask. L. R. 38.

Action for 558 barrels apples—*Damaged during shipment — When property passed — Reservation by seller of control until payment.*]—Defendants purchased from plaintiffs apples f. o. b. cars Belleville, Ont., to be paid for when received at Regina, Sask. Defendants refused to accept or pay for the apples as they had been damaged by frost during shipment:—*Held*, that the property in the apples did not pass as soon as they were placed upon cars at Belleville, the plaintiff having retained the power of disposal and control of the apples until payment at Regina. Action dismissed. Judgment of Britton, J. (1909), 14 O. W. R. 437, reversed. *Graham* v. *Laird* (1909), 14 O. W. R. 1058, 1 O. W. N. 294; 20 O. L. R. 11.

Action upon promissory note given for price of horses—*Place of delivery—Right of rejection—Existence of disease — Opportunity for inspection—Sale of Goods Ordinance, ss. 16, 17 (Alta.) — Caveat emptor — Infectious disease communicated to other animals—Animals Contagious Disease Act (Alta.)*]—Plaintiff sued upon a promissory note given for price of horses. Defendants counterclaimed for damages for breach of warranty and negligence:—*Held*, that

horses were delivered to defendants at High River, where they should have protected themselves as to the number of colts among the horses. Defendants having actually kept the horses and sold them are liable for the price, less any counterclaim for damages. —*Held*, further, that there was no breach of warranty. Any defect could have been discovered on delivery of horses. Defendants entitled to damages while horses in quarantine. *Urch* v. *Strathcona Horse Repository* (Alta.), 10 W. L. R. 475.

Apples.]—Defendant ordered a car of apples from plaintiffs. He shortly after cancelled this order, and ordered another car from R. Plaintiffs and their Ontario purchasing agent were notified, but they sent a car to defendant, who took in the apples and stored them, believing they came from R. A few days later the car from R. came along: —*Held*, that defendant was a bailee for plaintiffs, and having taken the usual and proper precautions in selling at the best price, after notifying plaintiffs, they were held at their risk; the action was dismissed. *Pioneer* v. *Litschke* (1909), 12 W. L. R. 94.

Attempted repudiation after acceptance — Misrepresentation as to condition—Rescission of contract — Condition—Warranty, express or implied—Evidence—Sale of Goods Ordinance. *Robertson* v. *Morris* (Alta.), 8 W. L. R. 611.

Contract — *Breach — Jurisdiction of Court — Arbitration clause in contract — Custom of trade—Damages — Action for damages for non-delivery of apples.*]—Bought and sold notes contained following clause: "Any difference arising under this contract to be settled by arbitration";—*Held*, Court had jurisdiction to try action notwithstanding this clause. The contract was to sell two cars of prime apples delivered in New York.—*Held*, that the number of boxes per car will be according to custom of New York market, although defendants resided in Ontario. The meaning of "prime" apples will also be construed according to meaning in market at New York, the place of delivery. Defendants broke contract by sending inferior apples. Damages allowed equal to difference between contract price and market price at which plaintiffs purchased in New York on last day of delivery. *Aspegren & Co.* v. *Polly and White*, 13 O. W. R. 422.

Contract — Breach — Refusal to deliver —Dispute as to quantity contracted for — Refusal of plaintiff to accept quantity defendants willing to deliver—Finding of fact —Appeal. *Hchsdoerfer* v. *Berger*, 9 W. L. R. 280.

Contract — *Order given to agent of vendors—Condition—Oral agreement — Acceptance of terms of order—Notice—Time—Cancellation—Delivery of goods — Evidence — Completed contract.*]—To an action for the purchase-price of an engine, the defendant set up two defences: (1) that the engine was not as represented by the plaintiffs, (2) that the agreement for purchase was not to be operative until the fulfilment of certain conditions, which were not fulfilled:—*Held*, upon the evidence, affirming the judgment of Wetmore, C.J., 12 W. L. R. 706, that the defendant gave an order for an engine to the plaintiffs on certain conditions; this order was accepted before cancellation by the defendant; and there was, therefore, a completed contract between the parties; and, as the engine was delivered to the defendant according to the agreement, the plaintiffs were entitled to succeed. *Waterous Engine Works Co.* v. *Wells* (1910), 15 W. L. R. 717.

Contract—*Receipt—Sale of Goods Ordinance.*]—In an action for the price of 43 head of horses at $23 per head, the evidence established that the plaintiff and defendant drove to the plaintiff's ranch and saw the plaintiff's bunch of horses; that the defendant specified such horses as were unsuitable for his purpose, which were thereupon marked and separated from the others; that the defendant gave the plaintiff $3 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff:—*Held*, that, though there may have been a sufficient acceptance, there was not such an actual receipt by the defendant of the horses as to establish a contract binding under s. 6 of the Sales of Goods Ordinance. *Livingstone* v. *Colpitts*, 21 C. L. T. 102, 4 Terr. L. R. 441.

Contract—Sale on trial—Contradictory evidence — Refusal to accept — Purchaser not returning goods—Sale of Goods Ordinance, s. 35. *Hurlburt* v. *Bayley* (N.W.T.), 6 W. L. R. 389.

Contract — Statute of Frauds — Sales of Goods Ordinance—Acceptance and receipt of part—Oral evidence — Admissibility—Entire contract—Refusal to accept part—Damages—Failure to prove actual loss—Nominal damages—Counterclaim — Extra-provincial company—Foreign Companies Ordinance, s. 10—Exceptional dealing—Rent of land to store lumber—Nominal sum allowed—Costs. *Tait and Sutherland* v. *Gibson Lumber Co.* (Sask.), 8 W. L. R. 350.

Contract — Unascertained goods — Sale by description—Sales of Goods Act—Deduction from price — Goods not of description ordered — Evidence — Resale of goods — Quality—Waiver—Time for objection—Condition precedent—Order of Judge permitting sale—Counterclaim — Delay in shipping — Breach of warranty—Costs. *Burlington Canning Co.* v. *Campbell*, 7 W. L. R. 544.

Contract for sale of hay — *Shipment in instalments—Delivery—Violation of contract—Measure of damages—Manitoba Sales of Goods Act, s. 49.*]—Plaintiff sued as assignee of P. for damages for breach of contract between P. and defendants for sale and delivery of hay. Part of the hay was shipped when defendants refused to accept balance. Judgment for damages. In estimating damages every reasonable presumption may be made as to the benefit which plaintiff might have received from *bona fide* performance of agreement. Elements to be considered in computing damages mentioned. *Bank of Ottawa* v. *Wilton*, W. L. R. 331.

Contract in writing — *Principal and agent—Goods not according to specifications —Acceptance.*]—*Held*, (1) that defendant I. was merely a go-between and action dismissed against him; (2) that the master of a ship is only an agent to receive goods for carriage not to accept delivery; and (3) that the lumber not being in sizes as specified in contract defendants justified in refusing to accept same. Action dismissed except as to advances made by plaintiffs to master of ship. *Black* v. *Tyrer*, 8 E. L. R. 1.

Default in payment of price—Vendor retaking goods—Action for deficit after resale — Acceptance of goods—Liability for price—Breach of warranty—Counterclaim—Damages—Measure of—Cost of repairs — Promissory notes — Addition of parties — Amendment — Set-off. *Mawhinney* v. *Portcous* (Man.), 6 W. L. R. 633.

Defence as to quality—*Offer to return and cancel sale.*]—In an action for the price of goods sold and delivered, the defendant cannot plead that the goods delivered to him were not of the quality stipulated for and that he has been obliged to replace them by other goods, without at the same time offering to the plaintiff the goods received from him, and demanding the cancellation of the sale. *Dominion Bag Co.* v. *Bull Produce Co.*, 5 Que. P. R. 175.

Description of article—*Parol evidence to explain — Article delivered not corresponding with that ordered—Material difference—Right to reject—Acts of acceptance—Sale of Goods Ordinance, secs. 33, 34 — Return of goods — Retention of part—Entire contract—Statement of claim—Amendment—Goods sold and delivered.*]—The defendant signed an order in writing, addressed to the plaintiffs, requesting them to supply him with "one 9-horse power mounted on steel truck," one 12-inch crusher with bagger, one 24-inch saw and frame, and 30 feet of belting, for which the defendant agreed to settle by giving his note for $700. The order contained a provision that the machinery was to be delivered at the defendant's farm, and that it was to work satisfactorily before settlement was given. The plaintiffs shipped the machinery to their local agent at R., who notified the defendant that the machinery was there. The defendant pointed out that the delivery was to be at his farm, whereupon the agent agreed to pay the defendant for taking it to his farm, but would not allow it to be taken away until the defendant signed a note for $700. The defendant signed the note, but pointed out that he was not to be called upon to settle until it was shewn that the machine worked satisfactorily. The agent said they would make it work satisfactorily. The defendant took the machine to his farm, but found that it was not what he had ordered, and that it did not work satisfactorily, and he therefore drew it back to R. and left it there:—*Held*, that parol evidence was admissible to shew what the parties meant by a "9-horse power mounted on steel truck;" and that, upon the evidence, the engine referred to was a 9-horse power portable gasoline engine, a picture of which was contained in the plaintiff's catalogue and marked by the defendant and the plaintiff's selling agent with their signatures at the time of the sale.—*Held*, also, upon the evidence, that the engine delivered did not correspond to the engine referred to in the order; the difference was material, and no contract arose from the delivery, unless the defendant accepted it; the signing of the note and the taking of the machine by the defendant to his farm did not, in the circumstances, constitute an acceptance; the defendant could not be deemed to have accepted it, unless he intimated to the plaintiffs that he had done so, or did some act in relation to it inconsistent with the ownership of the seller, or retained it after the lapse of a reasonable time without intimating to the seller that he had rejected it: Sale of Goods Ordinance, secs. 33, 34. But the defendant promptly rejected the engine, and had a right to do so, as it was not what he had ordered.—The defendant did not return the crusher, the saw, or the belt, but used them.—*Held*, that the contract was an entire one, and the plaintiffs were not entitled to recover upon it; but were entitled, upon a permitted amendment of the statement of claim, to payment for the crusher, saw, and belt, as goooods sold and delivered. *Ont. Wind Engine & Pump Co.* v. *Malfaire* (1910), 14 W. L. R. 264, 3 Sask. 315.

Entire contract — *Delivery and acceptance of part of goods — Recovery of proportionate part of price—Damage for non-delivery—Set-off.*]—E. agreed to sell to W. a complete bottling plant, consisting of machinery and a certain number of bottles, for $900. The machinery and a small part of the bottles were delivered and some of the machinery was affixed to W.'s building. W. paid E. $500. In an action by E. to recover the balance of the purchase-price, the trial Judge held that the contract was entire, and failure to deliver substantially the full number of bottles would prevent E. from recovering anything. He entered a verdict for W., but disallowed W.'s set-off for breach of contract:—*Held*, that E. was entitled to recover the value of the machinery and bottles delivered, and W. to recover damages, if any, for non-completion of the contract, and, as there were no findings on either point, there should be a new trial. *Emack* v. *Woods*, 39 N. B. R. 111.

Failure of carriers to deliver—Sale of Goods Ordinance, s. 31—Right of buyer to examine goods — Acceptance not complete. *Steven Brothers* v. *Burch*, 9 W. L. R. 329.

Five tons of hops—*Good and merchantable — Paid for on delivery — Tender of amount far in excess of five tons—No complete delivery.*] — By the English law, if there is a contract for sale by weight or measure, and acts are to be done in order to identify the thing to be delivered before it is in a fit state for delivery, no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. There is no material difference between the old French law prevailing in Lower Canada and the English law in this respect. K. & Co., by an agreement in writing, contracted to sell and deliver to V. five tons weight of hops for the years 1855, 1856,

and 1857, the hops to be good and merchantable, and of the growth of each respective year, to be paid for on delivery, at a rate specified; the hops to be delivered free in Quebec. In 1856, K. & Co. sent to B. a quantity of hops, consisting of eighty-two bales of the growth of 1856, in weight far exceeding five tons. B. inspected the hops, and after a tender by K. & Co. of the bulk, but without any specific tender of the specific quantity of five tons, B. refused to accept any of the hops, when K. & Co. took them away, and deposited them in a storehouse at Quebec. K. & Co. then brought an action against B. for breach of contract in not accepting the hops, and the Court of Queen's Bench of Lower Canada, reversing the decision of the Superior Court, held that K. & Co. had done all that they were bound to do, and that as it was B.'s own fault that the specific five tons were not set apart and distinguished from the bulk, they were entitled to the full contract price of the hops with interest and costs. Such judgment reversed by the Judicial Committee, on the ground that as the five tons of hops had never been separated from the bulk, and there was no complete delivery, K. & Co. could not sue for the price, but only to recover damages for the non-acceptance of the hops. —*Held*, further, that the measure of such damages would be the difference of the contract price and the market price at the time when the contract was broken. Although the Judges in Lower Canada under the old French law have power to reject or modify the conclusions in the pleadings, yet even if the Court is enabled to change the nature of the action and administer relief entirely different from that which the action sought, such power cannot be exercised with propriety in the case where a plaintiff, having a choice between two remedies, has exercised his election by the forms in which the action is brought. *Boswell* v. *Kilborn* (1862), C. R. 3 A. C. 287.

Gasoline launches — *Built for defendant—Not satisfactory — One boat put in order—Other destroyed by fire while plaintiff's agent was repairing it—Passing of property—Liability of defendant.*]—Defendant ordered two gasoline launches from plaintiff company. Both were received by defendant, but neither gave satisfaction. Plaintiffs put one in working order, but while their agent was working on the other, he lit a match and an explosion followed, resulting in the launch being destroyed by fire. Plaintiffs brought action to recover $1,015.22, the price of the launches.—Boyd, C., *held*, that the amounts defendant had paid plaintiffs satisfied their claim for the launch retained, and that the one destroyed by fire had never been accepted by defendant. Judgment given plaintiff for $106.75 for some goods and supplies purchased by defendant. No costs allowed.—Divisional Court dismissed plaintiff's appeal with costs. *Davis Co.* v. *Clemson* (1910), 17 O. W. R. 231, 1 O. W. N. 938, 2 O. W. N. 167.

Goods imported from Spain — *Shipment in instalments—Not shipped in time—Action for price of goods—Evidence as to intention of parties — Correspondence—Damages for breach of contract.*]—Defendants directed plaintiff to import from Spain certain goods. Owing to delay in getting the goods delivered, defendants cancelled their contract and plaintiff brought action for price of goods:—*Held*, that the contract was not simply a sale of goods by a merchant to a customer. Judgment for plaintiff for $697.92 entered at trial. Affirmed by Divisional Court. *Wagner* v. *Croft* (1910), 16 O. W. R. 593, 1 O. W. N. 1016.

Goods not all shipped—*Refusal before delivery.*]—Action for price of goods sold. Plaintiffs shipped goods which defendant refused to accept. Plaintiffs then resold, and now sued for their loss:—*Held*, that plaintiffs had fully performed their contract and are entitled to recover their loss. *Haffner* v. *Cumming*, 9 W. L. R. 621.

Goods to be manufactured—*Delay in delivery—Destruction of property for which goods required—Action for damages for non-acceptance—Time—Tender—Impossibility of performance.*]—In an action for non-acceptance of goods agreed to be sold, delivered, and installed, the plaintiff, to recover, must prove that the goods were delivered or tendered in condition for installation, within the time agreed, or, if no time was agreed upon, within a reasonable time, and the plaintiff is not excused from so doing by the fact that by reason of any omission on the part of the defendant it was impossible to complete the contract by installation. *Luzfer Prism Co.* v. *McLeod*, 8 W. L. R. 627, 1 Sask. L. R. 75.

Grain—*Order for future delivery—Condition of—Findings of jury—Correspondence —Contract—Statute of Frauds—Refusal to accept — Breach — Time of—Damages.*]—Plaintiff sued to recover damages for breach by the defendants, of two alleged contracts to purchase wheat. It was not disputed by defendants, that they had "placed" verbal "orders" with plaintiffs for the whole of the wheat at prices and on terms alleged by plaintiffs, but it was contended by defendants that it was a term of both orders that if they should not be in a position to take the wheat at times named for delivery, they should not be bound to take it but plaintiffs would take it off their hands. The jury found against this contention of defendants. Defendants also relied on the Statute of Frauds, which they were allowed to plead, though it had not been set up in their statement of defence.—Meredith, C.J.C.P., *held*, that as to the first order there was no note or memorandum in writing of the bargain sufficient to satisfy the Statute of Frauds, and there was no acceptance and actual receipt of any part of the wheat, and no earnest to bind the bargain or part payment, and the action, therefore, failed as to that branch of the case; that as to the second order, there was sufficient to satisfy the statute, and there was an acceptance and actual receipt of part of the wheat, and plaintiffs were, therefore, entitled to recover in respect of that order. Plaintiffs given judgment for four items claimed, amounting together to $1,495.86, with costs, and the claim in respect of the first order was disallowed. *Hay* v. *Dominion Milling Co.* (1910), 17 O. W. R. 954, 2 O. W. N. 457.

Grain — Refusal to accept — Difference in grade—Re-sale — Usage of trade—Ven-

dor's right to damages—Construction of contract. *Michaud* v. *Melady*, 4 E. L. R. 164.

Hay—No. 1 Timothy—To be delivered in Toronto—Refusal to accept delivery—Hay—Nonconform of contract—Contained admixture of inferior quality — Divisional Court allowed abatement in price—40 cts. per ton —Judgment for plaintiff for $129.55 balance due, and $75 costs. *Tasker* v. *McDougall* (1910), 17 O. W. R. 915, 2 O. W. N. 471.

Loss by fire before delivery — Statute of Frauds — Memorandum in writing — "Usual terms." *Mitchell Co.* v. *Simson Co.*, 2 E. L. R. 484.

Manufacture of machinery—*Refusal to accept — Repudiation — Damages.*] — A party who contracts for the manufacture of machinery, and afterwards notifies the manufacturer that he will not accept delivery of it, unless certain guarantees respecting it, not mentioned in the contract, be given him, is thereby held to repudiate the contract, and becomes liable for the price of the machinery, less whatever value it may have for the manufacturer. *Morgan-Smith* v. *Montreal Light, Heat & Power Co.*, 30 Que. S. C. 242, 2 E. L. R. 513.

Manufactured articles — Contract — Sale of specified lot or by sample—Evidence —Acceptance on terms—Property not passing—Freight and demurrage paid by purchaser—Return of outlay — Payment into Court—Costs. *Dominion Pressed Brick Co.* v. *Black*, 9 W. L. R. 445.

Misrepresentation of agent — *Right to rescind contract — Difference between goods ordered and goods received—Counterclaim for freight paid—Foreign judgment—Jurisdiction of foreign Court.*]—Action for price of 18 butter separating machines. Defendants on receiving them tested them and found them not as represented and returned them. Plaintiffs obtained judgment in Alberta, defendants, who resided in Saskatchewan, not appearing. Action must fail so far as founded on foreign judgment. As plaintiff's agent had wilfully misrepresented the machines, defendants were justified in cancelling the contract. They were not bound to return the machines. *McCullough* v. *Defehr*, 11 W. L. R. 524.

Mistake by vendor—*Goods accepted by vendee with knowledge of mistake—Implied contract.*]—Judgment of Patterson, Co. C.J., 9 E. L. R. 198, in favour of plaintiff in an action for goods sold and delivered, affirmed by Supreme Court of N. S. *Ackerman* v. *Morrison* (N.S. 1911), 9 E. L. R. 307.

Mistake of purchaser—Refusal to accept goods — Misrepresentation. *Cohen* v. *Hanley*, 3 E. L. R. 137.

Neglect by purchaser to take delivery—*Loss of the thing sold by fortuitous event.*]—C. C. 1472, 1491, 1493—The loss by fortuitous event, of a thing sold, falls upon the purchaser when he has neglected to take delivery of it. *Thibault* v. *Marsel*, 11 Que. P. R. 224.

Onions—*1¼ tons—To be shipped to Manitoba—Nonconform of contract—Refusal to accept.*]—Judgment of Teetzel, J., 14 O. W. R. 1268, affirmed by Divisional Court. *Kastner* v. *Mackinzie* (1910), 1 O. W. N. 501.

Order for goods given in one district subject to acceptance by the principal in another district, and that the said acceptance has taken place, and the goods delivered in said last district, the action for the recovery of the price of the goods must be taken in the district where the acceptance of the principal was affected. *Brock Co.* v. *Forget*, 11 Que. P. R. 21.

Order given in one district and accepted in another—*Variation in contract —C. P. 94.*] — If purchaser, residing in Joliette, writes the seller, residing in Montreal, asking that the contract be varied, then the contract is completed in Montreal where the new order is received.—Purchaser's action in damages for non-execution of contract should be taken in Montreal. *Courchene* v. *Maritime Nail Co.* (1910), 12 Que. P. R. 19.

Order given to agent of vendors — *Condition—Oral agreement — Acceptance of terms of order—Notice—Time—Delivery of goods—Evidence.*]—Action for price of machinery:—*Held*, that plaintiffs having notified defendant in reasonable time that they would ship the machinery and he neglecting to refuse promptly, and plaintiffs having delivered it, they must get judgment for amount claimed. *Waterous* v. *Wells* (1909), 12 W. L. R. 706.

Parol acceptance by vendor — *Delay in shipping—Refusal to accept goods.*]—The defendants on the 8th April, 1910, signed and delivered to a salesman of the plaintiffs a written order for an engine and appurtenances, to be shipped to a place named on or about the 12th April, 1910, for which the defendants agreed to pay the plaintiffs $3,700: —*Held*, that an acceptance of the order in writing signed by the plaintiffs was not necessary to make a contract; that the plaintiffs' manager had authority to accept and did accept on their behalf; and that the plaintiffs were ready to ship at any time. There was here a contract with mutual obligations founded upon good consideration; and the document was signed by the party to be charged.—*Held*, also, that, although the machine was not shipped by the plaintiffs on or about the 12th April, it was kept ready for shipment, and the shipment was delayed at the request and for the benefit of the defendants; and, even if the provision as to the time of delivery was intended to be a condition precedent to the defendants' liability, it was waived by the defendants.—*Held*, therefore, that the defendants had not justified their breach of the contract in refusing to accept the machinery when it arrived at the place named in the contract.—*Sawyer and Massey Co.* v. *Robertson*, 1 O. L. R. 297, applied and followed. *Gaar Scott Co.* v. *Ottoson* (1911) 16 W. L. R. 663, Man. L. R.

Parol agreement for sale of motor boat—*Statute of Frauds—Change of possession—Receipt and acceptance—Evidence.*]—

Plaintiff claims he sold a boat to defendant who received and accepted it. This defendant denies and pleads the above statute:—*Held*, that a sale was concluded. Plaintiff's evidence believed in preference to that of defendant. *Wingfield* v. *Stewart*, 7 E. L. R. 505.

Perishable goods—Sale by sample—Refusal to accept — Contract—Correspondence —Bill of lading—Place of inspection — Injury to goods by frost—Climatic conditions—Delay in accepting—Damages—Sale at reduced price — Expenses. *McLean Produce Co.* v. *Freedman*, 12 O. W. R. 1038.

Presumption of acceptance — Steps taken by one of two contracting parties in the interest of both do not imply an admission of liability on his part for the obligation of the other. Hence, where a quarryman delivers stone of different dimensions from what the purchaser, a building contractor, ordered, he cannot presume that the stone was accepted by the purchaser from the fact that the latter tried to get the proprietor to accept it, or that he deposited it in a yard for safe-keeping. *Imbault* v. *Crevier* (1911), 39 Que. S. C. 509.

Promissory notes given for price — *Defects in goods—Notice—Counterclaim for breach of warranty—Failure to return goods —Continued possession—Delay—Repudiation —Rescission of contract.*] — The plaintiffs sold to the defendant an engine, separator, and other articles, for which the defendant gave promissory notes, to recover the amount of which this action was brought. The goods were sold under a warranty that they were well built, of good material, and capable of doing good work if properly operated, and the agreement provided that failure to give immediate notice of any defect to the seller, or continued possession of the machine, should be deemed conclusive evidence that the machine filled the warranty. The evidence shewed that the separator did not work properly, and was continually breaking down, of which fact the plaintiff's agent was duly notified, and efforts were made by the plaintiffs to remedy the defect, but without avail. The plaintiff's agent also from time to time persuaded the defendant to keep the machine, promising to make it right, and the defendant continued to operate it during two seasons, and then he returned it, but in the meantime the engine, of which no complaint had been made, had become considerably dilapidated. The defendant pleaded a breach of warranty, and the return of the goods and rescission of the contract, and counterclaimed for damages for the breach:—*Held, per curiam*, that, by the continued use of the machinery after discovery of the defects and of the inability of the plaintiffs to remedy such defects, the defendant accepted the machinery, and was not entitled to return the same and rescind the contract. —Per Lamont and Prendergast, JJ. (Wetmore, C.J., dissenting), that continued possession and use of the machinery by the defendant could not, by reason of the promises of the plaintiffs' agent to make it work satisfactorily, be deemed conclusive evidence that the machinery answered the terms of the warranty, and, as the evidence shewed conclusively that the machinery did not answer the warranty, the defendant was entitled to damages for the breach thereof. *New Hamburg Manufacturing Co.* v. *Weisbrod*, 1 Sask. L. R. 342, 7 W. L. R. 894.

Property passing—*Sale by sample — Retention—Notice of rejection—Reasonable time—Sale of Goods Act—Breach of warranty as to quality—Damages—Delivery to carrier—Appropriation.*]—The purchasers of goods sold by sample, although they alleged that the goods when received were not what they had bargained for, and made a number of complaints by letter to the sellers and verbally to their agent, made sale of considerable portions of the goods, and did not expressly notify the sellers that they rejected the goods until about 6 weeks after they had received them into stock:—*Held*, that the purchasers had retained the goods without rejecting them within a reasonable time, and, under ss. 35 and 36 of the Sale of Goods Act, R. S. M. 1902, c. 152, had lost the right of rejection, and, therefore, were liable for the price agreed on, subject to their right, under s. 52 of the Act, to whatever deduction they could establish a claim for by reason of any breach of warranty as to quality or for damage by way of counterclaim. *Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250, and *Grimoldby* v. *Wells*, L. R. 10 C. P. 393, followed.—The Court held, on the evidence set out in the judgment, that the purchasers had failed to establish any such claim for damages.—*Held*, also, following Benjamin on Sale 5th ed., pp. 355, 639, and *Badische* v. *Basle*, [1898] A. C. 207, that, although delivery to a carrier is *prima facie* an appropriation of the goods, yet the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery. *Whitman Fish Co.* v. *Winnipeg Fish Co.*, 8 W. L. R. 488, 17 Man. L. R. 620.

Pulp wood sold at a specific price per cord, to be delivered by vendors upon the cars at a certain railway station, and when so delivered to be measured in the cars, the sale is not perfect, under Art. 1474 C. C., by a mere approximate estimate and stamping of said wood, by the purchaser's agent on the grounds of the railway station, it being understood by the vendors that said wood be finally measured when loaded and delivered on board the cars by the vendors, in conformity with conditions of sale. Such a delivery does not affect the right and privilege of the person who has cut and drawn said wood out of the forest—C. C. 1994 c. *Loiselle* v. *Boivin & Sturtvant*, 16 R. de J. 50.

Railway ties — *Sale to Government — Finding of Referee — Appeal.*]—Supplicant offered certain railway ties to the Government. These were inspected and inspector ignoring his instructions, purported to accept the ties for the Government. A new selection was made and ties purchased. Supplicant submitted that in all events he should recover for three piles of ties, 145 in all, used by the Government. Cassels, J., *held*, that supplicant had been fairly dealt with by the Referee, and that there was no ground of appeal, it being an afterthought, and dismissed the action. *Michand* v. *Rex* (1910), 8 E. L. R. 546.

Refusal to accept—Contract — Goods not all shipped—Refusal before delivery — Pleading—Amendment — Evidence — Credibility of witness — Damages. *Haffner* v. *Cumming*, 9 W. L. R. 621.

Refusal to accept — *Entire contract—Failure to supply part.*]—The respondent ordered, by illustrated descriptive catalogue received from the appellant, several articles of furniture, at the prices stated in the catalogue, for furnishing a cottage in the country. The order included a table styled a "monk's bench." The appellant, being unable to supply this article as described in the catalogue, substituted another table of a similar character. Some of the other articles sent also differed slightly from the description in the catalogue. The respondent, treating the order as an entire contract, refused to accept the whole or any part of the articles sent to him. Subsequently, the appellant offered to take back the article substituted for the "monk's bench." The action, however, was brought for the price of all the articles sent:—*Held*, affirming the judgment in 21 Que. S. C. 336, that the order of the respondent being for specified articles forming a suite of furniture for a cottage, the order was an entire contract, and the respondent was entitled to get exactly what he had ordered; and in default, to refuse acceptance of articles different from those contracted for, and also to recover his disbursements made under the contract. *Tobey Furniture Co.* v. *Macmaster*, 12 Que. K. B. 34.

Refusal to accept—*Goods supplied not according to contract — Liability for price where no set-off or counterclaim—Warranty —Pleadings—Evidence.*] — Appeal from the judgment of Laurence, J., in favour of plaintiffs, for the amount claimed with costs in an action for goods sold and delivered. *Brownlie & Co.* v. *Sydney Cement Co.* (N. S. 1910), 9 E. L. R. 150.

Refusal to accept—Non-compliance with contract as to time and mode of consignment. *Watterson* v. *McArthur*, 6 O. W. R. 11.

Refusal to accept—*Perishable goods — Sequestrator.*]—In an action to enforce a contract of sale and to recover the price, when the object of the sale has been tendered by the vendor to the purchaser, who refuses to take delivery, and where it is perishable and its price liable to fluctuate, the Court will appoint a sequestrator with power to sell. *Gordon* v. *Pinder*, 4 Que. P. R. 321.

Refusal to accept—Tender—Measurement of cordwood—Resale by vendor—Recovery of loss upon. *McLennan* v. *Gordon*. 5 O. W. R. 98.

Refusal to accept—Work and labour. *Dustan* v. *Niagara Falls Concentrating Co.*, 9 O. W. R. 11, 10 O. W. R. 441.

Right of rejection — *Notice.*]— A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he then finds them inferior to what he had ordered, and so notifies the vendor within a reasonable time. *Taylor* v. *Smith*, [1893] 2 Q. B. 65, followed. *Creighton* v. *Pacific Coast Lumber Co.*, 18 C. L. T. 425, 19 C. L. T. 285, 12 Man. L. R. 546.

Rights and obligations of the buyer —*Quality of the thing—Acceptance and use of the thing by the buyer—Silence of the buyer as to the defects of the thing—Delivery—Delays caused by the failure of the purchaser to conform to the conditions of sale.*] —A purchaser who accepts and uses the thing sold, is no longer entitled, when he is sued to recover the price, to complain of the defects in quality, dimensions, etc., which he might have known at once, but of which he made no mention in a correspondence of ten months with the vendor, subsequent to the delivery. The purchaser cannot complain about the delay in delivery of the thing caused by his own failure to fulfil the agreement made at the time of sale, of such a kind as consenting to a lien to guarantee the payment of the price. *Audet* v. *Naud* (1909), Que. S. C. 148.

Sale by correspondence—*Place where it is concluded.*]—The offer made of particular goods specified as to their nature and their price per pound, without mention being made as to quantity, followed by an acceptance of a certain quantity, constitutes a perfect sale, concluded, when it is by correspondence, at the place where the buyer's letter of acceptance is mailed.—It is of no importance that the offer requested a reply by telegram and it was given by post letter; nor that the buyer added to his acceptance the following words: "Ship at once." *Beaudoin & Watterson* (1910), 19 Que. K. B. 530.

Sale by description—Absence of inspection by purchaser—Resale — Defect in quality—Acceptance — Local customs and standards—Deduction from price for inferiority in quality—Contract. *Webster* v. *McPherson*, 11 O. W. R. 825.

Sale by sample—*Bill of lading.*]—Eggs were sold by sample f.o.b., London. There was no wilful delay in shipping on plaintiff's part. Defendant, who lived in Ottawa, learning that the eggs had been frozen in transit owing to the sudden drop in the temperature, wished to inspect before accepting the draft:—*Held*, that inspection should have been made at London and plaintiffs must be paid their losses on the resale, expenses and commission. *McLean* v. *Freedman*, 12 O. W. R. 1038.

Sale by sample—*Delivery — Condition f.o.b.—Sale of Goods Act, R. S. M. 1902, c. 152—Notice of rejection—Reasonable time—Breach of Warranty—Damages.*] — By contract made at Winnipeg, Man., the plaintiffs sold to the defendants, by sample, a car-load of cured fish, to be shipped during the winter from their warehouse at Canso, N.S., "f.o.b. Winnipeg." The sample was sound and satisfactory. The fish arrived in Winnipeg in a frozen state, and were received by the defendants, and kept by them in an outhouse for several weeks before being placed in the freezer, the atmospheric conditions being such that the fish could not, in the meantime, have deteriorated by thawing. Some of the fish when sold proved unsound, were returned by customers, and the

whole shipment was found not up to the sample and unfit for food. On inspection the health inspector condemned the whole carload, and it was destroyed. About six weeks after the fish had been received by them, the defendants notified the plaintiffs of the rejection of the carload so delivered. In an action for the price at which the fish had been sold, the defendants counterclaimed for damages for breach of warranty and consequent loss in their business:—*Held*, reversing the judgment of the Court of Appeal in *Whitman Fish Co.* v. *Winnipeg Fish Co.*, 17 Man. L. R. 620, 8 W. L. R. 488, that the sale had been made subject to delivery at Winnipeg; that any loss occasioned by deterioration in transit not necessarily incident to the course of transit should be borne by the sellers; that the loss in this case was not so incident; and that, in the circumstances, the purchasers had notified the sellers of the rejection within a reasonable time, as contemplated by the Sale of Goods Act, R. S. M. 1902, c. 152; that the plaintiffs could not recover; and that the defendants were entitled to damages on their counterclaim. *Winnipeg Fish Co.* v. *Whitman Fish Co.*, 41 S. C. R. 453.

Sale of ascertained goods by description — *Representations constituting identification or collateral warranty — Delivery—Acceptance — Rejection — Necessity for notice—Findings of fact by trial Judge.*]—*Held*, that on a sale of ascertained goods, described as second-hand, which the buyer has had no opportunity of inspecting, representations as to the length of time during which such goods have been used and the present condition thereof constitute part of the description, and are not merely a collateral warranty, and the buyer is entitled to reject the goods if they do not correspond with the description. — 2. That, following *Varley* v. *Whipp*, [1900] 1 Q. B. 513, 69 L. J. Q. B. 333, when goods are so sold, the property does not pass upon shipment, nor until the buyer has had an opportunity of inspecting the goods and signifying his acceptance.—3. That when such goods do not answer the description no notice of rejection need be given by the buyer. *Bannerman* v. *Harlow*, 1 Sask. L. R. 301; S. C., *sub nom. Bannerman* v. *Barlow*, 7 W. L. R. 859.

Specific articles — Contract — Condition—Failure of vendor to comply with as to portion of articles—Acceptance by retention—Condition turned into warranty—Damages for breach—Counterclaim—Amendment—Terms — Costs. *Dodge Manufacturing Co.* v. *Canadian Westinghouse Co.*, 11 O. W. R. 914.

Specific articles to be manufactured —Refusal of purchaser to accept—Justification for—Rescission of contract. *Hyde* v. *Reid* (Sask.), 8 W. L. R. 555.

Supply of telegraph poles — *Acceptance of part—Condition—Inspection—Property passing—Claim for price—Refusal to accept remainder — Vendor terminating contract.*]—Appeal and cross-appeal from 12 O. W. R. 243, 1097, dismissed. *Plaunt* v. *Western Electric Co.* (1909), 14 O. W. R. 404.

Tender — *Waiver — Damages — Property not passing — Possession — Judgment —Payment into Court.*]—Agreement for sale of goods for $175, payable $30 on receipt of bill of lading for or tender of the goods, and the balance in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible. On the 6th June the plaintiff sent the defendant an invoice of the goods. On the 14th June the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and draft and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote that the plaintiff had concluded not to ship the goods, and again refused to take them:—*Held*, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed by the performance was waived.—*Held*, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract.—*Held*, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goooods. *Tufts* v. *Poness*, 20 C. L. T. 330, 32 O. R. 51.

Terms of payment — *Substitution of goods by consent—Alteration of figures in written contract—Effect of—Materiality.*]—Plaintiff gave a written order for certain barbers' supplies. Not having one of the articles the manufacturers offered to supply a cheaper one, to which plaintiff agreed. The manufacturers then changed the order so as to make it conform to the substitution of the cheaper article:—*Held*, not a material alteration. *Gogain* v. *Drackett*, 11 W. L. R. 643.

Terms of sale — "*As is*"—*Sale by sample—Refusal to accept — Retention of part — Subsequent return — Property passing.*]—On appeal from 9 W. L. R. 72, the Court being divided, appeal dismissed. *Strait* v. *Shaw*, 11 W. L. R. 533.

Wheat—*Telegrams—Making the contract —Construction—Description — Delivery — Price — Breach — Damages—Sale of Goods Ordinance, s. 28, 31.*]—On the 22nd March, 1909, the plaintiffs, at Enderby, B.C., wired the defendants, at Calgary, Alta.: "Wire best prices at which you can sell 10,000 bushels basis one Northern basis on track Fort William shipment in May from Alberta, Government Calgary weights or our weights Enderby would accept apply contract number one rejected number two rejected one two Northern spreads date sale." On the 23rd March the defendants answered by wire: "Will sell 10,000 bushels two cents over

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Winnipeg May close, your conditions, except spreads be basis say of inspection." And on the same day the plaintiffs wired back: "We accept offer 10,000 bushels basis today's close Fort William May shipment Alberta points." On the same day the plaintiffs wrote to the defendants confirming their first telegram, and saying, "You will understand, of course, this shipment you would allow us the freight from Fort William to points shipped from in Alberta." This letter, of course, did not reach the defendants till after their telegram. The defendants sent no letters at all:—*Held*, that there was a contract between the parties.—*Held*, also, that the defendants understood what was meant by the expression "basis on track Fort William," and specifically accepted the conditions, with one exception, namely, the date at which the "spreads" were to be fixed; and the last telegram did not alter the conditions specified in any essential particular. The expression "two cents over Winnipeg close" meant that the defendants offered to sell wheat at a price two cents in excess of the price, on the Winnipeg Grain Exchange, at the close of the day on which the telegram was sent, of wheat sold for May delivery. This price is always for wheat in the elevators at Fort William. The expression "basis to-day's close Fort William," in the last telegram, must be read with the two previous telegrams and interpreted in the light of them; and the plaintiffs, by using the expression, were assenting to the defendants' price, but also reviving their previous condition contained in the expression "basis on track Fort William," to which the defendants had already assented. The expression "basis one Northern" referred solely to the basis upon which the price was to be fixed, and the second basis, "basis on track Fort William," did not refer to the price at all, but to the deduction to be made for freight saved, owing to the fact that the wheat, although sold at a price which assumed it to be in the elevators at Fort William, was really to be shipped at some point or points in Alberta westward to Enderby. The saving would be 15 cents a bushel freight and ¾ of a cent elevator charge, but the plaintiffs did not attempt to take advantage of the ¾ of a cent.—*Held*, also, that although the plaintiffs asked the defendants to withhold shipment for a time, there was no contract varying the time for delivery, and what was done amounted to nothing more than a voluntary forbearance on the part of the defendants. The original contract was for shipment to the plaintiffs at Enderby, and the defendants had a right at any time to revert to their rights in this regard, in spite of the plaintiffs' request.—*Held*, also, that the contract did not mean that the wheat could be shipped to any point at all and afterwards diverted to the plaintiffs; it meant that the defendants would ship to or towards Enderby during May. Section 28 of the Sale of Goods Ordinance was applicable, in the absence of any pleading or evidence as to the law of other provinces; and there was an implied contract that the defendants should send the wheat to the plaintiffs, and that it was not incumbent on the plaintiffs to attend at the sellers' place of business to receive delivery. Section 31 of the Ordinance also applied, and shipment on the cars to the buyers would, therefore, be deemed, *prima facie*, to be delivery to the buyers. The wheat to be supplied must have started on its journey towards Enderby in May. The date of shipment constitutes practically a description of the wheat required. *Ashmore* v. *Cox & Co.*, [1899] 1 Que. B. 436, explained and followed.—*Held*, also, that the defendants had broken the contract, as they admitted that there was no such wheat, moving westward upon a shipment in May, as would have enabled them to fulfil it.—*Held*, also, that the rules of the Winnipeg Grain Exchange were not binding on the plaintiffs. The contract was concluded when the plaintiffs sent their last telegram, and there were no circumstances which would make all the contents of the sale subsequently sent binding upon the plaintiffs.—*Held*, as to the measure of damages, that the closing price on the Winnipeg Grain Exchange on the 31st May for wheat of the description stipulated for, that is, of the grades allowed, and having been shipped from a point in Alberta westwards towards Enderby some time in May, and then moving towards Enderby, was the price upon which the damages should be based; but there could be no such price, because there was no such wheat available for purchase at all on the 31st May. The plaintiffs took the only possible course in endeavouring to secure wheat at Alberta points; and, as the evidence shewed that the only quotation they could secure for that class of wheat was at $1.20 for No. 2 Northern, that was the basis to be adopted; and the damages were, on a calculation, assessed at $2,078.44. *Columbia Flour Mills Co.* v. *Bettingen* (1910), 14 W. L. R. 669.

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2. ACTION FOR PRICE.

Absence of bargain as to price — Market value of goods at time of appropriation by defendants—Ascertainment—Reversing findings of trial Judge. *McCutcheon* v. *Northern Fuel Co.* (Man.), 4 W. L. R. 57.

Acceptance of part—Entire contract — Statute of Frauds. *Bastedo* v. *Simmons*, 2 O. W. R. 866, 955.

Accord and satisfaction — Novation. *Steine* v. *O'Neil* (N.W.P.), 6 W. L. R. 125.

Accord and satisfaction — *Return of article purchased—Promise to buy back if purchaser's circumstances should change.*]— The presumption of an accord and satisfaction arising out of the return of an article by the purchaser, stating his inability to pay for it and the acceptance of the article by the vendor and his keeping it for nearly four years, and trying to sell it without reference to the purchaser, will not be displaced by evidence shewing, in effect, merely that the purchaser, at the time of returning the article, had stated or promised that if, in the future, his circumstances should become such as to warrant it, he would buy the article back if still in the vendor's possession. Such promise or statement should be regarded as, at most, a voluntary statement of intention, and not as a condition on which the article was taken back. *Boyce* v. *Soames*, 4 W. L. R. 215, 16 Man. L. R. 109.

Account — Deductions — Freight overcharge—Inspection — Shortage — Defective quality—Interest—Costs. *McKenzie* v. *Miller*, 3 O. W. R. 242.

Account — Delivery to agents — Oral agreement — Letters — Evidence—Findings of jury. *Drader* v. *Lang*, 7 O. W. R. 52.

Action in magistrate's Court — *Intoxicating liquors — Canada Temperance Act — Evidence.*]—Case remitted to justice to set aside judgment in favour of plaintiff and directed to enter an order for judgment for defendant. The justice had relied partly on his personal knowledge and partly on defendant's general reputation for want of veracity. *Garden* v. *Irvine*, 6 E. L. R. 523.

Alleged inferiority of part of goods supplied — Failure to return. *O'Keefe Brewing Co.* v. *Gilpin*, 8 O. W. R. 581.

Ascertainment—Counterclaim for breach of contract—Representations not amounting to contract. *Kny-Scheerer Co.* v. *Chandler and Massey*, 4 O. W. R. 187.

Authority of agent of purchaser — Delivery — Acceptance — Sale of business by defendant—Evidence — Copies of orders for goods—Freight charges. *Shorey* v. *Van Meter* (N. W. T.), 2 W. L. R. 361.

Cloth for tailoring business.]—Plaintiff sold a quantity of cloth to defendant, who carried on a tailoring business, on the terms that the cloth was to be made up into suits, and paid for as it was made up. Before the cloth could be manufactured into suits it was seized, and taken away under claim of title by virtue of a chattel mortgage given by defendant to a third party:—*Held*, that the manufacture of the cloth into suits must be done within a reasonable time, and that, even without default on the part of defendant, he became unable to carry out his agreement, that did not excuse him from making payment. Also, that defendant, by suffering the goods to be taken out of his possession, put it out of his power to insist upon time for payment according to the stipulation at the time of sale. Also, that the fact of defendant having wholly repudiated his obligation under the contract, discharged plaintiff from any obligation that he was under to give credit, and enabled him to sue on a *quantum meruit* for the value of the goods. *McFarlane* v. *McLean*, 43 N. S. R. 304.

Collateral oral agreement—Condition precedent—Waiver — Acceptance — Part performance—Consideration — Warranty — Failure to return goods. *New Hamburg Manufacturing Co.* v. *Klotz* (N.W.T.), 1 W. L. R. 471, 3 W. L. R. 404.

Combination of dealers—Agreement—Construction—Course of dealing—Company. *O'Rielly* v. *Thompson*, 4 O. W. R. 506.

Condition as to test—Non-fulfilment—Dismissal of action—Costs. *Mellick* v. *Watt*, 2 O. W. R. 1116.

Construction of contract — Several articles of machinery — Warranty—Divisible or entire contract—Right of purchasers to return whole outfit on failure of goods to answer warranty—Time to remedy defects —Waiver — Notice — Computation — Rescission of contract. *American-Abell Engine and Threshing Co.* v. *Scott* (N.W.P.), 6 W. L. R. 550.

Contract — Acceptance — Sale of Goods Act, s. 6—Conduct of purchaser—Evidence. *Andrews* v. *Cook* (Man.), 6 W. L. R. 691.

Contract—Breach—Damages for delay—Penalties—Inspection fees. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 5 O. W. R. 561.

Contract—Damages for delay—Breach of contract — Penalties—Claim and counterclaim—Costs. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 3 O. W. R. 759.

Contract—Failure to fill requirements of —Tests — Evidence — Acceptance of goods by conduct, notwithstanding — Retention of goods—Failure to notify vendors—Defects in goods—Right to deduction from price — Counterclaim for damages—Measure of damages—Property not passing — Construction of contract — Special terms—Judgment — Reference. *Royal Electric Co.* v. *Hamilton Electric Light and Cataract Power Co.*, 9 O. W. R. 437.

Contract — Money had and received — Interest—Costs. *Grecnal* v. *Dunlop* (N.W. T.), 3 W. L. R. 369.

Contract—Place of delivery—Inspection Defect in quality. *Craig* v. *Shaw*, 2 O. W. R. 449, 508.

Contract by correspondence — *Specifications.*] — Appeal from a judgment of Laurence, J., in favour of plaintiff in an action for goods sold and delivered. *Richey & Toronto Sewer Pipe Co.* v. *Sydney* (N.S. 1911), 9 E. L. R. 313.

Contract in writing—*Verbal representation—Evidence.*] — The plaintiffs sent to the defendants the following telegram: "Can you handle 90,000 green cod? Answer price." The defendants replied: "If cod No. 1, large, no shrinkage, $1.45." The plaintiffs brought the cod to the defendants, and while the fish were being landed the defendants signed an agreement in writing by which they agreed to buy from plaintiffs "the cargo of fish now being landed," and to pay for the same at the rate of $1.46 per 100 lbs. In an action by the plaintiffs to recover the contract price of the fish, the defendants sought to give evidence of a verbal representation at the time of delivery that they were of No. 1 quality:—*Held*, that the trial Judge was right in refusing to receive such evidence, as tending to vary the written contract. Where the defendants were seeking a remedy in damages, by reduction in price, for breach of condition or warranty, the remedy was a purely common law one, and the authorities which would permit such evidence to be given in an action for specific performance, or to rescind a contract, were not applicable.—*Semble*, that if the defendants had not taken the fish, and the parties could have restored to their original position, the evidence might

have been given by way of defence to an action for the price. *Howard* v. *Christie*, 33 N. S. R. 367.

Conversion — Contract—Breach—False representations—Counterclaim, *Kny-Scheerer Co.* v. *Chandler & Massey*, 2 O. W. R. 215.

Counterclaim for breach of warranty. *Selby* v. *Mitchell*, 2 O. W. R. 496.

Counterclaim for damages—Substitution of inferior material in manufactured articles — Warranty — Resale — Delay in furnishing goods — Measure of damages — Costs. *Centaur Cycle Co.* v. *Hill*, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025.

Counterclaim for damages for inferior quality — Examination before shipping — Usage of trade — Merchantable goods — Acceptance — Examination after arrival at destination — Knowledge of special purpose for which goods required — Sale of Goods Ordinance. *Godwin* v. *Sawyer* (Y.T.), 5 W. L. R. 102.

Counterclaim for damages for inferiority — *Delay in complaining — Burden of proof — Action by foreign company — Foreign company — Foreign Companies Ordinance — Carring on business in province — Partnership name.*] — Action for price of apples. The plaintiff company carried on business at Spokane, and had not registered in Alberta:—*Held*, that this was unnecessary, as apples sold for delivery at Spokane. Plaintiffs failed to give evidence as to good condition of apples at Spokane, but defendants' conduct was inconsistent with claim now set up that large part of apples were rotten. Judgment for plaintiffs for $334.95. *Shinn* v. *McLean*, 11 W. L. R. 527.

Damage in transit — Place of delivery —Collateral security — Consignee's right to sue when bills of lading held by bank. *Deguire* v. *Anderson, Bell & Co.*, 3 E. L. R. 139.

Defence — *Delay in delivery — Proper subject of counterclaim — Not a defence to action — Costs of action and counterclaim — Set-off — Apportionment.*] —To an action for the price of goods, the defendant may set up, by way of total or part defence, damages for breach of contract resulting in a diminution of the value of the goods. This was so before the Judicature Act, and is a right existing independently of the Rules relating to set-off and counterclaim. But only damages diminishing the value of the goods can be so set up, and not any other damages arising from the breach of contract; the latter being recoverable only by way of cross-action or counterclaim; and damages for delay in delivery of the goods do not go to diminution of the price.—In an action for the price of goods the plaintiffs were *held*, entitled to the full amount claimed, and the defendant to damages on his counterclaim for delay; and in settling the form, it was ordered that judgment should be entered for the amount found due to the plaintiffs, less the amount awarded to the defendant upon his counterclaim, together with interest from the date of the writ of summons; the plaintiffs to have their costs and the defendant his costs, the one to be set off against the other, and the difference to be set off or added to the amount of the judgment; the costs of the trial, except the counsel fee, which was allowed to the plaintiffs, to go to the defendant. *Edmonton Iron Works* v. *Cristall* (1910), 15 W. L. R. 659, Alta. L. R.

Defence — *Inferior quality — Receipt of goods — Bar — Demurrer.*]—The purchaser may refuse the goods which his vendor has delivered to him, if they are not of the kind or quality agreed upon, or if, in the absence of agreement on this subject, they are not of a true and merchantable quality. 2. The fact of the receipt of the goods is not, by itself, a bar to the claim of the purchaser, if the silence of the latter is sufficiently explained, and if his conduct gives no occasion for suspicion. 3. Where the defendant, in an action for the price, alleges that the goods delivered were not of the quality agreed upon, and that he has notified the plaintiff to take them back, *preuve avant fair droit* will be ordered. *Topken* v. *Ramch*, 4 Que. P. R. 58.

Defence—Part not up to sample—Detention by purchaser—Damages—Set-off—Costs —Waiver — Conversion. *American Cotton Yarn Exchange* v. *Hoffman*, 2 O. W. R. 416, 987.

Defence of accord and satisfaction—Taking back goods sold — Evidence. *Boyce* v. *Soames* (Man.), 4 W. L. R. 215.

Delivery "on approval" — *Onus — Conflicting evidence — Findings of the trial Judge—Review—New trial by jury.*]—Where a question of fact, as to which the evidence is contradictory, and as to which there is no preponderance in favour of either party, has been determined by the trial Judge in favour of the plaintiff, but with doubt, and only for the reason that to send the case to a jury would probably result in a disagreement and in expense to the parties, the Court, if they consider that the interests of justice require it, will review the Judge's finding and will order a new trial, directing the issues to be settled by a jury; and where the delivery of goods, after negotiations for a sale, is as consistent with the defendant's account of the transaction (delivery on approval) as it is with plaintiff's, the trial Judge is in error in regarding the delivery as a fact which requires explanation, and throws the burden on the defendant. *Johnson* v. *Durant*, 37 N. S. R. 471.

Estoppel — *Conversion — Representation by rendering account — Sale of goods.*] —The plaintiff agreed to sell 40 feet of curbing stone to one P., who had contract to place stones in the town of W. Prior to this agreement, the town, with the plaintiff's knowledge, but without any authority or permission on his part, except such as can be implied from the fact that he saw the town's servants taking the stone and made no protest or objection, had taken away and made use of 174 feet of plaintiff's curbing stone. The plaintiff sent a bill of all the stone to P., and at his request the town held back all P.'s payment so as to force a settlement

of the bill, but P. refused to pay the plaintiff for more than 40 feet. The town being threatened with suit by P., paid him, and the plaintiff then sued the town in trover for conversion of 174 feet of stone:—*Held*, reversing the judgment of the County Court Judge, that the plaintiff's conduct did not estop him from recovering against the town, and a verdict was ordered in his favour for the value of 134 feet. *Fisher* v. *Woodstock* (1909), 39 N. B. R. 192, 7 E. L. R. 170.

Failure of consideration — Manufactured goods — Contract — Failure to fulfil requirements — Counterclaim for part of price paid and damages for breach of contract—Findings on evidence—Assignment of plaintiff's claim *pendente lite* — Refusal of assignee to be added as party—Dismissal of action. *Nixon* v. *Mundet*, 9 O. W. R. 612.

Failure of title to goods — Implied warranty of title—Will—Provision for maintenance of testator's children in hotel—Sale of furniture in hotel—Right of child to object—Executor—Powers of — Conduct — Estoppel—Contract—Lease — Offer to purchase. *Clark* v. *Mott*, 10 O. W. R. 940.

Finding of contract by trial Judge —Conflicting evidence — Appeal — Duty of Court of Appeal — Acceptance of horse —New trial — Discovery of fresh evidence. *Knight* v. *Hanson* (N.W.T.), 3 W. L. R. 412.

Finding of fact—Election to sue agents — Third parties — Indemnity — Costs. *Smith* v. *Matthews*, 9 O. W. R. 62.

Goods to supply place of others alleged to be found defective — Burden of proof — Evidence — Neglect to follow directions for using. *Miniota Lumber and Grain Co.* v. *Foley*, 7 W. L. R. 482.

Illegality of sale — *Intoxicating liquors —Liquor License Act — License in name of one partner.*]—Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C. O. 1898 c. 89), action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name:—*Held*, that the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portion of each which were not for intoxicating liquors. *Indian Head Wine and Liquor Co.* v. *Skinner*, 23 C. L. T. 73; *Plisson* v. *Skinner*, 5 Terr. L. R. 391.

Injury after delivery — Warranty — Examination. *Harris* v. *Simpson*, 4 O. W. R. 82.

Interpleader — Ownership — Issue — Costs. *Re Pendrith Machinery Co. & Farquhar*, 2 O. W. R. 317.

Joint debtors — Plaintiff claimed from defendants, a lumber company, and S., an officer of the company, for goods sold and delivered by P. & Co. to defendants, assigned to plaintiff:—*Held*, upon evidence, that the company alone, was the debtor to P. & Co., and S. was not liable.—*Held*, as to the other claims of the plaintiffs, upon certain guaranties, that he was entitled to judgment thereon against the defendants. *Wilson* v. *Stuart* (1911), 16 W. L. R. 403, Man. L. R.

Jurisdiction of magistrate—*Appeal.*] —Plaintiff recovered judgment in the stipendiary magistrate's Court. Defendant's set-off was not allowed. Defendant appealed:—*Held*, that defendant is entitled to his set-off as, when defendant had formerly sued plaintiff before a justice of the peace, that official had reduced the claim without the defendant's knowledge so as to bring it within his jurisdiction. *Abrams* v. *Refuse*, 7 E. L. R. 283.

Liability of transferee to vendor.]— A person who, not being the purchaser, obtains goods which have not been paid for, does not thereby incur the obligation of paying for them. *Walker* v. *Lamoureux*, 21 Que. S. C. 492.

Lien note — *Warranty—Breach—Contract—Evidence to vary—Collateral contract —Representation or condition—Damages — Rescission.*]—1. When a verbal agreement has been made for the sale of horses or other chattels, and the purchasers afterwards sign a lien note securing payment, with the usual provisions of such a note, evidence may be given of representations or conditions of the sale or to prove a warranty, when it appears that it was not intended to include in the lien note all the terms of the agreement between the parties. *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215, and *Erskine* v. *Adeane*, L. R. 8 Ch. 756, followed.—2. When the purchaser of a chattel bought with a warranty keeps it for a considerable time and makes a payment on account, the contract must be treated as executed, and any representation or condition as to the quality of the goods must then be regarded only as a warranty, for the breach of which compensation must be sought in damages and not by rescission of the contract. *McKenzie* v. *McMullen*, 3 W. L. R. 460, 16 Man. L. R. 11.

Lien note — Warranty — Breach — Contract—Evidence to vary—Proof of warranty — Waiver — Costs. *McKenzie* v. *McMullen* (Man.), 3 W. L. R. 460.

Manufactured article — *Action for price — Defence that article not suitable for purpose for which sold — Evidence — Tests —Good faith.*]—Action for price of rubber cement. Defendant claimed it was useless for their business. Plaintiffs said it was only sold as identical with a sample which defendants tested. Action dismissed. *Canadian Rubber Co.* v. *Connor*, 13 O. W. R. 1020.

Mistake as to essential matter — *Setting aside sale.*]—Mistake is a ground for setting aside a sale of goods when it concerns the substance of the goods sold or some essential quality thereof. Thus where the buyer understands that he is buying a thresher with a separator for all grains, and especially for peas and oats, the seller does not fulfil his obligation by delivering a thresher which does not separate peas from

oats, and he cannot recover the price. *Frost and Wood Co.* v. *Lacourse*, 14 Que. K. B. 320.

Offer to return part not resold — *Defences — Incompatibility — Exception to form.*]—A purchaser of goods against whom an action for the price has been brought may, in certain circumstances, plead specially that he has sold a part of such goods, and offer at the same time to return the remainder to the plaintiff; an exception to the form alleging that such grounds of defence are incompatible will be dismissed. *Celluloid Industrial Society* v. *Harbe*, 10 Que. P. R. 87.

Offset—Novation—Grounds for withholding costs on appeal from magistrate. *Oxner* v. *Hatt* (N.S. 1911), 9 E. L. R. 303.

Payment to plaintiffs' vendor — Substituted contract — Novation — Wages — Set-off — Counterclaim — Costs. *Neudorf Trading Co.* v. *Wanless* (N.W.T.), 6 W. L. R. 377.

Privilege of returning goods — *Defence.*]—Where, in a contract of sale, the purchaser had the privilege of freeing himself from the obligation of paying the price upon his returning to his vendor the articles sold, an action for the recovery of the price will, nevertheless, lie, and the purchaser cannot plead, by way of defence in law, that the creditor should allow him to return the articles sold, and not claim the price until after default to return. *Leduc* v. *Rabeau*, 4 Que. P. R. 154.

Proof of sale and delivery—*Justice's Court—Limit bond—Extension of time after breach.*]—In a Justice's Court a judgment by default was signed in an action for goods sold and delivered, the only evidence of the sale and delivery being that of the plaintiff, who swore that she sold the goods to the defendant's wife, as per bill put in evidence, and that she had received $5 on account. The bill contained the dates of the sales, the articles sold, and the amounts charged: — *Held*, sufficient to warrant the signing of the judgment. *Per* Barker, J. The giving of time to arrange payment by the plaintiff to the original defendant, after breach of a limit bond, is no defence to an action for such breach. *Kelly* v. *Thompson*, 35 N. B. R. 718.

Proposed organization of joint stock company — Liability of promoters for price of goods purchased for proposed company—Partnership — Agency — Agreement—Novation — Evidence — Joint liability—Contribution — Parties — Costs. *Howard Stove Manufacturing Co.* v. *Dingman*, 10 O. W. R. 127.

Quality — *Inferiority of part—Option of purchaser—Return of whole of goods — Abatement in price—Perishable goods—Sale by purchaser—Credit for proceeds.*]—When goods sold are, in part only, of inferior quality to that contracted for, the purchaser has, nevertheless, the option of giving back the whole and having the price refunded to him, or of keeping the whole and having a part of the price returned to him.—The purchaser of such goods may, when they are perishable, and after notice to the vendor, cause them to be sold for the account of him to whom they belong, and may do so notwithstanding the above option. The credit which he gives his vendor for what they have realized stands in the place of their return. *Dougall* v. *Chouillou*, 15 Que. K. B. 300.

Running account — Balance—Appeal on questions of fact. *Hand* v. *Sutherland*, 2 O. W. R. 263.

Sale by sample—Goods delivered not corresponding with samples—Mistake — Evidence. *McKenna-Thompson Co.* v. *Edmonton Clothing Co.* (N.W.T.), 4 W. L. R. 22.

Sale "subject to approval"—Return within reasonable time—Construction of contract. *Mason and Risch Piano Co.* v. *Thompson*, 3 O. W. R. 540.

Set-off—*Damages by delay in delivery.*]—A defendant, being sued for the price of goods, cannot plead set-off of damages caused to him by delay in the delivery of such goods, especially if it does not appear that a date certain has been fixed for such delivery. *Edge* v. *Vaïquet*, 8 Que. P. R. 169.

Ship — Contract — Correspondence — Bill of sale—Damages for not accepting — Delay. *Garroch* v. *Purvis*, 2 O. W. R. 632.

Shipment by car-load — *Goods consigned to vendors—Shortage in weight — Acceptance of weight certified by carriers — Trade custom—Claim to rank on insolvent estate.*]—H. having assigned for benefit of creditors M. filed a claim for coal delivered to them. H. had ordered two carloads of coal from M., who duly shipped same consigned to themselves. M. claimed that there was a trade custom among coal dealers to accept the weight of coal as certified by the railway company:—*Held*, there is no such custom, and that M. can only rank for actual amount of coal delivered. *Re Eutenier & Brothers*, 9 W. L. R 627.

Statute of limitations — Goods supplied to defendant's wife—Payment by defendant on account—Promise to pay—Evidence — Depositions taken under foreign commission — Admissibility without proof that witnesses beyond jurisdiction — Terms of order for commission—Notice of despatching commission. *St. John* v. *Friel* (N.W.T.), 4 W. L. R. 126.

Warranty — Breach — False representations—Horse's pedigree and age—Counterclaim—Damages — Costs. *Griffin* v. *Ruller* (N.W.T.), 3 W. L. R. 374.

Wheat delivered—*Action for payment—Evidence — Letter — Undertaking — Liability.*]—An action by plaintiffs to recover from defendants 3,800 bus. of No. 1 northern wheat, or the value thereof.—Sutherland, J., *held* that defendants' letter to plaintiffs therein undertaking to pay plaintiffs for the wheat was conclusive of defendants' liability. Judgment for plaintiff with costs. *Empire Elevator Co.* v. *Thompson* (1911), 18 O. W. R. 490, 2 O. W. N. 678.

3. AUCTION.

Rights of purchaser — *Payment.*] — The purchaser at a judicial sale of goods by auction does not acquire the property in them until payment of the purchase-price, and therefore, cannot, in the absence of payment, rely upon the sale as a ground of opposition to a subsequent sale of the goods. *Lamaire* v. *Filiatrault*, 16 Que. S. C. 334.

See AUCTION.

4. AUTHORITY OF AGENT.

Bill of sale — *Goods taken in stock to replace goods sold—Agency of husband of vendor.*]—Action in detinue and trover for certain goods which plaintiffs alleged were the property of Elizabeth Nickle, and were sold and assigned by her by bill of sale to plaintiffs, who demanded them of defendant, in whose possession they were, and who refused to deliver them. Defendant pleaded that Elizabeth Nickle brought these goods into stock to replace stock sold by her belonging to defendant; and Bills of Sale Act, R. S. O. 1897, c. 148, was relied on:—*Held*, upon the evidence, that the goods were the property of Elizabeth Nickle when she made the bill of sale to plaintiffs, and there was no proof that she ever authorised her husband to sell or give the goods to defendant. Judgment entered for plaintiffs for the value of the goods, fixed at $130, subject to a reference, if defendant desired to take it, at her own risk as to costs. *Semmens* v. *Harvey* (1910), 16 O. W. R. 745, 1 O. W. N. 1099.

Ratification.] — In an action for the price of certain articles alleged to have been sold by the plaintiff to the defendants, for use in connection with the construction of their line of railway, it was shewn that the articles sued for were sold to H., who acted as manager for the defendants, and were used by him in connection with the building of the road. It was also shewn that the plaintiff was employed by H. to do certain work on the road, and that this act of H. was recognized and ratified by the company, who paid plaintiff for the services rendered by him:—*Held*, that there was sufficient evidence to support a finding that the sale of the articles sued for was made to the company, and not to H. individually. *McDonald* v. *Broad Cove Coal Co.*, 32 N. S. R. 486.

5. CONDITIONAL SALES.

Agreement as to default — *Resumption of possession—Implied contract—Extension of time for payment—Consideration — Novation — Interest — Damages.*]—Goods were delivered to the plaintiff by the vendors on the terms of two conditional sale agreements. Until payment in full the goods were to remain the property of the vendors, and on default for one month of any of the stipulated payments, or of any extended payment, the whole balance of the purchase-money was to become due, and the vendors, notwithstanding action or judgment, were to be at liberty to resume possession and resell, etc. The plaintiff got into default, although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay $50 on account, and the balance of $242, made up of arrears of principal and interest, in quarterly instalments, with interest. The plaintiff paid the $50. In October, 1902, the defendant, who had a judgment against the plaintiff, paid the vendors the whole balance due and procured an assignment, and transfer of the goods to himself, subject to the plaintiff's right. In November, 1902, the defendant went to the plaintiff's house and seized the goods. The plaintiff was not then in default under the agreement for extension of August, 1902:—*Held*, that the seizure was wrongful and the defendant liable to damages, because an implied contract arose between the plaintiff and the vendor, from the delivery of the goods to the plaintiff on the terms of the receipts, that the right of resumption by the vendors should not be exercised—should not arise—while the goods remained in the plaintiff's possession until default had been made for one month of any of the payments provided for by the agreements "or of any extended payment," by which was plainly intended a default after an extension of time for payment.—*Held*, also, that the fact that under the agreement of August interest was to be paid upon interest then in arrears, as well as upon principal, was sufficient consideration for that new agreement.—*Held*, also, that the lowest measure of damages was the sum which the plaintiff had paid to the vendors on account of the price, inasmuch as this was the value of his interest in the goods which had been wrongfully taken out of his possession. *Bridgman* v. *Robinson*, 24 C. L. T. 214, 7 O. L. R. 591, 3 O. W. R. 503.

Agreement made, and goods delivered in foreign country — *Removal of purchaser with goods to Alberta—Sale to defendant there—Claim by original vendor —Alberta condition sales ordinance not applicable — "Purchaser," not including purchaser in Alberta*] — Plaintiff, under an agreement in writing, sold to C. a piano, title to remain in plaintiff until payments made. The agreement was made in Washington State, where parties resided. C. removed to Alberta, bringing with him the piano, which he sold to defendant:—*Held*, that the above Ordinance has no application. — *Held*, further, that defendant can take no advantage of plaintiff's failure to comply with provisions of Washington code as to filing, the contract being a conditional one. Judgment for plaintiff. *Cline* v. *Russell*, 10 W. L. R. 666.

Bills of Sale Act — *Foreign corporation—Contract made out of the jurisdiction.*]—The plaintiff's agent sold goods to J. at North Sydney, C. B., under a contract in writing, one of the terms of which was that the title to the goods was not to pass until after payment in full of the price, and another that the order was subject to the approval of the plaintiffs. The plaintiffs were a company carrying on business at Dayton, Ohio, but the goods were shipped from a factory at Hamilton, Ont.:—*Held*, that the contract was made out of the jurisdiction, either at Dayton, Ohio,

when it was accepted and agreed to by the plaintiffs, or at Hamilton, Ont., when the goods were shipped, and that it was, therefore, not affected by the provincial Bills of Sale Act, and that persons to whom J. transferred the goods took no title other than J. had at the time of the transfer. *National Cash Register Co.* v. *Lovett*, 1 E. L. R. 321, 39 N. S. R. 540.

Carriages — *Title remaining in vendors —Name affixed to carriages—Not paid for by purchaser—Re-sale by purchaser — Payment by promissory note—Ratification of sale by vendors — Assignment of note — Agency of middleman—R. S. O. (1897), c. 150.*]—Plaintiffs, manufacturers, brought action to recover two buggies, valued at $137, which they had sold to their agent on a conditional sale agreement, and by him re-sold to defendants, the agent taking promissory notes in payment. The agent failed to pay plaintiffs for the buggies, and they made a demand upon defendants for the buggies, which was not complied with. Ardagh, Co. C.J., dismissed plaintiffs' action, but assessed their damages at $70, should this judgment be reversed by Divisional Court.—Divisional Court reversed above judgment and entered judgment for plaintiffs for the $70 as above assessed, with costs of appeal. No costs in Co. C. allowed. *Dominion Carriage Co.* v. *Wilson & Humphries* (1910), 17 O. W. R. 363, 2 O. W. N. 214.

Chattel mortgage — *Coercion — Warranty — Breach — Executory contract — Return of chattel.*]—A lease of store premises was obtained by the plaintiffs through a guarantee of payment of the rent by the defendant. Subsequently, at the plaintiffs' request, the defendant took out in his own name a lease of the premises for a further term of four years, upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase-price was $750, upon which a payment of $100 was to be made. The cash payment subsequently was waived and notes for the full amount of the purchase money given. After the purchase, the plaintiffs incurred an additional indebtedness to the defendant of about $400. This amount, together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of the stock-in-trade to him, whereupon he made over the lease to them: — *Held*, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion.—While the rule, that in absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase-price, it will apply in such case where the vendee in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor. *Petropolous* v. *F. E. Williams Co.*, 3 N. B. E. 346, 1 E. L. R. 533.

Condition not complied with by vendor — Dismissal of action for price — charge on land—Execution of document procured by false representations. *Sawyer and Massey Co.* v. *Waddell* (Man.), 5 W. L. R. 346.

Contract — *Condition precedent to property passing — Possession — Principal and agent.*]—Judgment herein varied by reducing amount to which plaintiff entitled. *Henry Co.* v. *Birmingham*, 7 E. L. R. 163.

Contract — *Foreigners — Imperfect understanding of contract — Reservation of ownership — Warranty — Assignment — Promissory note — Sub-purchaser — Holder in due course.*] — Action on promissory notes made by defendants to S. and endorsed to plaintiffs. The note was given for a stallion purchased from S.:—*Held*, that this stallion did not fulfil the representation made by the agent of S. Action dismissed, plaintiffs not being *bona fide* holders for value. *First National Bank* v. *Matson*, 11 W. L. R. 663.

Debtor and creditor — *Seizure under prior chattel mortgage — Vendor's rights against mortgagee — Quantum meruit.*]—Action for price of goods sold. Defendant, a tailor, agreed to purchase cloths to be made into suits. Cloths were sold subject to time for payment. Before cloths were made up, they were seized under a chattel mortgage. Defendants have repudiated: — *Held*, that plaintiff is entitled to consider himself discharged from giving credit, and thereby enabled to sue on a *quantum meruit*. Judgment for plaintiff. *McFarlane* v. *McLean*, 6 E. L. R. 505.

Default — Appeal from 12 O. W. R. 564, dismissed. *Re Kurtze & McLean*, 13 O. W. R. 308.

Default — *Re-possession and re-sale—Commission on price of re-sale — "Extra-judicial seizure"—Saskatchewan R. Ordinance, c. 34.*]—Defendants sold machinery to plaintiffs on conditional sale agreement, possession to be vendors' until price paid. Default having been made in payments, defendants re-possessed and re-sold. Under agreement defendants were to get 20 per cent. commission on price for which machinery was re-sold:—*Held*, that such seizure as took place here comes within the above Ordinance, which fixes the rate of commission and expressly forbids parties having, taking, or receiving larger commissions. Commission allowed at 3 per cent. on $1,000 and 1½ per cent. on excess. *Albertan Publishing Co.* v. *Miller & Richards* (Alta.), 10 W. L. R. 528.

Default — *Re-sale by vendor—Action for Deficiency — Agency — Estoppel.*]—Upon a conditional sale of chattels, where the property was not to pass to the vendee until payment, the contract provided that if default were made the whole amount of the unpaid purchase-money and all obligations given therefor were at once to become due and payable and the vendor was to be at liberty to resume possession and sell the articles towards paying the amount remain-

ing unpaid thereon and interest. Default having been made, the vendors resumed possession and sold the goods, and sued the vendee upon promissory notes for the price, crediting the proceeds of the sale:—*Held*, following *Sawyer* v. *Pringle*, 18 A. R. 218, and *Arnold* v. *Playter*, 22 O. R. 608, that the vendor must fail because the contract did not expressly provide that on a re-sale the defendants were to remain liable notwithstanding the provision for sale "towards paying the amount remaining unpaid." 2. Nor did a request from the vendee "to take the engine back and sell the same and apply the proceeds, less the expenses, towards paying my indebtedness to you," put the vendor in a better position, for it was only a request to him to do what he might do under the contract; and it did not constitute the vendor the agent of the vendee to re-sell the goods, which were never the property of the vendee, and it did not estop the vendee. *Abell* v. *Campbell*, 21 C. L. T. 303.

Default—*Remedy—Taking possession — Action for price—Ratification—Defence of intoxication — Onus.*]—A written agreement entered into between the plaintiff and defendant for the purchase of an organ by the defendant from the plaintiff, provided that the property in the organ should remain in the vendor until payment in full of the price, which was payable in instalments, but that the vendee, making the payments agreed upon when due, &c., should be entitled to the possession and use of the property. It was further provided that, if at any time before payment in full of the price, the vendee should fail in the performance of the agreements on his part to be kept, &c., the vendor should be entitled to the immediate possession, and that if the rent due or to become due under the agreement was not paid within 30 days all rights of the vendee should cease, and any moneys paid by him on account of the purchase should be retained by the vendor. The vendee failed to make any of the payments as required:—*Held*, by two members of the Court, that the provision in the agreement enabling the vendor to retake possession in default of payment was cumulative, and that the vendor not having done any act towards making an election that he would forfeit the agreement to pay, and take possession of the instrument, was entitled to the ordinary remedy on breach of the agreement to pay; that the burden of establishing the defence of intoxication was upon the defendant, and that he had failed to make it out; and that the agreement, even if defective, had been fully ratified.—*Held*, by the other two members of the Court, that the agreement being one for the conditional sale of the organ, and no property passing until all instalments had been paid, and the agreement providing that, in the event of non-performance by the vendee of the conditions of sale, the payments made by him should be forfeited and that the vendor could retake possession, the latter was the only remedy open to the vendor and that he could not sue under the agreement for non-payment of the instalments. *Travis* v. *Way*, 33 N. S. R. 551.

Default—*Seizure—Re-sale—Rescission of Contract — Repairs — Warranty.*]—In an action for the balance of the price of machines sold by the plaintiffs to the defendants, it appeared that the sale was a conditional one, the agreement containing a warranty of the machines, and providing that on default of payment the plaintiffs might resume possession and sell the machines and apply the proceeds, after paying the expenses of taking possession and selling, towards payment of the amount remaining unpaid, and sue for the balance. The purchase price was $2,875, and when the defendants had paid $1,200 the plaintiffs resumed possession, made repairs, and effected a conditional re-sale to W. for $2,000, no part of which had been received by them:—*Held*, that the defendants, having failed to return the machines after trial, having used them during three seasons, and paid $1,200 on account, were barred, under the terms of the agreement, from claiming that the machines were not good and that payment should not be enforced. 2. That the agreement was not rescinded by the plaintiffs re-taking possession and re-selling. *Sawyer* v. *Pringle*, 18 A. R. 218, distinguished. *Watson Mfg. Co.* v. *Sample*, 12 Man. L. R. 373, 19 C. L. T. 94, followed. 3. That the plaintiffs had a right under the circumstances, to charge the cost of the repairs and of resuming possession against the proceeds of the re-sale. 4. That the defendants were not entitled to be credited in this action with anything on account of the proceeds of the conditional sale to W., as nothing had yet been received; if the money should be paid by W., the defendants would then have their own recourse against the plaintiffs. 5. That the plaintiffs were not entitled to charge the cost of the repairs against the defendants in this action. *Abell Engine and Machine Works Co.* v. *McGuire*, 21 C. L. T. 358, 13 Man. L. R. 454.

Default in payment — Contract — Incorporation of informal memorandum as to notice—Re-taking without notice — Damages. *Adams* v. *Newcombe*, 3 O. W. R. 201.

Delivery at buyer's warehouse.]—A sale, agreed to at the buyer's place of business by a merchant whose own place of business is in another district, of goods by weight with the stipulation that "while in transit no more than 2% of their billed weight to be lost," contains the implied condition that delivery is to be made at the buyer's warehouse. *Paradis* v. *Duclos* (1910), 20 Que. K. B. 97.

Destruction of subject matter.] — Where a mare, the subject of a conditional sale, was drowned while in the actual possession of the buyer after default in payments:—*Held*, that the loss fell upon the buyer and that therefore the seller was entitled to recover the balance of the price. *Gillespie* v. *Hamm*, 4 Terr. L. R. 78.

Failure to file agreement — *Subsequent mortgage — Seizure by landlord — Priorities—Bills of Sale Act—Subrogation.*]—W. & Co. sold a piano to W. under the terms of a memorandum in writing by which W. agreed to pay the purchase price within twelve months from date, the property in the meantime to remain in W. & Co.—W. & Co. failed to register the agreement, as required by the Bills of Sale Act, R. S. N. S. 1900 c. 142, and W. transferred the piano by chattel

mortgage to the plaintiff, who also failed to file his mortgage until after W. & Co., the original owners, had regained possession by paying to G., who had caused the piano to be distrained for rent, the amount due him for rent and expenses of the distress, and by taking an assignment of the debt due to G.:—*Held*, Longley, J., dissenting, that, as between W. & Co. and the plaintiff, the agreement entered into between W. & Co. and W., not having been filed, was null and void under the provisions of the Bills of Sale Act, s. 8 (4).—2. That the legal title having passed from W. to the plaintiff upon the execution of the chattel mortgage, W. & Co. were neither purchasers nor creditors within the meaning of the Act, s. 5 (3), as against whom the instrument would only take effect and have priority from the time of filing.—3. That, while W. & Co. had an interest in the property which would prevent them from being regarded as mere volunteers or meddlers, and would entitle them to be subrogated to the claim of the landlord as against the tenant, the right to subrogation, being purely an equitable one, could not be enforced as against the plaintiff, who, in addition to having the legal title, had equities equal to those of W. & Co. *Miller* v. *Curry*, 25 N. S. R. 537, distinguished. *Lapierre* v. *McDonald*, 39 N. S. R. 24, 1 E. L. R. 41.

Furnace — *Ont. Conditional Sales Act, s. 1.*]—This was an action for $165, the price of a furnace furnished to the defendant Ewing, or, in the alternative, for an order giving plaintiff liberty to remove said furnace, on the ground that it was sold subject to their lien, and that the property in it was not to pass until it was paid for. The house where the furnace was installed changed hands, and now belongs to defendant Pearcy, who denied knowledge of the plaintiff's lien. At trial action was dismissed, with costs as against Pearcy and the Northern Life Ins. Co.:—*Held*, that the statute should be construed strictly, and while the address of the vendor could be inferred, yet it was not given, and therefore there had been no compliance with s. 1 of the Act. *Mason* v. *Lindsay*, 4 O. L. R. 365, 1 O. W. R. 561, 583, followed. Judgment of Denton, Co.C.J., affirmed. *Toronto Furnace Crematory Co.* v. *Ewing* (1910), 15 O. W. R. 381.

Future-acquired goods — *Assignment for benefit of creditors—Possession taken by vendor—Agreement not registered—Bills of Sale Act — Assignment of book debts — License—Possession — Notice to debtors.*]—The plaintiff in 1898 agreed to supply M. & S., dry goods dealers, with goods under an agreement in writing that such goods should remain the plaintiffs' property, and that, should the plaintiffs at any time consider that the business of M. & S. was not being conducted in a proper way or to the plaintiffs' satisfaction, the plaintiff should be "at liberty to take possession of our stock, book debts, and other assets, and dispose of the same, and after payment in full of any amount then owing to you by us, whether due or to become due, the balance of the proceeds shall be handed to us." The agreement was not filed under the Bills of Sale Act, c. 142, C. S. N. B. 1903. Goods were supplied from time to time under the agreement. On the 17th February, 1905, the business not being conducted to the plaintiffs' satisfaction, and M. & S. being insolvent, the plaintiffs entered the store of M. & S. by force and took possession of all the stock and effects on the premises, and of the books of account. The stock seized was made up of goods supplied by the plaintiffs of the value of $5,000, and of goods supplied by other unpaid creditors of the value of upwards of $10,000. The account books shewed debts due M. & S. of the estimated value of $2,000. Later on the same day M. & S. made an assignment for the general benefit of their creditors:—*Held*, that the plaintiffs were not limited to taking possession of goods supplied by themselves; that as to goods supplied by the plaintiffs, as the property therein did not pass to M. & S., the agreement was not within the Bills of Sale Act, and that as to goods not supplied by the plaintiffs, as the agreement was not intended to operate as a mortgage, but as a license to take possession, the Act did not apply; that, while the license in the agreement to take possession of the book debts did not amount to an assignment, and the powers given by it had not been exercised by notice to the debtors, the plaintiffs were, nevertheless, entitled to them as against M. & S.'s assignees. *Gault Brothers Co.* v. *Morrell*, 2 E. L. R. 501, 3 N. B. Eq. 453.

Goods ordered in Nova Scotia and order accepted outside province — Provincial Act as to registration not applicable — Factors Act. *National Cash Register Co.* v. *Lovett. Moore* v. *National Cash Register Co.*, 1 E. L. R. 321.

Goods sold outside of Saskatchewan — *Seizure in Saskatchewan under execution—Property in — Necessity for registration—C. O. c. 44.*]—*Held*, following *Bonin* v. *Robertson*, 2 Terr. L. R. 21, that the laws in force where the property is situate and the parties reside at the time a contract for sale is made must govern; and therefore where, under the laws of Manitoba, goods were delivered to a purchaser upon terms that no property therein was to pass until such goods were fully paid for, which agreement was valid and enforceable in Manitoba without registration:—*Held*, that the seller might claim such goods when removed into Saskatchewan as against execution creditors and other persons claiming such goods, notwithstanding that no copy of such agreement has been registered as required by c. 44 of the Consolidated Ordinances. *Sawyer and Massey Co.* v. *Boyce*, 1 Sask. L. R. 230, 8 W. L. R. 834.

Hire receipt—*Registration—Bills of Sale Ordinance, N.W.T.—Possession—Description of goods.*]—The Ordinance respecting receipt notes, hire receipts, and order for chattels (No. 8 of 1889) requires such instruments to be registered "where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee." The instrument in question in this case provided that "the title, ownership, and right to the possession of the property for which this note is given shall remain in" the bailors:—*Held*, that, inasmuch as the "re-

ceipt note" in question in this case provided that the bailors might on certain contingencies take possession of the property, though the right of possession was in the bailors, the actual possession was to pass to the bailee, and therefore the instrument was one which came within the terms of the Ordinance. *Sutherland* v. *Mannix*, 8 Man. L. R. 541, and *Boyce* v. *McDonald*, 9 Man. L. R. 297, considered. The Ordinance provides (s. 2) that the provisions of the Ordinance respecting Mortgages and Sales of Personal Property (No. 18 of 1889) and amendments thereto shall apply to such receipt notes, hire receipts, or orders for the purposes of this Ordinance, in so far as the provisions thereof may not be incompatible with or repugnant to this Ordinance.—*Held*, that this provision made applicable to such instruments s. 8, Ord. No. 18 of 1889, which provides that mortgages, sales, assignments, or transfers of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished. The receipt note in question in this case stated that it was "given for one team of oxen."—*Held*, that, inasmuch as the instrument itself shewed further that the team of oxen was one bought by the bailee from the bailors for the price therein mentioned, that the team, immediately previous to the bailment, had been owned by the bailors, and at the time thereof was taken over by, and was in possession of, the bailee, the team of oxen was sufficiently described. *Western Milling Co.* v. *Darke*, 2 Terr. L. R. 40.

Hire receipt — Removal of goods. *Sharkey* v. *Williams*, 1 O. W. R. 135, 419.

Horses.]—Plaintiff sold a team of horses to his son, taking a lien on them, which was filed in the proper clerk's office. The son then gave a chattel mortgage thereon to W., who assigned it to S., who was subsequently told by the plaintiff about his lien, which he said was registered at A., whereas it was registered at B., the registration bounds having been changed. S. searched twice in the office at A., but not finding the lien, authorized the defendant, his bailiff, to proceed to sell, which he did:—*Held*, that plaintiff entitled to damages. *Reinholz* v. *Cornell* (1909), 12 W. L. R. 121.

Lien — Enforcement — Extra-judicial seizure — Fees—Amount due—Tender—Extent of lien—Moneys expended in improving property. *Pease* v. *Johnston* (N.W.T.), 1 W. L. R. 208.

Lien for purchase money — Equitable lien — Notice to purchaser — Chattel mortgagee — Solicitor's knowledge. *Trimble* v. *Laird*, 4 O. W. R. 63.

Lien note — *Affidavit for registration—Wrongful seizure of chattels—Title of purchaser at sale.*]—The plaintiff had sold a mare to one B., and took from B. a lien note, the affidavit upon which was imperfect, but which was duly registered. The chattel mortgagees of other property of B. seized and sold the plaintiff's mare under their mortgage:—*Held*, that the fact that the plaintiff had notice of the sale did not estop him from setting up his title to the mare, and that the defendant, the purchaser at the chattel mortgage sale, was not within the protection of the Ordinance Respecting Hire Receipts and Conditional Sales of Goods. *Aricinski* v. *Arnold*, 6 Terr. L. R. 240, 4 W. L. R. 556.

Lien note — *Default by purchaser in payment of price—Repossession by vendors—Action for deficiency.*]—Action for balance due on a lien note, which contained amongst other provisions this, "and to apply net proceeds towards the payment of any such note or notes and interest." Plaintiffs had, after some payments made, taken possession of chattels, sold them and applied the net proceeds in reduction of their claim:—*Held*, that plaintiffs entitled to recover balance, as the proviso contains an implied promise to pay any balance unpaid on the notes after crediting the proceeds of the resale. *Peebles* v. *Johnson*, 1 Sask. L. R. 523, 9 W. L. R. 616.

Lien note — Description of horse — Chattel mortgage — Repossession and resale—Title—Estoppel — Conversion—Registration of lien note—Copy—Affidavit—Sale of Goods Ordinance—Alteration of lien note—Damages for detention of horse. *Aricinski* v. *Arnold* (N.W.T.), 4 W. L. R. 556.

Lien note — *Necessity for registration—Law of Saskatchewan—Law of Manitoba—Place of contract.*]—M., who lived in Brandon, owned a horse which he sold to P., taking as part payment a lien note on the horse for $300. Such a note does not need to be registered in Manitoba. J., from Saskatchewan, subsequently bought the horse, and, in Brandon, sold it to plaintiff, also from the latter province, who paid $235 cash for it, and took it home. Later, bringing it back to Brandon, M. seized under his lien. In Saskatchewan such liens must be registered:—*Held*, that Manitoba law applies, and M. entitled to the horse. *Ross* v. *Henderson*, 11 W. L. R. 656.

Lien note signed after sale and delivery — *Priority of chattel mortgage.*]—On the 10th December, 1903, the plaintiff sold to C. three head of cattle; he swore that C. agreed at the time to give him a lien on the cattle; the reason it was not given at the date of the sale was that he had no form of lien note at the house; he procured one and had it signed by C. on the 31st December. Besides the cattle, the lien note included a gray horse; the plaintiff stated that, when he presented the note to C. for signature, the latter wanted to put in the horse, and it was done. He never owned the horse and did not claim it. On the 21st January, 1904, C., who was indebted to the defendant, gave him a chattel mortgage covering the cattle, horse, and other chattels; the chattel mortgage was duly registered. On the 29th March the plaintiff, having heard that C. had left the province, went to see the defendant and ascertained that he held the chattel mortgage, but had not yet taken possession of the cattle. They were in the stable of one P., to whom it was stated C. had sold them. The plaintiff made a warrant of distress under his lien note and tried to seize the cattle, but, during the night the defendant had taken possession of them under his chat-

tel mortgage and prevented the plaintiff from taking them:—*Held*, that if the lien note had been given at the time of the delivery of the cattle to C., it would have had its full effect under s. 26 (b) of the Sale of Goods Act, R. S. M. 1902 c. 152. The defendant, having obtained the chattel mortgage from C. in good faith and without notice of any lien or other right of the original owner, came within s. 26 (a), and was entitled to claim the goods under the chattel mortgage. *Gallant* v. *Mellett*, 18 C. L. T. 199, referred to. *Collom* v. *McGrath*, 24 C. L. T. 376, 15 Man. L. R. 96.

Lien notes — Acceleration of payment—Conditional Sales Ordinance—Notice to purchaser—Service — Manner of—Repossession and re-sale of goods—Precautions to obtain fair price—Reserved bid—Vendors deeming lien notes insecure — Agent of vendors — Authority—Costs. *Vanstone* v. *Scott*, 9 W. L. R. 257.

Lien notes — *Application of earnings from goods sold — Contract—Evidence to vary—Vendor resuming possession—Re-sale — Exchange — Counterclaim for purchase money unpaid — Account — Reference — Costs.*] — Action for damages for seizure and conversion of a team of horses and harness. Defendant sold plaintiff a team of horses and harness, plaintiff giving defendant a lien note. Shortly after defendant exchanged another horse for one of the team: —*Held*, that right of possession of latter horse remained in defendant. Such a reservation can be made verbally. Defendant resumed possession of the team later as plaintiff failed in making the payment. Plaintiff's claim that purchase price was to be paid out of earnings cannot stand as it contradicts the lien note. Power to sell under the note does not give right to exchange. As defendant had exchanged one of the horses he is prevented from claiming for unpaid purchase money. *Moore* v. *Johnston*, 9 W. L. R. 642.

Lien notes — Colourable transaction — Suspicious circumstances—Sale and resale—No actual delivery or change of possession—*Bona fides* — Bills of Sale Ordinance — Validity of lien notes—Rights of subsequent purchaser. *Taeger* v. *Rowe*, 9 W. L. R. 129.

Lien notes — *Conditional Sales Ordinance, s. 8—Notice of sale—Seller declaring whole price due on ground that he deems lien-note insecure—Principal and agent — Powers of agent to make declaration in place of seller—Compliance with condition.*] —Each of the three methods of giving notice provided by s. 8 of the Conditional Sales Ordinance is independent of the others and not qualified by anything contained in the others. The second only is limited and not general. If the contract of conditional sale or the lien note confers the right on the seller to declare the price due and payable in advance of maturity in case he shall deem the note insecure, an agent of the seller, unless expressly so authorised, cannot exercise the judgment or discretion conferred on the seller; and *quære* whether the seller can delegate this function at all. In any case the conditions to the exercise of the right must be strictly complied with.—*Per* Beck, J.—Section 8 of the Conditional Sales Ordinance means: (1) that the notice may be served personally; (2) only in case of absence may it be served by being left at the last place of residence; (3) whether or not the buyer, etc., is absent it may be served by registered letter.—A seller of goods exercising the right of resale is, like a mortgagee exercising a power of sale, bound to act *bona fide*, and to take reasonable precautions to obtain a proper price; and *semble*, that where the goods are sold by auction it will ordinarily be a reasonable precaution to fix reserve bid; but unless the auction sale is expressly "without reserve" the seller can at any time before the goods are knocked down to a bidder by the auctioneer withdraw them from sale; and *semble*, that it would be his duty to do so if the highest bid did not reach a proper price for the goods. *Johnston* v. *Boyce*, [1899] 2 Ch. 73, distinguished. *Vanstone* v. *Scott*, 1 Alta. L. R. 462, 8 W. L. R. 919, 9 W. L. R. 257.

Lien notes — *Dealer disposing of horses in the ordinary course of his business — Evidence — New trial.*] — The plaintiff's claim was for damages for the seizure by the defendants of a team of horses which he bought from one B. The defendants had sold the horses to one F., taking a lien note for the purchase money. The plaintiff purchased without any notice or knowledge of the existence of this note and gave full value. The trial Judge found that the defendants, when they sold to F., knew that his business was that of a horse-dealer, and that he would re-sell in the ordinary course of his business, and, in all likelihood, to an innocent purchaser, and, following *Brett* v. *Foorsen*, 17 Man. L. R. 241, gave the plaintiff a verdict:—*Held*, on appeal, that this verdict must be set aside, because the plaintiff had failed to give any evidence of his title to the horses other than that he had purchased for value from B., and had given no evidence of the sale to F. or of the sale by F. to B. *Pelekaise* v. *McLean*, 18 Man. L. R. 421, 10 W. L. R. 207.

Lien notes — Default — Vendors resuming possession — Insecurity of payments —Action to recover balance after sale or exchange of horses — Collateral agreement —Oral evidence — Admissibility — Pleading—Claim for feeding and stabling horses. *Trotter* v. *Russell* (N.W.P.), 5 W. L. R. 67.

Lien notes — Default by purchaser in payment of price—Repossession by vendors —Resale—Action for deficiency—Construction of proviso in lien note. *Peebles* v. *Johnson*, 9 W. L. R. 616.

Lien notes — *Failure to register — 7 Edw. VII., c. 17 (Sask.)—Amendment to Conditional Sales Ordinance—Name of vendor painted on articles sold — Amendment not operative as to prior sales—Subsequent sale of to bona fide purchaser for value — Repossession by vendor — Invalidity — Amount due by second purchaser to first, not available to vendor.*]—The new s. 11 added by 7 Edw. VII., c. 17 (Sask.), to the Ordinance respecting Hire Receipts and Conditional Sales of Goods, providing that "nothing in the said Ordinance or in this Act shall apply to the sale or bailment of

any manufactured goods or chattels of the value of $15 or over, which at the time of the actual delivery thereof to the buyer or bailee have the manufacturer's or vendor's name painted . . . thereon," is not retrospective, and does not apply to sales taking place before the section came into operation. —The defendants sold certain machines to the brother of the plaintiff in 1906, and took from him lien-notes for the price thereof. In 1907 and 1908 these machines were sold and delivered by his brother to the plaintiff. In April, 1909, the lien-notes not being paid, the defendants took possession of the machines. The lien-notes were not registered, as required by the above Ordinance:—*Held*, that the defendants had not a valid lien as against the plaintiff, a subsequent *bona fide* purchaser for value, and were not entitled to take possession; and to make available for their claim against the brother the moneys due from the plaintiff to the brother in respect of the machines, the defendants must take other proceedings; the plaintiff was entitled to have the articles returned to him or to be paid their value. *Dionne* v. *Massey-Harris Co.* (1910), 13 W. L. R. 557, 3 Sask. L. R. 18.

Lien notes — *Resale by conditional purchaser — Title of sub-purchaser without notice of lien — Implied authority to sell — Sale of Goods Act — Breach of warranty.*]—When a person makes a conditional sale of a team of horses, and delivers them to one whom he knows to be a dealer in horses and to be buying them for the purpose of reselling them at a profit, although he takes an agreement in the form usually called a lien note on the horses to secure the price, he thereby clothes the purchaser with implied authority to sell the horses and to transfer a good title, free from the lien, to a *bona fide* purchaser who has no notice or knowledge of the existence of the lien. Such sub-purchaser, therefore, is not bound to give up the horses to the holder of the lien note, though it be not paid; and, if he does, he cannot recover afterwards in an action for breach of warranty of title against one who has not been guilty of fraud.—The decisions in the cases of grantors of bills of sale and chattel mortgages who remain in possession of the goods and sell them in the ordinary course of their business, as in *National Mercantile Bank* v. *Hampson*, 5 Que. B. D. 177, *Walker* v. *Clay*, 49 L. J. Q. B. 560, and *Dedrick* v. *Ashdown*, 15 S. C. R. 227, apply also in the case of claims under lien notes. The reason for applying the doctrine of implied authority in the latter case is stronger than in the former, because lien notes are not registered, and a purchaser of horses has no means of ascertaining whether they are incumbered or not.—When the implied authority to sell exists, a good title may be transferred independently of s.-s. (a) of s. 26 of the Sale of Goods Act, R. S. M. 1902 c. 152; and s.-s. (b) of the same section, which only excepts goods purchased under lien notes from the operation of s.-s. (a), does not prevent the application of the principle referred to. *Brett* v. *Foorsen*, 7 W. L. R. 13, 17 Man. L. R. 241.

Lien notes — *Suspicious circumstances —Sale and re-sale—No actual delivery — Saskatchewan Bills of Sale Ordinance — Rights of subsequent purchaser.*]—Defendant sold a team to A., taking a cash payment and promissory notes. Later defendant met A., who sold back the team on A.'s giving up the unpaid notes. Defendant then proposed to sell them back to A. for the same price as he had re-purchased. A. to give two lien notes therefor. There was no actual change of possession. The same day, A. sold the team to the plaintiff:—*Held*, that there was no immediate delivery, no actual change of possession, and that it was never intended that there should be. Judgment for plaintiff. *Tacgar* v. *Rowe*, 1 Sask. L. R. 466; 9 W. L. R. 129; affirmed, 10 W. L. R. 674, 2 Sask. L. R. 159.

Machinery — *Agreement for lien — Delivery.*]—The company sold R. an entire outfit of second-hand threshing machinery for $1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes, R. had signed an agreement setting out the bargain, in which the following provisions appeared: "And for the purpose of further securing payment of the price of the said machinery and interest . . . the purchaser agrees to deliver to the vendor, at the time of the delivery of the said machinery as herein provided, or upon demand, a mortgage on the said lands (*i.e.*, lands described at the foot of the agreement), in the statutory form, containing also the special covenants and provisions in the mortgages usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realised, etc., should the vendors take and resell the said machinery . . . and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages, and expenses, and any and all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes, and all renewals thereof, and interest, and all costs, charges, damages, and expenses, as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands. . . . And, on default, all moneys hereby secured shall at once become due and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree for a lien and charge upon the lands therefor under the agreement:—*Held*, reversing 17 Man. L. R. 194, that the right of the company to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only became operative in the case of a complete delivery pursuant to the contract; and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery. *Rustin* v. *Fairchild Co.*, 27 C. L. T. 666, 39 S. C. R. 274.

Machinery — *Covenant for payment — Instrument purporting to be under seal — Execution — Finding as to effect — Sta-*

tute of Limitations — Conditional Sales Ordinance — Repossession and resale — Retention — Notice — Burden of proof.]—In an action by the vendors upon a contract for the sale of a machine to recover the balance of the price after default by the purchasers and repossession and sale by the vendors, it was admitted that, if the contract was not under seal, the plaintiffs could not recover owing to the Statute of Limitations. The document was called an "agreement" upon the face of it, and there was only one place in it where a covenant was spoken of. There was no testimonium clause preceding the signatures of the defendants. There was an attestation clause—"signed and sealed in the presence of." Opposite each of the signatures the word "seal" was printed, within brackets, and upon the word "seal" there was imprinted in red ink a mark in the form of the commonly used small red seals. These were all on the document (which was a printed form) long before the signatures. One of the defendants swore, and was not contradicted, that he could not read English, that he did not know the document was a sealed document, that his brother and co-defendant told him it was a mere form, and that he did not know what the red marks meant at all. The other defendant was not called as a witness:—*Held*, upon the evidence and a review of the authorities, that the document was not so executed as to give it the effect of a sealed instrument:—*Held*, also, that the provisions of the Conditional Sales Ordinance as to retention for 20 days and notice to the purchaser before resale applied to the agreement notwithstanding a clause authorising a private sale; and the burden of proving a proper sale was upon the vendors, the plaintiffs. *Sawyer & Massey* v. *Bouchard* (1910), 13 W. L. R. 394.

Machinery — *Repairs — Subsequent agreement not displacing former — Failure to pay purchase price—Removal of property —Agent—Authority.*] — The plaintiffs delivered to the defendant a boiler, engine, shingle machine, etc., under an agreement in writing, reserving the right of property to the plaintiffs until payment of the purchase price. Before the purchase money was all paid, the building in which the machinery was set up was destroyed by fire. The shingle machine was repaired by the plaintiffs at a cost of $200, and re-delivered to the defendant with another boiler and engine under a new agreement, which, omitting any mention of the shingle machine, conditioned the vesting of the property in the defendant upon payment of the balance due under the first agreement, as well as the further amount payable for the new machinery. On non-payment of the amount payable under the second agreement, the whole of the property was replevied by the plaintiffs:—*Held*, that the first agreement was not cancelled by the second, and that the repairs having become an inseparable part of the machine to which they were made, the plaintiffs' claim was rightly allowed by the trial Judge.—*Held*, also, that a statement made by the plaintiffs' sales agent at the time of the seizure, to persons with whom he was negotiating a sale, in respect to certain small articles, that they had better be removed to a place of safety was not an authorisation to remove the defendant's property, and that if such property was removed without the plaintiffs' authorisation, and was lost in consequence, the defendant would have to look to the person by whom it was removed. *Robb Engineering Co.* v. *Rines*, 39 N. S. R. 274.

Machinery — *Set-off — Notice — Contract.*]—S. purchased machinery from plaintiffs. The agreement therefor contained a provision that any moneys, etc., earned by the machinery, less costs of collection, were assigned to the plaintiff. S. became indebted to the defendant, one of his employees, who, on the 15th of October, was notified by the plaintiffs that this debt had been assigned to them. Shortly after this, S. did some threshing with the machinery in question for the defendant, and accounts were stated, the amount owing by S. to defendant being set-off:—*Held*, that the defendant could exercise the right of set-off after the receipt of the notice of the 15th October. The final settlement between S. and defendant was in pursuance of a previous contract. *American-Abel Engine & Thresher Co.* v. *Lentenbach*, 11 W. L. R. 329.

Machinery rented to third party — *Earnings by use of machinery sold — Interpleader.*] — By a lien agreement plaintiffs sold threshing machinery to A. and defendant T. This agreement provided that moneys to be earned by the machinery were assigned to plaintiffs. A., without plaintiffs' permission, rented his interest to defendant H., who knew of the lien agreement. Defendants did threshing for C. amounting to $920.35. Plaintiffs notified C. to pay to them. C. obtained an interpleader:—*Held*, assignment to plaintiffs valid, and although this sum may be owing to defendants, yet as they stand in the place of the original purchasers plaintiffs must succeed. *American* v. *Hay*, 9 W. L. R. 594. Reversed in 11 W. L. R. 471.

Money to bind the bargain — *Condition as to giving possession — Its effect between the parties and as to third parties — Earnest money by a dealer in hay in his barn and the use of the barn.*]—Money to bind the bargain is binding with regard to third parties by consent of parties, and the delivery provided for in Art. 1592, is only exacted to render it complete between them. This delivery takes place when the debtor gives his creditor the hay lying in his barn and with the use of the barn to keep it in. The creditor becomes owner of the hay for all purposes and has the right to replevy it against the assignee appointed at the assignment of the debtor. *Provost* v. *Lamarre*, 18 Que. K. B. 227.

Motors.]—In an action to recover possession of two motors sold by plaintiffs, or, in the alternative, the value of same, which were sold to the Cornwall Brewing Co., and installed in the brewery, at that time in their possession. Later on the company went into liquidation, when plaintiffs verified their account against the company, which account included the price of the goods in question. It did not appear that, as between plaintiffs and the Cornwall Brewing Co., there was any understanding that

the sale was other than an unconditional one, the property in the goods passing without any right in the plaintiffs to retake possession, and the Cornwall Brewing Co. being liable as ordinary debtors, for payment of goods sold and delivered:—*Held*, that the plaintiffs have no property in the goods in question, and that the action must be dismissed with costs. *Can. Fairbanks Co.* v. *St. Lawrence Brewing Co.* (1910), 15 O. W. 369.

Name of vendor — *Agreement to purchase.*]—Upon a piano made by a company whose corporate name was "The Mason and Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there was painted the words "Mason & Risch, Toronto:" — *Held*, that if the transaction came within the Conditional Sales Act, R. S. O. 1897 c. 149, this was not a compliance with the provisions of s. 1 of that Act. But held, also, that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession, to purchase the piano, but having merely the option to purchase it. *Helby* v. *Matthews*, [1895] A. C. 471, distinguished and applied. *Mason* v. *Lindsay*, 22 C. L. T. 371, 4 O. L. R. 365, 1 O. W. R. 561, 583.

Obligation to give seller written notice of defects—*Trial made with assistance of seller's agent — Conduct of seller amounting to tacit waiver of the necessity for notice.*]—The purchaser of a machine upon trial, who agrees to notify the seller in writing if the machine does not work properly and to particularize the nature of the defects, is freed from such obligation when, having tried the machine with the assistance of the seller's agent, the latter undertakes to give the required notice and does so by wire, and when the seller, upon receipt of the telegram, sends one of his employees to make a new trial of the machine in pursuance of the terms of the contract. *Claifoux* v. *Forest* (1910), 20 Que. K. B. 93.

Ordinance respecting hire receipts and conditional sales of goods, s. 11 —*Stamping name of manufacturer thereon —Part of name used — Non-compliance with Act — Lien-notes not registered — Bona fide purchaser for value.*] — The plaintiffs claimed a lien on a plough sold to H. upon a conditional sale agreement reserving to the plaintiffs the ownership until notes given for the price were paid. The plough was sold by the sheriff under execution against H., the notes being unpaid, and the defendants became the purchasers. Stamped on the plough was the word "Cockshutt," but the plaintiffs' name was not otherwise in any way affixed thereto:—*Held*, that the stamping of the word upon the plough was not a compliance with s. 11 of the Ordinance respecting Hire Receipts and Conditional Sales of Goods, which requires that "the manufacturer's or vendor's name" shall be stamped thereon; and the plaintiffs could not set up the right of property or possession as against the defendants, who were *bona fide* purchasers for valuable consideration, without registering their lien notes, as provided by s. 2, which they had not done; and therefore they had no lien on the plough. *Mason* v. *Lindsay*, 4 O. L. R. 365, approved. *Cockshutt Plow Co.* v. *Cowan* (1910), 13 W. L. R. 256, 3 Sask. L. R. 47.

Ownership to remain in vendor until payment — *Failure of condition — Revendication — Condition precedent — Tender of part of price paid.*]—The condition, in a sale of a chattel for a price payable part in cash and part at a future date, that the ownership will remain in the vendor until final payment, is a suspensive one, and, failing its realisation, the sale is not perfected, and is to be regarded as inexistent. The vendor, therefore, who revendicates the chattel from the vendee, must, as a condition precedent, tender to the latter the part of the price paid in cash, and do whatever else may be necessary to put him in the position in which he was before the sale. *Dandurand* v. *Coffin*, 32 Que. S. C. 83.

Payment by instalments — Default — Seizure of goods by vendor — Acknowledgment by purchaser of amount due—Chattel mortgage by purchaser to vendor of same goods—Agreement of vendor—Failure to put purchaser in possession of goods—Sale by vendor—Dismissal of action for balance due —Costs. *Jones* v. *Okada* (Y.T.), 8 W. L. R. 557.

Payment by instalments — *Retention of ownership by vendor — Suspensive condition — Non-fulfilment — Revendication — Repayment of instalments already paid — Contract made abroad — Application of foreign law.*]—The sale of a chattel, in consideration of a price payable by instalments, with the stipulation that the vendor shall remain the owner of it until payment in full, is a promise of a sale or a sale subject to a suspensive condition, and does not become complete until the fulfilment of the condition. Therefore, the vendor has, in the interval, the rights and remedies of an owner, and may revendicate the chattel without being obliged first to repay what has been paid on account of the price.—*Per* Mathieu, J., that the sale in this case, having taken place at Ottawa, was governed by the law of Ontario which permits the vendor of a chattel, with a stipulation that he shall remain owner of it until payment in full of the price, to revendicate it without any previous reimbursement. *Williams* v. *Nadon*, 32 Que. S. C. 250.

Piano sold under representation — *Written contract signed under reliance upon these oral representations—Piano not up to representation—Piano returned to plaintiff—Action brought upon contract—Admissibility of oral evidence to vary—Dismissal of action.*]—Plaintiff sold defendants a piano under a written contract. Defendants alleged that plaintiff made oral representations to the effect that if they were not satisfied with the piano they could return it. After having had the piano about two or three weeks, defendants returned the piano and plaintiff brought action to recover on the contract. Plaintiff contended that oral testimony could not be admitted to vary terms of a written contract.—Denton, Co.C.J., *held* (17 O. W. R. 710), that the evidence substantiated defendant's claim that the written contract was

signed upon the undertaking given by the plaintiff that if the defendant should find that the piano was not worth the price asked, viz., $575, that if he should find he was overcharged and not worth that money, then the plaintiff would take back the piano and refund the ten dollars that had been paid, and dismissed the action with costs.—Divisional Court *held*, that all the circumstances shewed that the obligation was not to arise if the piano was not at the time of the value represented. That the defendant did not agree to purchase a piano only worth in reality $400, for the expressed price of $575.—Appeal dismissed with costs. *Long v. Smith* (1911), 18 O. W. R. 88, 2 O. W. N. 631, O. L. R.

Possession — *Chattel mortgage — Lien Notes Act — Bills of Sale Act — Registration — Assignment for creditors — Exemptions.*] — The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase money, signed a lien note in favour of the defendant, the manufacturer, containing a description of the goods and statement that the property in them was to remain in the defendant until paid for in full and that on default the defendant might enter and retake them:—*Held*, in the absence of evidence to prove that defendant had obtained the lien note by fraud or misrepresentation, that it might be treated as a chattel mortgage on the articles for the debt secured by it as against the person who had signed it. The defendant had not put on the articles his name or any other distinguishing name so as to comply with s. 2 of the Lien Notes Act, R. S. M. c. 87:—*Held*, notwithstanding, that the lien note was valid as against the maker of it. The lien note was not registered under the Bills of Sale and Chattel Mortgage Act, 63 & 64 V. c. 31, and the maker of it, before maturity of the debt, became insolvent and made an assignment to the plaintiff under the Assignments Act, R. S. M. c. 7, for the benefit of his creditors.—*Held*, that, for want of such registration, the lien note, being an instrument intended to operate as a mortgage of goods which remained in the debtor's possession until the assignment, was null and void as against his creditors, including the plaintiff as his assignee, by virtue of s. 2 (a) of the Bills of Sale and Chattel Mortgage Act. It was doubtful upon the wording of the assignment whether the debtor had reserved any exemptions to which he would be entitled under s. 43 (f) of the Executions Act, R. M. S. c. 53.—*Held*, that defendant could not claim the benefit of any such exemption even if it was reserved by the debtor in the assignment. *Cox v. Schack*, 22 C. L. T. 188, 14 Man. L. R. 174.

Possession — *Non-payment — Loss of goods.*]—In an action upon a promissory note given by the defendant for the price of a machine sold by the plaintiffs to the defendant upon a conditional sale, under which the property in the machine was not to pass until payment, it appeared that the machine had been accidentally destroyed by fire while in the defendant's possession before payment in full was made:—*Held*, that a substantial interest in the machine had passed to the purchaser, and he was liable for the price. *Hesselbacher v. Ballantyne*, 28 O. R. 182, 17 C. L. T. 17, approved. *Goldie & McCulloch Co. v. Harper*, 20 C. L. T. 4, 31 O. R. 284.

Promissory note — *Land — Condition as to passing of title to property—Acceleration of payment—Negotiable instrument.*]—A document contained a promissory note together with a memorandum similar to that used in conditional sale agreements, although the instrument was given in connection with the purchase of land.—*Held*, that the memorandum is surplusage. There were all the requisites of a promissory note, and the acceleration clause did not make it any the less good. Judgment for plaintiff. *Canadian v. Livingston*, 6 E. L. R. 459.

Promissory note — *Property not to pass —Judgment in action on note—Execution.*]—Under execution issued upon a judgment against the defendant, the sheriff seized a binder in the possession of the defendant. The Massey-Harris Company claimed the binder under a lien note, which provided that until the full amount of the purchase money was paid the property in the binder should remain in the company. Previous to the seizure of the binder the company had recovered judgment in a County Court against the defendant upon one of the lien notes or agreements for the balance due on the binder, and had issued execution for the amount, but in this execution there was no evidence of any action having been taken:—*Held*, in an interpleader issue, that, notwithstanding the judgment recovered by the company against the defendant on the note or agreement and the issuing of execution thereon, the property in the binder still remained in the company, and it was not liable to seizure by the sheriff under the execution issued by the execution creditor. *Purtle v. Henry*, 33 N. B. R. 607, not followed. *Morris v. McAulay*, 21 C. L. T. 547.

Property not passing — Fixtures — Lien note — Alteration — Conversion. *Whitney v. Bruce*, 2 O. W. R. 625.

Property not passing — *Judgment for price — Bar to saisie-revendication.*]—Where a vendor has obtained judgment upon promissory notes, representing the price of machines sold, and at the time of sale it was provided by special contract that these machines should remain his property until they should be entirely paid for, he cannot, without first having desisted from his judgment, issue a *saisie-revendication* for the machines, or obtain a declaration that he is the owner of them, and thus have a new judgment against the defendant. *Plessisville Foundry v. Levesque*, 22 Que. S. C. 306.

Property not passing — *Refusal to accept — Destruction by fire — Action for price.*]—The plaintiffs, by agreement in writing, sold an engine and stone crusher, with some extra parts, to the defendant, on terms of the property remaining in them until the price was paid, for which notes were to be given by the defendant within ten days after the machines were started. The plaintiffs were willing to deliver the goods, but the defendant refused to take them and to give the notes, or to pay, according to the contract.

The plaintiffs then commenced this action, and, after notice to the defendant removed the goods and stored them for safe keeping at the place of delivery in their own warehouse, where the goods were destroyed by fire:—*Held*, that the plaintiffs were, nevertheless, entitled to recover the amount of the contract price. *Sawyer-Massey Co.* v. *Robertson*, 21 C. L. T. 182, 1 O. L. R. 297.

Property not passing—Right of vendor to retake. *Waterous Engine Works Co.* v. *Livingston*, 2 O. W. R. 214.

Property not passing to vendee — Possession given to vendee—Seizure under execution against vendee—Claim by unpaid vendors—Interpleader—Evidence—Order for goods—Proof of signature by vendee—Proof of delivery of goods—Goods transferred from Manitoba to Saskatchewan — Identity of goods seized with those purchased—Order for sale not registered in Saskatchewan—Sale made in Manitoba—Manitoba law. *Sawyer-Massey Co.* v. *Boyce* (Sask.), 8 W. L. R. 834.

Property remaining in vendors — *Machinery with manufacturers' name stamped thereon—Ontario Conditional Sales Act — Machinery affixed to the freehold — Rights of mortgagees of freehold.*]—Plaintiffs delivered to the P. P. Company certain machinery under a conditional order for sale, title to remain in plaintiffs till machinery paid for. In placing the machinery a cement bed was first prepared through which bolts passed, the machinery being bolted to the cement. Then the machinery was enclosed with brick and cement. To remove the machinery a considerable part of the wall would have to be taken down. Though ordered before, the machinery was not affixed until after the giving and registration of defendant's mortgage on the freehold:—*Held*, that plaintiffs are entitled to remove the machinery, it not having been paid for. *Goldie & McCulloch Co.* v. *Uxbridge*, 13 O. W. R. 696.

Purchase and hire agreement—*Necessity for filing — Bills of Sale Act — Rights of vendors against purchaser for value from vendee — Incomplete clause in agreement.*]—Where the plaintiffs sold to F. a piano for the sum of $300, F. paying a portion of the purchase money in cash and giving his promissory notes for the balance, and, immediately after the sale and delivery of the piano, signing a purchase and hiring agreement, under which, upon completion of the payments to be made by him, he was to become owner of the piano, the title to which, in the meantime, remained in the vendors, and in which it was provided that in the event of F. becoming insolvent, or attempting to sell or part with the possession of the piano, all rights of F. should cease and the vendors should be at liberty to retake possession, and, while about one-half of the purchase money was still unpaid, F. sold the piano:—*Held*, that the agreement, having been taken by way of security, should have been filed under the provisions of the Bills of Sale Act, R. S. N. S. 1900 c. 142, s. 8, in order to be valid against creditors or an innocent purchaser for value, and not having been so filed, the plaintiffs could not recover; and, the Court could not give effect to a clause in the agreement which contained a number of blanks which by inadvertence were not filled up at the time the agreement was executed, and which lacked ingredients to make it operative and must deal with the agreement as if the clause were not there at all. *Miller Bros.* v. *Blair*, 37 N. S. R. 293.

Quality, weight, etc. — *Inspection — Rejection — Conversion — Sale by Crown officials—Liability of Crown—Deductions for short weight.*]—Minister of Agriculture of Canada entered into contract with suppliants for supply of a quantity of pressed hay for use of British army engaged in operations during the late South African war, the quality of hay and size, weight and shape of bales being specified. Shipments were to be made f.o.b. cars at various points in Quebec to the port of St. John, N.B., and were to be subject to inspection and rejection at the ship's side there by Government officials. Some hay was refused by inspector, as deficient in quality, and some for short weight in bales. In weighing, at St. John, fractions of pounds were disregarded, both in respect to hay refused and accepted; there was also a shrinkage in weight and in number of bales as compared with waybills. The hay so refused was sold by the Crown officials without notice to suppliants, for less than prices payable under contract and the amount received upon such sales was paid by government to suppliants. In making payment for hay accepted, deductions were made for shortage in weights shewn on way-bills and invoices, and credit was not given for discarded fractions:—*Held*, Chief Justice and Davies, J., dissenting, that appellants were entitled to recover for so much of amount claimed on appeal as was deducted for shrinkage or shortage in weight of hay delivered on account of government weighers disregarding fractions of pounds in weight of hay actually accepted and discharged from cars at St. John.—*Held*, (*per* Girouard, Idington and Duff, JJ., Chief Justice and Davies and Anglin, JJ., dissenting), that the manner in which government officials disposed of hay so refused amounted to an acceptance thereof which would render Crown responsible for payment at contract prices:—Judgment appealed from (12 Ex. C. R. 198), reversed in part, Chief Justice and Davies, J., dissenting. *Boulay* v. *R.* (1910), 30 C. L. T. 523, 43 S. C. R. 61.

Resale by vendee — *Conduct of vendor —Estoppel — Implied authority — Title of bona fide purchaser — Waiver of condition.*]—The plaintiffs, who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale, replied in the negative, adding that they had already been sold to one M. The defendant thereupon bought a portion of said logs from M., who was in possession and had all the *indicia* of title to the same, and paid M. in cash for them. As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge. In an action of *trover* brought to recover the value of the logs so purchased from M. by the defendant:

—*Held*, that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant. *Per* McLeod, J., that the evidence shewed an intention on the part of the plaintiffs to abandon the conditional element of their contract with M., and that he was clothed by the plaintiffs with authority to sell the logs, accounting to them for the proceeds. *Per* Gregory, J., that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and, as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss. Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. R. 169.

Repossession and resale — *Deficiency —Retention of promissory notes — Delay in delivery of part of goods ordered—Entire contract—Damages.*]—The defendants sold to the plaintiffs one separator and one perfection weigher under one order for one price. The separator was duly delivered and accepted and used by the plaintiff, but there was delay in delivering the weigher, and the plaintiff refused to take it when it arrived. The plaintiff made default in payment of the purchase price, and the defendants, as they had the right to do under their contract, resumed possession of both machines, repaired the separator, and sold the machines for less than the amount due: —*Held*, that the contract was an entire one and that the plaintiff had no right to reject one article after having accepted the other; and the plaintiff was not entitled to have back his notes given for the price, or to damages for non-delivery of the weigher. *Gerrard* v. *Gaar Scott Co.* (1910), 13 W. L. R. 442.

Repossession and resale by vendor —Action for deficiency in price realised — Ordinance respecting Hire Receipts and Conditional Sales, s. 8—Exercise of power of resale—Failure to serve notice on purchaser personally — Resale without reserve and at undervalue—Suspicious circumstances. *Vanstone* v. *Scott* (Alta.), 8 W. L. R. 919.

Repossession of goods by vendor — *Retention — Recovery of price, less value of goods — Rescission of contract.*]—Where, in an agreement for conditional sale, it is provided that upon default the seller may take possession of and hold the goods until payment, or sell the same and apply the proceeds on the purchase price, and recover the balance, and the seller takes possession and retains the goods, the contract is not thereby rescinded, but he may recover the purchase price under the contract after crediting the value of the goods. *Harris* v. *Dustin*, 1 Terr. L. R. 404, and *Massey* v. *Lowe*, 1 W. L. R. 313, distinguished. *Hopkins* v. *Danroth*, 7 W. L. R. 303, 1 Sask. L. R. 225

Repossession upon default — *Resale upon credit — Action for price — Crediting "proceeds" of resale — Agreement for lien on land — Printed contract — Description of land not filled in — "Other lands."*]—A contract made upon the sale of machinery by the plaintiffs to the defendant provided that, if the defendant did not pay the price when due, the plaintiff might retake the machinery and resell it, and the contract should not thereby be cancelled or affected, but the defendant should remain liable for the whole price and interest, and the plaintiffs might sell upon cash or credit, "crediting the net proceeds of such resale" after deducting the expenses. The defendant made default, the plaintiffs repossessed the machinery, made a resale upon credit, and brought this action for the balance due under the contract:—*Held*, that the defendant was not entitled to credit for the proceeds of the resale until the plaintiffs received the same. —The contract (on a printed form) contained a clause by which the defendant agreed to deliver to the plaintiffs "a mortgage of the lands hereinafter referred to," and that the plaintiffs "shall have, and they are hereby given, a charge and specific lien for the amount of the purchase-money . . . upon the said lands and upon any other lands the purchaser now owns or shall hereafter own." At the end was a blank to fill in the description of the land, but it was not filled in, although the plaintiffs had a description of the land owned by the defendant, and claimed a lien upon the land so described:— *Held*, that where a printed form of agreement contains a space which it is necessary to fill up in order to make an effective contract, and where the parties intentionally leave this space a blank, they must be taken as meaning that the clause is not to take effect, and therefore the plaintiffs had no lien upon the defendant's land; and as to "any other lands," there were none, and that part of the clause was meaningless. *Can. Port Huron Co.* v. *Fairchild* (1910), 14 W. L. R. 525, 3 Sask. L. R. 228.

Resale by vendee before payment of price — *Repossession by vendors — Contract of sale — Construction—Rights against subsequent purchasers — Judgment against vendee — Merger — Election — Waiver — Conditional Sales Act — Laches.*]—The defendants supplied to B. certain machinery on the terms contained in a written order signed by B., among which were: that payment should be made in instalments, and if default should be made the whole amount should become due; that the title to the goods should not pass until all the dues, terms, and conditions of the order should have been complied with; that B. should not sell or remove the goods from his premises without the defendants' consent in writing, and in case of default of the payments or provisions of the order, and without affecting B.'s liability for purchase money, the defendants should be at liberty, with or without process of law, to enter upon B.'s premises and remove the goods, and, without notice, to sell them at such prices as, in their judgment, were advisable, and credit B. with the same, and that B. should forthwith pay the deficiency, if any, arising after such sale. B. installed the machinery in his mill in 1905, and on the 10th October, 1906, sold the mill, including the machinery, to M., who, on the 19th March, 1907, sold the same to the plaintiffs. On the 18th

February, 1908, the defendants took the machinery out of the plaintiffs' possession in the mill, money being then still due to the defendants under the contract. Before taking possession, the defendants recovered judgment against B. for the amount due under the contract. The plaintiffs, asserting that they were purchasers for value without notice of the defendants' rights, brought this action for wrongful removal: — *Held*, (1) That the original indebtedness was not merged in the judgment *quoad* the security provided by the contract, and the defendants were entitled to retain that security until payment.—(2) That by suing for and obtaining judgment for the purchase money the defendants had not elected to treat the transaction as an absolute sale, so as to waive their security. *McEntire* v. *Crossley* [1895] A. C. 457, 464, explained and distinguished.—(3) That the defendants' rights were preserved and their title to the machinery continuously asserted by having affixed thereto a stamp bearing their name and address, in compliance with the Conditional Sales Act, R. S. O. 1897 c. 49, s. 1; and there was no evidence of laches, but the contrary.—Judgment of the District Court of Muskoka affirmed. *Utterson Lumber Co.* v. *H. W. Petrie Limited*, 17 O. L. R. 570, 13 O. W. R. 104.

Rescission by vendor — *Principal and agent — Authority of agent — Parol evidence of agency.*]—Held, that the buyer of an article under a sale, conditional upon the property not passing until full payment of the price, was entitled to treat the contract as rescinded where the seller took possession, used, offered for sale, and neglected to take proper care of, the article, although he made no actual use of it. *Sawyer* v. *Pringle*, 20 O. R. 111, 18 A. R. 218, followed. The evidence of the authority of a person assuming to act as agent for a dealer in agricultural implements, and the scope of his authority discussed. Where, on the trial, parol evidence was given, without objection, to establish agency, and afterwards it appeared that the agent's appointment was in writing, and, on appeal, it was contended that the parol evidence should not have been and should not be considered:—*Held*, that, though upon the written appointment being put in evidence, an application might, perhaps, have been properly made to strike out the parol evidence bearing on the same point, yet, as no such application had been made, nor any objection taken to its reception, the parol evidence might properly be considered. *Harris* v. *Dustin*, 1 Terr. L. R. 404.

Retaking possession — Repayment of amount paid on account by purchaser. *Dandurand* v. *Coffin*, 3 E. L. R. 297.

Re-taking possession on default — *Chattel mortgages — Collateral securities — Rescissions of contract — Failure of consideration.*] — The defendant ordered from Massey & Co., Ltd., machinery, for the price of which he gave three promissory notes, which provided that "the title, ownership, and right to the possession of the property for which this note is given shall remain in Massey & Co., Ltd., until this note or any renewal thereof is fully paid with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for any good reason Massey & Co., Ltd., should consider this note insecure, they have power to declare it and all other notes made by me in their favour due and payable at any time, and to take possession of their property, and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price." The defendant gave two chattel mortgages as collateral security for the notes. The notes were afterwards indorsed by Massey & Co., Ltd., to the plaintiffs, who on default took possession of and sold the property mentioned in the notes, and applied the proceeds upon the amount unpaid. The plaintiffs sued for the balance, $487.45, as due under the chattel mortgages:—*Held*, that, in the absence of provision in the notes that the plaintiffs could after sale recover the balance, the original agreement was rescinded by the sale.—(2) That, as the plaintiffs had no right to recover on the notes, they could not recover on the collateral security. *Massey-Harris Co.* v. *Lowe*, 6 Terr. L. R. 71, 1 W. L. R. 213.

Retaking possession on default — *Chattel mortgage — Rescission of contract.*] —The defendant ordered from the Massey and Company, Ltd., machinery, for the price of which he gave three promissory notes, which provided "the title, ownership and right to the possession of the property for which this note is given shall remain in Massey and Company, Ltd., until this note or any renewal thereof is fully paid with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for any good reason Massey and Company, Ltd., should consider this note insecure, they have power to declare it and all other notes made by me in their favour due and payable at any time, and to take possession of their property, and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price."—The defendant gave two chattel mortgages as collateral security for the notes. The notes were afterwards endorsed by Massey and Company, Ltd., to the plaintiffs, who on default took possession of and sold the property mentioned in the notes and applied the proceeds upon the amount unpaid.—The plaintiff sued for the balance $487.45 as due under the chattel mortgages.—*Held*, 1. That, in the absence of provision in the notes that the plaintiff could after sale recover the balance, the original agreement was rescinded by the sale:—2. That as the plaintiff had no right to recover on the notes, they could not recover on the collateral security. *Massey-Harris* v. *Lowe* (1905), 6 Terr. L. R. 71, 1 W. L. R. 213.

Retaking possession on default — When the buyer, in a contract of conditional sale, agrees that failure on his part to comply with any one of the conditions shall operate as a rescission and a forfeiture of such part of the consideration theretofore paid by him, the Court in case of such failure, is bound to give effect to the covenant at the instance of the seller. *Klock* v. *Molsons Bank* (1911) 39 Que. S. C. 435.

Revendication by vendor — *Opposition — Saisie-gagerie — Judgment against purchaser — Representation—Laches.*]—The vendor of a chattel, in consideration of a price payable by instalments, and on condition of the vendor retaining the property in the chattel until final payment, has the right to revendicate it in the hands of a curator appointed under a *saisie-gagerie* which has been made (illegally according to him), even after a judgment declaring it good and valid. Such judgment cannot be set up by way of opposition; the judgment is without effect as against the vendor, having been pronounced in a cause in which he was not a party, and in which the defendant, his purchaser and in this case his debtor by specialty, could not be considered as representing him, and it is of no importance that the vendor knew of the *saisie-gagerie* so made and did not use diligence in intervening to contest it. *Somers* v. *Whiteman*, 31 Que. S. C. 261, 8 Que. P. R. 321.

Right of vendor to resume possession upon default — Contract — Alteration—Evidence—Company—Powers of provisional directors—Conditional Sales Act—Goods maked with name of vendor—Contract not filed with clerk of County Court. *Re Kurtze and McLean Limited, Petrie* v. *London and Western Trusts Co.*, 12 O. W. R. 564, 13 O. W. R. 308.

Right to repossession on default — *Hiring of goods after repossession—Rescission of contract—Action for price—Sale by vendors after action begun — Conditional Sales Ordinance, s. 7—Notice — Costs.*]—The contract for the sale of machinery by the plaintiffs to the defendant contained the provisions that the property in the goods sold should remain in the vendors, who might repossess themselves of the goods on default or on other specified conditions, and might thereafter sell them on account of the purchaser, by public auction or private sale, and, after crediting the net proceeds of the sale, the purchaser should be liable for the balance remaining unpaid. The defendants had the use of the machinery for more than a year, during which time he sent numerous letters to the plaintiffs containing laudatory comments on the machinery, and made no complaints. However, he paid the plaintiffs nothing, and they took possession of the machinery. They first hired it out to D., and then, after the commencement of this action upon a mortgage given for the price, sold it:—*Held*, that the defence that the machinery was defective failed, upon the evidence. — 2. That the plaintiffs had no right to hire the machine out to D., and by so doing had entitled the defendant to treat the contract as rescinded. If the machinery was to be sold for the benefit and credit of the defendant, he was entitled to have it when sold in as good condition as when taken out of his possession. *Sawyer* v. *Pringle*, 18 A. R. 218; *Harris* v. *Dustin*, 1 Terr. L. R. 404, and *Moore* v. *Johnston*, 9 W. L. R. 642, followed.—3. On the 1st December, 1908, after the hiring to D., the plaintiff gave the defendant notice that, at the expiration of 5 days, to wit, on the 12th December, they should proceed to sell the machinery at Didsbury, and that the defendant could redeem it any time within the 20 days required by the statute after the 23rd November, on payment of a named sum.—*Held*, that the plaintiffs properly assumed that they were bound by the provisions of s. 7 of the Conditional Sales Ordinance, C. O. 1898, c. 44; and they had not complied therewith; the 20 days fixed by the notice did not expire until the 13th December, while the sale was to be on the 12th December; but in fact no notice of the sale which was actually made was ever given, as no attempt was made to sell at Didsbury, and no notice was given of the sale which actually took place afterwards at Brandon. In the circumstances, the action was dismissed without costs. *North-West Thresher Co.* v. *Bates* (1910), 13 W. L. R. 657.

Sale a remere to secure advance — *Retention by vendor—Assignment for creditors — Revendication from assignee.*]—The sale *à rémére* of a chattel to guarantee the repayment of advances is complete without delivery of chattel, and the purchaser has a right to revendicate it from the curator of the vendor who has made an assignment of his property. *Sonne Awning Tent and Tarpaulin Co.* v. *McDonell*, 33 Que. S. C. 481.

Suspensive condition — *Term of credit — Delivery — Pledge — Shipping bills — Bills of lading — Indorsement — Notice — Fraudulent transfer — Insolvency — Resiliation of contract — Revendication — Pleading.*]—The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills, and places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper measures in order to ascertain these facts and obtain a clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee. But, *per* Taschereau, C.J.C., dissenting, that where a sale of goods has been completed by actual tradition and delivery, the mere absence of the consignee's indorsement upon shipping bills representing the goods made in the name of the vendor, cannot have the effect of reserving any right of property in the vendor. If the goods have been sold upon terms of credit, the unpaid vendor has no right to revendicate such goods after they have passed into the possession of a third person in the ordinary course of business, and, in the present case, on failure of the conservatory seizure and in the absence of any right of the plaintiff to revendicate the goods, the alternative relief prayed for by his action should not be granted. *Gosselin* v. *Ontario Bank*, 36 S. C. R. 406.

Turret lathe — *Purchased on hire receipt—Effect of sale—Winding-up of company — Right of vendors to rank as preferred creditors.*]—Vendors claimed a lien on a turret lathe sold insolvent company on following agreement: "The title in said machinery and goods, and goods included in former orders, and orders which may be hereafter given by us to you, shall not pass from you until all terms and conditions of this order and such other orders shall be fully complied with by us, and until all

moneys payable and notes given under this order, and such other orders have been fully paid and satisfied." Vendors claimed a lien for $266.50; $120.56 on purchase price of lathe and $124.89 and $11.15 for further purchases. Hodgins, Master in Ordinary, *held*, that vendors were entitled to a lien for $120.56 only; that to allow the other claims would be to allow vendors to evade the provisions of the Conditional Sales Act and the Chattel Mortgage Act. *Re Can. Camera Co. Ex p. Williams Machine Co.* (1901), 30 C. L. T. 341.

Unpaid vendor of goods delivered to the purchaser on condition that the property shall not pass until the price, payable by instalments, is fully paid, has the right to revendicate it, notwithstanding the acceptance by him of notes of purchaser, no novation having thereby taken place. *Tremblay* v. *Quinn* (1910), 39 Que. S. C. 215.

Waiver — *Intention — Secondary evidence—Handwriting.*]—On proper evidence as to non-production of the original secondary evidence of the contents of a letter, given by a witness who had seen the author write once only, was admitted. On a conditional sale, evidenced by writing, providing that the title should remain in the seller till cash, notes, or drafts (for the balance of purchase price) as agreed upon, should be paid:—*Held*, that the question whether the conditions had been waived and thus the property had vested in the buyer, was entirely a question of intention, and that the facts shewn in evidence, one of which was that the seller had accepted, for the balance of the purchase price, the promissory note of a firm of which the buyer was a member, did not shew an intention to waive the condition as to property. *Marcy* v. *Pierce* (No. 2), 4 Terr. L. R. 246.

Written order — *Oral agreement for return if not satisfactory after fair test —Return and acceptance by vendor.*]—Action on lien notes for price of goods sold. The written order for the goods was lost; —*Held*, that it was part of the agreement that if after a fair test the machine did not work it could be returned. This came to pass and plaintiff resold it. Action dismissed. *Brownsberger* v. *Harvey* (1909) 12 W. L. R. 596.

See BILLS OF SALE AND CHATTEL MORTGAGES.

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6. CONTRACT.

Acceptance and delivery — *Evidence —Demand — Dispensing with—Ascertained goods.*]—Although the terms or conditions of a civil contract for an amount exceeding $50 (Art. 1235, C. C.), cannot be proved by oral testimony, the acceptance of the contract and the delivery of the article sold may be proved by a witness. 2. From the moment that a party to a contract refuses to acknowledge the contract, a demand and tender of payment becomes useless. 3. A person who has bought *en bloc* a certain ascertained number of animals cannot be forced to accept a smaller number. *Wark* v. *Clancey*, 25 Que. S. C. 199.

Account — Gold dust—Water—Counterclaim—Set-off—Costs. *Morin* v. *McDonald* (Y.T.), 4 W. L. R. 159.

Agent — *Representations — Contract — Vessel — Latent defect — Inspection—Part payment — Forfeiture,*] — The defendants wrote to the plaintiffs enquiring whether they knew of a vessel fulfilling certain requirements, and which they could "in every respect recommend and guarantee." The plaintiffs replied, mentioning and recommending a vessel offered for sale, but saying, "If you consider this vessel, we would advise you to send a man and inspect her, as we would not care about sending you a vessel and then not to turn out satisfactory." The defendants wrote in return that they were unable to send a man to examine the vessel, but were prepared to take her on the plaintiffs' recommendation. They thereupon authorized the plaintiffs to buy the vessel and draw on them for a portion of the purchase money, and agreed to pay the balance on delivery:—*Held*, that when the bargain was finally struck between the plaintiffs, acting for the vendor, and the vendee, the property passed, and there was no further *locus panitentiæ* after that date. Some time after delivery, the defendants discovered that the vessel was infected with dry rot, which made her practically valueless, but could not be detected by any ordinary inspection.—*Held*, that, in making the representations they did as to the condition of the vessel, and in the conduct of the negotiations, the plaintiffs were only bound to use ordinary diligence in the discharge of their duties, and the evidence fully warranted the conclusion that such diligence was used.—*Held*, further, that a reference to the part payment as "earnest money," and a provision for forfeiture of the amount paid in the event of the defendants failing to complete the purchase were not sufficient to give the defendants the option of forfeiting their deposit and refusing to carry out their contract as to the balance. *Hackett* v. *Rorke*, 37 N. S. Reps. 435.

Appropriation of goods—Interception by assignment—Fraud — Warehoused goods. *Metalli* v. *Roscoe*, 6 O. W. R. 880.

Appropriation of goods to contract —Interception by assignment — Fraud — Warehoused goods. *Metalli* v. *Roscoe*, 7 O. W. R. 166.

Authority of agent — Recognition by principal — Breach — Non-delivery of goods —Cause of action—Jurisdiction of Ontario Court—Correspondence — Refusal to complete delivery—Measure of damages. *Johnston* v. *Hurb*, 3 O. W. R. 192.

Bailment — *Evidence — Alterations in documents.*]—The plaintiff delivered wheat to the defendants, millers, from time to time, receiving delivery tickets, of which the following is a sample, "22/11" (date) "H. L. Cargo. 85 B. Wht. J. & E., K." (defendants' miller). The plaintiff alleged a sale of the whole; the defendants a purchase of a part of the wheat delivered, and a bailment of the remainder:—*Held*, that the tickets shewed delivery only, and that the question of sale or bailment must be determined by extrinsic

evidence. On the evidence the trial Judge found for the defendants. The effect of alterations in documents discussed. *Cargo* v. *Joyner*, 4 Terr. L. R. 64.

Breach — *Conditions — Shipping payment—Construction of contract—Damages.*] —By contract in writing M. agreed to sell to P. cedar poles of specified dimensions, the contract containing the following provisions: "All poles as they are landed at Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining in Arnprior over one month after they are in shipping condition to be paid for on estimate in 30 days therefrom, less 2 per cent. discount. . . . For shipments cash 30 days from dates of invoices less 2 per cent. discount:"—*Held*, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition, but only after 30 days from receipt of the estimate of such poles. M. refused to deliver logs that had been on the ground one month without previous payment, and P. brought an action for specific performance and damages, contending that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles.—*Held*, Sedgewick and Killam, JJ., dissenting, that each party had misconstrued his rights under the contract, and no judgment could be rendered for either. Judgment of the Court below, 3 O. W. R. 96, reversed. *Phelps* v. *McLachlin*, 25 C. L. T. 53, 35 S. C. R. 482.

Breach—Failure to give lien notes for price — Acceptance of goods—Measure of damages — Lien — Relief not claimed. *Krienke* v. *Mohr* (N.W.T.), 1 W. L. R. 254.

Breach — Quality of goods — Counterclaim — Damages — Evidence — Reference. *Lang* v. *Williams*, 12 O. W. R. 1243.

Breach — Refusal to accept — Damages —Costs. *Watts* v. *Hehsdoerfer* (No. 2) (N.W.T.), 1 W. L. R. 110.

Breach — Rescission—Damages. *Fisher* v. *Carter*, 5 O. W. R. 296.

Breach — Warranty — Defect. *Williams* v. *Cook*, 1 O. W. R. 133.

Breach of contract — *Refusal to deliver.*]—Action for damages for breach of contract to deliver hay. The trial Judge found in favour of defendants. The Alberta Full Court holdng that evidence was conflicting, practically confined to the parties and no preponderance of evidence or probability in favour of plaintiff's contention, dismissed the appeal. *Hehsdoerfer* v. *Berger*, 9 W. L. R. 280.

Cargo of coal — Expenses of discharging cargo — Liability for — Evidence. *Lehigh Valley Coal Co.* v. *King* (N.S. 1910), 9 E. L. R. 42.

Completion — *Time of payment.*]—It is not, in principle, necessary for the completion of a contract for sale of goods that the time for payment of the prices shall be fixed; it is sufficient if the parties are agreed as to the price of the thing sold. *Hurlburt* v. *Stewart*, 24 Que. S. C. 19.

Condition — *Measurement of logs by surveyor—Action for price — Evidence.*] — An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ and that such survey was to be final:—*Held*, that proof of such survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to the plaintiff's right to recover the price of the logs, and that the trial Judge was in error in rejecting the evidence of such surveyor on the ground that he was not proved to have been a duly sworn surveyor, appointed by the municipality and under bonds. *Patterson* v. *Larsen*, 36 N. B. R. 4.

Condition as to acceptance — *Post letter—The limit—Term of delivery—Breach of contract — Damages—Counterclaim — Right of action.*] — The plaintiff on 2nd October, 1899, wrote offering to supply the defendants with 37 car loads of hay at prices mentioned "subject to acceptance within 5 days, delivery within 6 months." On the 5th October the defendants replied: "We will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand, and also get off the 7 cars as early as possible . . . We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was registered, and, although it reached the plaintiff's post office within the five days, was not received by him until the following day. The hay was not delivered, and, before the expiration of the six months named for delivery, the defendants, in defence of this action (which was brought in respect of earlier transactions), counterclaimed for damages for breach of contract in the non-delivery of the 37 car loads:—*Held*, that the correspondence did not constitute a binding contract, as the parties were never *ad idem* as to all the terms proposed.—2. That, as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature. *Oppenheimer* v. *Brackman and Ker Milling Co.*, 23 C. L. T. 62, 32 S. C. R. 699.

Construction — Supply of telegraph poles — Acceptance of part — Conditions —Inspection — Property passing — Claim for price — Refusal to accept remainder — Failure to inspect — Vendor terminating contract — Damages for refusal to accept — Interest — Appeal—Costs. *Plaunt* v. *Western Electric Co.*, 12 O. W. R. 233, 1097.

Contract by letter and by traveller —*Where is it completed?—Declinatory exception—C. P. 94, 174.*]—In contracts by

correspondence, the place of the contract is where the consent of the parties meets and not where the goods sold are actually counted, weighed and measured. The same principle applies to sales effected by commercial travellers. When the sale is subject to ratification, it is presumed to have been completed where the order is taken and not at the place where the sale was ratified. *Superior Mattress Co.* v. *Arcand* (1910), 12 Que. P. R. 176.

Cordwood — Measurement — Tender — Resale — Partnership — Dissolution — Acquiescence — Estoppel — Contract—Setting apart wood. *Smith* v. *Gordon*, 3 O. W. R. 397.

Correspondence — *Condition as to quality — Acceptance — Completed contract — Breach.*]—The plaintiffs offered to buy a quantity of fish from the defendant, at a price twenty-five cents per quintal above the Halifax price, provided the fish were so cleaned, or prepared for market, as to leave "little, if any, blood or black spot." The defendants answered, guaranteeing to furnish the quantity of fish required, at the price specified, and prepared as required by the plaintiffs, "with one exception, that it is impossible for us to take all black skin from the napes of fish." The plaintiffs, in reply, stated that the condition which the defendants wished to except was the most important requisite, that it was done in the case of all fish caught and cured in Iceland, and other places mentioned, and that, for this one reason, fish from those countries sold at a fair price, when fish not so prepared could not be sold at all. The defendants failed to make any immediate reply to this letter, and the plaintiffs wrote again, asking whether the defendants had decided to supply the cargo in the condition the plaintiffs would like to have it, as per their previous letter. The defendants thereupon wrote: "We will furnish any quantity of fish that you want, suitable for any market, at the price you offered." They added: "I will do my best in regard to removing the black skin, as you stated in your previous letter." To this letter the plaintiffs replied, stating that they would take a cargo of 2,500 quintals, "according to previous arrangement as to quality and price." The defendants failed to deliver the fish, as required, and the plaintiffs claimed damages: — *Held*, that, notwithstanding the words "I will do my best," there was a complete contract, upon which the plaintiffs were entitled to recover. *Anglo-Newfoundland Fish Co.* v. *Smith*, 35 N. S. R. 267.

Correspondence — Offer and acceptance —Rescission—Breach — Damages — Non-delivery. *McGrath* v. *Black* (N.S.), 6 E. L. R. 501.

Counterclaim — Onus. *Rat Portage Lumber Co.* v. *Kendall*, 1 O. W. R. 197, 528.

Cross accounts — Settlement — Overdue acceptance—Judgment for amount by default—Action by judgment-debtor for alleged balance due him by judgment-debtor—Verdict against weight of evidence — New trial. *Densmore* v. *Hill* (1911), 9 E. L. R. 475, N. S. R.

Delivery abroad — *Importation prohibited—Customs laws — Knowledge of vendor—Ignorance of purchaser.*] — One who sells, promising to deliver to the purchaser in a foreign country, goods the importing of which to his knowledge is prohibited by the laws of that country, is obliged, in case of confiscation of the article sold, to repay the price to the purchaser, where the latter was ignorant at the time of the sale of the prohibition. *Quigley* v. *Desjardins*, 23 Que. S. C. 434.

Delivery abroad — *Importation prohibited — Knowledge of purchaser — Confiscation by customs authorities.*]—When goods sold are deliverable in a foreign country, where the importation of that kind of goods is prohibited, to the knowledge of the purchaser, the vendor, who assumes all risk of confiscation of the goods until delivery, is not responsible to the purchaser if, after delivery and acceptance by the latter, the goods are confiscated by the custom authorities. *Couch* v. *Desjardins*, 24 Que. S. C. 543.

Description — Measurement—Rejection —Evidence — Findings. *Mickle* v. *Collins*, 2 O. W. R. 1147.

Description of articles — *Construction — Lease of shop and contents — Subsequent purchase of contents by lessee — Diminution of rent — Expense of detachment of machinery sold.*]—The lessee of a ship and its machinery, who buys the machinery and continues in possession of the demised premises, has a right to an abatement of the rent in proportion to the value of the machinery bought from the day of its acquisition.—2. A written offer to buy "all the wood-working machinery, shafting and belting, etc. (excepting dynamo and lighting system), included in the shop we presently occupy," for $1,200, refused by the owner, who proposes on his part to sell the articles for $2,000, and a written acceptance of this last offer, in which the chattels are described as "machinery, shafting and belting, etc., all contents in the shop . . . with the exception of dynamo and electric light system . . ." constitute a sale which includes the coils and pipes of the heating apparatus of the shop in question.—3. The cost of delivery being at the charge of the vendor, he must reimburse the purchaser for the expense of detaching the machinery sold from the shop in which it was installed, even if the purchaser has used it after the purchase in the state in which it was before detachment. *Sun Life Assurance Co.* v. *Pausé*, 17 Que. K. B. 1.

Divisibility — *Condition precedent — Performance — Waiver.*] — Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal arrangement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiffs. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made:—*Held*, that the contract was divisible, and that the price of

the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower.—*Held*, however, that the proper attachment of the wind stacker was a condition precedent to the plaintiffs' right to obtain payment, and that, in the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second season of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition. *New Hamburg Manufacturing Co.* v. *Klotz*, 1 W. L. R. 471, 6 Terr. L. R. 323.

Divisibility of contract — *Condition precedent—Performance.*]—Upon a sale of a wind stacker and chaff blower of a different make from the threshing machine in use by the defendant, there had been a verbal agreement, made contemporaneously with the written agreement of purchase, that these were to be attached to the threshing machine by the plaintiff. It was found impossible to attach the chaff blower, and the alterations in the wind stacker necessary to make it work with the threshing machine had not been made:—*Held*, that the contract was divisible, and that the price of the wind stacker was recoverable, although the plaintiffs abandoned their claim for the price of the chaff blower.—*Held*, however, that the proper attachment of the wind stacker was a condition precedent to the plaintiffs' right to obtain payment, and that under the circumstances and in view of the absence of any offer to make the alterations in the wind stacker, its use through a season, and the purchase at the beginning of the second season of another wind stacker in substitution for it, did not constitute a waiver of the performance of the condition. *New Hamburg Mfg. Co.* v. *Klotz* (1905), 6 Terr. L. R. 323, 1 W. L. R. 471.

Evidence—Jurisdiction of magistrate. *Langille* v. *Zinck* (N. S. 1910), 9 E. L. R. 113.

Findings of Master on reference — *—Appeal — Findings affirmed — Not clearly wrong in holdings—Depended on weight of evidence—Costs.*]—Action for alleged balance due on pay-as-you-enter cabinets and cash boxes supplied defendants. The matter was referred by Falconbridge, C.J.K.B., to the Master. The Master gave plaintiff judgment for $1,432 with costs. Teetzel, J., affirmed judgment of M.-in-O. *Banfield* v. *Toronto Rw. Co.* (1911), 19 O. W. R. 636, 2 O. W. N. 1344.

Foreign forum — *Bills of lading—Conditions.*]—Words or conditions stated in the margin of a bill of lading, which appeared there at the moment of acceptance, form part of the contract.—2. The stipulation in a bill of lading, executed in a foreign country, that "all disputes regarding this bill of lading are to be settled according to the law of the Empire of Germany, and decided before the Hamburg law Courts," is not contrary to public order and will be recognized and enforced by the Courts of this province. 3. The condition is restrictive in form. 4. Where it is expressly stated in the bill of lading that "in accepting this bill of lading, the shipper, owner, and consignee of the goods agree to be bound by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, or consignee," the consignee of the goods in Montreal is bound by such condition. *Michalson* v. *Hamburg American Packet Co.*, 25 Que. S. C. 34, 6 Que. P. R. 165.

Fulfilment — Non-payment of price — Exercise of vendor's lien — Changing character of goods. *Heaton* v. *Sauve*, 5 O. W. R. 446.

Goods shipped failing to comply with order both as to quality and quantity — Payment of draft attached to bill of lading to obtain inspection—Acceptance of part of goods shipped — Return of part—Recovery of part of moneys paid on draft. *Arnold* v. *Peacock*, 3 O. W. R. 273.

Indefinite order — Contract. *Massey-Harris Co.* v. *Zwicker*, 3 E. L. R. 193.

Locus contracti.]—A contract for the sale of goods is completed at the place where the buyer's letters arrived and in which he asked to be assured of the accuracy of the prices quoted him by the seller's commercial traveller and authorising the sending of goods mentioned in the said letters. *Watterson* v. *Beaudoin*, 11 Que. P. R. 86.

Measurement — Tender—Insufficiency —Resale — Privity — Estoppel — Contract —Setting apart goods — Scale of costs. *Smith* v. *Gordon*, 2 O. W. R. 960.

Mistake—*Price of goods—Clerical error—Parol evidence—Conclusive proof—Rectification of contract.*]—Where the defendants, by a clerical error in a letter to the plaintiff, named 15 cents per foot as the price to be paid to the plaintiff for piling to be supplied by the plaintiff, and it appeared that 5 cents was the fair and reasonable price, and was that intended to be named by the defendants, and that the plaintiff had experience and knowledge of prices, the defendants were *held* entitled to relief on the ground of mistake, and the plaintiff entitled to recover at the rate of 5 cents.—Where one party knows that another understands his offer in a sense different from that in which it is manifested, the contract will not be allowed to stand. Parol evidence is admitted, not to contradict the form of the agreement, but to prove a mistake therein which cannot otherwise be proved. The proof must be clear and conclusive to justify the Court acting on such evidence. *Bennett* v. *Adams River Lumber Co.* (1910), 15 W. L. R. 383, B. C. R.

Option to extend contract — *Breach —Damages.*]—Plaintiff agreed to buy certain boxes from defendant. The contract contained the clause, "Buyers to have option to extend contract for 12 monthly shipments of 20,000 to 30,000 boxes after receipt of this sample shipment. The sample shipment was made on 4th October. On 8th November plaintiff notified defendant of taking advantage of option. Defendant claimed option forfeited through unreasonable delay: — *Held*, defendant should have notified plaintiff to exercise his option within a reasonable

time or it would be forfeited. Appeal allowed and new trial directed, as damages had not been assessed. *Jones* v. *Cushing*, 7 E. L. R. 190.

Order given to agent — *Promise to buy.*]—An order given to a travelling salesman of a wholesale house, whose power as agent to accept it is not shewn, is at least a promise to buy which binds him who gives it. *Théoret* v. *Morency*, 27 Que. S. C 150.

Parol — *Common counts — Sawing timber — Evidence.*] — Action for sale of oak timber and for cost of sawing thereof. Practically a question of fact. A new trial will not be ordered on ground of error in Judge's findings on facts unless the Court is clearly of the opinion that he is wrong. *F. E. Sayre & Co., Ltd.* v. *Rhodes Curry & Co., Ltd.* (N.B.), 6 E. L. R. 514.

Payment — Mistake — Recovery back—Counterclaim — Delay — Damages — Evidence. *Scott* v. *Tasker*, (N.W.T.), 1 W. L. R. 199.

Payment — Refusal to deliver—Sale to another — Rival claimants—Possession — *Bona fides. Sapery* v. *Simon*, 6 E. L. R. 143.

Payment — Security — Lien — Oral contract — Novation — Consideration — Property passing. *Watts* v. *Hehsdoerfer* (No. 1) (N.W.T.), 1 W. L. R. 105.

Payment — *Substitution of debtor — Novation — Discharge of original debtor.*]—The vendor of merchandise who accepts the note of a third party for the amount of the price, and who, at its maturity, receives a part of it and agrees to renew for the balance, thereby effects a novation of the obligation of his purchaser to pay the price, and discharges him from it. *Howard* v. *Boisvert*, 34 Que. S. C. 455.

Payment by exchange — Unascertained goods — Assignment by vendor for benefit of creditors — Right to specific goods —Bills of Sale Act. *Haverson* v. *Smith* (Man.), 4 W. L. R. 249.

Place of delivery — *Receipt of goods— "Delivered price"—Notice — Estoppel.*]—The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to the defendants 20 cars of Pittsburg slack at $1.25 at mine, which they would ship all rail, if the defendants wished, and if the plaintiffs would procure the necessary cars. The defendants telegraphed, giving order at the price named, "F.O.B. mine," adding "Route it G. T. R. London." On the same day the plaintiffs wrote accepting the order, and stating that they would ship as soon as railway equipment could be furnished, that an all rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put same through at once. Subsequently and before any shipment had been made, it was arranged between the plaintiffs and defendants that No. 8 Pittsburg slack should be substituted for Pittsburg slack, at the same "delivered price." Invoices sent with the coal shewed the mine price at $1.65, but, notwithstanding, the defendants accepted the coal, and made no protest until making their first payment: — *Held*, that the place of delivery was to be at London at the price of $3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from shewing the contrary. *Burton Beidler, and Phillips Co.* v. *London Street Rw. Co.*, 24 C. L. T. 337, 7 O. L. R. 717, 3 O. W. R. 666.

Purchaser unable to read English and relying on representations of vendors' agent—*Return of goods as not answering description — Manitoba Sale of Goods Act, s. 20, Rule 4 — Property not passing.*]—Action for price of second-hand threshing outfit sold to defendant. Defendant, who could not read English, signed plaintiffs' usual order form, the agent informing him that he could return machine if not satisfactory:—*Held*, that the ordinary rule does not apply where a man incapable of reading is induced to sign a contract, it being represented that it is an entirely different document. Defendant having given the machine a reasonabe trial returned it as unsatisfactory after a reasonable time:—*Held*, further, that the property did not pass to the defendant under Rule 4 above. Action dismissed. Notes to be cancelled and lien on defendant's farm to be discharged. *American-Abell* v. *Tourounc*, 10 W. L. R. 413.

Refusal of vendor to fulfil — Return of money paid by purchaser — Damages — Counterclaim — Delivery — Acceptance. *Robson* v. *McMichael* (N.W.T.), 3 W. L. R. 58.

Sale "commerciale"—*Goods of another —Recovery.*]—The sale by a trader of the whole assets of his business, is a sale "*commerciale*." The owner of an article sold as part of such assets cannot recover it from a purchaser in good faith, the sale of the goods of another being, as a sale "*commerciale*," valid. *National Cash Register Co.* v. *Demetre*, 14 Que. K. B. 68.

Sale of goods of a company being wound up—*Damages.*]—On 30th January, 1906, an order was made to wind up plaintiff company, and defendant was appointed liquidator. Some time prior, the company had hypothecated all their stock of manufactured linens to the Crown Bank as security for advances. The stock was advertised and sold to one Todd, a clerk in office of plaintiffs' solicitors, who for "valuable consideration" assigned his rights to the stock to plaintiffs. Certain goods, at bleach in Scotland, were not delivered to Todd nor his assignees, and these goods were sold in Scotland to pay charges for bleaching, without objection by liquidator, and plaintiffs claimed this was done without their consent and sued for recovery.—MacMahon, J., *held*, 14 O. W. R. 1163, 1 O. W. N. 262, that as the goods were sold by defendant as "free from incumbrances" and were paid for by Todd, plaintiffs' assignor, and as the goods were not delivered by defendant, he was liable for a breach of his contract. Damages assessed at $1,084.94, the goods having been put in at mill prices.—Court of Appeal reversed the

findings of trial Judge, holding that what the liquidator had done fell far short of a legal conversion, and a liquidator by agreement is entitled to be held harmless by the plaintiffs, and therefore they cannot compel him to pay under the circumstances. That the plaintiffs treated and regarded the goods as delivered as far as the defendant was concerned, and the claim upon the contract also failed. —Meredith, J.A., dissenting. *Dom. Linen Mfg. Co.* v. *Langley* (1911), 19 O. W. R. 648, 2 O. W. N. 1255.

Services performed — Money paid — Account — Items — Commission—Evidence —Admissibility. *Pinki* v. *Western Packing Co.* (N.W.T.), 2 W. L. R. 336.

Specific amount per week—*Breach of agreement — Measure of damages.*]—Defendant agreed to buy tobacco from plaintiffs at the rate of $300 per week. This the defendant failed to do and ultimately ceased to deal with plaintiffs:—*Held*, on appeal, that plaintiffs cannot recover damages simply by shewing an estimate of loss from failure to purchase. Action dismissed. *Crowe* v. *Couch*, 8 E. L. R. 45.

Statute of Frauds — *Inability of vendor to deliver goods — Breach of contract — Sale of business as a going concern.*]—The plaintiffs were executors of one John McCalla, who had carried on a general grocery and hardware business in St. Catharines. They caused an advertisement to be published asking for tenders for the purchase *en bloc* of the grocery and hardware stock, goodwill, fixtures, etc., of the business. The advertisement stated, *inter alia*, that intending purchasers were to tender at a rate of so much in the dollar for the stock and fixtures, and a specified sum for the goodwill; that the business had been continued from McCalla's death by the executors, and was a going concern; that the stock sheets might be seen on application to the executor's solicitor; and that further particulars and conditions of sale might also be seen there. Defendant came into the office of the solicitor on two occasions and looked over the stock sheets; that on 22nd September, 1902, the day before the tenders were to be opened, defendant met him in the street in the evening and said he thought he would make a tender on the stock. Defendant asked the solicitor to write it out for him and gave him the figures, 75 cents for the grocery stock and 50 cents for the hardware stock; nothing for the goodwill. Solicitor then wrote the following offer: "To the Trusts and Guarantee Co. (Ltd.), Toronto. "Dear Sirs,—I offer 75 cents on the dollar for the grocery stock and 50 cents on the dollar for the hardware, but nothing for the goodwill. Yours, John Ross, per A. W. Marquis." This offer was accepted by the plaintiffs, and notice thereof in writing given by the solicitor to the defendant containing a request to call and execute the agreement in accordance with conditions of sale, and to make his deposit. The defendant by letter repudiated any liability on the contract. The conditions of sale were never produced nor proved. There had been a large quantity of staple goods sold prior to time for completion of the contract:—*Held*, that there was no valid contract under the Statute of Frauds; and further, that, by the depletion of the stock, the plaintiffs were not in a position to carry out the alleged contract. *Trusts and Guarantee Co.* v. *Ross*, 5 O. W. R. 558, 9 O. L. R. 715.

Statute of Frauds — *Order for goods —Agency — Correspondence.*]—The travelling salesman of a wholesale dealer is presumably not authorised by the customer who buys from him to sign a contract for the customer as purchaser; and this presumption is not rebutted by a written memorandum of the order being made in the purchaser's presence and a duplicate given to the latter: the entry of the purchaser's name made by the salesman is not evidence *per se* of his agency:—*Held*, upon the facts of this case, that there was nothing upon which the Court could conclude that the vendor's agent was acting as the agent of the purchaser, and the subsequent letters of the purchaser did not identify the contract; and therefore the Statute of Frauds was an answer to a claim for the price of goods for which an order was orally given by the defendant to the plaintiffs' agent, but which the defendant refused to accept. — Judgment of District Court of Algoma reversed. *Imperial Cap Co.* v. *Cohen*, 11 O. L. R. 382, 7 O. W. R. 128.

Supplementary agreement to exchange if found unsuitable — Condition of goods—Onus of proof—Evidence. *McLeod* v. *McCutcheon* (Man.), 5 W. L. R. 159.

Unascertained future goods — *Appropriation to contract — Property passing.*]—*Held*, that, under the circumstances of this case, there was a sale by description of unascertained future goods, viz., wood to be cut, drawn, and delivered, and 714 cords of the wood were delivered at the place at which by the contract they were to be delivered, and in the state in which by a subsequent agreement they were to be delivered, and the plaintiff, by measuring, estimating, marking and stamping them with his own stamp, assented to the delivery of them in the state in which they were delivered, and unconditionally appropriated these 714 cords to the contract, and the property therein thereupon passed to the plaintiff, as was the intention of the parties; and the provisions of the subsequent agreement did not prevent the property passing; and the plaintiff must bear the loss of part of the wood which was destroyed by fire. *Wilson* v. *Shaver*, 21 C. L. T. 141, 1 O. L. R. 107.

Usurious transactions — *Commission of five per cent, besides interest—Customary allowance for transacting business.*]—Where a merchant supplied goods, money, promissory notes, and other commercial instruments to country customers and where accounts, returns and settlements were made from time to time at their convenience with produce from the upper country, transferred by vessels and barges, the Privy Council *held*, that a commission of five per cent, on all advances besides interest, under the circumstances, was not an usurious transaction, but a customary allowance for the trouble and inconvenience of transacting the business. *Pollock* v. *Bradbury* (1853), C. R. 2 A. C. 46.

Vendor's risk — *Insurance clause — Interpretation — Perishable goods.*] — Under the "cost, freight, and insurance" clause in a contract of sale, the vendor is obliged to keep the goods fully insured against all loss, damage, or deterioration to which they may be exposed, until delivery; and, consequently, in the case of perishable goods, such clause is not complied with by an insurance warranted free from particular average, or part loss, and which covered only a portion of the risk from ordinary perils of the sea. *Canada Hardware Co.* v. *Suren-Hartmann Co.*, 24 Que. S. C. 430.

Work and labour—Common counts—Evidence — New trial. *Kennedy Island Mill Co.* v. *St. John Lumber Co.*, 4 E. L. R. 107.

Work and labour performed—Set-off —Counterclaim by loss by fire caused by plaintiffs' negligence — Contributory negligence. *Stephens & Irving* v. *Awalt* (N. S. 1910), 9 E. L. R. 262.

Writing — *What amounts to—Evidence —Commencement of proof.*]—It is not essential that the writing required by clause 4 of Art. 1235, C. C., set forth the contract of sale in all its details; it is sufficient if it set forth the essential terms of the contract, or refers to another writing which does contain them. The writing may be supplemented by the admission of the party, but such admission ought to include all the conditions contained in the writing, and ought to be complete in itself; furthermore Art. 1235, forming, as it does, an exception to Art. 1233, such admission cannot be offered as the commencement of proof by writing. A writing, signed by the party sued, which confirms the requirements of Art. 1235, C. C., but which such party contends is not binding, would, nevertheless, be sufficient to form a basis for the admission of oral testimony of the contract of sale. *Molleur* v. *Mitchell*, 14 Que. K. B. 74.

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7. DELIVERY.

Agreement between manufacturer and customer that the latter will take delivery of goods into his warehouse, at expense of former for demurrage, storage, etc., with further covenant that invoices will be dated from time of conversion of goods by customer to his own use, is not a sale, and the customer is left to make such conversion or not, as he thinks fit, and, if not, he incurs no liability for the goods or their value. *Western Stoneware Co.* v. *Ozo Co.*, (1910), 39 Que. S. C. 251.

Breach — *Cause beyond control of vendor — Terms of contract.*] — A vendor of construction stone who engages "to ship and deliver on cars at N. granite stone," etc., is not liable in damages for default of delivery due to the fact that there are no cars and that it is impossible to procure them. The breach of his obligation arises, in this case, from a cause which can not be imputed to him: Art. 1071, C. C. *Verret* v. *Perron*, 18 Que. K. B. 129.

Change of possession — Animals — Visible and public change — Conversion — Dispute as to ownership — Costs — Scale of —Set-off. *McNichol* v. *Brucks* (N.W.T.), 1 W. L. R. 478.

Damage for non-delivery — Contract —Correspondence — Executors of vendor—Corroboration. *Upton* v. *Eligh*, 2 O. W. R. 629.

Damages for non-delivery—Measure —Claim and counterclaim — Payment into Court — Costs. *Delhi Fruit and Vegetable Canning Co.* v. *Poole*, 2 O. W. R. 413.

Delay — *Damages — Acquiescence — Payment.*] — The purchaser, by written agreement of the 20th April, of goods to be shipped without delay, who on the 25th of the same month receives written notice from his vendor that the goods are to arrive in a few days and will be forwarded at once, and does not reply thereto, and who receives the goods on the 27th May following, and pays for the carriage of them without objection, is not in a position to sue to recover damages for delay in delivery. *Timossi* v. *Moos*, 16 Que. K. B. 382.

Delay — Goods required for special season—Time impliedly of essence. *Laidlaw* v. *Shorey*, 3 E. L. R. 93.

Delivery of part—Promissory note for price of whole—Balance of goods undelivered —Demand—Action on note—Consideration. *Fuller & Co.* v. *Holland* (N. S. 1910), 9 E. L. R. 110.

Denial of delivery — *Novation—Evidence of inferior quality — Admissibility — Amendment.*]—Where, in an action for the price of piles of red pine, sold and delivered to the defendant, the plea, in addition to a general denial of delivery, was to the effect that the plaintiff had accepted other persons as his debtors instead of the defendant, thereby creating novation, evidence of the inferior quality of the goods supplied is irrelevant to the issue, and inadmissible. 2. Amendment of the plea at the trial, in order to allege that the goods supplied were not in conformity to the contract, ought not to be allowed, more particularly where the evidence did not shew objection or refusal to accept on this ground at the time of delivery. *Veilleux* v. *Atlantic and Lake Superior Rw. Co.*, 23 Que. S. C. 217.

Denial of sale and delivery — *Burden of proof — Corroboration — Appeal — Reversal of judgment.*]—In an action for the price of goods sold and delivered, judgment was given in favour of the defendants at the trial, on the ground that the denial of the sale and delivery threw the burden of proof upon the plaintiffs, and that they had failed to satisfy this burden, there being a conflict of evidence between the plaintiffs' traveller, E., and the defendant M. It appearing from the evidence that the ground upon which the case was determined at the trial was wrong, the evidence of E. being corroborated in a number of particulars, and there being a preponderance in favour of the plaintiffs:—*Held*, that the appeal should be allowed and judgment entered for the plaintiffs for the amount of their claim, with costs of action and appeal. *Fraser* v. *McCurdy*, 35 N. S. R. 467.

Destruction of goods.] — The sale of movable objects (such as 20 barrels of pork at $29.50 a barrel out of a large number) is only completed when the things sold have been ascertained. Acceptance by the buyer from the seller of a delivery order does not transfer ownership of the objects until they have been ascertained, and if they are destroyed by fire, the seller must bear the loss. *Cream* v. *Kirouac* (1910), 39 Que. S. C. 486.

Destruction of goods before delivery —*Construction of written agreement.*]—In a sale of specific or ascertained goods under contract requiring something to be done by the seller before the buyer was bound to accept delivery, a portion of the goods was destroyed without either party's default. The buyer was nevertheless held entitled to recover as damages the amount paid for the goods so destroyed:—*Held*, also, that the object of the Sales of Goods Ordinance was merely to codify the existing law, not to lay down new law. *McLean* v. *Graham* (1898), 6 Terr. L. R. 438.

Engine — Agency—Ratification—Failure to deliver engine—Damages—Loss of profits. *Finn* v. *Dyment Foundry Co.*, 12 O. W. R. 192, 412.

Failure of seller to deliver part — *Action by purchaser — Damages — Proportionate value.*]—A purchaser who is not put in possession of a part of the goods sold to him *en bloc*, can claim from the vendor only the value of the part which he has not received in proportion to the total price, and the damages mentioned in Art. 1518, C. C.; all other damages will be refused upon defence in law. *Muscat* v. *Montreal Hardware Manufacturing Co.*, 5 Que. P. R. 197.

Failure to deliver—Counterclaim for refusal to accept — Damages. *Kennedy* v. *Joyce* (N.W.T.), 1 W. L. R. 197.

Goods sent on approval — Plea that goods stolen without fault of vendee—Bailment — Liability — Contract. *Laurin* v. *Ginn*, 5 E. L. R. 335.

Late delivery — Inferiority — Counterclaim — Amount overpaid — Extra-provincial company — Incorporation by Dominion Act — Doing business in province without license — British Columbia Companies Act, s. 123 — *Intra vires* — Constitutional law. *Waterous Engine Works Co.* v. *Okanagan Lumber Co.* (B.C.), 8 W. L. R. 278.

Non-delivery of quantity contracted for — *Measure of damages — Measurements —Specifications — Interest — Mise en demeure.*]—An insolvent had agreed to deliver to V., a creditor, upon a certain dock, a quantity of wood at so much per foot, the expenses of measurement to be paid by the insolvent, who was to furnish specifications to V., the measurement to be made by the measurers of the Quebec harbour commission:—*Held*, that the delivery was not complete until the measurement had been made and the specifications furnished to V.; also that it was incumbent on the insolvent or on the curator representing him to prove his allegation that V. had received a larger quantity of wood than the specifications shewed or than V. admitted, and the proof of that must be clear and certain. 2. In a commercial matter interest upon money does not run unless it be alleged and shewn that it is allowed by commercial usage. 3. In a commercial matter *mise en demeure* arises by lapse of time alone. 4. By the default of the insolvent to deliver to V. the quantity of wood which he had contracted to deliver to him, V. had the right as damages to the difference between the price upon which he had agreed with V. and the price at which he had sold or could re-sell the wood. 5. In a commercial matter it is necessary to be faithful and to fulfil exactly a contract within the time agreed, for a disturbance may quickly be caused in the affairs of a trader by reason of one with whom he has contracted not punctually fulfilling his obligations. *In re Moisan*, 22 Que. S. C. 423.

Payment for — Covenant — Action on —Counterclaim for non-delivery of part — Nominal damages. *Delahey* v. *Reid*, 1 O. W. R. 522.

Place — "*At*," *meaning of.*]—A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you. (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel upon the dock, about 80 feet from the shed, and separated from it by a road:—*Held*, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed," as provided by the contract signed by the parties, which was the binding document:—*Held*, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." (See also, 20 C. L. T. 303.) *Holmes* v. *Goderich*, 22 C. L. T. 222, 32 S. C. R. 211.

Potatoes — *Action for damages for non-delivery of potatoes.*]—*Held*, that the letters formed a binding contract and that there has been a breach thereof, and that the measure of damages should be the price prevailing in Alberta, where the plaintiffs came to buy. Reference as to damages. *R.* v. *Anderson* (1909), 12 W. L. R. 167.

Refusal of vendor to deliver—*Justification—Prior debt due to vendor — Damages.*]—The vendor of goods to whom a solvent purchaser neglects or refuses to pay a debt due prior to the sale, is not the less bound to deliver the goods, and is responsible for the damages which result from default to do so. *Takefman* v. *Hofeller*, 18 Que. K. B. 112.

Refusal of vendor to deliver until payment — Breach of contract — Damages —Reference. *Phelps* v. *McLachlin*, 1 O. W. R. 806.

Refusal to complete delivery — Breach—Damages — Measure of. *Johnston* v. *Hurb* (Man.), 1 W. L. R. 565.

Sale of Goods Ordinance, ss. 27, 31 and 47 — *Delivery, when complete.*]—In absence of evidence shewing a different intention, goods sold "F. O. B." any particular place must arrive at that place before delivery is complete. *Stephens Bros.* v. *Burch* (1909), 2 Alt. L. R. 68.

Time of delivery—Novation—Discharge of old contract—Statute of Frauds—Breach of contract — Damages — Return of goods given in exchange. *Clement* v. *Faircloth Co.* (Man.), 1 W. L. R. 524.

Vendee's rights — *Delivery — Change of possession — Animals — Actual and continued change—Costs—Set-off.*]—At the time of the sale of certain cattle they were in a pasture belonging to the vendor, but on the same day the vendor's right to the field passed to a third person, with whom the vendee made an arrangement under which the cattle continued in the field where they were looked after by the vendee and his servants:—*Held*, that there had been a sufficient actual and continued change of possession to support the sale.—Remarks as to the application of item 95 of the tariff providing for set-off of costs in certain cases. *McNichol* v. *Brucks*, 6 Terr. L. R. 184, 1 W. L. R. 478.

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8. Description of Goods.

Conveyance of goods — *Invalidity for want of specification — Invoice value.*]—A firm, having in its premises goods consisting of books and stationery of the invoice value of $17,000, executed a conveyance to the plaintiff of goods to the invoice value of $6,500. Such conveyance was, however, in general terms and did not specify any particular portion of the stock, nor was it followed by any selection or appropriation from the stock, or any delivery of any part of it:—*Held*, that no property passed by such conveyance, as it was impossible to state what particular goods became the property of the plaintiff. *Ross* v. *Cameron*, 40 N. S. R. 126.

Fruit Marks Act — *Acceptance — Conduct amounting to.*] — In a memorandum of sale of apples, the expression "number one stock" means good, sound, clean, merchantable apples, which need not meet the requirements of the Fruit Marks Act, 1901, for fruit of the first quality.—A statement in the memorandum of the prices to be paid for certain kinds of apples, *e.g.*, "Fameuses, $2.50, St. Lawrence, $2.10," etc., does not mean that apples of kinds not mentioned are excluded from the bargain.—The acceptance by the buyer of apples is sufficient evidence that they are according to contract, and when he writes to say he will not accept them, but deals with them as owner by having them sold at auction, such conduct amounts to an acceptance. *Minaker* v. *Cramer*, 28 Que. S. C. 443.

Hay — *Pressed.*]—Plaintiff entered into a contract with defendant for sale to him of a quantity of pressed hay, stored in plaintiff's two barns at M. Plaintiff hauled the hay away from one of the barns, but when he commenced to haul the hay from the other barn and to deliver it to others he found that it was in bad condition. The jury found that it was part of the bargain between plaintiff and defendant, that the hay sold was to be of first-class quality:—*Held*, that the expression used in the contract constituted a term of description as to the kind of hay, going to the root of the matter, rather than a subsidiary or collateral statement not of the essence of the contract, and that the hay being sold subject to the condition, and the condition not being fulfilled, the property did not pass. Also, that taking delivery of the hay which was according to contract in the one barn, was not an acceptance of the hay in the other. *Mitchell* v. *Seaman*, 43 N. S. R. 311.

Memorandum of sale — *Ambiguity — Parol evidence to explain — Admissibility.*] — The description in a broker's note of oats sold, in these words, "Cars of 10,000 bushels No. 2 white oats at 32¾ cents per bushel f.o.b. basis 11½ cents freight to Montreal for export, cent less if No. 3," shews no ambiguity of language as to quality of the merchandise. Therefore, the testimony of witnesses to explain it is useless and inadmissible. — The formal repudiation of a contract of sale by the buyer dispenses the seller from tendering delivery of the merchandise, before having it resold for the account of him to whom it belongs, according to the usage of commerce. Judgment in 31 Que. S. C. 1 reversed. *Melady* v. *Michaud*, 17 Que. K. B. 25.

Memorandum of sale — *Description of goods — Latent ambiguity — Parol evidence to explain.*] — A description of goods in a bought and sold note as follows, "Cars of 10,000 bushels No. 2 white oats at 32¾ cts. per bushel f.o.b. basis 11½ cts. freight to Montreal for export, cent less if No. 3," contains a latent ambiguity as to the quality of the goods meant. Parol testimony is therefore admissible to explain it. *Melady* v. *Michaud*, 31 Que. S. C. 1.

Misdescription — Deceit — Agent of vendor — Fraud — Contract — Proviso as to representations — Knowledge of defects —Estoppel — Ratification — Recovery on notes given for price — Execution—Sheriff —Costs. *Peacock* v. *Bell*, 10 O. W. R. 926.

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9. False Representations.

Fraud — *Redemption — Delivery — Seizure in revendication — C. C. 1472.*]—In absence of fraud, the buyer becomes the proprietor, without delivery or removal, of movable effects which he has purchased when the seller has reserved the right of redemption. *Power* v. *Desjardins & Latur* (Que. 1910), 16 R. L. n. s. 340.

Manufactured article — *Damages — Deception.*]—The defendants, stove manufacturers, having in their possession a second-hand stove of the plaintiff's manufacture, repaired and refitted it. One of the defendants' employees, obeying the instructions of one of the firm, put on the stove a plate bearing their own name, and it was sold with this plate on it, but the purchaser was in-

formed that the stove had been manufactured by the plaintiff. The stove was soon afterwards returned by the purchaser to the defendants, and another taken in its place:—*Held*, (affirming the judgment in 16 Que. S. C. 189), that there having been no misrepresentation or intention to deceive, and no damages proved, and the purchaser having been informed that the stove was of the plaintiff's manufacture, the plaintiff had no right to recover damages. *Chapleau* v. *Laporte*, 18 Que. S. C. 14.

Manufactured article — *Injunction — Trade-mark.*]—An action for damages lies against a person who passes off goods manufactured by him as the manufacture of another, and a writ of injunction may be granted to restrain the sale of such goods under false representations, although the plaintiff has not registered any trade-mark for the goods manufactured by him. *Vive Camera Co.* v. *Hogg*, 18 Que. S. C. 1.

Misrepresentations — *Contract.*] — *Held*, upon the evidence, that the misrepresentations alleged by the plaintiff, as the basis of an action to set aside an agreement for the sale of plant, were not proved; and the action was dismissed. *Wilkerson* v. *Composite Brick Co.* (1910), 14 W. L. R. 270.

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10. Prescription.

Action en garantie — *Recovery of price —Damages.*]—The plaintiff in an action in which a right of property in personal estate is claimed, to which a *prescription trentenaire* is pleaded, and who then brings in his vendors *en garantie*, cannot add to his demand *en garantie* a claim for damages and for recovery back of his purchase money, and this part of the action *en garantie* will be dismissed upon *exception à la forme*. *Anderson* v. *Smith*, 3 Que. P. R. 56.

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11. Principal and Agent.

Agency—*Contract with seamen on defendant's ship — Guarantee — Bailment.*]—Appeal from the judgment of Wallace, Co. C.J., in favour of defendant in an action for goods sold and delivered. *Levine* v. *Sebastian* (N.S. 1911), 9 E. L. R. 311.

Agency—Repudiation—Fraud and misrepresentation—Statements by vendors — Purchasers not relying on—Failure of consideration—Goods not merchantable — Extra-provincial company—Absence of license—Agents in Ontario—63 V. c. 24, s. 6—Damages—Loss of profits. *Humphries Patent Bracket Co.* v. *Ottawa Fireproof Supply Co.*, 12 O. W. R. 501.

Authority to compromise claim — Debtor and creditor — *Lex loci contractus* —Ratification of agent's unauthorised act—Delivery of goods to carrier — Effect of, on contract. *Morris* v. *McDonald*, 4 E. L. R. 157.

Husband and wife — Separate business — Certificate — Conditional transfer—Debtor and creditor. *Myers* v. *Webber*, 4 E. L. R. 140.

Limited authority of agent — Custom of trade — Ratification. *Mathys* v. *Ehrenbach*, 4 E. L. R. 214.

Order given to commercial traveller —Delivery by steamer contemplated — Impossibility of shipment — Order not accepted by principal. *Wilson & Co. Limited* v. *Farquharson*, 3 E. L. R. 146.

Principal and agent — Partnership—Defence of payment to the agent. *Chapman* v. *Prest* (N.S. 1911), 9 E. L. R. 201.

Right to sell article in particular territory—Action for price of assignment of right—Counterclaim for breach by selling in same territory. *Delahay* v. *Congdon*, 3 O. W. R. 934.

Undisclosed principal — *Judgment against husband and wife — Married Woman's Act.*]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser, but, on becoming aware of it, and the goods not having been paid for, sued both husband and wife, but, on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in a County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—*Held*, on appeal, that the proper inference was that the husband's note was not taken in satisfaction of the debt, and that there was no election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action; but that they could not have judgment against both husband and wife; and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under the Married Woman's Property Act, R. S. O. c. 168. *Wagner* v. *Jefferson*, 37 U. C. R. 551, distinguished. *Davidson* v. *McClelland*, 21 C. L. T. 118, 32 O. R. 282.

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12. Property Passing.

Article of food — *Perishable nature — Merchantable condition — Depreciation through exceptional or accidental cause — Burden of proof.*]—The defendant, by telegraph, ordered 15 barrels of oysters from the plaintiff at Buctouche, N.B., to be shipped to him at Halifax, N.S., "first soft weather." The oysters were shipped as directed, going forward in two lots, and were delivered to the defendant at Halifax about four days after shipment. The Judge of the County Court found, and the evidence supported his finding that the oysters were in merchantable condition at the time they were shipped, but immediately after their receipt by the defendant they were found to be bad and unfit for use. The evidence shewed that they could have only reached the condition in which they were when received through some exceptional or accidental cause, such as being frozen and allowed to thaw:—*Held*,

that the oysters having been shipped in good condition, and injured through an exceptional or accidental cause, were at the defendant's risk.—*Per* Russell, J., dissenting, that the burden was upon the plaintiff of shewing that the deterioration was due to an accidental or exceptional cause, and that, in the absence of such evidence, the Court must conclude that the goods were not in such condition when shipped as to be merchantable for a reasonable time after their arrival at the place to which they were shipped. *Barnes* v. *Waugh*, 2 E. L. R. 221, 41 N. S. R. 38.

Ascertainment of quality — *Culling — Destruction before delivery — Property not passing.*]—The plaintiff sold to the defendant all the apples of first and second quality on the trees in the plaintiff's orchard at a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples when in barrels to the railway station. There was no agreement as to the time and mode of culling and packing or the time for payment. The plaintiff picked the apples and placed them in piles and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them:—*Held*, that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had therefore not passed; and that the loss must fall on the plaintiff. *Lee* v. *Culp*, 24 C. L. T. 316, 8 O. L. R. 210, 4 O. W. R. 41.

Bill of lading in name of vendor — *Transmission to purchaser unendorsed — Pledge by purchaser — Right to rescind — Right of vendor to recover from third party —Banks.*]—When the vendor of goods, to secure payment, has consigned them to himself at the ports of shipment, and taken from the carriers bills of lading in his own name, and afterwards sent these to the purchaser, without endorsing them and without completing the delivery of the goods, he alone has power to dispose of these bills of lading, and the purchaser cannot lawfully assign them to a bank to secure advances, nor pledge or otherwise give title to them. The vendor not having made delivery of the goods, since the bills of lading were made out to his order and were not endorsed, Arts. 1543, 1098, and 1999, C. C., do not apply; but, by virtue of the provisions of Art. 1065, the vendor, who had preserved his possession of and property in the goods, could avoid the sale, the purchaser having been guilty of failure to carry out his obligation to pay for them; and the bank which had made advances to the purchaser as aforesaid, was bound to account to the vendor for the bills of lading which had been received from the purchaser and the goods which they represented, and in default, for the value of such goods. Judgment in 25 Que. S. C. 430 varied. *Ontario Bank* v. *Gosselin*, 14 Que. K. B. 1.

Breach of warranty — Counterclaim—Pleading. *Marks* v. *Waterous Engine Works Co.*, 1 O. W. R. 148.

Condition — *Waiver — Detinue — Demand and refusal.*]—The plaintiff sold to the defendant his one-half interest in a heifer named Irene, registered as a thoroughbred, the defendant already being owner of the other half. The defendant subsequently charged the plaintiff with having wrongfully secured the registration of the heifer as a thoroughbred when, as he alleged, she was not. The charge was laid before the Executive Committee of the Dominion Short Horn Breeders' Association at Toronto. The parties then entered into a written agreement, which provided: (1) that the heifer should be resold to the plaintiff at a certain price; (2) that on payment of the price the heifer was to become the property of the plaintiff; (3) that the defendant should withdraw the charge above referred to, and upon all proceedings in respect to it being dropped by the association the "foregoing part" of the agreement was to be carried out. The defendant did not withdraw the charge, nor were the proceedings dropped. The plaintiff twice tendered the purchase price of the heifer to the defendant, which was refused. He then, without making a formal demand for the heifer, sued the defendant in detinue:—*Held*, that, as the condition contained in the third clause of the agreement was inserted for the plaintiff's benefit, he could waive it; that he had waived it, by proffering payment; that on refusal to accept the price the defendant became *ipso facto* the wrongful detainer of the heifer; that a demand and refusal was therefore not essential to the plaintiff's right of action; and that the plaintiff was, therefore, entitled to succeed. *Wright* v. *Shattuck*, 4 Terr. L. R. 455, 5 Terr. L. R. 264.

Destruction on vendor's premises — Liability — Damages. *Taylor* v. *McClive*, 4 O. W. R. 252.

Entire contract — Property not passing —Action for price—Deduction for defects—Damages. *Crompton and Knowles Loom Works* v. *Hoffman*, 1 O. W. R. 717.

Future delivery — *Destruction before measurement.*] — Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained. The property in the cordwood in question in this case was held to have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision. Judgment of a Divisional Court, 1 O. L. R. 107, 21 C. L. T. 141, affirmed. *Wilson* v. *Shaver*, 22 C. L. T. 11, 3 O. L. R. 110.

Goods to be manufactured — Breach —Construction — "If it is satisfactory" — Damages — Property passing — Destruction by fire — Appropriation of goods to contract. *Delaplante* v. *Tennant*, 4 O. W. R. 76.

Loss of goods — Default of vendee — Specific goods — Unconditional contract — Postponement of delivery and payment. *Craig* v. *Beardmore*, 2 O. W. R. 985.

Place of inspection — *Acceptance of part — Rejection of residue.*]—Contract for sale of butter then manufactured and also for all butter to be manufactured during the season; quality to be "fine;" delivery to be f.o.b. cars, Birtle. Purchaser carried on business in Winnipeg. No inspection took place at time of contract. Vendor shipped car load at purchaser's request to Winnipeg. Purchaser refused to accept because of defect in quality. Vendor re-sold and sued for difference between contract price and amount realised:—*Held*, that the agreement as to quality was a condition of the contract; that the property in the butter had not passed; that the place for inspection was Winnipeg; that the purchaser's duty to accept depended upon the quality of the butter; that the fact that the purchaser had accepted other car loads of "fine" butter did not bind him to accept one that was not. (*Dyment* v. *Thompson*, 9 O. R. 566, 12 A. R. 658, 13 S. C. R. 303, commented on;) that the onus was on the vendor to prove the quality of the butter; that such evidence could not be given in rebuttal. *Lewis* v. *Barré*, 22 C. L. T. 336, 14 Man. L. R. 32.

Specific goods — *Deliverable state — Property passing — Destruction before payment or delivery.*]—Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed. The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiff's trouble and expenses of carrying bark to the siding and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it: — *Held*, that the property had nevertheless passed to the defendants, and they were liable for the price. Judgment of Meredith, J., 2 O. W. R. 985, affirmed. *Craig* v. *Beardmore*, 24 C. L. T. 308, 7 O. L. R. 674, 3 O. W. R. 547.

Unascertained goods — Contract — Appropriation — Passing of property — Acceptance and part payment. *Southampton Lumber Co.* v. *Austin*, 1 O. W. R. 548.

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13. Rescission of Contract.

Action — *Time — Defect in goods — Vice redhibitoire.*]—An action to set aside a contract for the sale of goods, begun 16 days after the sale, where the parties lived 20 miles from each other, and the purchaser has, two days after the sale, asked to have it rescinded, and has not ceased since to negotiate with the vendor to obtain rescission by consent, is begun within a reasonable time. 2. A certain lameness or halting which was shewn when the horse, the subject of the sale, was at rest for a time, and which did not appear when the trial was made by the purchaser at the time of the sale, is a defect which affords ground for setting aside the sale: Art. 1522, C. C. *Balcer* v. *Provancher*, 24 Que. S. C. 137.

Action to set aside sale — *Default in payment — Pleading — Possession.*] — An allegation by the plaintiff that the defendant is still in possession of chattels bought by him from the plaintiff, is sufficient to sustain a demand for the setting aside of the sale in default of payment of the price. *Pelletier* v. *Maranda*, 7 Que. P. R. 349.

Breach — Damages. *Fisher* v. *Carter*, 4 O. W. R. 319.

Contract — *Refusal to perform — Remedies.*]—A refusal by the promisor to perform the contract unless the promisee will do something which he is not bound to do, may be treated as an absolute refusal to perform it, and the promisee may at once rescind the contract and sue for damages. *Freeth* v. *Burr*, L. R. 9 C. P. 208, *Withers* v. *Reynolds*, 2 B. & Ad. 882, and *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434, followed. When the promisee has thus rescinded a contract of sale of ascertained goods, and afterwards put it out of his power to perform it by otherwise disposing of some of the goods, subsequent negotiations on his part to induce the promisor to take other similar goods on the same terms or offers to settle the dispute for the sake of avoiding litigation, will not necessarily be considered as doing away with the effect of the previous rescission. *McCowan* v. *McKay*, 22 C. L. T. 100, 13 Man. L. R. 590.

Default of payment — *Stipulation for right — Time for exercise — Extension — Insolvency — Demand for assignment.*]—A demand for an assignment and the filing of a claim, being only a demand for payment, do not deprive the creditor of his right to rescind a sale of goods for default of payment of the price. 2. In the case of a sale of movables, this right of rescission may, in case of insolvency, be exercised after 30 days, when delay has been allowed for payment of the price, and the right of rescission has been formally stipulated for. *In re Giroward*, 24 Que. S. C. 396.

Defect — *Diligence.*]—Where communication between buyer and seller may be had easily and promptly, and, in the case of the sale of a horse, the defect complained of is one which would have been quickly discovered if a proper trial of the animal had been made promptly, but the buyer did not make any complaint until sixteen days after the sale, and even then did not tender the animal back, but allowed eight days more to elapse before bringing suit, the action for resiliation of the sale was not instituted with reasonable diligence. *Brown* v. *Wiseman*, 20 Que. S. C. 304.

Defective quality — *Rescission of contract — Misrepresentation—Action for price of hay in two barns.*]—*Held*, that the expression in the contract in this case constituted a term of description as to the kind of hay. It went to the root of the matter. It was to be nice coarse hay, whereas it turned out to be musty and otherwise defective. The purchaser had in mind hay of a particular character as well as hay in the particular barn. Appeal dismissed. *Mitchell* v. *Seaman*, 6 E. L. R. 489.

Evidence — Conduct. *Vipond* v. *Griffin*, 2 O. W. R. 532.

Failure to carry out contract —Resale by vendor — Conversion — Possession — Purchase money — Tender — Damages — Costs. *Brown* v. *Dulmage*, 10 O. W. R. 451.

Inadequacy of price — *Duress.*]—A sale of chattels made by a prisoner charged with a criminal offence, in order to raise funds for his defence and to secure his liberty, cannot be set aside on the ground of the inadequacy of the price paid. *Lapierre* v. *St. Amour*, 15 Que. K. B. 466.

Insolvency of vendee — Stoppage in transitu — Termination of transitus—Carriers — Warehousemen — Railway. *Re Purity Manufacturing Co.*, 6 O. W. R. 418.

Latent defect — *Action for rescission —Diligence — Notice to vendor — Defence to action for price.*]—The purchaser of a chattel which has a hidden defect must bring an action to set aside the sale with proper diligence, and it is not sufficient for him to call upon the vendor to take back the article. Therefore, one who buys a horse, and, finding out that it has a hidden defect, immediately calls upon the vendor to take it back, will not be allowed, 26 days after the sale, to set up these facts in an action to recover the price begun in the interval. *Guilmette* v. *Langevin*, 31 Que. S. C. 331.

Return of goods — Action for repayment of price — Warranty — Breach — Pleading — Amendment — New trial. *Boake* v. *Coupland*, 9 O. W. R. 560.

Sale by sample — *Reasonable diligence —Acceptance — Pledging — Tender.*] — Where the buyer of goods (in this case, eggs) by sample, after he had knowledge of the alleged inferior quality of the goods, instead of tendering them back immediately, completed a sale of part of them at a reduced price, a week later sold another lot, and afterwards obtained permission from the holder of the warehouse receipt to take a further lot out of warehouse:—*Held*, that he had not shewn "reasonable diligence" within the meaning of Art. 1530 of the Civil Code, and was not entitled to resiliate the contract. 2. There may be a receipt of goods without an acceptance, but the buyer, in order to be entitled to bring a redhibitory action, must not, by his acts, have adopted the contract. Pledging the goods is an adoption. 3. A tender back of the goods to the vendor is ineffective where, at the time it is made, the goods are really out of the control of the buyer, and in the possession of a party who has made advances thereon. *Loynachan* v. *Armour*, 25 Que. S. C. 158.

Sale note — Delivery — Refusal to accept—Revocation of contract — Date—Evidence. *Taylor* v. *McLaughlin* (N. S. 1910), 9 E. L. R. 40.

Sample sale — Knowledge by vendor of destination — Sale of Goods Act—Variation of contract — Buyer's risk — Goods not up to sample. *Mills* v. *Manitoba Commission Co.* (Man.), 2 W. L. R. 30.

Specific article — Vendor supplying another article—Purchaser accepting after inspection — Vendor's fraud—Return of money paid. *Wallace* v. *Garrett*, 3 O. W. R. 640.

Surrender of goods — *Action — Diligence.*]—A purchaser who seeks the resiliation of a sale under Art. 1526, C. C., must be in a position to surrender the goods sold, and must bring suit with reasonable diligence. An action, therefore, brought a full month after the plaintiff has become aware of the grounds of resiliation, comes too late, and will further be dismissed if during its pendency a part of the goods sold has been disposed of. *Raymond* v. *Poitras*, 29 Que. S. C. 393.

Terms — Re-sale by vendor—Repudiation —Evidence — Amendment. *Brown* v. *Dulmage*, 4 O. W. R. 91.

Vendor re-taking possession—Action for balance of price — Credit given for value of goods. *Hopkins* v. *Danroth* (Sask.), 7 W. L. R. 303.

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14. Specific Articles.

Breach by vendor—*Vendee procuring article elsewhere—Action for difference in price — Mandatary—Damages—Defence.*] — The seller of an article who writes to the buyer notifying him of the impossibility of delivering the article, begging him to buy elsewhere, and promising him reimbursement for the difference in price, does not constitute him in any way his mandatary. On his part there is only the acknowledgment of the obligation to pay the damages caused by the non-performance of the contract. Therefore, where the vendee, having purchased the required article elsewhere, with care and at a reasonable price, claims from the vendor the excess of such price as damages, the vendor cannot set up that the article bought by the vendee is not exactly of the quality, dimensions, etc., of that which was the subject of the contract. *Chalifoux* v. *Beauregard*, 34 Que. S. C. 376.

Cargo of Ship — *Ascertainment of quality and quantity — Transfer of ownership.*] — The sale of the cargo in a schooner for a price paid, subject to the ascertainment of the quality and quantity of the goods, after delivery, and consequent filling of the price or refund of excess in it, as the case may be, is a perfect contract of sale of a specific thing, and passes the ownership of the same to the buyer. *Bertrand* v. *Blouin*, 32 Que. S. C. 396.

Defect — *Acceptance — Evidence—Implied warranty as to quality — Damages — New trial.*]—A cash register ordered by the defendant from the plaintiff was found on delivery not to contain a device which the defendant had regarded as essential in ordering it, and to be defective and unreliable in its operation. The defendant wrote a letter to the plaintiff's agent, the day after the machine was received, informing him that the article delivered was not the one ordered and was not in a workable condition, and in a letter written some days later he requested the agent to remove the register from his shop, and notified him that he would not accept another machine in performance of the contract. The machine was not removed as requested by the defendant, but remained on the counter of his shop from the time of delivery in December, 1904, until March, 1906, during which time it was in use as a cash box or money drawer, but not as a cash register; — *Held*, that the defendant could not use the machine as shewn by the evidence, and at the same time claim the right to reject it as not fulfilling the contract, but that, as the plaintiff's contract was broken, he could only recover the actual value of the article sold, and that, as there were no data for assessing the value of the machine, there must be a new trial for that purpose. *Thompson* v. *Cameron*, 2 E. L. R. 192, 41 N. S. R. 29.

Defect — Acceptance — Evidence—Warranty — Damages. *Thompson* v. *Cameron*, 2 E. L. R. 192.

Duty of vendor to furnish complete —*Addition of accessories at expense of vendors.*]—The sale of a steam engine to be delivered from a distance, complete and in workable condition, comprises the necessary accessories. When after the delivery, it appears that it is incomplete, the seller does not fulfil his obligation by despatching the accessories to the buyer; he is bound, in addition, to fit them to the machine, and he cannot require the buyer to do the preparatory work for that purpose. *Parent* v. *Wilcock*, 35 Que. S. C. 99.

Engine—Price of work done in connection with machine — Whether included in contract price—Evidence—Estoppel — Costs. *Hutchison Bros. & Co.* v. *Perkins* (B.C.), 8 W. L. R. 16.

Machine—Extras—Conflicting evidence. *Pendrith Machinery Co.* v. *Taylor*, 6 O. W. R. 1010.

Machinery — Absence of express warranty — Implied warranty — Evidence — Capacity of machine. *Mussen* v. *Woodruff Co.*, 8 O. W. R. 487.

Machinery — Promissory notes given for price — Action on — Contract — Construction — Acceptance of goods — Failure to return pursuant to provisions of contract —Counterclaim — Breach of implied warranty — Sales of Goods Ordinance—Express warranty in contract — Machinery bought for particular purpose known to vendors — Reliance of purchaser on vendors' skill and judgment — Sale of specified article under its trade name — Damages — Costs. *Sawyer and Massey Co.* v. *Thibart* (N.W.T.), 5 W. L. R. 241.

Machinery — Written agreement—Warranty — Breach — Failure to do good work —Abandonment — Return of machinery—Waiver of right — Notice — Construction of contract — Return of notes given for price — Delivery up of securities—Damages. *Wright* v. *Ross*, 9 O. W. R. 618.

Manufactured article — Action for price — Defence — Defects in article supplied — Implied warranty of fitness for particular purpose. *Frost and Wood Co.* v. *Ebert* (N.W.T.), 3 W. L. R. 69.

Property passing — *Revendication — Tender — Payment into Court.*]—A sale of all the hay in certain mows or stacks, at a fixed price per ton, is a sale of a specific thing and passes the property of the hay to the purchaser.—The buyer at such a sale, however, who revendicates the hay, is bound, as a condition precedent, to tender the price and, on refusal, to bring it into Court. *Brown* v. *Lauzon*, 30 Que. S. C. 178.

Railway ties — "*Government standard ties*" — *Construction of contract.*]—Action for price of railway ties:—*Held*, that ties should have been "government standard ties." Judgment for plaintiff. Counterclaim for damages allowed. *Halliscy* v. *Musgrave*, 7 E. L. R. 527.

Raw hides — *Tacit custom of trade.*]—When difficulties arise between vendor and purchaser as to the quality and number of commercial objects sold, and that the testimony of the parties is contradictory, an offer on the purchaser's part to have the goods examined in the presence of both parties and the vendor's refusal to agree to such proposal, is a fact which gives rise to a presumption of good faith in favour of the purchaser, who, everything being equal, may have his version accepted in preference to the vendor's. Between merchants, a trade sale, in the absence of an agreement to the contrary, is considered to be tacitly subject to the custom of trade.—By a general custom of trade, in sales affecting raw hide skins, tanners or purchasers, not present at the place of delivery, are permitted to examine the hides at their tanneries for the purpose of ascertaining their quality and number. *Duclos* v. *Paradis*, 16 R. de J. (Confirmed in appeals. February, 1910).

Sale by description — Reliance on vendor's representations — Proof of falsity — Implied warranty — Action for price—Evidence — Contradicting witness. *Bannerman* v. *Barlow* (N.W.T.), 6 W. L. R. 557.

Sale of monument — *Sample — Evidence.*] — In an action for the price of a tombstone, the defence was that it was not of the design ordered. It had been ordered from photographic samples, and an order form was filled in, which, when produced at the trial, contained the words "E. M. Lewis Reporter Design," which the defendant asserted were not in it when it was signed by him, but which were there two or three hours later when handed to one of the ven-

dors by their foreman who had taken the order and filled in the form. The evidence at the trial was conflicting, and the Chancellor, trying the case without a jury, dismissed the action. His judgment was reversed by the Court of Appeal (1 O. W. R. 602):—*Held, per* Taschereau, C.J., that the evidence established that the words in dispute were in the order when it was signed, and the plaintiffs were entitled to recover:—*Held, per* Sedgewick and Davies, JJ., Mills, J., *hesitante*, that, even if these words were not originally in the order, the circumstances disclosed in evidence shewed that the design supplied was substantially that ordered; and the judgment appealed from should stand. *Lewis* v. *Dempster*, 23 C. L. T. 179, 33 S. C. R. 292.

Sale of several articles together, some only being supplied — *New contract subject to terms of old one — Sale of Goods Act, R. S. M. 1902 c. 152, s. 16 — Implied warranty — Interest.*]—Action for the price on an engine, thresher, and other articles of machinery supplied by the plaintiffs to the defendants in pursuance of a written contract.—This contract called for the furnishing at the same time of a number of parts and attachments necessary to the effective use of the machinery in addition to those actually supplied. The statement of claim was founded upon the original contract, but the evidence shewed that the defendants had made a new bargain with the plaintiffs, under which they accepted the machinery actually delivered, on the plaintiffs promising to pay the freight and allow for the articles not delivered. — The trial Judge found that the machinery accepted was reasonably fit for the purposes for which it was sold, although this had been disputed by the defendants:—*Held*, that the plaintiffs should be allowed to amend the statement of claim by setting up the new contract and compliance therewith, and should then have judgment for the contract price, less the freight and the cost of the articles not delivered.—The defendants contended that the written agreement was superseded by the new arrangement, and that the plaintiffs could only rely upon an implied agreement to pay what the goods received were worth, subject to the implied condition, under s.-s. (a) of s. 16 of the Sale of Goods Act, R. S. M. 1902 c. 152, that they were reasonably fit for the purposes for which they were sold.—The original agreement, however, contained a proviso that "in the event of changes being made in machinery or terms mentioned in this contract . . . or any changes whatever, such changes are in no way to supersede or invalidate this contract, but it is to remain valid, binding, and in full force in all its clauses except in so far as relates to the specific changes:"—*Held*, that full effect must be given to this proviso, and that all the provisions of the original contract, except those modified by the new bargain, remained in full force.—The original agreement made provision for the giving of promissory notes by the defendants for instalments extending over several years, and that two of such notes were to bear interest at 7 per cent. per annum until due, also that if such notes were not given the whole purchase price should be due and payable forthwith, but there was no provision for interest in that event.—*Held*, that, as the notes had not been given, the plaintiffs were only entitled to interest at the statutory rate of 5 per cent. per annum. *Ross* v. *Moon*, 5 W. L. R. 552, 17 Man. L. R. 21.

Threshing outfit — Incapacity of engine and boiler forming part of outfit — Contract — Warranty — Implied warranty —Reduction in purchase money—Reference —Payment into Court — Promissory notes—Damages. *Bell* v. *Goodison Thresher Co.*, 10 O. W. R. 445.

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15. STATUTE OF FRAUDS.

Actual delivery — Samples—Conduct—Carriers — Interpleader. *Re Cleghorn and Asselin*, 2 O. W. R. 28.

Actual receipt.]—Action for the price of forty head of horses "sold and delivered to the defendant at $23 a head." There was no agreement in writing nor part payment to bind the bargain. By s. 6 (3) of the Sales of Goods Ordinance, in order to establish a binding contract, the plaintiff had to prove an acceptance and an actual receipt by the defendant of at least a part of the goods. The plaintiff said he was to keep the horses until paid for, but he had no direct agreement not to give them till paid for. The horses which the defendant orally agreed to buy were kept on the plaintiff's ranche separate from the rest of the plaintiff's herd:—*Held*, that, even if there was an acceptance, there was no actual receipt by the defendant; and the action failed. *Livingstone* v. *Colpitts*, 21 C. L. T. 102.

Correspondence — Completed contract —Terms—Payment and inspection — Oral assent—Breach of contract—Non-delivery of goods—Damages. *Upton* v. *Eligh*, 3 O. W. R. 219.

Delivery — *Acceptance — Shipment — Inspection.*]—The defendants agreed to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at $1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading, describing him as the consignor, and in it, under the heading "consignees," was written "order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft:—*Held*, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.—*Held*, also, that neither the shipment in the vessel provided by the defendants, nor the taking by defendants of samples of the cargo for inspection, constituted an acceptance within the statute. *Scott* v. *Melady*, 20 C. L. T. 205, 27, A. R. 193.

Incomplete contract — *Statute of Frauds, s. 17—Deferred payments—No time fixed—Possession.*]—A contract in writing for the sale of goods is not complete, under s. 17 of the Statute of Frauds, where, although the price is stated in it, the contract shews upon its face that the time for payment is left to be settled by further negotiations, as to which there has been no agreement; and the fact that possession of the goods is taken under the terms of the agreement does not affect the rights of the parties. *House* v. *Brown*, 10 O. W. R. 396, 14 O. L. R. 509.

Letters — Oral evidence to identify subject matter of contract. *Frank* v. *Gates*, 3 O. W. R. 76.

Memorandum — Signature — Conflicting evidence. *Nasmith Co.* v. *Alexander Brown Milling and Elevator Co.*, 4 O. W. R. 451.

Memorandum in writing — *Omission of term — Oral evidence connecting documents.*]—The plaintiff's agent took an oral order for goods from the defendant, one of the terms of payment being that he should, in a certain event, have six months' credit. The plaintiff's agent signed a memorandum containing all but this term of the contract. The defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit. The Sale of Goods Ordinance, No. 10, 1896, s. 4 (now C. O. 1898 c. 39, c. 6), (substantially a re-enactment of s. 17 of the Statute of Frauds), was pleaded:—*Held*, that it was open to the defendant to prove, as he had, that the term as to six months' credit was part of the contract, and, as it did not appear in any of the documents submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover. 2. That as the statement of claim alleged the term as to six months' credit to be part of the contract sued on, it was unnecessary for the defendant to have proved it, and he might have taken the objection immediately upon the written evidence of the contract being put in. 3. That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods. *Semble*, that parol evidence is admissible to connect several writings so as to constitute them together a note or memorandum under the Ordinance. *Oliver* v. *Hunting*, 44 Ch. D. 205, referred to. That a memorandum of sale required to be in writing may be complete and binding, though silent as to price and to time and mode of payment, if no agreement in fact was made on these points, the omission being equivalent to a stipulation for a reasonable price and immediate payment in the usual mode. *Valpy* v. *Gibson*, 4 C. B. 837, referred to. *Calder* v. *Hallett*, 5 Terr. L. R. 1.

Motor boat — *Statute of Frauds — Acceptance and receipt — Change of possession.*]—Appeal from 7 E. L. R. 505, dismissed. *Wingfield* v. *Stewart*, 7 E. L. R. 511.

Payment on account — *Garnishment—Waiver.*]—The primary creditor sued the primary debtor to recover damages for refusal to accept and pay for a horse bought by the primary debtor from the primary creditor for $50. At the time of the sale the primary debtor had deposited $5 in the hands of the garnishee, which was to have been paid over to the primary creditor when the horse was delivered. There was no delivery, no acceptance, no memorandum in writing, and nothing given by way of earnest:—*Held*, that there had been no compliance with s. 17 of the Statute of Frauds; the payment to the garnishee was not sufficient to satisfy the statute, the primary creditor, by his action in garnishing this amount, having elected to treat it not as a payment under the contract (in which case it would be the primary creditor's money and not garnishable), but as the primary debtor's money. *Weese* v. *Peak*, 21 C. L. T. 43.

Writing — *Possession — Conversion — Title—Pleading.*] — N. purchased from A certain goods under hiring agreements, by the terms of which the property in the goods purchased was to remain in A. until payment in full of the price agreed upon. N. died intestate without having made payment as agreed, and the goods were verbally sold by his administrator to the plaintiff. There was no note or memorandum in writing made at the time, and no change of possession. At the time of the sale the goods were in the custody of C., with whom they had been left by N. The defendant, as agent of A., made a demand upon C. for the possession of the goods under the hiring agreements, and they were delivered to him:—*Held*, that the plaintiff could not maintain an action for conversion, there having been no note or memorandum in writing or change of possession, or other compliance with the Statute of Frauds.—2. That, on the issue whether the goods were the goods of plaintiff or of A., whose agent defendant was, the defendant could avail himself of the defence that no title passed to the plaintiff, on account of non-compliance with the provisions of the Statute of Frauds, without pleading the statute.—*Held*, also, that if it became necessary for the plaintiff to alter in any way his statement of claim, or new assign, he could only do so by amending his statement of claim and not by way of replication.—*Held*, also, that the cause having been tried with relation to the effect of the Statute of Frauds, as if the pleadings were sufficient, the Court, on appeal, could make any amendment that was necessary.—*Held*, also, that even if the omission on the part of the defendant to plead the statute were material, the plaintiff should not be allowed to take advantage of it, the whole difficulty, if any, having arisen from irregular and improper pleading commenced by him. *Kent* v. *Ellis*, 32 N. S. R. 549.

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16. Terms and Conditions of Sale.

Agreement as to prices on re-sale— *Illegal combination or conspiracy unduly to enhance prices and lessen competition—Refusal to enforce contract.*]—The plaintiffs, manufacturing chemists and sole owners of certain proprietary medicines, brought this

action for damages and for an injunction to restrain the breach of two contracts entered into between themselves and the defendants, in one of which the defendants covenanted not to sell wholesale any of the plaintiffs' preparations below the price therein mentioned, and in the other not to sell the same to any retailer except at the prices therein mentioned, and then only when such retailer had signed an agreement with the plaintiffs. The agreement was in the form adopted by the committees representing a large part of the wholesale and retail trade, and the evidence shewed that the commodities in question could not be purchased by the defendants or any one else unless and until they had signed the agreements in question:—*Held*, that the agreements were a breach of ss. 516 and 520 of the Criminal Code, inasmuch as they unduly prevented, and in fact entirely destroyed, competition in the articles referred to, and affected the entire trade in such articles. *Wampole & Co.* v. *Karn Co.*, 11 O. L. R. 619, 7 O. W. R. 810.

Assignment—*Conditions — Commission on goods rejected.*]—The assignee of a contract for the supply of goods who undertakes to carry it out and to pay a commission to the assignor, is liable for commission on goods rejected as not being of the quality required by the contract. *Ashdown Hardware Co.* v. *Dillon*, 30 Que. S. C. 440.

Cash or credit — *Evidence — Admissibility.*] — A manufacturer who engages by agreement under seal to furnish his products to an agent for sale, in consideration of certain conditions, but without mention of the mode of payment, is not obliged to fill orders otherwise than for cash; and evidence of witnesses is admissible to explain how a first order providing for payment of the price on terms of credit came to be executed, without making it an acknowledgment applicable to the subsequent orders. *Columbia Phonograph Co.* v. *Superior*, 16 Que. K. B. 264.

Contract — *Inspection of lumber.*]—A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor), "by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final:"—*Held*, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a person chosen by the buyer having inspected the lumber, and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on both parties. *Matheson* v. *Thomson*, 20 C. L. T. 293, 30 S. C. R. 357.

Contract — *Written order — Parol variation—Evidence.*] — Action by a Montreal firm for price of engine ordered by the defendants—"for which we agree to pay you $350 delivered in Halifax; shipment to be made as soon as possible." The defendants set up that they gave the order to an agent of the defendants, believing that they were dealing with a Toronto company, who had in their possession a crusher of the defendants worth $780, for which they were to get credit on machinery to be ordered. As a matter of fact the Montreal firm and the Toronto company were distinct:—*Held*, by McDonald, C.J., and Ritchie, J., upon the evidence, that the acceptance of the crusher in payment for the engine ordered was a term of the contract between the parties, and evidence of the agreement with the agent was properly received. But *per* Weatherbe and Meagher, JJ., that the order delivered by the defendants to the agent being on its face a complete agreement, parol evidence was inadmissible to vary its terms either as to the mode of payment or as to the persons with whom it was made. *Wilson* v. *Windsor Foundry Co.*, 33 N. S. R. 21.

Contract — *Written order — Parol variation — Evidence.*]—Judgment in 33 N. S. R. 21, affirming by a division of opinion the judgment of the trial Judge in favour of the defendants, affirmed on appeal. *Wilson* v. *Windsor Foundry Co.*, 31 S. C. R. 381.

Demand for security — *Breach of contract—Acquiescence.*]—1. Where goods are sold without condition as to security, a demand by the vendor, before shipment, for security (naming a surety selected by himself) that there will be no trouble about the sight draft attached to the bill of lading, is a breach of contract, and gives rise to a right of action by the purchaser for damages caused by the refusal to deliver.—2. The fact that the purchaser offered sureties amply sufficient, but who were not accepted by the vendor, cannot be interpreted as an acquiescence in the condition sought to be imposed by the vendor. *Durocher* v. *McLaren*, 16 Que. S. C. 257.

Goods to be manufactured—Breach—Construction of contract—Implied condition — Expectancy — Consideration — Property passing—Destruction by fire—Appropriation of goods to contract. *Delaplante* v. *Tennant*, 4 O. W. R. 76, 5 O. W. R. 81, 6 O. W. R. 217.

Lowest wholesale price — *Special discount.*]—By contract in writing whereby the defendants agreed, for 3 years from the date thereof, to purchase for their business surgical instruments manufactured by the plaintiffs only, the latter contracted to supply their products at "lowest wholesale prices," and for all goods furnished from New York to allow a special discount of 5 per cent. from the prices marked in a catalogue handed over with the contract:—*Held*, that under this agreement the plaintiffs could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent. without being obliged to give the same reduction to the defendants. Judgment of the Court of Appeal, 4 O. W. R. 187, affirmed. *Chandler-Massey* v. *Knyscheerer Co.*, 36 S. C. R. 130, 25 C. L. T. 106.

Payment — *Condition — Change — Refusal to deliver.*]—Where goods were sold to be delivered at a railway station, and the condition of payment was acceptance by the purchaser of sight draft accompanied by bill of lading, the purchaser was not justified in asking to be allowed to retain $50, and, if

all was correct, to pay the balance later. Such a demand was a material change of the conditions of the contract, and the seller was entitled to refuse delivery. *Clement* v. *Durocher*, 16 Que. S. C. 479.

Sale of specified cargo—*Sale "on arrival"—Duty to ship—Quantity mentioned.*]—The sale of a cargo of coal, not then loaded, evidenced by two writings, the first being an agreement to accept "a cargo . . . consitsting of from 1,000 to 1,100 tons to arrive at this port (Levis) later from Swansea during this fall from Mr. Francis Gunn of Quebec," and the second providing that "the cargo of Welsh anthracite which is now declared to arrive per S.S. 'Avon' in September, for Messrs. P. Robitaille & Fils of Levis," is not a sale of a cargo "on arrival," and so conditional upon arrival, but made it the duty of the vendor to ship the quantity mentioned by the ship designated, and the contract was not satisfied by the delivery of 465 tons carried by the vessel named. *Robitaille* v. *Gunn*, 13 Que. K. B. 552.

Sale on credit—Representation by purchaser—To whom credit given—Contradictory evidence—Liquor License Ordinance—Licensee—Restaurant business — Estoppel. *North American Transportation and Trading Co.* v. *Olsen* (Y.T.), 1 W. L. R. 518.

Time of shipment—*Fulfilment of provision—Time of loading on cars—Receipt of shipping bill—Place of weighing—Costs.*]—A contract for the sale of a car load of wheat to be shipped in the first half of October is fulfilled if the grain is loaded on a car on or before the 15th of that month, although the bill of lading is not signed until the 17th and is not received by the purchaser until the 19th. Shipment means simply putting on board. *Bowes* v. *Shand*, 2 App. Cas. 455, followed.—The car of wheat in question was shipped from a station of the C. N. R., and was, in the regular course of the traffic over that railway, sent to Port Arthur, and the wheat was weighed there and not at Fort William, where wheat sent over the C. P. R. is generally weighed; and it appeared that the insertion in contract of words "Fort William weight," was inadvertently made by defendants' manager who had prepared it, and that it really made no difference to defendants whether wheat was weighed at one place rather than the other: — *Held*, that plaintiff was entitled to recover, although weighing had not been at Fort William.—When defendants' manager received shipping bill, he objected to delay, as price of wheat had declined, but offered to pay him $5 of amount demanded by plaintiff:—*Held*, that plaintiff should not have incurred risk of litigation for so small a sum, and should be deprived of costs on that account. *Perry* v. *Manitoba Milling Co.* (1906), 15 M. L. R. 523, 1 W. L. R. 541.

Unascertained goods—Appropriation—Passing — Acceptance — Part payment. *Southampton Lumber Co.* v. *Austin*, 1 O. W. R. 578, 2 O. W. R. 638.

Unascertained goods — *Assignment of vendor for benefit of creditors—Delivery — Right to specific goods — Bills of Sale Act —Agreement that purchaser should bear loss by fire.*]—B. agreed to deliver to defendant at Carman 195 cords of wood to be taken out of two piles of wood containing 200 cords lying at another railway station, and received the consideration therefor. Before anything was done towards delivery of the wood or setting apart the 195 cords from the rest of the wood, B. assigned to the plaintiff for the benefit of his creditors:—*Held*, that the defendant had acquired no title to the wood as against the plaintiff, as s. 3 of the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, had not been complied with.—*Held*, also, that the defendant's agreement to bear the loss if the wood should be burned, was not sufficient to vest the title in him in the face of the other facts. *Haverson* v. *Smith*, 4 W. L. R. 249, 16 Man. L. R. 204.

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17. Title to Goods.

Chattel mortgage — Bill of sale — Description—Evidence—Trover. *Fuller* v. *Hunker Mercantile Co.* (Y.T.), 7 W. L. R. 80.

Damages.]—The purchaser of a chattel is entitled to recover from the vendor upon failure of title, the value of the chattel, and not merely the amount paid by him to the vendor. *Confederation Life Association* v. *Labatt*, 20 C. L. T. 299, 27 A. R. 321.

Failure of title to goods — Implied warranty of title — Executor — Will — Provision for maintenance of testator's children in hotel — Sale of furniture in hotel — Right of child to object — Powers of executor — Conduct — Estoppel — Contract — Lease — Offer to purchase. *Clark* v. *Mott*, 11 O. W. R. 580.

Ownership — Conversion — Seizure — Delivery — Acceptance. *Union Bank of Canada* v. *Backwood* (Man.), 2 W. L. R. 574.

Revendication by true owner—*Stolen property—Purchase from dealer—Art. 1489, C. C.—Recovery of price paid.*]—The "*commercant trafiquant en semblables matières*" of Art. 1489, C. C. means one who publicly and habitually carries on his business in the locality where he is known. Therefore, one who buys a horse from a distributor of newspapers, who occasionally buys, sells, and exchanges horses, cannot exact repayment of the price which he has paid from the owner from whom the horse has been stolen, and who revendicates it. *Parent* v. *Belanger*, 31 Que. S. C. 383.

Right of unpaid vendor — *Conservatory attachment — Insolvency — Time for seizure.*]—When a conservatory attachment is issued and the property of a person who is not shewn to be a trader is seized by the unpaid vendor thereof, the attachment will not be quashed upon petition on the ground that the seizure was not made within thirty days of the delivery of the goods. *Swaeschnikoff* v. *Breitman*, 6 Que. P. R. 30.

Rights of the real owner are in no way affected by the exception to the rule that

the sale of a thing not the property of the seller is null, as contained in Art. 1488 C. C. respecting commercial matters. The exception only applies to the parties to the contract. *Tremblay* v. *Mercier & Lachaine* (1909), 38 Que. S. C. 57.

Sale of stolen chattel — *Art. 1489, C. C.—"Dealer trading in similar articles."*]— The words "a dealer trading in similar articles" in Art. 1489, C. C., mean a trader whose ostensible business is to deal in similar articles. Hence a pedlar of fruits and vegetables, although he may occasionally buy and sell horses, is not a dealer trading in horses within the meaning of the article. *Vezina* v. *Brosseau*, 30 Que. S. C. 493.

Trover — Bills of Sale Act — Estoppel — Ownership — Evidence. *Mitchell* v. *Weese*, 4 O. W. R. 346.

Undertaking by seller to deliver successively to two persons — *Conditions of preference—Actual possession—Constructive possession—Bill of lading—Good faith—Knowledge of previous sale.*]—Constructive possession of merchandise by delivery of a bill of lading therefor does not amount to the "actual" possession which is the ground of preference under Art. 1027, C. C.—2. A party who is aware of a previous sale to another, of merchandise in the hands of a carrier, and obtains the bill of lading for the same, does not become a possessor in good faith, so as to be entitled to the above preference. *Sapery* v. *Simon*, 34 Que. S. C. 329, 5 E. L. R. 143.

18. Warranty.

Absence of — *Waiver of inspection — Damages for inferior quality.*]—Cheese was sold without special warranty as to quality, but subject to inspection at the factory before shipment. The purchaser's agent did not avail himself of the opportunity to make an inspection at the factory. The purchaser complained after delivery that the quality of the cheese was inferior, and that some damage had been done by nails in packing it, and he tendered the price, less half a cent per pound, deduction for damage. The Court below allowed a deduction for the damage by packing, but maintained the action for the balance. The defendant inscribed in review:—*Held*, that there being no special warranty as to quality, and the buyer, by his agent, having waived inspection at factory by asking that the cheese be forwarded before it had been inspected, could not afterwards claim damages for inferior quality, which, if it existed, would have been disclosed by the inspection. *Lebrecque* v. *Duckett*, 22 Que. S. C. 135.

Absence of express warranty — Implied warranty—Quality of hay — Opportunity for inspection—Acceptance—Estoppel —Division Court judgment — Evidence as to opinion of quality. *Bouck* v. *Clark*, 10 O. W. R. 653.

Action for contract price — *Defence and set-off — Counterclaim for damages — Substitution of inferior material — Condition precedent — Resale — Measure of damages — Delay.*]—In an action for the contract price of goods sold and delivered, in which it was shewn that the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings:—*Held*, that the defendants were entitled to have their damages applied in reduction of the plaintiffs' claim.—*Held*, also, that as soon as the vendee discovers the defect he may bring an action on the warranty and recover the value of the article he should have received, and that the right of action is complete without a resale, and that the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them.—*Held*, also, that where credit is given or where the goods have been paid for, the vendee may sue at once, or in case of credit, if the vendee so elects, he may await an action for the price and set off or counterclaim for his damages by reason of the defective material or other breach of warranty.—*Held*, also, that where there had been delay in the delivery of the samples, as well as the bulk of the goods ordered for a particular season, which arrived late for the season, and in consequence were sold at a loss, the measure of the damages was the difference between the value of the goods at the time at which they were to have been delivered according to the contract and their value for the purpose of resale. *Wilson* v. *Lancashire and Yorkshire Rw. Co.*, 9 C. B. N. S. 632, and *Schultz* v. *Great Eastern Rw. Co.*, 19 Q. B. D. 30, followed. *Centaur Cycle Co.* v. *Hill*, 22 C. L. T. 253, 24 C. L. T. 121, 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 110, 411.

Action for price — *Defence — Reliance on statements and warranties—Correspondence—Defects in goods supplied.*]—Plaintiffs sued for price of wooden piping sold to defendants for their waterworks system. The purchase was made from catalogues and correspondence. Piping was laid under supervision of plaintiffs' expert. The defect was in the coupling:—*Held*, total failure of consideration. Action dismissed with reference to ascertain damages. By consent, engineer appointed to inspect and report. *Pacific Coast Pipe Co.* v. *City of Fort William, Pacific Coast Pipe Co.* v. *Newman*, 13 O. W. R. 427.

Apparent defects — *Opportunity for examination — Inferiority of quality.*]—A vendor is not held liable for apparent defects in the article sold of which the purchaser could have known the existence. Therefore, a man who buys an article of merchandise through the medium of an agent who sees it and examines it before signing the contract of sale, will not be allowed, after delivery, to set up that the quality is inferior to that agreed upon. *Metallic Bedstead Co.* v. *Sapery*, 35 Que. S. C. 368, 6 E. L. R. 201.

Breach — *Acceptance of goods — Damages—Measure of—Resale — Commission — Cost of repairs—Loss of profits.*]—Action to recover the price of a threshing outfit, consisting of a new separator and a second-

hand engine, sold to the defendant. The engine had been warranted to be in first-class repair and in good running order. The trial Judge found as a fact that it was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it. The chief question to be decided, therefore, was the amount of damage to be allowed for the breach of warranty. The defendant discovered nearly all of the defects complained of before he started using the machine, and the others almost at once after starting; but, instead of proceeding at once to have the missing parts supplied, he continued to operate the machine in its defective condition without complaining to the plaintiff of anything but the friction:—*Held*, following *Crompton and Knowles Loom Works* v. *Hoffman*, 5 O. L. R. 554, 2 O. W. R. 273, that there could be no recovery for damage which might have been prevented by reasonable efforts on the defendant's part. The defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them, and could not recover anything for damages beyond what he would have sustained had he pursued that course. The measure of the defendant's damage is the amount that it would have cost to put the engine in the condition it was warranted to be in, plus his loss of profits or from delays during the time that would necessarily elapse before these repairs could be made had he acted promptly after discovering them. On the defendant's default in payment the plaintiff had repossessed and resold the outfit, and sought to deduct from the proceeds of the sale the sum of $250, which he said he had had to pay by way of commission on the resale. There was no evidence that the sale had been made through an agent, or, if it was, what the proper commission should be.—*Held*, that the plaintiff had not sufficiently established his right to charge such commission against the defendant, and that it should not be allowed to him. *Mawhinney* v. *Porteous*, 6 W. L. R. 633, 17 Man. L. R. 184.

Breach — *Contract for delivery of grain according to sample—Grain in bad condition when received by purchaser—Grain injured in course of carriage while at risk of vendor.*]—Defendant sold plaintiff, by sample, a car load of wheat to be shipped from R. to Q. When the car was opened a portion of the wheat was found not equal to sample and was refused by plaintiff:—*Held*, that defendants were liable for wheat until bill of lading endorsed to plaintiff, and that injury to wheat had risen prior to delivery of bill of lading. The plaintiff had right to inspect at Q. The damaged wheat had been sold with permission of defendant's agent. Judgment for plaintiff. *Moore Milling Co.* v. *Laird*, 1 Sask. L. R. 471, 9 W. L. R. 199, affirmed 11 W. L. R. 301.

Breach — Damages — Construction of warranty — Option for return—Death of stallion—Remedy. *Gunby* v. *Hamilton*, 12 O. W. R. 489, 606.

Breach — Damages — Costs. *Moran* v. *Woodstock Wind Motor Co.*, 5 O. W. R. 650.

Breach — *Damages — Rescission of contract.*]—At the time of the sale to the plaintiff of a gasoline engine, and as a part thereof, the defendants' agent guaranteed that it was a 20 h.p. engine, and would do the work of a 20 h.p. engine, and that he would repair it and make it like a new engine. The plaintiff, relying on this guaranty, gave promissory notes for $1,500, the purchase-price, and gave security for the payment thereof. He afterwards paid $150. The plaintiff kept the machine and used it for a year to operate a separator capable of operation by an 8 h.p. engine, and also used it for chopping; but in 1909 purchased a new separator, the operation of which required a 20 h.p. engine. The engine sold to the plaintiff, though built for a 20 h.p. engine, was not in reality so, and the evidence shewed that it would not develop more than 13 h.p.:—*Held*, that the plaintiff had no right to rescind the contract, return the engine and recover back his notes, securities, and moneys paid; but he was entitled to damages for breach of the warranty; and the measure of damages was the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty, together with any other loss directly and naturally resulting in the ordinary course of events from the breach: Sales of Goods Ordinance, sec. 51, sub-secs. 2 and 3. Upon this footing the damages were assessed at $800, plus $16.95 for disbursements in endeavouring to make the engine answer the warranty; and the defendants were allowed the option of a rescission if they chose to consent. *Decker* v. *Sylvester Mfg. Co.* (1910), 14 W. L. R. 500, 3 Sask. L. R. 173.

Breach — Damages. *Robinson* v. *Boyd* (N.W.T.), 2 W. L. R. 425.

Breach — *Implied condition as to reasonably good usage.*]—In an action to recover the amount of a promissory note given by the defendant for the price of a bicycle purchased by him from the plaintiff's agent, the defendant pleaded an undertaking on the part of the agent that the bicycle delivered would carry the defendant or bear his weight but that the bicycle delivered would not carry defendant or bear his weight, and broke down. The evidence shewed that the agent by whom the bicycle was sold was to have come the following morning to instruct the defendant in the use of it, but that the defendant, who was a heavy and clumsy man, and who had never ridden a bicycle before, undertook to try it in the absence of the agent. The County Court Judge found that a warranty that the bicycle would bear the defendant's weight implied the condition of reasonably good usage, and that, under the circumstances in proof, the defendant assumed the risk of injuring the bicycle, and even if there was a warranty as alleged, there was not sufficient proof of breach:—*Held*, that the Judge was right. *Johnson* v. *Moore*, 34 N. S. R. 85.

Breach — *Measure of damages — Sale of Goods Act, R. S. M. 1902 c. 152, s. 52 (d).*]—Action for damages for breach of a warranty on the sale of a second-hand engine, that the engine was in a good state of

repair and in good working order:—*Held*, that, under s.-s. (d) of s. 52 of the Sale of Goods Act, R. S. M. 1902 c. 152, the proper measure of damages to be allowed is the amount which at the time of the sale it would have been necessary to expend in order to remove defects which constituted the breach of the warranty, but not including cost of repairs necessitated by wear and tear or accidents after the plaintiff began to use the engine. *Cook* v. *Thomas*, 6 Man. L. R. 286, followed. *Sumner* v. *Dobbin*, 3 W. L. R. 382, 16 Man. L. R. 491.

Breach — Remedy — Contribution. *Ferguson* v. *Arkell*, 1 O. W. R. 190.

Breach — *Rescission of contract—Fraudulent representations—Finding of jury—Appeal — Value of goods.*]—Where a chattel sold with a warranty is delivered as agreed upon and is not up to the warranty, that fact, in the absence of fraud, affords no ground for rescinding the contract, but the remedy is for a breach of warranty. A Court of Appeal will not disturb the finding of a jury on a question of fraudulent representations, where there is any evidence upon which the verdict may reasonably be supported. Evidence of the value of the chattel (a horse) at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale. *Finn* v. *Brown*, 35 N. B. R. 335.

Breach — Soundness of animals — Damages—Action on promissory notes given for price — Counterclaim — Set-off — Costs. *Swilling* v. *Arnold*, *Swilling* v. *Glass*, (N. W.T.), 2 W. L. R. 48.

Breach — Waiver — Consideration — Contract. *Davidson* v. *Reid* (N.S.), 6 E. L. R. 428.

Canned salmon — *Non-conform of contract—Express warranty—Implied warranty —85 per cent. fit for human food—Inspection and acceptance—Condition of food not exhibited on inspection—Third parties — Sale by, to defendant—Relief over by defendant against third parties—Damages allowed—Reference to Master in Ordinary — F. D. and costs reserved.*]—Plaintiffs purchased 573 cases of salmon from defendant. These were "do-overs" and sold as such by defendant, who had purchased them from the Canadian Canning Co., Ltd., under an agreement whereby they agreed to protect him from all legitimate claims for blown, swell, dry and leaks. The goods were received by plaintiffs and inspected, but the inspection did not exhibit the true condition of the goods. They were accepted on the inspection, paid for, and sent out to customers, who immediately began to return them as they were unfit for human food. The plaintiffs brought action to recover $1,750 damages for breach of contract. Defendants claimed relief over against the original vendors on their agreement with him:—Riddell, J., *held*, that plaintiffs were entitled to (1) damages on the express warranty; (2) damages on the implied warranty, that 85 per cent. of the goods were fit for human food, and (3) to costs up to and including judgment. Reference to Master in Ordinary to fix damages. That defendant was entitled to relief over against original vendors, under head (1), and to one-half the costs paid by defendant to plaintiffs, one-half the costs of third party proceedings and one-half the costs paid by defendant to his solicitor—all these up to and including judgment. Third parties may attend and take part in the reference. Further directions and costs of reference reserved. *Grocers' Wholesale Co.* v. *Bostock* (1910), 17 O. W. R. 129, 2 O. W. N. 144, 22 C. L. T. 130.

Condition of machinery — *Damages—Wages—Anticipated profits—Counterclaim—Costs.*]—On the 22nd October, 1905, the defendant purchased from the plaintiffs a portable saw mill, intended to be used for the purpose of manufacturing laths. The plaintiffs were aware of the purpose for which the mill was to be used, and guaranteed the engine to be in running order. It was found by the defendant that the engine was not working properly, and the plaintiffs undertook to put it in repair, but failed to do so until 12th January, 1906. In an action for the contract price of the mill, the defendant counterclaimed damages for breach of contract, and was awarded by the trial Judge a sum in excess of the purchase price, including not only damages for the loss of the use of the mill, but an amount paid for wages and board of the men:—*Held*, that the amount awarded for damages for loss of the use of the mill was rightly allowed, but that the Judge exceeded the proper measure of damages when he added wages and board of men.—*Held*, also, that the case was not one in which damages could properly be allowed for loss of anticipated gain, the business being a new one, and the profits being too uncertain.—*Held*, also, the plaintiffs having notified the defendant of their willingness to allow damages for loss of use of the mill, when they delivered their reply to the counterclaim, and the amount being sufficient, that there should be no costs of the counterclaim. *Thompson* v. *Corbin*, 2 E. L. R. 84, 3 E. L. R. 111, 41 N. S. R. 386.

Conditional contract — *Performance—Jury — Waiver — Pleading — Amendment after trial — New trial—Costs.*] — During negotiations for the sale of two standard stokers for use in the defendant's brewery, warranted to give certain results in the saving of fuel, etc., a contract was submitted to the defendants in which a particular test called the evaporation test was specified to be applied to determine whether the stokers would produce the guaranteed results. The defendant refused to be bound by the specified test, and the proviso was struck out and the contract signed, making a proviso for the test as follows: "To determine that these guarantees are lived up to and the same quality of coal is used and same load is being carried, tests are to be made under ordinary running conditions on hand and stoker fired boilers." The stokers were installed, and the defendant refused to pay for them, alleging that they did not fulfil the guarantee. The plaintiffs brought this action, declaring on the common counts for goods sold and allow the plaintiffs to make the evaporation test, asserting that that test was excluded from the contract. In answer to questions, the jury found that the defendant's tests were not fair and proper under the contract, and that the tests that the plaintiffs apply were better tests than the defendant's, and that

no proper tests were ever made. In answer to other questions they said that they were unable to answer whether the test spoken of in the contract was to be by evaporation, as contended by the plaintiffs, or by weighing the coal, as contended by the defendant. —On these answers a verdict was entered for the defendant: — *Held*, *per* Tuck, C.J., Landry and Barker, JJ., that the verdict was improperly entered: that, while all the findings were in favour of the plaintiffs, no verdict could be entered for them on the pleadings, as there was no allegation of waiver, or proof that the conditions precedent to payment had been performed; and there must be a new trial.—*Per* Hanington, J., that under the contract as executed it was open to the parties to apply any efficient test, and the proper question for the jury was, "Was the test which the plaintiffs intended to apply an efficient test to determine the results guaranteed?" and, as this question was not left, the case was not fully tried, and it should be sent down for another trial.—*Per* McLeod, J., that the conditions precedent were not shewn to have been performed, and, no waiver of performance having been alleged, the plaintiffs could not recover on the pleadings, and the verdict should stand. If the plaintiffs were allowed to amend and add a count for waiver, a new trial should only be granted on payment of costs.—An application to amend ought to be acceded to as a matter of course, even after the trial, when the question really in dispute has been fully tried out. *Murray* v. *Duff*, 33 N. B. R. 426, and *Frederick* v. *Gibson*, 37 N. B. R. 126, followed. *Underfeed Stoker Co.* v. *Ready*, 1 E. L. R. 502, 37 N. B. R. 505.

Contract — *Waiver* — *Sale of Goods Act—Implied condition of sale.*]—When a contract for the sale of an engine contains a printed form of warrant as to the fitness of the engine, with the provision that the agent of the vendors may not "add to, abridge, or change" that warranty in any manner, the purchaser is not precluded from insisting on the fulfilment of any other warranty specially given in writing by the agent.—2. If the vendors accept and fill an order for an engine with a provision specially written by their agent in it that the engine is to be satisfactory to the purchasers, they thereby waive any limitations of the authority of their agent as to giving warranties that may be embodied in the printed part of the order.—3. As the plaintiffs' agent knew that the engine was required by the defendants to drive a particular separator, and that the defendants relied on his skill and judgment as to its fitness for that purpose, and as the engine was an article of a description which it was in the course of the plaintiffs' business to supply, there was, apart from any representations of the agent, an implied condition (under s.-s. (*a*) of s. 16 of the Sale of Goods Act, R. S. M. 1902 c. 152) that it would be reasonably fit to drive the separator. *Chanter* v. *Hopkins*, 4 M. & W. 399, distinguished. *New Hamburg Manufacturing Co.* v. *Shields*, 4 W. L. R. 307, 16 Man. L. R. 212.

Correspondence — *Construction* — *Breach* — *Damages.*]—The plaintiff, a private banker, wrote to the defendants, safemakers, for an estimate of a burglar proof door. The defendants, in answer, described No. 67, as 1¼ inches thick, the entire surface protected with hardened drill proof plate, and enclosed a cut of No. 67, called "fire proof vault door with chilled steel lining." The plaintiff, in reply, asked whether No. 67 would furnish a fair protection against burglars, and the defendants answered, "No. 67 door gives both fire and burglar proof protection." The plaintiff purchased a No. 67 door, which was blown open by burglars. It appeared that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave entrance to further explosives by which the door was wrecked. The door having been taken to pieces, it was found that the centre layer of the three layers making up the door, represented to be hardened drill proof plate, was not so, and was easily perforated by a hand drill:—*Held*, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time and place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safemakers could make them. Both warranties had been broken.—*Held*, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as damages the price, $250. *Denison* v. *Taylor*, 23 C. L. T. 264, 6 O. L. R. 93, 2 O. W. R. 386, 469.

Culvert pipe for use of railway—*Defects in pipe—Action for price—Counterclaim for defects in pipe.*]—Action to recover $774.26 for vitrified salt glazed culvert pipe supplied to defendants to be used in the construction of railway culverts by defendants on the Walkerton and Lucknow branch of the C. P. Railway.—Defendants alleged that the pipe supplied was defective; that the sewer pipe supplied was neither vitrified nor salt glazed as agreed; that nearly 1,000 linear feet thereof broke, whereby they were put to damage, and they counterclaimed for $1,141.14.—Falconbridge, C.J.K.B., *held* (15 O. W. R. 820, 1 O. W. N. 699), that plaintiffs' action should be dismissed with costs, and judgment entered for defendants for $1,141.14 on their counterclaim, with costs. —Court of Appeal dismissed plaintiffs' appeal with costs. *Ontario Sewer Pipe Co.* v. *Macdonald* (1910), 17 O. W. R. 1014, 2 O. W. N. 483.

Deceit — Breach of warranty of title — Incumbrance on goods—Retaking by person entitled to lien—Sale in the ordinary course of business — Estoppel — Implied authority—Fair value — Misrepresentation as to ownership—Costs. *Brett* v. *Foorsen* (Man.), 7 W. L. R. 13.

Defect in article — Contract — Conditions as to return — Compliance with — Authority of agent of vendor—Waiver — Notice. *John Abell Co.* v. *Long* (N.W.T.), 1 W. L. R 24.

Defect in machine — *Notice — Time —Waiver — Implied condition—Reasonable fitness—Sale of Goods Ordinance, s. 16 — Sale of specified article under trade name— Evidence — Admissions—Payments on account — Sale by description — Breach — Remedy—Continued possession—Repairs*]— A contract for the sale of "a Hart-Parr gasoline engine" and attachments by the defendants to the plaintiffs contained the following provision: "The above machinery is warranted, with proper usage, to do as good work and to be of as good materials and as durable with care as any of the same class made in Canada. If the above machine will not bear the above warranty after a trial of one day, written notice shall be given to the (defendants) . . . and the agent of whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given the (defendants) to send a competent person to remedy the difficulty. . . If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor which shall fill the warranty, or the money and notes returned. Continued possession shall be evidence of satisfaction. When, at the request of the purchaser, a man is sent to operate the above machinery, and the same is found to have been carelessly or ignorantly handled, to its injury in doing good work, the expense incurred by the (defendants) in putting the same in good working order again shall be paid forthwith by the purchaser to the (defendants). No other remedy than the return of the said machinery, in the manner herein provided for, shall be had for any breach of warranties on this purchase. It is also agreed that no act or conduct on the part of any local . . . agent or of any mechanical expert, whether in rendering assistance to operate the said machinery, or attempting to remedy defects therein, shall be or constitute a waiver of any of the provisions hereof, or operate to extend the period of trial, and that no modification of this contract or waiver of its requirements on behalf of the (defendants) can be made by any person other than a member of the said firm (defendants), and then only in writing." — The plaintiffs alleged, as a breach of the warranty contained in the first sentence of the above quotation, that the engine was so defective and of such poor materials and workmanship that the plaintiffs could not operate the same.—The engine was delivered and the plaintiffs commenced to use it on the 16th May, 1907, in the morning, and during the course of that morning, one McL., the defendant's expert, came out to assist in operating it and to see that it operated properly, and he left in the afternoon. According to the testimony of the plaintiffs, it did not work satisfactorily on that occasion, and was not working satisfactorily when McL. worked it, and never worked satisfactorily. The plaintiffs continued to work it both at ploughing and threshing during the seasons of 1907 and 1908, down to December, 1908, when, on account of a breakage, they discontinued doing so, and never worked it afterwards. The objection to the engine was that it did not develope enough power. Written notice was not given in the manner provided by the contracts to the defendants or their agents from whom the machine was purchased, and no notice at all was given until the 3rd November, 1907, when a complaint was made in a letter from the plaintiffs to the defendants:—*Held*, that if the letter was a notice under the above quoted clause, it was too late; and, although it was unreasonable to give a buyer of such a machine only one day's trial, the plaintiffs were bound by the contract which they had made. —*Taylor* v. *Caldwell*, 3 B. & S. 826, and *Levis* v. *Great Western Rw. Co.*, 3 Q. B. D. 195, followed.—*Held*, also, on the evidence, that the defendants had not waived the omission to give the notice. An agent could not waive it, under the above provisions, and that clause was a reasonable one. Sending McL. out in November, 1907, to overhaul the engine and ascertain what was the matter with it and repair it if necessary, was not a waiver considering that 6 months had elapsed since the time for giving the notice had expired, that in the meantime nothing had been said or written to the defendants about rescinding the contract or returning the engine, that the plaintiffs had been continually working it, and that the plaintiffs paid for McL.'s services in going out and doing the work.—The plaintiffs alleged also that they made known to the defendants the particular purpose for which the engine was required, that it was defendants' business to supply engines for that purpose, and that the engine was sold subject to an implied condition that it should be reasonably fit for such purpose, but it was not so fit: s. 16, clause 1 of the Sale of Goods Ordinance, C. O. c. 39. Clause 4 of the section provides that "an express warranty of condition does not negative a warranty or condition implied by this Ordinance, unless inconsistent therewith." — *Held*, following *Cockshutt Plow Co.* v. *Mills*, 2 W. L. R. 355, that the plaintiffs could not set up an implied warranty or condition for the purpose of getting rid of an express warranty to the same effect contained in the contract. If the plaintiffs were satisfied to accept such a warranty as that contained in the contract, they must have been satisfied that, if the machine would do as good work as any of the same class in Canada, it would do the work for which they had purchased it, and, therefore, the warranty amply protected them.—*Held*, also, that the contract was one for the sale of a specified article under its trade name, and under the proviso to clause 1 of s. 16, which had not been repealed at the time the contract was made, there was no implied condition as to its fitness for any particular purpose.—*Frost and Wood Co.* v. *Ebert*, 3 W. L. R. 69, followed. —*North-West Thresher Co.* v. *Andrews*, 8

W. L. R. 827, not followed.—*Held*, also, upon the evidence, that the engine was reasonably fit for the purpose for which it was required by the plaintiffs, as the plaintiffs themselves practically admitted in letters to the defendant and by making payments. —It was further alleged that the contract was a contract for the sale of an engine by description, and that the engine did not come up to the description.—*Held*, that a printed catalogue of the Hart-Parr Co. given by the defendants' agent to the plaintiffs, which contained a description of the engine, did not affect the contract, having regard to its provisions and the terms of clause 4 of s. 16 of the Ordinance, and of clause 51; and in any case, the plaintiffs' only remedy for such a breach would be to return the engine. — *Held*, also, that effect must be given to the provision of the contract that "continued possession shall be evidence of satisfaction."—*New Hamburg Manufacturing Co.* v. *Weisbrod*, 7 W. L. R. 895, distinguished.—*Held*, also that as a matter of fact, the plaintiffs accepted the engine as satisfactory without any intention of setting up that it was defective in the matter of description, and they only conceived the idea of raising that after the disaster in December, 1908, which was not occasioned by reason of any alleged defect in the matters of description relied upon, nor by any inherent defect in the machine or negligence on the part of the defendants in repairing it. Reference to clause 2 of s. 16 of the Ordinance. —*Held*, also, that the defendants were not liable for the repairs rendered necessary to the engine by virtue of breakages, either under the contract or by virtue of a collateral agreement set up. *Elliott* v. *Brown* (1900), 13 W. L. R. 690, 3 Sask. L. R. 238.

Defective condition — Damages caused to purchaser by—Contract—Absence of express warranty—Implied warranty—Conditional sale—Property not passing. *Warder* v. *Bell*, 3 O. W. R. 682.

Defects — *Damages — Findings of jury.*]—The contract for the sale by the defendants to the plaintiff of a steam traction-engine, a separator, and certain attachments, provided that, if, at the end of two days after starting the machine, the plaintiff should be unable to make the same operate well, he should, within 24 hours, give notice by letter to the defendants; that, if the plaintiff desired a competitive trial, he should give a similar notice within 3 days; that all the warranties, except as to free repairs, should be considered as fully satisfied, unless the plaintiff gave such notices within the prescribed times; that failure to give such notices should be conclusive evidence of the due fulfilment of all warranties; and that more than two days' use of the machines, or any of them, should also be conclusive evidence of such fulfilment. The outfit was delivered to the plaintiff on the 15th September, and he immediately moved it by the traction-engine to his farm. On the 18th the defendants wrote from Winnipeg to their agent at Calgary and to the plaintiff, stating that the blower attachment was not properly equipped, and that certain necessary pulleys would be shipped to the plaintiff on that day or the following. On the 21st, the plaintiff wrote to the Calgary agent that he had tried the "rig," and it was all right except the blower:—*Held*, in an action for breach of warranties that the reference in the plaintiff's letter to the trial must be assumed to refer to a trial of the outfit as originally supplied to him; and the defendants' letter constituted an admission that that outfit would not work properly; and the plaintiff, having entered upon, if not completed, the two days' trial before receiving the pulleys mentioned therein, was not bound to give notice of defects or of the improper working of the outfit.—The plaintiff did not return the outfit to the defendants, and it was still in his possession at the time of the trial. The action was tried with a jury, and questions (among others) were put to them as to damages, Q. 7: "If it (the outfit) was not reasonably fit for the purpose, and by reason thereof it was worth less than the contract-price, what was it worth at the time of the purchase?" A.: "It was worth nothing to the plaintiff for the purpose for which it was intended:"—*Held*, that, as the plaintiff retained the machines, the defendants were entitled to a deduction from the damages to which the plaintiff might otherwise be found entitled, of the actual value of the outfit for any purpose; and the answer of the jury was not sufficient to enable the Court to determine the actual value.—Q. 8: "If the outfit was not reasonably fit for the purpose for which it was intended what damage (if any) did the plaintiff sustain by reason of its unfitness; (a) by reason of loss of custom; (b) by reason of loss of time and expenses during such lost time; (c) for repairs?" In answer to this, the jury found that the plaintiff was entitled to $2,400 damages under (a) and (b) jointly, and did not distinguish as to the damages under each:—*Quære*, whether the plaintiff was entitled to recover any damages in respect of loss of custom. That question, however, need not be determined, as, in view of the answer to question 7, the amount which the plaintiff should recover could not be ascertained.—The defendants' motion for a nonsuit and the plaintiff's motion for judgment on the findings were both dismissed. *Neiss* v. *Canadian Port Huron Co.* (1911), 16 W. L. R. 542, Alta. L. R.

Diseased animal — *Caveat emptor* — Examination and inspection—Implied warranty. *Blondin* v. *Seguin* (1909), 1 O. W. N. 220.

Exclusion of other warranties — *Implied condition as to fitness—Sale of Goods Ordinance, s. 16 (1)—Breach—Action for price of machine—Counterclaim—Damages—Admissions—Promises to pay.*]—The plaintiffs sold machinery to the defendant, who signed a written contract containing a special clause stating that the machinery was sold "upon and subject to the following mutual and independent conditions." One "condition" was: "It is warranted to be made of good material and durable with good care and with proper usage to do as good work as any of the same size sold in Canada." Then followed a provision, in case the machinery could not be made to satisfy the warranty, for written notice by the defendant to the plaintiffs. There was also this provision: "There are no other warranties or guarantees, promises or agree-

ments, than those contained herein":—*Held*, that this last stipulation was not sufficient to exclude the implied condition as to reasonable fitness for the purpose for which the article was bought which it attached to such a sale as this by the Sale of Goods Ordinance, C. O. 1905, c. 39, s. 16, s.-s. 1. and which is something higher than a warranty, and not inconsistent with the express warranty first set out in the clause.—In an action for the balance of the price of the machinery, with a counterclaim for damages for breach of warranty, the trial Judge found as facts that the machinery did not fulfil the condition as to fitness, and that the defendant had suffered damage to the amount of the plaintiff's claim for the balance of the price of the machinery—or, in other words, that the machine was worth no more than the cash payment made:—*Held*, that the Court should not, on appeal, reverse these findings.—*Held*, also, that promises to pay made by the defendant in letters, without mentioning the defects which he alleged to exist, did not destroy his right to claim damages for a breach of warranty. Judgment of Beck, J., 10 W. L. R. 457, affirmed. *Sawyer-Massey Co.* v. *Ritchie* (1910), 13 W. L. R. 89.

Express and implied warranties.] — By an agreement in writing dated the 21st August, 1909, between the plaintiffs and the defendant, the defendant agreed to buy from the plaintiffs certain machinery for $1,065. Shortly after the date of the contract, machinery was delivered by the plaintiffs to the defendant, in presumed compliance with the contract. After trial of the machinery and complaints made by the defendant and some correspondence between the parties, the defendant paid the plaintiffs $535 and interest thereon, and gave a promissory note for $530, both under protest, as the defendant said, because the machinery was not satisfactory. The agreement contained, among other provisions, the following: "The said machinery . . . is warranted to be made of good material, and durable with good care, and with proper usage, and skilful management to do as good work as any of the same size sold in Canada. If the purchasers, after trial, cannot make it satisfy the above warranty, written notice shall, within 10 days after starting, be given both to the company and the selling agent . . . stating wherein it fails to satisfy the warranty, and reasonable time shall be given the company to remedy the difficulty . . . the company reserving the right to replace any defective part or parts; and if then the machinery . . . cannot be made to satisfy the warranty, it is to be returned by the purchasers . . . and another substituted therefor that shall satisfy the warranty, or the money and notes immediately returned and this contract cancelled . . . ; and if both such notices are not given within such time, that shall be conclusive evidence that the said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall, at the purchasers' request, render assistance of any kind in operating said machinery . . . or in remedying any defects, such assistance shall in no case be deemed a waiver of any term or provision of this agreement. . . . There are no other warranties or guarantees, promises or agreements, than those contained herein:" — *Held*, following *Sawyer-Massey Co.* v. *Ritchie*, 43 S. C. R. 614, that the words of the contract excluding other warranties excluded the provisions of the Sales of Goods Act as to implied conditions; and that the provision requiring written notice of breach to be given to the company within 10 days after starting applies only to the warranty as to the machinery doing as good work as any in Canada.—The defendant complained of the machinery to the plaintiffs' agent, who sent a telegram to the plaintiffs informing them that the defendant's machinery was "laid up" and requesting them to send an expert:—*Held*, that, even if the complaint to the agent was in fact made within 10 days (which, on the evidence, was doubtful), the terms of the contract as to notice were not observed.—*John Abell Co.* v. *Long*, 1 W. L. R. 24, and *American-Abell Engine and Threshing Co.* v. *Scott*, 6 W. L. R. 550, distinguished.—*Held*, also, upon the evidence, that the plaintiffs had not waived their right to insist upon the terms of their contract. *Sawyer-Massey Co.* v. *Ferguson* (1911), 16 W. L. R. 667, Man. L. R.

Express or implied warranty—*Caveat emptor*—Horse sold of no value—Ignorance of vendor—Absence of fraud—Chattel mortgage—Time for payment — Seizure before maturity—Removal of horse from county—Injunction—Terms—Counterclaim. *Horton* v. *Smith*, 12 O. W. R. 910.

Express stipulation of no warranty — *Fraudulent concealment of defect.*] — "Tic" or "rot" in a horse is a defect for which a contract for the sale of the horse can be set aside. 2. Even where the seller of a horse sells it without warranty, and the purchaser buys it at his own risk, the seller will be held to have warranted it if at the time of sale he knew that the horse had such a defect; for, in stipulating that there shall be no warranty in these circumstances, he has been guilty of fraud as against the purchaser.—3. When the seller has refused to cancel the sale of a horse having, to his knowledge, such a defect, and persists in his refusal in his defence to an action, he cannot object that the buyer has not offered the horse back to him before action; the fraud practised leaving the purchaser always in a position to rescind the fraudulent sale. *Ducharme* v. *Charest*, 23 Que. S. C. 82.

Express warranty — Implied condition as to fitness—Breach — Evidence—Findings of jury — Counterclaim. *North-West Thresher Co.* v. *Andrews* (Alta.), 8 W. L. R. 827.

Failure of consideration — Animals Contagious Diseases Act—Compensation — Set-off. *Conn* v. *Annis* (N.W.T.), 4 W. L. R. 332.

Failure to establish — Onus — Evidence — Course of dealing. *Freeman* v. *Cooper*, 10 O. W. R. 1025.

Fitness for particular purpose. — The defendant bought from the plaintiff an Eclipse thresher, a three-horse power tread, Pitts pattern, and an Eclipse bagger for the purpose of threshing grain for hire, and

signed a contract in which the goods were expressly warranted to be of "good material, durable with good care, and, with proper usage and skilful management, to do as good work as any of the same size sold in Canada." It was provided that there should be no other warranties or guarantees than those contained in the agreement. The articles individually were good of their kind, but were not adapted to work in combination, and it was impossible to thresh profitably for hire with the apparatus.—*Held*, 1. That the implied warranty that the goods should be reasonably fit for the purpose for which they were, to the knowledge of the vendors bought, was not inconsistent with the express warranty.—2. That the exclusion by the terms of the agreement of other warranties and guarantees did not exclude this implied warranty.—3. That the contract, being a single contract for sale of the combination of articles, the implied warranty was not excluded, although each of the parts of the apparatus was a specified article under a trade name.—4. That in deciding whether the purchaser had relied upon the skill and judgment of the vendor, the essential thing was not whether he had exercised his private judgment, but what had led him to exercise it as he did. *Sawyer-Massey Co.* v. *Thibart* (1907), 6 Terr. L. R. 409.

Fitness of machinery — *New agreement—Breaches prior to new contract—Relinquishment of rights under former agreement.*]—R. & N. purchased threshing machinery from the company, in Nov., 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. & N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled, said company putting same in working order again, the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver, or if the purchasers shall in any respect have failed to comply herewith."—Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the Autumn of 1907 and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaimed for damages for this breach.—*Held*, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties.—*Held*, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was "made of good materials" and would be "durable with good care."—The consideration for the release of N., and the acceptance of the sole liability of R. for the price of the machinery was the execution of the new notes and agreement which involved the relinquishment by both parties of all their rights under the first agreement.—Judgment in 13 W. L. R. 89, Alta L. R. , reversed. *Sawyer-Massey Co.* v. *Ritchie* (1910), 43 S. C. R. 614, 31 C. L. T. 195.

Furnace — Defective construction condition precedent. *Crocket* v. *McKay* (1911), 9 E. L. R. 398. N. S. R. .

Hidden defects — *Cancellation of sale—Oral evidence—Admissibility—Contract between trader and non-trader.*]—Myosis or intermittent lameness in a horse is a defect which is ground for an action to set aside the sale. It is sufficient that the disease exists or that it is there in germ at the time of the sale, although its development may

be afterwards.—2. The sale of a horse by a horse dealer to a non-trader is a commercial contract as to the former, and oral evidence of a warranty is admissible against him. *Les Ecclesiastiques du Seminaire de St. Sulpice de Montreal* v. *Jacobs*, 33 Que. S. C. 68, 4 E. L. R. 340. Affirmed by the Court of King's Bench. *Jacobs* v. *Gentlemen of the Seminary*, 5 E. L. R. 567.

Horse as "good in his hands" — *Restlessness — Rescission—Change in the condition of a thing sold.*]—The vendor of a horse who warrants it "good in his hands" warrants as good for the purpose of the purchaser. Hence, the latter has a recourse to a suit to set aside the sale, resulting from this guarantee at the time of sale, on account of restlessness in the animal. A change in the condition of the thing sold caused by the legitimate treatment of it by the buyer before being able to prove that it is not such as warranted, is no barrier to his right to move to set aside the sale. Hence a person who buys a mare guaranteed kind may after having her mounted by a trainer, move to set aside the sale on account of restlessness which he only discovered afterwards. *Tremblay* v. *Bergeron* (1909), 36 Que. S. C. 202.

Horses infected with disease — *Animal Contagious Diseases Act, R. S. C. 1906 c. 75, s. 38 — Absence of evidence to shew knowledge of vendor — Illegal contract — Lien-notes — Action on — Compensation-money — Amendment — Money had and received — Damages — Costs — Warranty.*] —The Animal Contagious Diseases Act, R. S. C. 1906 c. 75, was passed for the protection of the public; and by sec. 38 Parliament intended to prohibit the sale of an animal infected with disease, whether the vendor knows it to be so infected or not.—And where lien-notes were given by the defendant for the purchase-price of two horses which were, at the time of sale, infected with glanders, and which, after they came into the defendant's possession, were killed by the government veterinary surgeon: — *Held*, that the contract of sale was illegal, although there was no evidence that the plaintiff knew of the disease, and the lien-notes were void; and an action upon the notes was dismissed; but the plaintiff was allowed to amend and to claim and recover the sum of $200 received by the defendant for compensation-money from the government, as money had and received by the defendant for the plaintiff's use.—There being no contract, the defendant was not entitled to damages, but was entitled to the costs of the action, to be set off *pro tanto* against the $200.—*Held*, also, upon the evidence, that the defendant failed to prove a warranty. *Nickle* v. *Harris* (1910), 14 W. L. R. 515, 3 Sask. L. R. 200.

Implied condition — *Express limitation of warranty — Onerous and unusual provision not expressly brought to purchaser's attention — Representations of vendor's agent.*]—Action for balance of price of machine. Defendant, an educated man, signed plaintiffs' usual written contract, which provided that if machine not satisfactory written notice had to be given plaintiffs within ten days after starting the machine, and on failure to give this notice, machine was to be considered satisfactory:—*Held*, that the special provision not having been brought directly to defendant's attention, plaintiffs' express warranty stands with this provision eliminated. The agent's representations caused the defendant not to read terms of contract. Machine also held to be defective in material and in construction. Judgment for plaintiffs for amount claimed. Counterclaim for damages allowed to same amount with set-off. *Sawyer-Massey* v. *Ritchie*, 10 W. L. R. 457.

Implied condition — *Right of purchaser to inspect and reject—Duties of seller and purchaser respectively—Sale of Goods Ordinance, s. 16, s.-s. 1—"Patent or other name"—Interpretation — Agricultural machinery — Discussion of special clauses in agreement — Authorities—Decisions of the Courts of the North-West Territories.*] — An express warranty in a contract for sale of goods does not necessarily negative the implied condition under the Sale of Goods Ordinance, s. 16, s.-s. 1. The words "specified article under its patent or other name," in the proviso to this sub-section, refer to (a) a specified article sold under a patent name, (b) a specified article sold under a name *ejusdem generis* with "patent name," i.e., a specific name known to the trade, and indicating a claim by the manufacturer or seller of some special advantage in the particular kind of article so named over other articles of the same general description. *Frost & Wood Co.* v. *Ebert*, 3 W. L. R. 69, distinguished. The Supreme Court of Alberta is not bound by decisions of the Supreme Court of the North-West Territories, which are only entitled to the like respect accorded to decisions of the Courts of other provinces. The effect of the special warranties and implied conditions on the sale of a steam plough and engine, in this case the right of the purchaser to inspect and reject, his duties to the seller, and the effect of a special clause providing that in case a cancellation of the order, or rejection of the goods by the purchaser, he agrees to pay freight and ten per cent. of the price, discussed. *Reeves* v. *Chase*, 8 W. L. R. 313, 1 Alta. L. R. 274.

Implied statutory conditions—*Breach —Defence — Absence of notice—Action on lien-notes — Misrepresentation by vendors' agents—Inducement to sign notes—Defence —Dismissal of action.*] — The defendants ordered an engine from the plaintiffs, and agreed to pay for it by promissory notes, and to receive the engine on arrival, subject to the warranty mentioned in the order, and to give the notes upon delivery or tender of the engine. The warranty was with respect to several specific matters. The defendants took possession of the engine when it arrived at the place agreed upon, but refused to give the notes until they saw how the engine ran. They ran it for 6 days, and, finding it did not work satisfactorily, refused to give the notes. They were subsequently induced by the plaintiffs' agent to give, not the notes agreed to, but "lien-notes" for the price of the machine, although they were still not satisfied with it: —*Held*, that the evidence did not shew any breach of the express warranty; but did shew that the plaintiffs knew the particular purpose for which the defendants re-

quired the engine; that the defendants relied on the plaintiffs' judgment; that the engine was of a description which it was in the course of the plaintiff's business to supply; and that the engine was not reasonably fit for the purpose intended; and therefore the provisions of clause (1) of s. 16 of the Sales of Goods Ordinance applied; the implied statutory condition under that clause not being inconsistent with the express warranty; the defendants did not keep the engine an unreasonable time before they ceased using it for the purpose of trying and testing its fitness; but there was no counterclaim, and the defendants had given the plaintiffs no proper notice that they rejected the engine, and so were unable to set up the breach of the condition as a defence. The agreement contained a clause that the use of the engine after the expiration of the 6 days mentioned in the warranty should be conclusive evidence of the fulfilment of the warranty:—*Quære*, whether the defendants were not estopped, under that clause, by using the engine after the expiration of 6 days, from making a defence based either on the warranty or the statutory condition. — *Held*, however, that the defendants were induced to sign the lien-notes sued on by the misrepresentations of the plaintiffs' agent, made with the object of inducing the defendants to sign the notes; and it made no difference that the misrepresentations were as to a matter of law, viz., as to the construction to be put on the agreement of sale; this was a good defence, and the defendants were entitled to have the action brought upon the lien-notes dismissed. *Hart-Parr Co.* v. *Eberle* (1910), 13 W. L. R. 263, 3 Sask. L. R. 34.

Affirmed 15 W. L. R. 564, Sask. L. R. 386.

Implied warranty — *Contract—Breach —Seed wheat—Purchase of spring wheat — Fall wheat mixed with spring wheat—Damages.*]—Action for damages for breach of contract in supplying plaintiff with a mixture of fall wheat and spring wheat, for seed instead of spring wheat, which plaintiff ordered and defendants say they supplied. Plaintiff succeeds, the evidence shewing that there was a mixture. *Wetenhall* v. *Brackman-Ker Milling Co.* (B.C.), 10 W. L. R. 100.

Implied warranty — Contract — Evidence — Principal and agent—Identity — New trial. *Windson* v. *Simmons*, 5 E. L. R. 139.

Implied warranty — *Latent defect — Inspection—Caveat emptor.*]—The plaintiffs sought to recover from the defendants a sum of money paid on account of the purchase of a boiler and engine purchased by the plaintiffs from the defendants for the purpose of operating a grist mill, claiming that the engine and boiler were not reasonably fit for the purpose for which they were sold:—*Held*, that the case came within the first class of cases mentioned in *Jones* v. *Just*, 3 Que. L. R. 202, and that the goods being *in esse*, and in a position to be inspected by the buyers, and there being no fraud on the part of the sellers, the maxim *caveat emptor* applied, even though the defect was latent, and could not be discovered on examination. *Higgins* v. *Clish*, 24 N. S. R. 135.

Implied warranty of title — *Breach — Evidence.*]—The defendant sold to the plaintiff a mare, then, as was assumed in the absence of evidence to the contrary, in the defendant's possession:—*Held*, following *Raphael* v. *Burt*, 1 Cab. & El. 325, and *Brown* v. *Cockburn*, 37 U. C. R. 592, and distinguishing *Morley* v. *Attenborough*, 3 Ex. 500, that the sale being one of a specific article, and there being no evidence that the vendor did not intend to assert ownership, but only to transfer such interest as he might have, there was an implied warranty of title. The defendant having arranged with the plaintiff that a third party should hold the mare pending settlement of the dispute about the title, and having upon inspecting the adverse claimant's alleged title, authorized the custodian to give her up to the claimant.—*Held*, sufficient evidence, by way of admission, on which the trial Judge could reasonably find a breach of the warranty. *Dickie* v. *Dunn*, 1 Terr. L. R. 83.

Implied warranty of title — *Knowledge of defect.*] — If, where a specific article is sold, there is knowledge on the purchaser's part of a defect in the vendor's title, there is no implied warranty of title as against such defect. *Dickie* v. *Dunn*, 1 Terr. L. R. 83, distinguished. *Turriff* v. *McHugh*, 1 Terr. L. R. 186.

Intention of vendor — *Inspection by purchaser—Implied condition of fitness — Reliance on skill or judgment of vendor — Sale of Goods Ordinance, sec. 16 (1).*] — The defendant bought from the plaintiff and his partner a second-hand separator, which had been the property of H., upon whose premises it still was, and was there inspected by the defendant before he bought. The defendant alleged an express warranty by the plaintiff's partner that "the machine had been doing better work than the new machine" which H. had purchased. The defendant asked for a trial or a guarantee, but the plaintiff refused to give either:—*Held*, that a representation made at the time of a sale of personal chattels is not a warranty unless it appears to have been so intended; and the words used by the plaintiff's partner were not intended by him to be a warranty nor were they received by the defendant as such.—*Held*, also, upon the evidence, that the defendant did not rely upon the skill or judgment of the plaintiff's partner, and, therefore, there was no implied condition, under sec. 16 (1) of the Sale of Goods Ordinance, that the goods should be reasonably fit for the particular purpose for which they were required. *Thompson* v. *Bell* (1910), 14 W. L. R. 272, 3 Sask. L. R. 170.

Interest of warrantors — Sale to intermediate purchaser — Agent—Scope of authority—Trading corporation—Power to warrant goods sold—Findings of jury—Evidence—Damages. *Laramie* v. *Galt Art Metal Co.*, 12 O. W. R. 860.

Latent defect — *Estoppel — Acceptance—Misdirection — Undue weight to evidence of one party.*]—Where a Judge undertakes to put the evidence before the jury, he is not at liberty to present in a strong light all the facts and circumstances that make for the contentions of one of the parties, and entirely, or practically, ignore the evidence that makes for his opponent. A charge con-

structed on such lines is tainted with misdirection, and the verdict resultant thereupon in favour of the one party, will not stand unless the case is so clear that a verdict for the opposite party, on the evidence before the Court, would be set aside as one that no reasonable jury could give. The purchaser of goods subject to a latent defect, sold with a warranty, is not estopped from claiming for breach of the warranty, when sued for the price, by having received the goods without objection made at the time. *Smith* v. *Archibald*, 2 E. L. R. 397, 41 N. S. R. 211.

Latent defects — *Rescission — Sale of a horse—Blind staggers — Proof—Implied guarantee in selling—Proof by witnesses — Sale by a dealer to a non-dealer.*]—That blind staggers or intermittent lameness in a horse is a recurrent vice which gives rise to an action to rescind the sale. It is sufficient that the disease exists in germ at the time of sale although the development of it may only be later. The sale of a horse by a horse dealer to a non-dealer is subject to the law commercial so far as the seller is concerned, and the oral testimony that it was made with the seller's guarantee is admitted against him. *St. Sulpice* v. *Jacobs*, 18 Que. K. B. 195.

Latent defects — *Rights of purchaser — Action quanti minoris—Damages—Diligence in exercising redhibitory recourse — Amendment.*]—The buyer of a chattel impaired by a latent defect has the option of surrendering it and recovering the price, or keeping it and recovering a part of the price in proportion to the defect. He is also entitled to damages when the seller knew, or is presumed to have known, of the defect at the time of the sale; but he has no action to compel the seller to remedy the defect. He must use reasonable diligence in resorting to his remedy; and, when he allows ten months to elapse between the detection of the defect and the institution of the action, the latter is brought too late. 2. An amendment of a declaration will not be allowed if it changes the nature of the action. *Phelan* v. *Montreal Investment and Freehold Co.*, 35 Que. S. C. 72.

Machine not as ordered.]—Action to recover amount of a lien note. Judgment for plaintiffs, on appeal, was dismissed:—*Held*, there was no express warranty as to the fanning mill sold, nor an implied warranty under s. 16. *Imperial Bank* v. *Kievell* (1909), 12 W. L. R. 308.

Machinery — Breach — Damages — Loss of profits — Wages paid while waiting for machinery. *Thompson* v. *Corbin*, 2 E. L. R. 84.

Machinery — Breach — Defective working of machine—Damages—Counterclaim—Costs. *Sumner* v. *Dobbin* (Man.), 3 W. L. R. 382.

Machinery — *Breach — Payment of price.*]—A warranty by the vendor of a machine that it will work in a satisfactory manner must be applied having regard to the usage it receives in ordinary circumstances of place, work, and employment. Breach of the obligation arising from such warranty frees the purchaser from payment of the price. *Frost and Wood Co.* v. *Themblay*, 28 Que. S. C. 46.

Machinery — *Defect — Notice — Contract — Condition — Fulfilment.*]—The condition in a written sale of a threshing machine expressed in French, as follows: "*L'acheteur aura une journée pour essayer le moulin dans les dix jours qui suivront l'envoi, et si la machine ne fonctionne pas bien, il devra en donner avis par écrit (expliquant en quoi elle fait défaut), à l'agent qui a pris la commande ainsi qu'aux vendeurs et donner le temps raisonnable à ces derniers de remédier aux défauts, s'il y en a; l'acheteur lui donnant toute l'assistance possible, et, d'une manière amicale, fournissant une paire de chevaux ainsi que le conducteur.*"—is sufficiently fulfilled by the buyer who, finding the machine defective, notifies the sellers' agent, and, through him, the sellers themselves, and provides a team, a driver, and the necessary quantity of grain for a trial of the machine, which takes place four days after the notice. The sellers are not entitled to a further trial with use of the buyer's horses, driver, and grain, under pretext of failure by the latter to specify, in his notice, the defect he found in the machine. *Chalifoux* v. *Forest*, 34 Que. S. C. 226.

Machinery — *Defects — Implied warranty—Damages — Costs.*]—1. Under s.-s. (d) of s. 16 of the Sale of Goods Act, R. S. M. 1902 c. 152, an express warranty in a contract for the sale of goods by description does not exclude the implied warranty provided for by s. 15 of the Act that the goods shall correspond with the description, and on the sale of a threshing engine by description there is an implied warranty that it shall be reasonably fit for the work that the vendor knew the buyer wanted it for, which is not inconsistent with any of the express warranties usually inserted in such a contract. 2. Where a contract for the sale of a threshing engine contains the usual warranties and also a provision that in case the engine is not satisfactory the company may supply another engine, and, if it does, "the terms of the warranty shall be held to be fulfilled, and the company shall be subject to no further liability," this should not be construed to mean that the company would be exonerated after supplying another engine no matter whether it was as defective as the first one or not. 3. The defendant should be allowed interest on the amount allowed him as damages, as he had to pay interest on the promissory notes sued on. *North-west Thresher Co.* v. *Darrell*, 15 Man. L. R. 252, 2 W. L. R. 262.

Machinery — *Written contract — Express warranty—Implied condition as to fitness for particular purpose—Non-fulfilment —Right of purchaser to reject—Evidence — Findings of trial Judge—Express agreement negativing implied conditions or warranties —Sale of Goods Ordinances, ss. 16, 53.*]—Appeal from judgment, 8 W. L. R. 313, allowed, and judgment given plaintiffs for amount claimed or defendant may return plough, when judgment will be for limited amount as provided in agreement. Action for price of steam plough which defendants refused to accept on the implied condition that it was not reasonably fit for special

purposes for which it was bought under s. 16 above. The written agreement set out that there were no implied conditions, as under s. 53 above implied conditions may be negatived. Judgment must be for plaintiff. *Reeves* v. *Chase*, 11 W. L. R. 459; 2 Alta. L. R. 133.

Machinery — *Written contract — Illiterate purchaser—Contract not read to or by—Purchaser bound only by terms understood by him.*]—Action on a mortgage to recover price of machinery. Defendant was illiterate:—*Held*, that he was not bound by written order, but by express terms made with agent, and legal implications arising therefrom. Mortgage held valid, as when executed, defendant had been recommended for his homestead patent though not so when he signed the agreement. Mortgage effective so far as it conforms to the agreement as found. *Canadian* v. *Peck*, 11 W. L. R. 605.

Measure of damages — *Resale—Onus—Fair price — Substituted agreement — Tender.*]—The defences to an action for the price of a horse were: (1) that the plaintiff, at the sale, warranted the animal to be no more than 10 years old, whereas in fact he was older; (2) that the plaintiff instructed the defendant to sell the horse, and said that he (the plaintiff) would accept the amount realised as payment in full; that the defendant sold the horse for $50, and tendered that amount to the plaintiff, who refused to accept it:—*Held*, that the measure of damages for a breach of warranty of a chattel when the article has not been returned (as here) is the difference between its value with the defect warranted against and the value which it would have borne without that defect. The onus was on the defendant to prove that, and he did not do it; it was not sufficient to shew that the horse was sold for $50; he must shew that the sale was for a fair price, the sale not being at auction.—*Held*, also, that a substituted agreement was not proved, and there was no evidence of a tender. *Beck* v. *Graham* (1911), 16 W. L. R. 291, Sask. L. R. .

Obligations of the vendor — *Warranties of hidden defects — Guarantee when selling—Action to set aside the sale—Diligence.*]—A declaration by a vendor before a sale that the thing has not a certain specific defect, constitutes a special warranty when selling with regard to this point, and receives its effect notwithstanding the subsequent conclusion of the sale without a warranty in general terms. Hence, an action to set aside the sale for violation of this warranty is not subject to the rule of Art. 1530 C. C. regarding the diligence with which an action for rescission must be brought. *Gallant* v. *Bélanger*, 36 Que. S. C. 5.

Onions, 14 tons of — *To be shipped to Manitoba — Nonconform, of contract.*] — Plaintiff brought action to recover price of 14 tons of Dutch sets (onions). According to agreement they were to be small, hard, dry and unsprouted, and were to be shipped from county of Perth, Ont., to Brandon, Man., and to be inspected and approved of before shipment. Upon inspection defendant refused to accept delivery.—*Held*, upon the evidence, that the goods tendered were nonconform, of contract. Action dismissed with costs. *Kastner* v. *Mackenzie* (1909), 14 O. W. R. 1268, 1 O. W. N. 288.

Quality — Deduction for inferiority — Notice of breach. *Meech* v. *Ferguson*, 5 O. W. R. 773.

Quality of goods — *Remedy—Laches—Estoppel.*]—A buyer is bound to use diligence in availing himself of the remedies he has against the seller as warrantor of the quality of the thing sold; more particularly when he has to shew that he was not himself to blame in respect of its not suiting the purpose for which it was bought. Hence a builder of a bridge who buys cement which he finds unfit for his work, and allows 6 months to elapse thereafter, is estopped from claiming damages from the seller, when it can no longer be ascertained whether he had mixed it properly, or whether he had not allowed it to deteriorate through exposure to moisture. *Trudeau* v. *Lafleur*, 32 Que. S. C. 223.

Parol evidence.]—A written contract was entered into for the sale by description of a specific article, namely, a gasoline engine with a pump standard. It was not pretended that the article did not answer the description:—*Held*, that the contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence was not admissible to shew a warranty made prior to the entering into of the contract which was inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from, the written contract; and the statements alleged to have been made by the vendors, and acted on by the purchaser, were not such as to constitute a separate and independent collateral agreement, and admissible as such. *Northey Mfg. Co.* v. *Saunders*, 20 C. L. T. 171, 31 O. R. 475.

Rebuilt engine is a second-hand engine and the representation that an engine was rebuilt is not a condition of sale but a warranty, for the breach of which the vendors are liable in damages. *New Hamburg Mfg. Co.* v. *Webb* (1911), 18 O. W. R. 216, 2 O. W. N. 588, 23 O. L. R. 44.

Remedy — *Return of article.*]—Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and, if such defect could not be remedied, the engine was to be returned to the defendants and a new engine given in its place: — *Held*, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty. *Henckcliffe* v. *Banwick*, 5 Ex. D. 177, followed. *Hamilton* v. *Northey Mfg. Co.*, 20 C. L. T. 178, 31 O. R. 468.

Removal of goods—*Estoppel from setting up defective quality.*]—The purchaser who accepts the goods sold at the place agreed upon for delivery and removes them

elsewhere, is estopped from setting up their defective quality as a ground for claiming a reduction of the price or a rescission of the sale. *Bessette* v. *Lyall* (1910), 38 Que. S. C. 474.

Representation — *Intention—Reliance on—Evidence.*]—Every affirmation as to the character of goods at the time of the sale is a warranty, but it must appear that the representation was intended as a warranty, and was relied upon by the purchaser, and formed a part of the contract. *Taylor* v. *Poirier*, 8 W. L. R. 949, 1 Sask. L. R. 204.

Representation — *Jury — New trial.*]—The general rule is that whatever the vendor represents at the time of the sale of a horse is a warranty, but often there must be discrimination between language merely of expectation, estimate, or praise, and that which constitutes a representation or warranty, and the attention of the jury should be called to this distinction, in pointed language.—Principles which should govern the Court in limiting the inquiry upon a new trial. *Irvine* v. *Parker*, 40 N. S. R. 392.

Representation as to quality — *Delivery and acceptance—Part not as warranted —Deduction of damages.*]—The purchaser of a specific lot of eggs at fixed price cannot, after delivery and acceptance, reject and return them because of a representation, made in good faith by the vendor, that the proportion of good eggs in the lot was greater than it turned out to be, but is entitled to a deduction from the vendor's claim by reason of getting a smaller quantity of good eggs than he was led to expect, such deduction being allowed by way of damages for breach of warranty. *Prout* v. *Rogers Fruit Co.*, 18 Man. L. R. 240, 9 W. L. R. 554.

Representations as to quality—*Warranty—Breach—Measure of damages—Sale of Goods Ordinance, sec. 51, sub-secs. 2 and 3—Loss of profits.*]—The plaintiffs purchased from the defendant a second hand threshing outfit for $1,000. The defendant represented that the engine and separater were in a first-class state of repair, and were ready to go into the field and do good work and thresh in competition with any other machine; that the engine had been refued the year before with new flues; that the separator had been all overhauled and put in good shape; and that the belts were in good repair:—*Held*, upon the evidence, that these representations were not true; that they were relied upon by the plaintiffs; that the defendant knew the machine was being purchased to do public threshing; that the representations were material; and that the plaintiffs would not have purchased had the representations not been made.—*Held*, therefore, that the statements made to the plaintiffs were warranties, and there had been a breach of them.—The measure of damages for breach of warranty is set out in the Sale of Goods Ordinance, s. 51, s.-ss. 2 and 3, and is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. And *held*, upon the evidence, that the machine, when sold to the plaintiffs, was worth $500; the plaintiffs' damages were therefore, $500.—But *held*, that the plaintiffs were not entitled to damages for the loss of profits which they would have made if the machine had been as warranted; the reason why they did not continue threshing was on account of an accident to the engine, which might have happened if the machine had been as represented. *Scramlin & Smith* v. *Phalen* (1910), 14 W. L. R. 259, 3 Sask. L. R. 194.

Representations of agent — *Warranty —Breach—"Condition" and "quality" of fruit trees—Remedy in damages for breach of contract—Remedy given by contract—Replacing trees by vendor—Purchaser not confined to that remedy.*]—Action to recover price of nursery stock. Counterclaim for damages, it being claimed goods not up to quality contracted for. The trial Judge in the County Court gave judgment for $253.25 and for $200 damages on counterclaim: — *Held*, that he could have given judgment on counterclaim for an amount to counterbalance plaintiff's judgment. An express warranty in the contract was that trees were to be in "good condition."—*Held*, on an appeal, that "condition" here means "quality." The contract contained a proviso that stock failing to live could be replaced at half price if plaintiffs were notified by a fixed date.—*Held*, that this does not prevent defendant from claiming damages by an action. Appeals dismissed. *Wellington* v. *Fraser* (1909), 14 O. W. R. 291, 19 O. L. R. 88.

Sale by sample — *Endorsement of bill of lading.*]—The defendant wrote plaintiffs that he had a car of wheat "on the track" for sale and sent samples, which plaintiffs agreed to buy. Instead of being on the track, the wheat was in defendant's elevator, and was shipped on 30th August, but billed to his own order. On the first September plaintiffs gave defendant a cheque for the full amount and bill of lading was endorsed to them. When the car reached plaintiffs part of the wheat was damaged, getting wet in transit on 30th or 31st August. Having sold the damaged wheat at a loss plaintiffs now sued for damages:—*Held*, that they must succeed as the defendant was the owner of the wheat until the bill of lading was endorsed to the plaintiffs on the first of September, the wheat having been damaged before the latter date. *Moore* v. *Laird*, 9 W. L. R. 199.

Sale of Goods Ordinance, ss. 13 (b), 15 (1) — *Condition or warranty—Implied warranty of fitness — "Course of the seller's business" — Second-hand article.*] — Where goods are sold on a representation, amounting to a condition of the contract, if the buyer accepts the goods, the effect of s. 13 (b) of the Sale of Goods Ordinance, is that the condition sinks to the position of a warranty, unless there is an express or implied term in the contract giving a right of rejection under such circumstances.—Mere expressions of commendation by the seller are not representations or warranties; and, *semble*, where a buyer says he will buy a specific article at a given price, if the seller will guarantee it to be in perfect condition, and the sale afterwards takes place at such price, in the absence of evidence of an express assent on the part of the seller to such representation or warranty, it will not be deemed either a condition or a warranty.—The implied warranty of fitness under s. 16,

s.-s. 1, of the Sale of Goods Ordinance, does not apply where the seller is not a regular dealer in the class of goods sold; and, *semble*, not to second-hand goods. *Robertson* v. *Morris*, 1 Alta. L. R. 493, 8 W. L. R. 611.

An appeal was dismissed without expressing any opinion of approval or disapproval. *Caveat emptor* applies. *Ibid.* 10 W. L. R. 404.

Sale of horse — *Subsequent development of vice.*]—A horse sold by the defendant to the plaintiff was guaranteed sound and without vice, fault, or tricks. The evidence shewed that for a period of eight years prior to the sale the horse was without faults or tricks, but that, immediately afterwards, in the hands of the plaintiff, it baulked and kicked when in harness, and was useless for the purpose for which it was purchased. Judgment having been given, on these facts, in favour of the defendant:—*Held*, McDonald, C.J., *dubitante*, that the appeal must be dismissed. *McGill* v. *Harris*, 36 N. S. R. 414.

Second-hand goods — *Provision excluding other warranties — Application to implied warranty under Sales of Goods Act.*] —The plaintiffs sold to the defendant an outfit of threshing machinery, consisting of a second-hand separator, an engine, and several other articles. The plaintiff alleged an express warranty that the machinery was to be delivered in good working order and condition ready to be operated. The agreement of sale was in writing and contained an express warranty that the machinery would "do good work if properly operated by competent persons." The agreement provided that the express warranty was not to apply to second-hand machinery; and also provided that "there are no other warranties, guarantees, or agreements whatsoever other than those contained herein." The only part of the machinery complained of by the plaintiff was the separator, to which, as it was second-hand, the express warranty did not apply:—*Held*, that the express warranty was not essentially different from that alleged by the plaintiff; and as, by the terms of the agreement, the express warranty did not apply to the separator, the plaintiff could not set up a warranty equivalent in effect, though couched in slightly different language.—The plaintiff did not allege the implied warranty of reasonable fitness under the Sales of Goods Act; but the case was treated at the trial as if it had been alleged:—*Held*, that that implied warranty was excluded by virtue of the provision in the agreement that there should be no other warranties, etc., which provision applied to second-hand goods, which were not covered by the express warranty. *Sawyer-Massey Co.* v. *Ritchie*, 43 S. C. R. 614, 15 W. L. R. 444, followed. *Clark* v. *Waterloo Mfg. Co.* (1910), 16 W. L. R. 53, Man. L. R. .

Skill and judgment of sellers.] — In a loosely constructed contract for the sale of specific goods the question arose whether there was attached to the sale an implied condition or warranty that the goods would answer the particular purposes for which they were procured. Court of Appeal *held* that taking into consideration what was present in the minds of the parties and the surrounding circumstances as developed by the direct testimony that the defendants intended to rely upon the skill and judgment of the company. That the company understood what was expected. That their obligation had not been discharged, and that the writing did not prevent, in this case, a scrutiny into the facts. Appeal dismissed with costs. *Can. Gas Power & Launches & Mackay* v. *Orr Bros.* (1911), 19 O. W. R. 235, 2 O. W. N. 1070.

Specific article — *Implied warranty — Knowledge of purpose — Inspection.*]—In a sale of a specific ascertained article, by one who is not a producer or manufacturer, for a particular purpose, known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected, or has had the opportunity of inspecting it, before purchasing. *Jordan* v. *Leonard*, 36 N. B. R. 518.

Specific article — Knowledge of purpose —Representation of fitness — Evidence — Repairs — Liability for payment—Counterclaim — Breach of warranty — Damages. *Hutchison* v. *Johnston* (B.C.), 8 W. L. R. 251.

Specific article — Sale by description— Reliance on vendor's representations—Proof of falsity — Implied warranty — Action for price — Evidence — Credibility of witnesses. *Bannerman* v. *Barlow*, 7 W. L. R. 859.

Specific articles — *Express and implied warranties — Specified articles under trade name — Combination — Fitness for particular purpose.*] — The defendant bought from the plaintiffs an Eclipse thresher, a three-horse power tread, Pitts pattern, and an Eclipse bagger, for the purpose of threshing grain for hire, and signed a contract in which the goods were expressly warranted to be of good material, durable with good care, and, with proper usage and skilful management, to do as good work as any of the same size sold in Canada." It was provided that there should be no other warranties or guarantees than those contained in the agreement. The articles individually were good of their kind, but were not adapted to work in combination, and it was impossible to thresh profitably for hire with the apparatus: — *Held*, that the implied warranty that the goods should be reasonably fit for the purpose for which they were, to the knowledge of the vendors, bought, was not inconsistent with the express warranty.—2. That the exclusion by the terms of the agreement of other warranties and guarantees did not exclude this implied warranty.—3. That the contract, being a single contract for the sale of the combination of articles, the implied warranty was not excluded, although each of the parts of the apparatus was a specified article under a trade name.—4. That in deciding whether the purchaser had relied upon the skill and judgment of the vendor, the essential thing was not whether he had exercised his private judgment, but what had led him to exercise it as he did. *Sawyer-Massey Co.* v. *Thibart*, 5 W. L. R. 241, 6 Terr. L. R. 409.

Threshing outfit — Incapacity of engine and boiler forming part of outfit — Contract — Construction — Implied warranty — User of machines — Promise to repair — Promissory notes — Substituted contract — Amendment. *Bell* v. *Goodison Thresher Co.*, 8 O. W. R. 881, 12 O. W. R. 477.

Traction engine—*Note given in payment —Action on — Counterclaim for breach of warranty — Evidence — Findings of jury— Damages allowed purchaser.*] — Plaintiffs brought action on a promissory note for $260 given in payment for a traction engine. The defendant counterclaimed for $600 damages on the allegation that plaintiff falsely represented to defendant that the traction engine purchased by him was a comparatively new engine, while the fact was that it was an old wornout and worthless engine. At the trial judgment was awarded plaintiff on the note for $297.33 and to defendant on their counterclaim for $600, upon the findings of the jury.—Divisional Court *held*, that the jury were wholly justified in adding $59 to the sum of $541 proved, to make up the $600 at which they assessed defendant's damages; that there was nothing to indicate that the jury had not faithfully done their duty, therefore the appeal should be dismissed with costs. *New Hamburg Mfg. Co.* v. *Webb* (1911), 18 O. W. R. 216, 2 O. W. N. 588, 23 O. L. R. 44.

Warranty against disturbance — *Goods taken by third person from possession of unresisting purchaser — Recourse against vendor.*]—The buyer of goods in possession of the articles sold who allows himself to be despoiled of them without resistance by a third person has no *locus standi* to exercise, against the seller, the remedy arising from a warranty against eviction. *Bastien* v. *Langlois*, 33 Que. S. C. 255.

Written warranty — Inconsistent undertaking of agent for vendors — Return of goods — Condition precedent — Notice — Waiver — Implied warranty — Counterclaim — Defects in goods — Costs. *Cockshutt Plow Co.* v. *Mills* (N.W.T.), 2 W. L. R. 355.

See DAMAGES—EVIDENCE.

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19. WEIGHTS AND MEASURES.

Agreement — *Objection not raised at trial — Payments on account.*]—When a defendant seeks to avoid payment of an account for lime furnished to him on the ground that it was sold to him by measure and that the measure used was not stamped as required by the Weights and Measures Act, R. S. C. c. 104, the onus is on him to prove that the measure was not properly stamped. *Hanbury* v. *Chambers*, 10 Man. L. R. 167, followed. Section 21 of that Act does not render it illegal for parties to agree upon a sale by some authorised measure, and then that the quantities should be ascertained by authorised weights, and, when lime is ordered by the bushel and supplied by weight, the sale would not be illegal or void if the purchaser knew that such was being done, and the onus is on him to prove that he did not know of it. After the passing of 61 V. c. 30, s. 2 (D.), a bushel of lime was to be determined by weighing, unless a bushel by measure should have been specially agreed upon:—*Held*, that, as to certain lime furnished by measure after the passing of the Act of 1898, the plaintiff was entitled to recover for it, on the ground that the defendant had not raised at the trial the objection that there had been no agreement for a determination by measure. The defendant had voluntarily made certain payments on account of certain other sales of lime which were admitted to have been illegal, but he gave no evidence to shew that, when he made the payments, he was ignorant of the illegality.—*Held*, that he could not recover back the amount of such payments. *Hughes* v. *Chambers*, 22 C. L. T. 333, 14 Man. L. R. 163.

City by-law — *Infringement — Ultra vires — Constitutional law.*]—Order *nisi* to quash a conviction under a by-law for having bread for sale without having weight and baker's initials stamped thereon discharged:—*Held*, that local legislature had power to give authority to city council to pass such a by-law, and in so doing was not contravening s.-s. 2, s. 91, B. N. A. Act, and council had power to act under that authority. Whether or not it was fancy bread is solely for the magistrate. *Rex* v. *Kay*, 7 E. L. R. 209.

Sale by measure — *Place and manner of measurement — Custom of trade—When binding—Culling or refusal by purchaser of unmerchantable goods.*] — When goods are sold by measure, and without agreement as to place and manner of measurement, neither party can validly make it without notice to, and in absence of, other. In case of dispute, between parties as to quantity delivered, it must be determined by the Court according to evidence, in usual way. — A custom of trade, to be binding, must be one of universal application and not a mere temporary, or local, or particular custom of individuals.—Culling of goods sold, or rejection of those not according to contract, must be made by purchaser at, or previously to, delivery. *Champaux Co.* v. *Brompton, etc., Co.* (1913), 38 Que. S. C. 261.

Sale by weight — *Determination of weight—Completion of sale—Revendication.*] —The sale of movables by weight, count, or measure, is not complete until they have been weighed, counted, or measured.—"The hay now found in a barn and two stacks, less so much as the vendor has need of for his own use," is an indeterminate quantity, and the purchaser of it at so much a ton does not become the owner and cannot revendicate it so long as the weighing and determination of it have not been made. *Brown* v. *Lauzon*, 28 Que. S. C. 10.

SALE OF LAND.

Judgments Act — *Equitable mortgage—Notice—Right to dispose of timber—Estoppel by course of litigation.*]—In 1891 O.'B. pre-empted Provincial Crown land, and in 1898 M. obtained a judgment against him, which

provided that he might cut timber from O'B.'s pre-emption, and apply the proceeds in satisfaction of the judgment, and which restrained O'B. for six months from cutting or selling timber. M. registered his judgment in 1899. In January, 1900, O'B. agreed to sell to McK. the timber for $1,050, payable at various times, part of the consideration being the fees payable to the Crown for Crown grant; and, on these being advanced by McK., the Crown grant was delivered to him as security for such advance. The plaintiff moved for liberty to sell the land under his judgment, and Drake, J., made an order for sale, holding that McK., being an equitable mortgagee, was excluded by the statute:—*Held*, reversing the decision, that the sale should be subject to McK.'s interest. *Per* Martin, J., that, as the plaintiff at the trial induced the Court to grant him a judgment recognising the defendant's right to timber, he was estopped from afterwards contending that, by virtue of certain sections of the Land Act, the defendant had no right to dispose of timber. *Manley* v. *O'Brien, In re Mackintosh*, 22 C. L. T. 74, 8 B. C. R. 280.

Judicial sale — Tenders — Sale to highest bidder—Re-sale. *Piggott* v. *French*, 6 O. W. R. 398, 877.

See ARBITRATION AND AWARD—DEVOLUTION OF ESTATES ACT — EXECUTION — EXECUTORS AND ADMINISTRATORS — FRAUD AND MISREPRESENTATION — INFANT—LAND TITLES ACT — LIMITATION OF ACTIONS — LUNATIC — MORTGAGE — MUNICIPAL CORPORATIONS — PRACTICE — PRINCIPAL AND AGENT — REAL PROPERTY ACT — SETTLED ESTATES ACT — SUBSTITUTION — VENDOR AND PURCHASER.

SALE OF LIQUOR.

See INTOXICATING LIQUORS.

SALE OF LITIGIOUS RIGHTS.

See LITIGIOUS RIGHTS.

SALE OF LOGS.

See TIMBER.

SALE OF LUMBER.

See TIMBER.

SALE OF MINE.

See DEED — MINES AND MINERALS.

SALE OF PIPES.

See CONTRACT.

SALE OF POISON.

See PHARMACIST.

SALE OF RAILWAY.

See FIXTURES — RAILWAY.

SALE OF SHARES.

See COMPANY.

SALE OF TIMBER.

See TIMBER.

SALVAGE.

See APPEAL — CONTRACT—COSTS—INSURANCE—SHIP — WATER AND WATERCOURSES.

SALVATION ARMY.

See PARTIES.

SASKATCHEWAN ACT.

See CONSTITUTIONAL LAW.

SASKATCHEWAN CONTROVERTED ELECTIONS ACT.

See ELECTIONS.

SASKATCHEWAN SUPREME COURT.

See APPEAL.

SATISFACTION.

See COMPANY — WILL.

SATISFACTION OF JUDGMENT.

See ARREST—COMPANY—JUDGMENT.

SAVINGS BANK DEPOSIT.

See GIFT.

SAW LOGS DRIVING ACT.

See COURTS—WATER AND WATERCOURSES.

SCALE OF COSTS.

See COSTS.

SCANDAL.

See SOLICITOR.

SCHOOL FUNDS.

See CONSTITUTIONAL LAW.

SCHOOLS.

1. HIGH SCHOOLS, 3931.
2. PUBLIC SCHOOLS, 3931.
3. SEPARATE SCHOOLS, 3956.

1. HIGH SCHOOLS.

Maintenance of county pupils in city school — Dispute as to amount to be paid—Arbitration — County Court Judge — Injunction. *Essex* v. *Windsor Board of Education*, 3 O. W. R. 403.

Ontario high schools — Constitution of high school district—Validity — By-law of county council — Assent of Lieutenant-Governor in council—Appointment of trustees—County and township by-laws—Organisation of board—Term of office of trustees —Refusal to fill vacancies—High Schools Act —Construction — Demand of trustees for money to carry on school—Mandamus. *North Plantaganet High School Board* v. *North Plantaganet*, 7 O. W. R. 17.

2. PUBLIC SCHOOLS.

Accommodation for pupils — Formation of new section — Award — Action to set aside—*Mandamus*—Postponement of application—Convenience—Terms. *Re Russell & Doyle*, 2 O. W. R. 727.

Action by commissioners against secretary-treasurer — *Revendication of books — Necessity for resolution authorising action—Failure to produce — Exception to form.*]—An action brought by school commissioners to compel their secretary-treasurer to give up the books of the commission must be accompanied by a resolution adopted by them authorising the action. Section 474 of the School Code, which provides that every action shall be begun by a resolution to that effect, is imperative and obligatory, and if such a resolution is neither alleged nor filed, an exception to the form based upon such default will be maintained. *St. Croix School Commissioners* v. *Lemay*, 33 Que. S. C. 257.

Action to restrain conveyance of land and to recover property — School trustees had brought an action to recover certain property and had obtained an interim injunction preventing its disposition. One trustee retiring a new one was appointed. The legality of the latter's appointment has since been attacked. A majority of the trustees and a majority of the ratepayers now wish the action discontinued:—*Held*, that an amendment may be made making a ratepayer plaintiff; the Attorney-General should also be made a plaintiff on obtaining his consent, and the trustees made defendants, and struck out as plaintiffs. *Trustees* v. *Landry*, 7 E. L. R. 446.

Agreement for stated sum per month —*Application of section—School Ordinance, s. 155.*]—Plaintiff had a written agreement with defendants for payment of salary for teaching at $50 a month for 6 months, the agreement setting out the provisions of s. 155 School Ordinance. He taught for 6 months and received $300. In action for $48.55, balance payable under the provisions of above section:—*Held*, that the section applied although the agreement did not call for a yearly salary:—*Semble*, that the parties could not have contracted themselves out of the operation of the section. *Porter* v. *Fleming School District* (1906), 6 Terr. L. R. 348.

Agreement with teacher — *Dismissal —Seal—Validity.*]—*Semble*, that where public school trustees had entered into an agreement for securing the services of a teacher, and had directed the officer who had custody of the seal to affix it, and both parties had for two years acted on it as a binding agreement, the fact that the seal had not been actually affixed did not invalidate the agreement. Where such an agreement is entered into with the intention that it shall supersede a previous agreement of a like character entered into between the trustees and the same teacher, if the second never becomes operative, the first agreement will remain in force and govern the relations between the teacher and the trustees. Where such an agreement is valid on its face, and has been acted upon for several years, the onus of proving invalidity by reason of the requirements of s. 19 of the Public Schools Act, R. S. O. c. 292, enacting that no proceeding of a rural school corporation shall be valid or binding unless adopted at a meeting at which at least two trustees are present, except as stated in that section, not having been complied with rests upon the trustees; and *semble*, that the absence of a formal minute of the proceedings of the meeting at which the first agreement was signed would not be fatal to its validity. A teacher acting under an agreement, who has been wrongfully dismissed, may treat his discharge as a rescinding of the contract by the trustees, and, adopting the rescission, is entitled to his salary *pro rata* up to the time of his discharge, and thence to the time of bringing his action. *McPherson* v. *Usborne School Trustees*, 21 C. L. T. 181, 1 O. L. R. 261.

Alteration of boundaries — *Arbitrators — Appeal — Discretion — Mandamus.*] — The provisions of s.-s. 3 of s. 39 of the Public Schools Act, R. S. O. c. 292, are permissive, not imperative. It is plain from a review of the history of the legislation as to the matter with which that section deals, that the Legislature in 1887

deliberately abandoned the policy of making it obligatory upon the county council to appoint arbitrators, and plainly vested in the county council the discretion of appointing them or not, as it might in the exercise of that discretion deem proper. Order granting a *mandamus* to the county council to appoint arbitrators to hear an appeal against a by-law of a township council providing for the alteration of the boundaries of school sections, reversed. *In re Wooliver & Kent*, 20 C. L. T. 97, 31 O. R. 606.

Alteration of boundaries — *Division of sections — Appeal — Maintenance of school — Refusal — Demand—Particulars.*] — There is no appeal from resolutions of school commissioners changing the boundaries of school sections, if such resolutions have not been read and published according to law, even when they have been partly acted upon. When a notice of appeal in the matter of a school complains of the refusal of the school commissioners, the appeal will not be dismissed, upon motion, for default in shewing a demand. — But the appellant will, upon motion of the school commissioners for particulars of the demand, be obliged to declare where, when, how, and by whom the school commissioners received a demand to maintain a school in a particular section. *Rozon* v. *St. Lazare School Commissioners*, 3 Que. P. R. 249.

Alteration of boundaries — *Union school section.*] — There was no proof of the formation of the union school section in question, but it was shewn that for many years a lot in one township had been marked in the assessment roll as in a school section of the adjacent township, to which the taxes received in respect of that lot were paid; that in various reports and returns made by the school inspector the owner of the lot was treated as a ratepayer in respect of the school section of the adjacent township; that his children went to the school established there; and that in the township school map, prepared by the township clerk under the provisions of s.-s. 4 of s. 11 of the Public Schools Act, R. S. O. c. 292, the lot was marked as in the school section of the adjacent township:—*Held*, that the evidence was sufficient to shew that the union school section existed in fact, and that s. 42 of the Act applied to it, so that it must be deemed to have been legally formed. History and object of that legislation discussed. Proper corporate description of the trustees of a union school section pointed out. A municipality in which there is any territory forming part of the union school section in question, is concerned, within the meaning of s. 43 of the Act, in any proceedings for the alteration of the section, and these proceedings must be based upon a petition of five ratepayers of this municipality, though not necessarily of ratepayers in the territory itself. *Nichol School Trustees* v. *Maitland*, 19 C. L. T. 384, 26 A. R. 506.

Alteration of school sections — *Appeal — Arbitrators — By-law — Description of lots.*]—The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section differing from that asked for in the petition. *Re Southwold School Sections*, 3 O. L. R. 81, applied. In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described. *In re Sydenham School Sections*, 23 C. L. T. 305, 6 O. L. R. 417, 2 O. W. R. 830. Affirmed 24 C. L. T. 88, 7 O. L. R. 49, 3 O. W. R. 227.

Annexation of part of township to city — *Sale of school site.*]—By proclamation part of the township of B. was added to Hamilton. Within the added part was an entire school section in which was the school house and grounds used for school purposes. The Hamilton Board of Education took possession of said school grounds for school purposes, but subsequently not requiring them offered them for sale:—*Held*, that the Board could make a good title. *Re Hamilton and McNicol*, 12 O. W. R. 1015.

Board of commissioners — *Trustee — Legality of appointment — Public Instruction Act (N.S.), s. 37.*]—*Quo warranto* proceedings to determine the validity of the election of school trustees. The information was dismissed. An appeal also dismissed: — *Held*, that there was a meeting but no election, so that the District Board was entitled to nominate the trustees. *R.* v. *Buchanan*, 7 E. L. R. 465.

Board of Education — *15 V. c. 15 — Order locating schoolhouse within three miles of another — School rate — Appeal.*]—Appeal from a conviction for a school rate. The 15 V. c. 15, s. 25, enacted that a schoolhouse could not be legally located within three miles of one already established under the Act. In this case the school was located within the limit and it was contended that the Board of Education had no power to establish it and the rate was therefore void, in answer to which respondent's counsel contended that the decision of the Board establishing the school (until reversed on *certiorari*) was conclusive and that no evidence could be heard to contradict it.—Section 15 of the Act also provided that when a settlement desired the erection of a new school district, five of the inhabitants should make a request therefor in writing to the Board which was then to "proceed as pointed out by the Act." The requisition was dated in January, 1853, but the Act did not come into force until April, and it was urged that the requisition must have been to the former Board, which had not the powers of the present one:—*Held* (Peters, J.), that the decision of the Board (until quashed) was conclusive and that in collateral proceedings no evidence could be heard to contradict it.—2. That the requisition was not such as the Act required, and that all proceedings founded on it were void. *Robinson* v. *McQuaid* (1854), 1 P. E. I. R. 103.

Board of trustees — *Power to accept bills of exchange — Evidence of authority of secretary-treasurer and chairman — Seal.*]—One Broley was erecting a school building for the defendants, and, being indebted to the

plaintiff, gave him an order on the defendants for the amount of his indebtedness. On presentation of the order, which was held to be an inland bill of exchange, a memorandum was endorsed thereon as follows: "This order is accepted and to be paid when contract for school is completed and money becomes due;" which was signed by the secretary-treasurer and chairman of the board, and the corporate seal affixed. There was no evidence that the acceptance of this bill of exchange or order had been authorised by the board: — *Held*, that a corporation has no power to make or accept bills of exchange, unless such power is expressly given by the Act by which the corporation is created, or the power attaches inferentially where the nature of the business is of such a character as to render such making or acceptance necessary in the course of its business; and, as no such power is given by the School Ordinance, and as it is not an incident to or necessary for the purpose for which the board is created, the board had no power to accept the order, and the plaintiff could not recover thereon.—2. That, as there was no evidence that the board had authorised the acceptance of the order, the plaintiff could not recover. *Stephens* v. *North Battleford School District*, 1 Sask. L. R. 506, 9 W. L. R. 501.

Board of trustees — *Powers—Building school house — Employing architect to prepare plans — Rejection of by-law authorising expenditure — Quantum meruit.*] — It is within the power of trustees of public schools to employ an architect for hire to prepare plans, etc., for a proposed school house, and an architect who has prepared such plans is entitled to be remunerated on a *quantum meruit*, even though a by-law authorising the necessary expenditure for the building is rejected by the municipal council or the electors; Boyd, C., dissenting on the ground that the plaintiff was not entitled to be paid, in the special circumstances. — Judgment of MacMahon, J., 12 O. W. R. 864, reversed. *Erb* v. *Dresden Public School Board*, 18 O. L. R. 295, 13 O. W. R. 503.

Boundaries of school sections — By-law — Petition — Award — Powers of arbitrators — Finality — Award set aside as to one section — Effect on others. *Re Kincardine School Sections*, 4 O. W. R. 157.

By-law for erection and maintaining continuation school — *Application to quash —R. S. O. (1887), c. 226—9 Edw. VII., c. 90, s. 9—9 Edw. VII., c. 91, s. 4.*]—Middleton, J. (17 O. W. R. 210, 2 O. W. N. 152), dismissed a motion to quash a by-law for the erection and maintaining a continuation school, based on a by-law of the county setting aside and establishing the township as a continuation school district. The same township had been previously constituted a high school district by by-law, but no trustees were ever appointed, no site purchased or anything done under that by-law. By the High School Act, 9 Edw. VII. c. 91, s. 4, wherever a high school district has existed in fact for 3 months, it shall continue to exist and shall be deemed in fact to be a high school district under the same Act, no matter whether originally regularly passed or not.—Divisional Court *held* that the above section did not apply as the limits of the high school district had never been defined and was not in existence at the time of the passing of above Act. Another later by-law for the erection and maintenance of a continuation school was valid. Order of Middleton, J., confirmed.—Riddell, J., *dissenting, held*, that the by-law of the county was invalid, therefore it followed that the township by-law was also invalid and should be quashed. *Robertson* v. *Grand Trunk Rw. Co.*, C. R., [1909] A. C. 180, specially referred to. *Henderson* v. *West Nissouri* (1911), 18 O. W. R. 1, 2 O. W. N. 529, 23 O. L. R. 21.

Change of school site — *Meeting to determine — Poll — Right of farmers' sons to vote.*]—By the Public Schools Act, 1 Edw. VII. c. 39, s. 34 (O.), it is enacted that the trustees of every rural school section shall have power to select a site for a new school house, or to agree upon a change of site for an existing school house, and shall forthwith call a special meeting of the ratepayers of the section to consider the site selected by them; and no site shall be adopted, or change of site made, except in the manner hereinafter provided, without the consent of the majority of such special meeting:—*Held*, that there is power to hold a poll at such a meeting, and that at such polling persons entered on the assessment roll as "farmers' sons" are entitled to vote. *McFarlane* v. *Greenock School Trustees*, 9 O. W. R. 183, 13 O. L. R. 220.

Collection of rates — *Description of land — Irregularity — Action for rates — Defence — Res judicata — Costs.*] — The description of land as "No. P 628 of the official plan of the parish of . . . " in a collection roll in respect of school rates, is sufficient according to the terms of Arts. 342 and 360 of the Schools Act, when a part only of the lot described by its cadastral number in the municipal valuation roll, is contained within the limits of the school municipality. Therefore, an irregularity of this kind (if it is one) can only be invoked in a demand of rectification, or rather as a preliminary ground; it cannot be set up as a defence to the merits against a demand for recovery of the rates.—A judgment which dismisses an action for default to observe the preliminary formalities cannot be set up as *res judicata* against a second action begun after the formalities have been observed.—The payment of the costs of a first action dismissed with costs is not required as a condition precedent to the institution of a second. *St. Boniface de Shawinigan School Commissioners* v. *Shawinigan Water Power Co.*, 31 Que. S. C. 81.

Collection of rates — Protestant separate school — Building—By-law—Petition — Status of plaintiff. *Scott* v. *Ellice*, 2 O. W. R. 880, 4 O. W. R. 38, 93.

Commissioners — *Election of — Duties of president—New municipality—Procedure —Justice of the Peace—Status of candidates —Of mover and seconder.*]—The president of a meeting for the election of school commissioners may have other persons to help in the performance of his duties, provided that he is present during the whole time of the election, personally, authorizing and participa-

ting in all that is done. In case of a first election of commissioners in a new municipality, whilst it may be said that this election ought to be presided over by a justice of the peace or three electors, if the resident justice of the peace is not in fact known as such, the three electors may call the first meeting. The irregularity in case of such meeting will not nullify the election if such justice of the peace is present and allows nominations to be made without protest, and only calls in question the legality of the meeting after the proclamation of the election of commissioners by the president of the meeting. The lack of status, supposing it existed in certain persons who moved and seconded the nomination of candidates, would not render the election void. The fact of candidates being indebted for school taxes to the neighbouring school municipalities or to municipalities out of which the new municipality has been formed, does not render such candidates ineligible as school commissioners under the terms of Art. 148 of the School Code. *Nadon* v. *Labelle*, 7 Que. P. R. 45.

Commissioners — *Liability to valuators —Valuation roll—Errors in—Correction.*]— The valuators named by the superintendent of public instruction are entitled to be paid for their services by the school commission. 2. The commissioners of schools cannot declare void the valuation roll prepared by their valuators, because lands belonging to dissidents are entered thereon, or because the description of lands therein is erroneous, but they ought, according to the provisions of Art. 353 of the statute respecting public instruction, to examine and correct the errors in the roll. *Robert* v. *Commissioners of Schools of St. Hermengilde*, 20 Que. S. C. 540.

Contract — *Salary — Evidence — Parol agreement — School returns — School regulations.*]—In an action in a County Court brought by a public school teacher for a balance of salary, evidence of a parol agreement of January, 1902, and the school returns, were admitted to explain a written contract signed by the parties on the 4th February, providing that the plaintiff should teach for the unexpired portion of the term ending the 30th June, 1902, for $75. The term contained 121 days, of which the plaintiff's contract covered 100. The plaintiff taught for the unexpired portion of the term, and was paid the agreed salary, and continued teaching the next term, which begun on the 1st July and ended on the 31st December following, but which, in consequence of holidays under the regulations of the board of education, contained only 92 teaching days. The returns sent to the chief superintendent by the teacher and trustees, as required by the school law, stated the salary to be $180 per year. These returns were sworn to by two of the trustees. The trustees refused to pay the plaintiff for the short term more than $69, asserting that she was entitled only to the same rate per day as the first term, viz., 75c. per day. Clause 4 provided "that for a term or any part of a school year the teacher is to receive such proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term," instead of "in the school year," as in the form prescribed by the regulations, clause 5 of which provides that "in default of written notice the contract shall continue in force from school year to school year." The County Court Judge, reading the written agreement and the parol evidence together, found that the plaintiff was entitled to $90 for the short term:—*Held*, that the finding was right. *Southampton School Trustees of District No. 9* v. *Haines*, 36 N. B. R. 617.

Contract with teacher — Execution by trustees—Necessity for meeting—"Continuation class"—Appropriation of payments—Salary—Days of absence. *Acheson* v. *Bastard School Trustees*, 2 O. W. R. 451.

Dismissal of teacher by trustees — Appeal to Commissioner of Education — Affirmance or non-reversal of dismissal — Right to alter decision—Grounds of decision —Salary of teacher — Evidence—Certificate of acting deputy commissioner — Engagement of teacher—Minutes of school board. *Clipsham* v. *Grand Prairie School District No. 833* (N.W.P.), 6 W. L. R. 95.

Dismissal of teachers — School boards cannot dismiss teachers without specifying their reasons therefor. Such dismissals can only be decided upon at a special meeting called for that purpose. The School Act gives a ratepayer no special remedy, therefore he may take advantage of C. P. 50. In present case, the Court granted petitioner, a ratepayer, an injunction to prevent the Catholic School Commission of Montreal from carrying into effect a resolution whereby it dismissed a number of its employees, without giving any reasons for so doing, and at same time paying them the amount of their salaries for the whole period of their contracts. A ratepayer cannot prevent the commissioners from committing an illegal or arbitrary act, but he may always prevent the doing of something which is *ultra vires*. *St. Denis* v. *Catholic School Commission* (1910), 17 R. de J. 1, 12 Que. P. R. 112.

Dissolution of union school section —Formation of new union section and non-union section—Award—Jurisdiction of arbitrators—Petition—Costs—Reference back—Construction of Public Schools Act — "Or." *Re Churchill and Townships of Goderich and Hullett*, 6 O. W. R. 66.

Division of township into sections —Mandamus—Demand — Particular by-law —Duty of council—Discretion—Newly organized township—Public Schools Act, s. 12 — Construction—Costs. *Re Ellis and Widdifield*, 5 O. W. R. 47, 11 O. L. R. 284.

Election of trustees — *Invalidity — Formation of school district—Invalidity of acts of trustees — Public policy—Authority conferred by Commissioner of Education — Letters to deputy commissioner—Illegal distress for school taxes — School Assessment Ordinance—School Ordinance—Damages.*]— Action for damages and for a return of a horse seized for non-payment of school taxes. The horse was returned:—*Held*, that the school trustees had not been properly elected. Judgment for plaintiff. *Macdonald* v. *Brown* (1909), 12 W. L. R. 713.

Engagement of teacher — *Oral contract—Resolution of school commissioners—Dismissal—Status of teacher to sue for rescission — Notice of school meeting—Oral notice.*] — A teacher engaged by word of mouth only, but by virtue of a resolution of the school commissioners in which she was indicated by name, and who filled the place of teacher for a scholastic year, is in a position to bring an action to set aside a second resolution of the commissioners putting an end to her engagement. The commissioners cannot in such a case plead by way of exception the fact that the engagement was not in writing. Resolutions adopted by school commissioners at a meeting called by oral notice given to each commissioner are not on that account void. Written notice is not prescribed by Art. 206 of the Schools Act on pain of nullity, and may be replaced by an oral notice, if no prejudice results therefrom. *Monfette* v. *School Commissioners of Ste. Anastasie de Nelson*, 29 Que. S. C. 487.

Erection of school district — *Consent of ratepayers—"Actual Resident"—Person "Affected"—Residence—Domicil.*] — The expression "all the resident ratepayers affected by such permission," as used in s. 12 of the School Ordinance, c. 5, C. O. 1898, means, not "all the resident ratepayers," but only those who are affected by the district being more than five miles long, and when the district purported to be erected is in fact over five miles long, the residents in each of the tiers of sections which lie at the extremities of the district must be considered as affected, since it is impossible to say which tier should be regarded as the excess in length. Where a ratepayer owned real property in the district, and had a house with furniture in it locked up on this property, but rented a house out of this district for the use of his wife and family, while he was prospecting in the mountains and for some time also working in a coal mine, both out of the district:—*Held*, that he was not an "actual resident" whose consent in writing could be required under s. 12. The meaning of "residence," "actual residence," and "domicil," considered. *Curren* v. *MacEachren*, 5 Terr. L. R. 333.

Expenditure — *Annual estimates—Revision—Power of municipal council.*]—Under the proper construction of ss. 65 (9) and 71 (1) of the Public Schools Act, 1 Edw. VII. c. 39—which provide that the public school trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, and that the council shall levy and collect upon the taxable property of the municipality such sums as may be required by the trustees, and shall pay the same to the treasurer of the public school board—the right of the school board, in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority, and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are, and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes *intra vires* of the school board. If an item or class of items is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this the council cannot go. The council has no voice in the control or management of the affairs which are committed by law to the school board; its duty is to levy and collect and pay out, from time to time, as required, the moneys shewn by the estimate to be necessary for lawful school purposes. Judgment of a Divisional Court, 2 O. L. R. 727, 22 C. L. T. 15, affirmed. *In re Toronto Public School Board and City of Toronto*, 22 C. L. T. 279, 4 O. L. R. 468, 1 O. W. R. 443.

Expropriation of land for school purposes — Infants interested in land — Appointment of arbitrator by County Court Judge on their behalf — Validity—Public Schools Act—Parties to arbitration—Executor—Injunction—Costs. *McDonald* v. *Ottawa Public School Board*, 12 O. W. R. 572.

Formation of new school section — Award—Action to set aside—Costs—Submission of rights. *Doyle* v. *Drummond School Trustees*, 2 O. W. R. 1029.

Formation of new school section — Award of arbitrators — Statutory requirements—Area of section—Number of children of school age—Determination of arbitrators —Jurisdiction—Power of Court to review. *Re Bainsville School Section*, 4 O. W. R. 455, 5 O. W. R. 250.

Formation of union school section— —Alteration in boundaries — Award—Petition — Ratepayers in two townships — Necessity for petition from both — Setting aside award—Costs. *Re Osgoode and Mountain Union School Section*, 3 O. W. R. 87.

Formation of union school section— —Appointment of arbitrators — Amendment of Public Schools Act—Effect on pending appeal—Stay of proceedings. *Re Arthur and Minto Union School Section*, 4 O. W. R. 3.

Formation of union school section— — Award — Appointment of arbitrators — Township councils—By-law—Resolution — Description of lots—Reference to petition— Arbitrator — Municipal clerk — Award — Unanimity — Publication — Time—Uncertainty as to surplus—Reference back. *Re Arthur and Minto Union School Section, No. 17*, 2 O. W. R. 930.

Membership of high school board of village — Representative of public school board—Rural school section—Union school section—Village school board—High Schools Act—*Mandamus*— Costs. *Re Rockland Public School Board and Rockland High School Board*, 10 O. W. R. 1002.

Model school — Town separate from county—Liability of county. *Toronto Junction Public School Board* v. *County of York*, 3 O. L. R. 416, 1 O. W. R. 216.

Money for school site and building —*Meeting of school board—Notice—Meeting of Council—Adjournment—New Business — By-law—Recital of Debts—Debentures.*] — After the injunction in a previous action (24 C. L. T. 15, 6 O. L. R. 539) had been dissolved the defendant school board passed a new resolution asking the village council to

pass a by-law for the issue of debentures for $12,500 for the purchase of a school site and the erection of a school house. This was presented on the same day to the council, who repealed their by-law and passed a new one as requested. The plaintiff then brought this action to have the new by-law declared invalid, alleging that notice was not given to the members of the board of the object of the meeting, and that the council meeting was an adjourned one and no notice of this by-law had been given:—*Held*, that, in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it was unnecessary to specify the business to be transacted. *Rex* v. *Pulsford*, 8 B. & C. 350, and *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788, distinguished. *Marsh* v. *Huron College*, 27 Gr. 605, and *Cannon* v. *Toronto Corn Exchange*, 5 A. R. 268, referred to. It was the duty of every member of the council to be present at the adjourned meeting, and it was competent to the members present to transact any business that might have been transacted at the original meeting. As the later by-law was passed only to overcome certain defects in the earlier one, it might well have been passed without any new requisition. The by-law sufficiently recited the amount of the debt intended to be created, as it recited that application had been made by the school board to the council to raise $12,500 by debentures, and it authorized an issue to that amount:—*Held*, also, that s.-s. 1 of s. 386 of the Municipal Act, 1903, authorized the issue of debentures providing for the payment of principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of s.-s. 5 of s. 384 of that Act. *Forbes* v. *Grimsby Public School Board*, 24 C. L. T. 15, 130, 6 O. L. R. 539, 7 O. L. R. 137, 2 O. W. R. 947, 1158

Municipal corporations — *Estimate of expenses—Taxes.*]—Under s. 62, s.-s. 9, of the Public Schools Act, R. S. O. c. 292, it is the duty of a board of education, formed under s. 10, to submit to the municipal council at certain times "an estimate" of the expenses of the schools under their charge for the twelve months next following:—*Held*, that such estimate should furnish the council with the like details upon which the board base their own calculation, and not merely state a certain sum as required. If, as in this case, the sum in question is for repairs and improvements, there ought to be information given as to the schools to be repaired and improved, and the amounts required in respect of each, as well as some indication of the nature and extent of the repairs and improvements. The municipal council have the right, indeed it is their duty, to take some care that they are not made the instrument by which any intentional or unintentional excess of the powers of the school board are given effect to by levying for them any sum of money which the law does not authorize them to exact. *Board of Education of London* v. *London*, 21 C. L. T. 219, 1 O. L. R. 284.

North-west Territories public schools —*Meeting of trustees—Striking rate of taxation—Informal meeting—Minutes.*]—A rate of taxation not struck at a regular or special meeting of a school board, but an informal meeting, of which no minutes were kept, was held to be invalid. — *Quære*, whether the rate would have been validly struck, even if the meeting had been a regular or special meeting, without a proper minute. *Vienna School Trustees* v. *Roszkosz*, 6 Terr. L. R. 51.

North-west Territories public schools —Teacher — Dismissal of, by trustees — Appeal to commissioner of education — Affirmance of dismissal—Right to alter decision — Grounds of decision — Salary of teacher. *Clipsham* v. *Grand Prairie School District No. 833* (N.W.T.), 3 W. L. R. 313.

North-west Territories public schools —Teacher — Salary of—Contract—School Ordinance — Receipt — Estoppel—Rate of payment—Period of hiring. *Porter* v. *Fleming School District* (N.W.T.), 3 W. L. R. 186.

Ontario public schools — Change in school site—Expenditure of money—Special meeting of ratepayers—Taking poll—Right of farmers' sons to vote—Public Schools Act—Injunction—Motion for judgment. *McFarlan* v. *Greenock School Trustees*, 8 O. W. R. 672.

Ontario public schools — *Dissolution of union school section — Award—Reference back — Formation of new union and non-union sections — Including other lands — Jurisdiction of arbitrators.*] — There being nothing in the Public Schools Act to bring an award of arbitrators, appointed under s. 46 of that Act, within the exception contained in s. 47 of the Arbitration Act, R. S. O. 1897 c. 62, there is power in the Court or a Judge to remit the matters referred or any of them for reconsideration to the arbitrators. There is also power in such arbitrators, when dissolving a union school section, to form both a union and a non-union school section out of the lands which were comprised in the dissolved union section; and in doing so, although they cannot bring into the new non-union section any lands which did not form part of the dissolved union section, they have the power to include such other lands in the new union section; and there is no reason for limiting the arbitrators' jurisdiction to either action in exact conformity with the prayer of the ratepayers' petition or a rejection of their request. *In re Sydenham School Sections*, 6 O. L. R. 417, 7 O. L. R. 49, distinguished. *In re Churchill and Goderich and Hullett*, 11 O. L. R. 284, 6 O. W. R. 586.

Ontario public schools — *Municipal by-law — Altering boundaries of school sections—Motion to quash—Forum.*]—A motion to quash a by-law of a municipality altering the boundaries of a school section, upon the ground that the by-law is invalid, must since the statute 6 Edw. VII. c. 53, s. 29, s.-s. 4 (O), be made to the Judge of the County or District Court of the county or district in which the section is situate, and not to the High Court, which has jurisdiction only upon an appeal as provided by the enactment. *Re Almonte Board of Education and Ramsay*, 12 O. L. R. 486, 8 O. W. R. 147.

Payment to city high school for county pupils — *Dispute as to — Reference to County Court Judge — Absence of*

jurisdiction — Res judicata—High Schools Act—Payment for particular year.]—The town of Windsor separated from the county of Essex on 1st January, 1881, and remained separated until it became a city on 14th April, 1892. The High Schools Act was passed on 4th May, 1891. Until then the county was under no legal obligation to contribute towards the support of a high school situated in a town separated from the county, or in a city, but by s. 31, s.-s. 2, a change was introduced, and a county became liable thereafter to pay its proportionate share, upon the trustees of the high schools notifying the county clerk that such high school was open to county pupils. Acting under this provision the trustees of the Windsor High School, on 11th June, 1891, notified the county clerk of the county of Essex, and the next day a meeting was held between the warden of the county and the Windsor high school board, for the purpose of settling the amount which the county should pay, and a proposition was made by the warden to pay $500 as a fixed sum per annum, but not accepted by the board. Then on 30th December, 1891, this cheque was issued to and received by the plaintiff: "$500, Treasurer of the county of Essex, pay to the order of Alex'r Bartlet five hundred dollars due from the county to him for amount granted to Windsor high school for 1891. F. B. Bouteiller, warden of the county of Essex. Office of the County Council, Sandwich, Decr. 30th, 1891." The defendants had previously made grants in each year for several years prior to 1891, but these were wholly voluntary, and not in any way based upon allowance or expenditure, as became the case under the Act of 1891, and as made in each year plainly for that year and not for a previous year, and were usually so expressed in the cheques. The next previous one, the only one which could bear upon the question in this action, bears date 23rd January, 1891, and is for $500 "for amount granted to Windsor high school for 1890." Then following upon the cheques before set out are yearly cheques for 1892, 1893, 1894, 1895, 1896, and 1897, all paid at or near the end of each of these years, all expressing on their face for what year they were given, and all in like manner accepted and received by plaintiffs without objection. In 1898 the cheque expresses on its face that it was for the year 1897, and the same with the cheque issued in 1899, which on its face says that it is for the year 1898. But the cheque issued in 1900 again follows the course of the first seven, and says it is for the year 1900 and the same in 1901 and 1902. Certain statements submitted from time to time by plaintiffs to defendants were produced and much relied on by plaintiffs. They shewed that the amounts payable from year to year were calculated upon the previous year's attendance, which was what the statute intended, but this circumstance did not alter the fact really in question that the amount to be paid in 1903, however arrived at, was in fact the payment for that, and not for the previous year, and therefore one to which the reduction authorized by the statute 3 Edw. VII. c. 33 would apply. The defendants' contention is correct, and the appeal should be allowed and the action dismissed, both with costs. *Windsor Board of Education* v. *Essex*, 5 O. W. R. 726, 10 O. L. R. 60.

Powers of school board — Order drawn on board by contractor for building of school house—Bill of exchange—Acceptance by chairman and secretary-treasurer—*Ultra vires*—Seal of school corporation — Absence of authority. *Stephens* v. *North Battleford School District*, 9 W. L. R. 501.

Public office — *School commissioners —Property qualification — Disability for want of it — Usurpation and unlawful detainer of office — Quo warranto proceedings.*] —*Quo warranto* proceedings under Art. 987 C. P. lie to oust a person from the office of school commissioner, who has no property qualification. He is not only ineligible, but disqualified from holding the office and his detainer of it, even after the delays for contesting his election, under the statute, have expired, is an unlawful usurpation which gives interested parties a right to the remedy. *Larochelle* v. *Pouliot*, 37 Que. S. C. 359.

Public Schools Act, 1877 — *Construction of — Trustees' powers of dismissal of teacher.*]—Defendants as trustees gave notice of dismissal to plaintiff, who was a schoolmaster, on 6th November, and subsequently locked him out of the school. Plaintiff after expiration of three months from notice brought action for wrongful dismissal against the trustees personally, and obtained a verdict. On motion of non-suitor for new trial plaintiff's counsel contended that the locking out was a continuing wrong, and that action would lie at any time within three months from such locking out: — *Held*, (Palmer, C.J., and Peters, J.) that it was not a continuing wrong and that plaintiff must be non-suited. *Larkins* v. *Montgomery* (1881), 2 P. E. I. R. 416.

Qualification of trustee — *"Residence" — "Resident ratepayers"—Public Schools Act, R. S. M. 1902, c. 143, ss. 22, 175, 239.*]—A public school trustee in Manitoba worked and slept all week on his farm in school section A., except on Saturdays and Sundays, when he was with his wife and family in Portage la Prairie. Is he an actual resident ratepayer of section A. under above sections?—*Held*, that he is not disqualified. *McCuaig* v. *Hinds*, 11 W. L. R. 682.

Quebec public schools—*Action against school commissioners — Notice of action — Public Instruction Act — Meetings of board —Notice — Service on members — Time — Collective dismissal of teachers — Invalidity —Recovery of salary — Deductions.*]—The expression "any person performing public duties or functions" in Art. 88, C. P. C., does not include corporations created by the Public Instruction Act under the denomination "The School Commissioners for the Municipality of ." Actions begun against such corporations are not subject to the condition of preliminary notice prescribed by that article.—A session of school commissioners called for a special object by notices which do not mention such object is not a regular session, within the terms of s. 223 of the Public Instruction Act.—A session of school commissioners at which all the members resident in the municipality are not present, and notice of which has not been served at least two days before the day fixed

for such session, upon one of them, is not a regular session, within the terms of s. 223.—A resolution of school commissioners "that instructor X. and all the instructresses of this municipality, with the exception of Y., who has resigned, be notified that the school commissioners do not intend to continue their engagement as instructor and instructress for the next year (1903-1904)," is void because it involves the violation of s. 226 of the Public Instruction Act, which prohibits every notice of dismissal given collectively or simultaneously to the teachers.—The engagement of teachers cannot be cancelled by the commissioners upon any of the grounds mentioned in clause 2 of s. 215 of the Act, except after mature deliberation at a session called for that purpose.—The breach by the school commissioners of obligations arising from the engagement of a teacher is ground for an action by the latter to recover the entire salary stipulated for. From this amount, however, the Court will deduct sums earned by the teacher, and expenses saved to him by the closing of the school, during the period of the engagement. *Lacavalier* v. *Ste. Philomène School Commissioners*, 27 Que. S. C. 521.

Quebec public schools — *Election of commissioner — Contestation — Procedure —Quo warranto.*]—The election of a school commissioner can be contested on the ground of incapacity from not knowing how to read or write, only in the manner prescribed by Arts. 178 and 179 of the school code. The remedy of *quo warranto* is not open in such a case, even after the expiration of the time fixed for the contestation in the articles mentioned. *Duval* v. *Marchand*, 28 Que. S. C. 184.

Quebec public schools — *Sale of school property — Officer of school board to sell at auction — Formalities — Entries in books.*] —Section 232 of the Public Instruction Act, 62 V. c. 28 (Q.), creates an exception to Art. 1565, C. C., in prescribing that the sale of school properties shall be made at auction by the secretary-treasurer of the school board; and the latter sufficiently complies with Art. 1566, C. C., when he enters in the minute books of the school board the name of the purchaser and the amount of the purchase money. *Edgar* v. *North British and Mercantile Ins. Co.*, 27 Que. S. C. 299.

Religious instructions *given by teacher after school hours — Privilege of other denominations.*]—Teetzel, J., dismissed action to restrain public school board from continuing to have Roman Catholic religious instruction in their school after school hours. Clergy of other denominations may apply for same privilege. *Shaver* v. *Cambridge & Russell Union S. S.* (1911), 18 O. W. R. 501, 2 O. W. N. 686.

Right to attend elementary schools —*Age limit — Mandamus — Implied renunciation of recourse — Attendance.*] — Children of from five to sixteen years only have the right to attend the elementary schools of the province, and the trustees cannot be forced by *mandamus* to admit those who are not within these limits as to age. A person who has complied for nearly three years with a resolution of the trustees of the school with regard to his child's attendance at the school is no longer entitled to a *mandamus* to compel these functionaries to rescind their decision. Residence is a condition precedent essential to the right of securing a *mandamus* to compel a functionary or a public body to perform a duty. *Charrand* v. *The Trustees of St. Anastasie* (1909), 36 Que. S. C. 193.

Rural school section — Acquisition of site and providing new school house—Award —Opposition to site selected — Meeting of ratepayers — Refusal to sanction issue of debentures—Public Schools Act, 1901, s. 74— "May" — Mandamus to trustees—Power to change site — Amendments to Act — Discretion — Interference of Court. *Re McLeod & Tay (No. 11) School Trustees*, 10 O. W. R. 649.

Salary of teacher — *Contract—Schools Ordinance, s. 155 — Period of hiring.*]—The plaintiff had a written agreement with the defendants for payment of salary for teaching their school at $50 a month for six months, the agreement setting out the provisions of s. 155 of the Schools Ordinance. He taught for six months, and received $300. In an action for $48.55, balance payable under the provisions of the section referred to: *Held*, that the section applied, although the agreement did not call for a yearly salary.—*Semble*, that the parties could not have contracted themselves out of the operation of the section. *Porter* v. *Fleming School District*, 3 W. L. R. 186, 6 Terr. L. R. 348.

Salary of teacher — *Contract—Validity —Meeting of board of trustees—Minutes — Period of service under agreement — Public Schools Act, 1901, s. 81, s.-ss. 4, 6 — Expiration of agreement — Notice — Resignation — Penalty for non-payment — "Until paid."*]—An agreement between the plaintiff, a teacher, and the defendants, was signed by all the trustees and the plaintiff, and the defendants' seal affixed, at one time, at the house of the secretary-treasurer of the defendants, but no minute thereof appeared in the minute book:—*Held*, that the agreement was valid and binding upon the defendants.—Under the agreement the plaintiff served as teacher for the year 1907 and during the months of January and February, 1908. The fourth paragraph of the agreement provided that it might be terminated by a month's notice, and the 5th, that until so terminated the agreement was to continue from year to year. The defendants gave the plaintiff a month's notice to terminate the agreement at the end of February, 1908, and the plaintiff also sent in his resignation to take effect at that date:—*Held*, that s.-s. 4 of s. 81 of the Public Schools Act, 1901, applied to the agreement, and the plaintiff was entitled to be paid, for the time which he served, a sum bearing the same proportion to the amount of the yearly salary as the number of days served bore to the whole number of teaching days in the year in which the service was rendered.—*Held*, also, that the agreement expired, within the meaning of s.-s. 6, either as the result of the giving of the notice or by the resignation; and, having so expired, it immediately became the duty of the defendants to pay the amount due; having failed to pay the full amount, they became liable to the penalty imposed by s.-s.

6, viz., that "the salary shall continue to run at the rate mentioned in the agreement until paid:" and that did not mean merely until action brought, but until actual payment, or, in this case, until judgment in the Division Court as there ordered, the plaintiff not having appealed. *Gliddon* v. *Yarmouth Public School (Section 17) Trustees*, 12 O. W. R. 1001, 17 O. L. R. 343.

Salary of teacher.]—The plaintiff, a public school teacher, entered into an agreement with defendants to teach for $500 during the year 1907, the agreement to run from year to year until terminated by one month's notice on the last day of a calendar month. Notice was given on the 28th February, 1908. The defendants paid to the teacher one-sixth of $500, that is $83.33, but under s.-s. 4, s. 81, Ontario Public Schools Act, the teacher claimed $94.78, or a balance due to him of $11.45. The plaintiff now claimed that under s.-s. 6 of said section that in addition he was entitled to be paid at the rate of $500 per annum until the defendants paid this balance of $11.45. The plaintiff's computation was held to be correct and that the salary does not stop with the institution of the action, but continued until the actual payment of the balance was made. *Gliddon* v. *Yarmouth*, 12 O. W. R. 1001.

Sale of school lands by trustees—To railway company—Resolution approving sale at $400—Dom. Railway Act, R. S. C. (1906), c. 37, s. 184. *Re Walkerton & Lucknow Rw. Co. & P. S. Sec. No. 9 Glenelg* (1910), 17 O. W. R. 885, 2 O. W. N. 430.

School board — *Notice of meeting—Terminating contract with school master — Salary — Division Court.*]—The plaintiff was the master of a public school. The contract between him and the school board gave either party the right to terminate it on one month's notice. There were eight members of the school board, and at a meeting on the 19th February a resolution was passed instructing the secretary to notify the plaintiff that the contract between him and the board should cease on the 31st March, which he accordingly did. The notice of the meeting given to the members of the board did not state that the matter of determining the plaintiff's contract was to be considered, and some of the members had no knowledge of this fact, nor had the plaintiff any knowledge or notice of the meeting. Only six members of the board attended the meeting, of whom four voted in favour of the resolution, and two against it: — *Held*, that the above resolution and notice to the plaintiff in pursuance of it was not a fair or proper exercise of the power and option to determine the plaintiff's contract contained in it, and the agreement with the plaintiff was not terminated thereby. The plaintiff brought this action under the above circumstances, claiming a balance of salary, and had recovered judgment for $132.03.—*Held*, that the matters of difference between the parties fell within R. S. O. c. 292, s. 77, s.-s. 7, and a Division Court had jurisdiction. *Greenlees* v. *Picton Public School Board*, 21 C. L. T. 520, 2 O. L. R. 387.

School commissioner — *Appointment by commissioners — Illiterate commissioner —Quo warranto — Interest of applicant.*]—The remedy given by Art. 987, C. P. (*quo warranto*), is open to a person interested in having the appointment of a school commissioner who does not know how to read or write, made by the commissioners by virtue of 62 V. c. 28, s. 198 (Q.), declared void. *Thibault* v. *Lévesque*, 34 Que. S. C. 476.

School commissioner — *Inability to read and write — Quo warranto to remove —Lapse of time — Neglect to contest election — Estoppel.*]—The inability of a school commissioner elect to read and write is not a ground for declaring the office vacant as of public right or at common law; the fact that the election is not contested in the usual way under the statute, at the proper time and before a competent tribunal, is an estoppel as against those interested, and they cannot later succeed by way of *quo warranto*, in vacating the office for want of legal capacity. *Bonin* v. *Pagé*, 9 Que. P. R. 177.

School commissioners — *Action against —Notice of action.*]—The preliminary notice provided by Article 88, C. P. C., is not required in respect of an action for damages against a corporation called "The Commissioners of Schools for the Municipality of . . . ." unless they are filling some public function. *Lecavalier* v. *Commissioners of Schools*, 27 Que. S. C. 521, referred to. *Gregoire* v. *St. Charles de Bellechasse School Commissioners*, 29 Que. S. C. 215.

School commissioners — *Borrowing powers — Promissory notes — Repayment of loan — Instalments — Annual tax — Interest — Annuities — Resolution — Presumption — Time.*]—School commissioners have the power, with the approval of the Lieutenant-Governor in council, to borrow money for purposes which they are by law authorised to carry out. They may do so by means of promissory notes to the lender, and are under no obligation to issue hypothecary debentures or mortgage bonds.—2. They can contract for repayment of loans by instalments covering a period of years, provided an annual tax is imposed to meet a sinking fund and interest. It is only when the entire loan and interest is made payable by annuities that the 4 Edw. VII. c. 19, s. 7, requires that they shall not exceed five in number.—3. When a resolution to borrow a sum for a lawful purpose has been passed by school commissioners, in the manner and with the formalities prescribed by law, a second resolution to borrow an additional sum for the same purpose, the first having been found insufficient, will not be set aside because it does not specify the time for which the loan is made nor the rate of interest. There is a presumption that it is an amendment of the first resolution, and that the same delay and rate of interest apply to it. *Cloutier* v. *Chateau Richer School Commissioners*, 33 Que. S. C. 349.

School commissioners — *Meeting — Proof of notice calling — Dissenting commissioner — Division of school section — Discretion — Review by Court — Size of school section — Conveyance of pupils — Agreement between ratepayers — Local authority.*]—A special meeting of school commissioners is not irregular because the

original of the notice calling the meeting cannot be produced at the moment that all the commissioners have met pursuant to service upon them of copies of such notice; when the only absent commissioner was at the place of meeting some moments before the hour at which it was to be held, and did not wish to be present or take part.—Decisions of the commissioners to divide or join sections are within their discretionary powers, and are not subject to judicial review when rendered according to the formalities required.—An imperative duty is incumbent upon school commissioners not to permit the existence of school sections more than five miles in length, in the absence of arrangements for carrying the children to school in vehicles.—Agreements between ratepayers cannot prevail against legislative decisions of competent local authorities.—*Semble*, it is otherwise in the case of a simple act of administration or contract between the local authority and a private person. *Lord* v. *St. John the Evangelist School of Commissioners*, 8 Que. P. R. 233.

School lands held in trust for school purposes — Unincorporated religious order —Mortgage—Breach of charitable trust — Intervention of Attorney-General. *Attorney-General* v. *McIntosh* (36 N. S. R. 177), relied on. Supreme Court of N. S. dismissed an appeal from a judgment of Longley, J., 9 E. L. R. 270, in an action to enforce a trust. *Att.-General for N. S.* v. *Landry* (1911), 9 E. L. R. 472, N. S. R.

School rates — *Partnership—Co-owners of mine — Assessment.*]—The Act to amend and consolidate the Acts relating to public instruction, Acts 1895, c. 1, in relation to the assessment of property for school purposes, provides that all ratable property belonging to any association, corporation, or firm shall be assessed in the name of the firm, association or corporation:—*Held*, that the defendants were properly assessed as a firm, in respect of a mining property owned by them in the plaintiff's section, the property having been purchased by the defendants with a view to working or sale, and having been worked by them jointly for upwards of two years, the proceeds, after paying expenses, being equally divided. The evidence shewed a community of interest in the profits and losses and capital employed:—*Held*, that the defendants were partners in the business of carrying on the mine, and that their liability, as such, could not be affected by evidence on their part denying the existence of a partnership or authority on the part of either to bind the other. *Montagu School Trustees* v. *Oland*, 35 N. S. R. 409.

School sections — *Subdivision into — Mandamus.*] — The Public Schools Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:—"The municipal council of every township (except where township boards have been established) shall subdivide the township into school sections, so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants asked for an order of *mandamus* commanding the respondents to subdivide the township into school sections:—*Held*, that there must be some discretion left to a township council as to when the township shall be subdivided; and, that even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body have honestly attempted to do their duty; and upon the facts, as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of *mandamus* should be made. *In re Ellis & Widdifield*, 24 C. L. T. 298, 3 O. W. R. 802.

Selection of school site — *Trustees — Ratepayers — Difference — Award — Invalidity — Mandamus — Estoppel.*]—It is only in case of a difference between the trustees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site selected by the trustees, that an arbitration is to be had, under s. 31 of the Public Schools Act, R. S. O. 1897 c. 292. And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees:—*Held*, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by s.-s. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a *mandamus* to the corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house in pursuance of the vote of the ratepayers. — *Quære*, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers. — *Held*, also, that there could be no estoppel against the applicants, or waiver of the public right. Judgment of a Divisional Court, 22 C. L. T. 291, 1 O. W. R. 387, 447, 4 O. L. R. 272, affirmed. *In re Cartwright Public School Trustees & Cartwright*, 23 C. L. T. 216, 5 O. L. R. 699, 2 O. W. R. 340.

Selection of site — *Arbitration and award.*]—Under s. 34 of the Public Schools Act, 1 Edw. VII. c. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site. *In re Sombra Public School Section No. 26*, 24 C. L. T. 16, 6 O. L. R. 585, 2 O. W. R. 928.

Selection of site — Difference between trustees and ratepayers — Powers of arbitrators — Award — Reference back. *Re Sombra Public School Section 26*, 928; 6 O. L. R. 585.

Separate town within county — *County model school situated in.*] — The town of Toronto Junction, territorially within the limits of the county of York, but a separate town within the provisions of the Municipal Act, and as a municipality not

under the jurisdiction of the county council, is yet part of the county, within the meaning of ss. 83 and 84 of the Public Schools Act, 1 Edw. VII. c. 39; and the county is bound to contribute to the support of a county model school situated in the town. *Toronto Junction Public School Board* v. *York*, 22 C. L. T. 145, 3 O. L. R. 416.

Site — Change — Trustees — Adoption by ratepayers' meeting — Resolution—Minutes — Evidence *dehors* — Inspector—Arbitration — Award — Injunction—Estoppel—*Res judicata*—Reverting to former site after change — Resolution of ratepayers—Poll—Qualification of voters — Scrutiny. *McLean* v. *Robertson*, 1 O. W. R. 578, 2 O. L. R. 111.

Supporter of separate school—*Right to withdraw and support regular school.*]— It is permissible for any ratepayer in a school section to withdraw from a dissident corporation and join the majority under the control of the school commissioners, even where such ratepayer has previously petitioned for the creation of the dissident corporation, to which he has paid taxes for a certain time, and even when he is of a different religion from that of the majority. *Outremont School Syndics* v. *Ainslie*, 25 Que. S. C. 348.

Trustee — *Bond given by secretary of trustees — Liability on — Not affected by regulation of council inconsistent with Public Instruction Act — R. S. N. S. c. 52, s. 59.*] —Defendant was first elected to office in June, 1900, and was re-elected and continued in office for five years subsequently:—*Held*, that the bond given by defendant, on being first appointed, covered only the period of one year from its date, and default committed within that time, and that liability upon the bond was not affected by the regulation of the Council of Public Instruction providing that where a secretary of trustees is continued in office from one year to another it shall not be necessary for him to give a new bond, providing the existing one is drawn in a sufficient sum and the sureties are satisfactory, such regulation being inconsistent with the provision of the Act in reference to bonds and security to be given by secretaries of school trustees. R. S. 1900, c. 52, s. 59. *Atty.-Gen. for N. S.* v. *Cameron* (1908), 43 N. S. R. 49.

Trustee — *Election — Irregularity — Voters' qualification — Unpaid taxes—Quo warranto.*]—Motion to test validity of a school election:—*Held*, that two voters who were refused permission to vote for non-payment of school rates had paid same, and that he who had deposited one dollar should have been allowed to vote. As the vote apparently shewed the wishes of the school section, motion was refused. *R.* v. *Landry*, 7 E. L. R. 490.

Trustee — *Election of — Equality of votes — Casting vote — Complaint — Jurisdiction of County Court Judge.*]—Upon the complaint of S. of the election of I. as a public school trustee for the year 1902 for a ward in a city: — *Held*, that the Public Schools Act, 1 Edw. VII. c. 39, s. 63, presupposes an election, and that, inasmuch as in the election in question there was a tie, and the proper officer had not yet given the casting vote, there was not an election within the meaning of the section, and the Judge of the County Court had no jurisdiction to hear the complaint. *In re Ireland*, 22 C. L. T. 151.

Trustee — *Forfeiture of office by reason of contract with board of trustees — Quo warranto — Qualification of relator—Relator put forward by real prosecutor.*]—An application for leave to exhibit an information by way of *quo warranto* to unseat a person as school trustee should be dismissed if the relator is a person not really interested in the matter complained of, but merely put forward as a nominal relator by the real prosecutor because of the latter's want of qualification to be such relator. *R.* v. *Daws* (1767), Burr. 2120; *R.* v. *Parry* (1837), 6 A. & E. 810, and *R. ex rel. Stewart* v. *Standish* (1884), 6 O. R. 408, followed. A member of the board who voted for payment of the account of a brother member for wood supplies for the school would not be qualified to be relator in proceedings to unseat the latter by reason of such payment. *Quo warranto* proceedings to test the right of a person to hold a seat as school trustee are purely civil proceedings and an application for leave to file an information by way of *quo warranto* for such a purpose is properly made by notice of motion and not by rule *nisi*. The Crown side of the Court of King's Bench referred to in rule 1, and s. 32 of the King's Bench Act, is only that part of the business of the Court which it gets by virtue of the Dominion legislation in the Criminal Code. *Tuttle* v. *Quesnel* (1909), 19 Man. R. 20, 23, 10 W. L. R. 722. See 11 W. L. R. 96.

Trustee — *Right to office — Residence — Quo warranto — Discretion — Costs.*] — The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son, and went to live with his wife and family on a farm owned by his wife in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family and remaining there over night, while the wife occasionally visited him, staying a couple of weeks, when there was cooking or mending to be done:—*Held*, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion, so as to qualify him as a trustee for a school section within that township, to which office he had been elected. As, however, the granting of the order for a *quo warranto* was in the discretion of the Court, and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed, but without costs. The relator was not debarred by R. S. O. c. 292, s. 14, s.-s. 8, from making the application. *Regina ex rel. Horan* v. *Evans*, 20 C. L. T. 172, 31 O. R. 448.

Trustees — *Agreement with teacher — Meeting — Necessity for.*]—An agreement between a board of school trustees and a

teacher, which appeared not to have been adopted at a meeting of the board, was held to be void as against the board by reason of the provisions of the School Ordinance. *Sparling* v. *Spring Coulee School Trustees*, 4 Terr. L. R. 366.

Trustees — *Contract — Architect — Preparation of plans for school board — Remuneration — Quantum meruit.*]—Appeal from judgment reported in 12 O. W. R. 864, allowed and judgment entered for $125 and County Court costs. *Erb* v. *Dresden*, 13 O. W. R. 503.

Trustees — *Declaration of office inspector —Enquiry — Replevin — Parties — Use of name of school corporation.*]—An inspector appointed under the Public Schools Act, R. S. M. 1902 c. 143, is not authorised by s. 32 of the Act or otherwise to enquire whether a trustee duly elected has forfeited his office under s. 243 of the Act by refusing or neglecting to take the declaration of office required by s. 31. Where an inspector undertook such inquiry and declared the seats of two trustees vacant, and two new trustees were subsequently elected at a meeting of the ratepayers called by direction of the inspector, the proceedings were declared null and void, and the plaintiff corporation held entitled to succeed in an action of replevin commenced by direction of the old board against the two new trustees and others who had broken into the school building and taken away the furniture. *Chaplin* v. *Woodstock Public School Board*, 16 O. R. 728, followed. *Quære*, whether the defendants could resist the action which was brought in the name of the school corporation, the acknowledged owner of the goods, and whether the defendants in any case could do more than apply to the Court to stay the use of the name of the corporation in the action, on the ground that its use was not authorised by those who were lawfully the trustees. *Youville School District Trustees* v. *Bellemere*, 24 C. L. T. 146, 14 Man. L. R. 511.

Trustees — Duty of — Action by teacher —Injury to health—Neglect to employ caretaker—Waiver—Evidence—Cause of illness—Costs. *Emerson* v. *Melancthon School Trustees*, 3 O. W. R. 12, 426.

Trustees — *Election — Disqualification of nominating elector — School Ordinance, 1896, s. 28 — "Resident ratepayer"—School trustee — Quo warranto.*]—At a meeting for the election of school trustees, two candidates were put in nomination. After the close of the nominations one of the electors asked the returning officer to declare one of the candidates elected, on the ground that one of the two electors by whom the other was nominated was not a resident elector. The chairman refused the request, and at the election which followed, the candidate objected to received a majority, and was declared elected. It appeared that the nominating elector objected to owned a half section within the school district, but that his residence and farm buildings were on other property separated from the half section by a road allowance, the whole, however, being worked as one farm:—*Held*, by Richardson and Wetmore, JJ., that leave to file an information in the nature of a *quo warranto* should be granted.—*Held*, by Rouleau and Scott, JJ., that, in view of the action of the applicant in not calling attention to the disqualification of one of the nominating electors until too late to remedy the irregularity, and in view of the fact that no injustice or inconvenience had been caused, or any result followed different from what would have followed the fullest compliance with the law, the leave should not be granted. —*Semble*, by the Court, that the nominating elector objected to was not a resident of the district. *Regina ex rel. Thompson* v. *Dinnin*, 3 Terr. L. R. 112.

Trustees — *Power to borrow — Ordinary expenditure.*]—The plaintiff, one of the trustees of a school section, at the instance of his co-trustees, lent to the trustees a sum of money required for payment of the teacher's salary:—*Held*, that, as the amount borrowed was to be applied to ordinary expenditure, and did not increase the liabilities of the corporation, no special authority to borrow was necessary. *McNeil* v. *Victoria School Trustees*, 34 N. S. R. 546.

Trustees — *Qualification — Contract with board — Termination.*]—The lack of qualification of a school trustee which results from his having a contract with the school board, ends with such contract, and after he has been paid the amount owing in respect of it, he is no longer liable to be unseated on this ground. A school trustee who, at the order of the board, causes certain work to be done on account of the board, and pays for it himself, and afterwards is paid what he has expended and for his time in overseeing the work, is not a contractor with the board within the meaning of Art. 147 of the School Code, and does not by thus acting forfeit his seat. *Larochelle* v. *Roi*, 27 Que. S. C. 55.

Trustees — *Secretary-treasurer of board —Security — Validity.*]—The security furnished by the secretary-treasurer of a board of school commissioners and accepted by the chairman, is not void because it is not made by notarial act nor by act *sous seing privé* signed and acknowledged before a justice of the peace, in accordance with Art. 2088, R. S. Q.; but such formality being only accidental and not essential to the validity of the security, a security *sous seing privé* not signed and acknowledged before a justice is a valid engagement on the part of the surety. 2. Although Art. 2089, R. S. Q., says that the security should be given jointly and severally by two solvent sureties, a security given by a single surety is not less valid. 3. The neglect to transmit the security to the superintendent of public instruction is without effect upon the validity of the security. *St. Norbert School Commissioners* v. *Paquette*, 18 Que. S. C. 289.

Trustees — *Successors — Judgment — Leave to issue execution — Continuation of corporate body — Ratepayers.*]—A dispute arose between two rival bodies about the proper situation for a school house. A judgment was obtained by the corporation in 1879 against certain defendants for injury done to the school house. In a judgment in another action in 1884 it was held that no

legal trustees had existed in the section for years. After this, a meeting of the ratepayers of the section was held, at which a new board of 3 trustees was elected. Application was then made (in 1886) on behalf of the board so elected for leave to issue execution on the judgment obtained in 1879. The defendants contended that the corporation in existence at the date when the judgment was obtained had gone completely out of existence:—*Held*, that the real corporation was the body of ratepayers of the section of whom the trustees were only the representatives, and that the title to the judgment remained in the ratepayers in the same way as the title to a school house; that only the legal machinery for making it effective was in abeyance for want of trustees, and revived as soon as these were legally elected; and the application was granted. *Colchester* v. *Seaber*, 3 *Burr*, 1870, referred to. *Picton (No. 16) School Trustees* v. *Cameron*, 40 N. S. R. 156*n*.

Trustees — *Teacher — Power of dismissal — Inquiry.*]—Under s. 16 (7) of the Public Schools Act, 1 Edw. VII. c. 40 (O.), which enables the board of education of a municipality "to appoint and remove such teachers, officers, and servants, as they may deem expedient," members of the board are the sole judges of what they may deem expedient in each particular case in the matter of the removal or dismissal of a teacher on the ground of unsuitability for the position. They may institute a private inquiry into such a matter without allowing the usual safeguards of representation by counsel to the person affected, or they may dispense with such investigation and proceed on their own conviction of what is right from a general knowledge of the situation; they may also act on the report of an inspector, although irregularly obtained, or may remit the matter to a committee and act on its report, and they should not be interfered with by injunction in any action they may be advised to take. Although honorary trustees of the property held for the purposes of public education, their relation is not in any sense fiduciary. Cases of charitable endowments, in which property is clothed with a trust, considered. *Dunn* v. *Toronto Board of Education*, 24 C. L. T. 223, 7 O. L. R. 451, 3 O. W. R. 393.

Trustees — *Verbal contract with teacher —Wrongful dismissal — Action for damages —Public Schools Act, 1 Edw. VII. c. 39, s. 81, s.-s. 1.*]—Plaintiff, a teacher, sued the defendant trustees, on an alleged verbal contract for the year 1908, for wrongful dismissal and for $199 damages and costs. At the trial judgment was given plaintiff for $50 damages and Division Court costs. Divisional Court *held*, that the plaintiff's contract not being in writing, the Ontario Public Schools Act, 1 Edw. VII. c. 39, s. 81, s.-s. 1, was a bar to plaintiff's claim. Appeal allowed and judgment set aside and action dismissed without costs. *Birmingham* v. *Hungerford* (1869), 19 U. C. C. P. 411, followed. *McMurray* v. *P. S. Board of S. S. No. 3, East Nissouri* (1910), 15 O. W. R. 806, 21 O. L. R. 46.

Two school buildings in one section —*Public Schools Act, ss. 31, 44 (1), 72g, 76d.*]—Middleton, J., 18 O. W. R. 279, 2 O. W. N. 594, granted mandamus to compel a township council to pass a by-law and issue debentures to erect two school buildings in one school section.—Divisional Court affirmed above order, Britton, J., dissenting. *Re Medora S. S. No. 4* (1911), 18 O. W. R. 992, 2 O. W. N. 985.

Union of school sections — *Powers of arbitrators — Appeal to county council— 1 Edw. VII. c. 39, s. 42.*]—An application was made to a township council to alter the boundaries of school sections 12, 13, and 14, by taking about 1,200 acres from 13 and adding them to 12, and by taking about 2,000 acres from 14 and adding them to 13. The township council refused the application; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of s. 42 (3) of the Public Schools Act, 1 Edw. VII. c. 39. The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite sections 12 and 13, and recommended the building of a new school house in a central position in the thus united sections:—*Held*, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power "to form, divide, unite, or alter the boundaries," but that means to form, divide, unite, or alter in accordance with the subject matter of the appeal. Award set aside without costs. *In re Southwold Public School Sections*, 22 C. L. T. 62, 3 O. L. R. 81, 1 O. W. R. 32.

Union school section — *Formation of —Appeal from township councils — Lands mentioned in petitions — Exclusion of and inclusion of other lands — Powers of arbitrators.*]—Petitions were presented to the councils of two townships, asking for the formation of a union school section under the Public Schools Act, 1 Edw. VII. c. 39, s. 46 (1). The councils having refused to pass a by-law, an appeal was had to the county council, under s. 47, as a result of which arbitrators were appointed: — *Held*, that the arbitrators appointed by the county council had the right, in forming the union school section, to leave out, or take in, land not mentioned in the petitions, and that their jurisdiction was not limited to a mere granting or rejecting of the prayer of the petitions. *In re Churchill and Hullett*, 11 O. L. R. 284, followed.—*In re Sydenham School Sections*, 7 O. L. R. 49, distinguished. *In re Mersea School Section No. 3*, 12 O. W. R. 88, 16 O. L. R. 617.

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3. Separate Schools.

Adjoining municipalities — *Three-mile limit — Separate school supporters — Notice — Change in assessment rolls—Court of Revision.*]—Roman Catholic supporters of a separate school who live in a town may, by giving notice, become supporters of the nearest separate school in an adjoining rural municipality within three miles distance; and the High Court has power, in an action

brought by the trustees of the rural separate school section against the town corporation, to adjudge that taxes levied and collected from ratepayers of the defendant municipality, who gave the required notice, shall be paid over to the plaintiffs for the support of the rural separate school. *Sandwich East (No. 1) Roman Catholic Separate School Trustees* v. *Walkerville*, 5 O. W. R. 211, 527, 10 O. L. R. 214.

Division of property between school boards — *Arbitration and award.*]—Award of Street, J., as arbitrator. *In re Windsor Schools*, 24 C. L. T. 173.

Duties of school commissioners — *Schools under their control — Schools in which teaching is done by religious orders— Duty to use uniform school books.*]—School commissioners cannot escape the duties imposed upon them by law requiring control of the schools by entering into a contract whereby teaching is done by religious orders. Such schools nevertheless remain under the control of the commissioners within the meaning of s. 215 of 62 Vic., c. 28, and, it follows, that as respects such schools as well as other schools, they should insist upon the use of uniform books recognised by authority. They may be obliged to do so by *mandamus* and they cannot plead to the writ the contracts which they may have entered into in face of the provisions of the law. *Catholic School Commissioners of Montreal & St. Denis* (1909), 19 K. B. (Que.) 322.

Establishment of — *Debts of public school district — Liability of separate school supporters for — Construction of statutes.*]—On the 24th February, 1899, the Grattan Roman Catholic Separate School District was established in the town of Regina by the Roman Catholic ratepayers, the limits of the school district being those of the municipality of the town, as also the limits of the previously organised public school district of Regina. At the time of the establishment of the separate school district, the public school district was liable for debts, to secure the repayment of which by yearly instalments (one falling due in 1899) the public school corporation had issued debentures, and the trustees included the amount of the 1899 instalment in the amount which they required the municipal council of the town to levy for the year. In making the levy the town council exacted payment from the plaintiff of $1.95, which was his assessed proportion of the amount necessary to pay the debenture instalment, and which he paid under protest and now sought to recover back from the municipality, upon the ground that the council had no power to assess him, he being a separate school supporter:—*Held*, that the plaintiff was not liable for the rate in question. Construction of s. 14 of the North-West Territories Act, R. S. C. c. 50, as amended by 61 V. c. 5, s. 1, and s. 36 of the School Ordinance. *McCarthy* v. *Regina*, 21 C. L. T. 321.

Ontario Protestant separate schools —Establishment — Failure to bring into operation — Municipal by-laws — Rates — Assessment — Inequality — Adjustment — Debentures — Collector's roll — Action — Declaration — Parties — Trustees — Fraud —Costs. *Ellice (No. 1) Public School Trustees* v. *Ellice*, 7 O. W. R. 6.

Ontario Roman Catholic separate schools — Formation of union school section — Defective proceedings — Declaration that school not legally established—Injunction. *Malden R. C. Separate School (No. 3a) Trustees* v. *Martin*, 7 O. W. R. 469.

Ontario Roman Catholic separate schools — Qualifications of teachers — Status of members of religious communities —Construction of statutes — "Persons"— History of legislation. *Re Qualification of Teachers in Roman Catholic Separate Schools in Ontario*, 7 O. W. R. 141.

Ontario Roman Catholic Separate Schools Act, R. S. O. c. 294, s. 36 — *Construction — Qualified teachers — Exemption from examination.*]—*Held*, that by the true construction of the Ontario Separate Schools Act, R. S. O. 1897 c. 294, s. 36, those members of the appellant communities who became such after the passing of the British North America Act, 1867, are not eligible for employment as teachers in the Roman Catholic schools in the province of Ontario, unless they have received certificates of qualification to teach in the public schools. The exemption from examination recognised by that section is limited to those who were members at the date of the Act of 1867.—Judgment in *Re Qualification of Teachers in Roman Catholic Separate Schools in Ontario*, 7 O. W. R. 141, affirmed. *Brothers of the Christian Schools* v. *Minister of Education for Ontario*, [1907] A. C. 69.

Protestant school — *Pupil of another faith — Scholarship — Withholding—Mandamus — School regulations.*]—The petitioner, a British subject, resident in Montreal, but not the owner of real estate, was by religion a Jew. His son was admitted to a Protestant school under the control of the respondents, and by his success in his classes and in the examinations would, in ordinary course, have been entitled to a commissioners scholarship, which gives a right to a high school course free of tuition fees. The commissioners having under their regulations, withheld the scholarship, the petitioner applied for a writ of *mandamus* to compel the respondents to grant his son such scholarship:—*Held*, that the remedy by *mandamus* was the proper one under the circumstances, the petitioner alleging the refusal on the part of the respondents to perform a duty incumbent on them by law. 2. The petitioner not being a Protestant, and not being the owner of real estate inscribed on the Protestant panel, his son was not entitled, as of right, to admission to the Protestant schools. 3. His admission to a Protestant school by grace of the Protestant school commissioners did not amount to a warranty that the existing school regulations were to be permanent and unchanged throughout the entire scholastic course. 4. The respondents had, within the limits of their corporate authority, power to change the school regulations from year to year, and particularly in regard to prizes and other competitive rewards; and, consequently, they had power to provide by regulation that the child of a Jew, not the owner

of real estate, should be ineligible to compete for a commissioners' scholarship. *Pinsler* v. *Protestant Board of School Commissioners*, 23 Que. S. C. 365.

Qualification of teachers — *Construction of statute — Religious community — Status.*] — The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the same certificates as common school teachers, but some persons are exempted from its immediate operation, and the word "persons" in s. 36 of R. S. O. 1897 c. 294, is to be read as "individuals;" and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires. Judgment of MacMahon, J., 24 C. L. T. 319, 8 O. L. R. 135, 4 O. W. R. 58, affirmed. *Grattan* v. *Ottawa Roman Catholic Separate School Trustees*, 25 C. L. T. 104, 9 O. L. R. 433, 4 O. W. R. 389.

Supporters of — *Assessment for public schools debts.*]—A ratepayer rated as a supporter of a separate school where a separate school district has been formed is not liable to be assessed for a debenture indebtedness of the public school incurred prior to the establishment of the separate school district. *McCarthy* v. *Regina*, 21 C. L. T. 321, 5 Terr. L. R. 71.

Teachers — *Religious community—Residence — Contract.*]—The Ottawa separate school trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement among other things providing for the erection by the trustees of a house or residence with chapel, etc., for the Brothers, and the advance of $100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth for each year, the contract to be in force for ten years unless previously put an end to by notice in a prescribed way:—*Held*, that the agreement was invalid because (1) Christian Brothers as such are not qualified to teach in separate schools in Ontario; (2) School trustees have no authority to expend money in erecting a house for teachers; or (3) To enter into a contract with a teacher extending beyond a year. *Grattan* v. *Ottawa Separate School Trustees*, 24 C. L. T. 319, 8 O. L. R. 135, 4 O. W. R. 58, 389.

Withdrawal of supporter — *Continuance of liability.*] — Property which was owned by a separate school supporter and so assessed for rates imposed under by-laws passed before the time when the supporter has withdrawn, does not remain liable for such rates in the future unless the property is still owned by him at the time of each assessment, and he resides in the section. But the ratepayer who was such when the loan was effected remains liable for future assessments to the extent of the ratable property he possesses, so long as he is resident within the school district. *In re Education Department Act and Separate Schools Act*, 21 C. L. T. 288, 1 O. L. R. 584.

SCHOOL COMMISSIONER.

See NOTICE OF MOTION.

SCIENTER.

See ANIMALS — CRIMINAL LAW.

SCIRE FACIAS.

Crown lands — *Grant — Error — Adverse claim — Cancellation.*]—The provisions of the Quebec statute respecting the sale and management of public lands, 32 V. c. 11, R. S. Q. Art. 1299, do not authorise the cancellation of letters patent by the Commissioner of Crown Lands, where adverse claims to the lands exist. Judgment of the Court of Queen's Bench reversed, and judgment of the Superior Court (in review), 18 Que. S. C. 520, restored. *Rex* v. *Adams*, 21 C. L. T. 328, 31 S. C. R. 220.

Procedure — *Information — Attorney-General — Action to repeal letters patent —Service of writ — Authorisation of attorneys.*]—The information by the Attorney-General mentioned in Art. 1008, C. P. C., is, as regards a claim to set aside letters patent, what the declaration mentioned in Art. 123 is in ordinary actions, that is to say, a document in which are set forth the causes of the demand and the claims based upon them.—Service in a case of *scire facias*, or demand to set aside letters patent, is made by means of a writ issued in the ordinary manner, without affidavit of the petitioner, and without permission or order of a Judge or fiat of the Attorney-General.—The defendant is not allowed to plead default of authorisation of the attorneys who signed the information for the Attorney-General. The latter alone can disavow them if there is ground. *Gouin* v. *McMand*, 28 Que. S. C. 216.

See CROWN LANDS — PATENT FOR INVENTION — WATER AND WATERCOURSES.

SCRIP CERTIFICATE.

See CONTRACT.

SCRUTINEERS.

See ELECTIONS.

SCRUTINY.

See ELECTIONS.

SEAL.

See COMPANY — CONTRACT — CRIMINAL LAW — EXECUTORS AND ADMINISTRATORS — MUNICIPAL CORPORATIONS — RAILWAY — SCHOOLS — VENDOR AND PURCHASER.

SEALING.

See SHIP.

SEAMAN'S WAGES.

See COURTS — SHIP.

SEAMEN.

See SHIP.

SEAMEN'S ACT.

Order for payment of seaman's wages — *Imprisonment — Certiorari — Practice — Affidavits — Intituling — Recognizance — Costs.*]—On proceeding before a magistrate under the Seamen's Act, R. S. C. c. 74, to recover the share of a fisherman on board a fishing vessel, an order was made for payment by the defendant to the plaintiff of an amount named with costs, and in default that the same be levied by distress of the goods and chattels of the defendant, and in default of such goods and chattels that the same be levied by distress and sale of the schooner, and in default of sufficient distress on the vessel that the defendant be imprisoned, etc. On application for a writ of *certiorari* to remove the order, two grounds of objection were urged; (1) that the affidavits were intituled in the cause in the magistrate's court; and (2) that the affidavits of justification of bail were not verified as required by Crown Rule 29:—*Held*, that the first ground of objection was covered by Crown Rule 19, enabling the Judge to receive the affidavit notwithstanding the irregularity in form, and to direct a memorandum to be made on the document that it was so received; and that the Judge not having acted upon the Rule, it was open to the Court to do so, and to direct the memorandum to be made.—*Held*, also, that the verification by affidavit referred to in Crown Rule 29 refers to the filing of the recognizance and affidavits before the giving of the notice, and that the provision is mandatory; and that while the order was defective under s. 54 (the order only applying where the ship is within the jurisdiction), there was no power to quash it, as it was not regularly before the Court, and for this reason the plaintiff should not have costs of his resistance to the application to quash. *Marshall* v. *Schwartz*, 3 E. L. R. 227, 41 N. S. R. 471.

See CONSTITUTIONAL LAW—POLICE MAGISTRATE — SHIP.

SEARCH WARRANT.

See INTOXICATING LIQUORS — JUSTICE OF THE PEACE.

SEARCHING FOR DOCUMENTS.

See COSTS.

SECONDARY EVIDENCE.

See EVIDENCE.

SECRET COMMISSION.

See VENDOR AND PURCHASER.

SECRET PROFITS.

See COMPANY — CONTRACT — FRAUD AND MISREPRESENTATION — PRINCIPAL AND AGENT — TRUSTS AND TRUSTEES.

SECURITIES.

See BANKRUPTCY AND INSOLVENCY—BANKS AND BANKING — BILLS AND NOTES — CONTRACT — GUARANTY — SETTLED ESTATES ACT.

SECURITY FOR COSTS.

See APPEAL — COSTS — EVIDENCE.

SEDUCTION.

Action by master of girl seduced — *Cause of action arising in another province —Right at common law irrespective of statute — Effect of ordinance respecting the action of seduction, sec. 3.*]—In an action brought by the plaintiff, as master or as standing *in loco parentis* of an adopted child, for her seduction by the defendant, it appeared that the cause of action arose in the province of Manitoba, where the plaintiff resided, but the action was brought in Saskatchewan because the defendant resided therein. The jurisdiction of the Court to entertain the action was not disputed. The action was commenced more than six months after the girl was delivered of a child, and there was no evidence of any other action for the seduction having been brought by any other person. The parents of the girl were unknown. No evidence was given as to the law in Manitoba:—*Held*, that it should be assumed that the common law governed in Manitoba in respect of such actions; at common law the plaintiff had a good cause of action, because the relation of master and servant existed between him and the girl.—*Nickolls* v. *Goulding*, 21 U. C. R. 366,

and *Ford* v. *Gourlay*, 42 U. C. R. 522, approved and followed.—It was not necessary to consider the effect of sec. 3 of the Ordinance respecting the Action of Seduction; *sed quære*, whether that section was intended to embrace such an action as the present—whether it was not confined to a cause of action arising within the jurisdiction.—And *held*, upon the evidence, that the defendant had seduced the plaintiff's servant and was the father of her child. *Bolton* v. *Hodgins* (1910), 14 W. L. R. 210, 3 Sask. L. R. 149.

Claim for payment in advance of expenses of confinement.]—In an action by the father of a girl under age for breach of promise of marriage and seduction, the plaintiff made a claim for payment provisionally and in advance of $100 for the expense of the girl's expected confinement: — *Held*, that this claim could not be sustained, and *preuve avant de faire droit* was ordered. *Bolduc* v. *Corbeil*, 7 Que. P. R. 412.

Daughter's evidence — *Rape.*]—*Held*, affirming the judgment of a Divisional Court, 10 O. L. R. 489, that the case was one to be submitted to the jury, to say whether upon the whole evidence they could find that the defendant seduced the plaintiff's daughter.—*Per* Moss, C.J.O., Maclaren, J.A., and Clute, J.—If the evidence should establish a case of rape and disprove a connection yielded to in the end though commenced with violence and resisted for some time, in fine a case of seduction, the plaintiff's right of action could only rest upon his daughter being his servant, which was not this case, and the provisions of R. S. O. 1897 c. 69, ss. 1, 2, would not apply.—*Per* Garrow, J.A.—The action would lie although trespass *vi et armis* might have been sustained, and it would be no defence that the offence was rape and not seduction. *E.* v. *F.*, 11 O. L. R. 582; *S. C., sub nom. Gambell* v. *Heggie*, 7 O. W. R. 633.

Evidence — Action brought for daughter's benefit—Judge's charge—Credibility of witnesses—Rejection of evidence—Miscarriage. *Grainger* v. *Hamilton*, 1 O. W. R. 819.

Evidence — *Examination of defendant for discovery—Promise of marriage.*]—In an action for seduction, questions as to a promise of marriage said to have been made by the defendant, who admits the seduction, are irrelevant, and the defendant will not be held to answer them upon his examination for discovery. *Leroux* v. *Schnupp*, 19 O. W. R. 617, 15 O. L. R. 91.

Evidence of plaintiff's daughter — *Rape—Nonsuit—No reasonable evidence of seduction—Disagreement of jury—Rule 780—Scope of.*]—Father brought action for seduction of his daughter and the jury disagreed three times. Motion was made by the defendant, under Rule 780, for judgment dismissing the action. The plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. The daughter was not in the plaintiff's service or living at home at the time of the seduction:—*Held*, that it was for the jury to say, on the evidence of the daughter, whether or not they accepted her statement on the whole, as they might be satisfied as to the paternity but still discredit the evidence of force. *Vincent* v. *Sprague*, 3 U. C. R. 283, and *Brown* v. *Dalby*, 7 U. C. R. 160, considered. *Gambell* v. *Heggie*, 2 O. W. R. 1174, 5 O. W. R. 746, 6 O. W. R. 184. S. C., *sub nom. E.* v. *F.*, 10 O. L. R. 489.

Plaintiff's daughter in service of defendant — *Birth of child — Motion for further and better particulars.*] — Order that defendant was not entitled to more particulars as those already furnished were more definite than those given in *Switzer* v. *Switzer* (1907), 10 O. W. R. 940, 1116 (1908), 11 O. W. R. 143; *Sewell* v. *Clark* (1909), 14 O. W. R. 732, 1 O. W. N. 75, affirmed 1 O. W. N. 135.

Right of action — Death of father — Action by mother—Proof of service—Survival of father's right—Amendment—Statute of Limitations—Trustee Act. *O'Brien* v. *Ellis*, 2 O. W. R. 685.

Right of action — *Illegitimacy of female seduced.*]—Section 1 of the Act respecting the action of seduction, 55 V. c. 43 (Man.), does not apply to the case of the seduction of an illegitimate female. *St. Germain* v. *Charette*, 20 C. L. T. 249, 13 Man. L. R. 63.

Women who have parent, guardian, etc.]—In an action under 15 Vict. c. 23 (P.E.I.) for seducing plaintiff and getting her with child, it was *held*, that the Act only applied to women who had a parent guardian or master, who might maintain an action at common law. *McInnis* v. *McCallum* (1854), Pet. P. E. I. R. 72.

See CRIMINAL LAW — INFANT—PARTICULARS.

SEIGNEURIAL TENURE.

Holder of part of property — *Payment of the whole rent.*]—The possessor of a part of the property inscribed on the register of a fief, made and deposited by virtue of the Seigneurial Act, 1854, s. 7 *et seq.*, is personally bound to pay the whole of the rent as it appears upon the register in order to take the place of the quit-rent and rents with which the property was charged under the previous seigneurial tenure. *Letellier de St. Just* v. *Desjardins*, 28 Que. S. C. 350.

Promise of sale — *Entry — Good faith — Commencement de preuve par ecrit — Improvements — Compensation—Tender of deed.*]—The appellants, plaintiffs, were the grantees of the lands in question, part of the Seigniory of Metapedia, the former proprietors of which had an agent resident in the seigniory who administered their affairs there. It had been customary, on applications by intending settlers for the purchase of lots of their wild lands, for this agent to take memoranda of their names and permit them to enter upon the lands, and this was done in respect to the lots in question, and the applicants were allowed to hold possession and make improvements thereon without notice of any special conditions lim-

iting the titles which might subsequently be granted to them by the owners. The defendants, respondents, acquired the rights of these applicants, and when the plaintiffs tendered deeds of the said lots to them, they refused to accept them, on the ground that conditions were inserted which had not been stipulated at the time of the original entries upon the lots, and of which no notice had been given. In actions *au petitoire* the defendants pleaded that their possession had been in good faith in expectation of eventually receiving titles without such restrictive conditions as were sought to be imposed, and that, in the event of eviction, they were entitled to full compensation for the value of all necessary improvements made on the lands without deductions in respect of rents, issues, and profits: — *Held*, affirming the judgments appealed from, Fitzpatrick, C.J.C., and Duff, J., dissenting, that the memoranda made by the agent were *commencement de preuve par ecrit* and equivalent to a binding promise of sale without usual conditions in limitation of any titles which might be granted. (2) That the entries made upon the lands, the possession thereof held by the defendants and their auteurs, and the works done by them thereon, could not be held to be in bad faith, nor with knowledge of defective title. 3. That, under the circumstances and notwithstanding that the defendants had actual notice of prior title, the plaintiffs could not maintain actions *au petitoire*, although they might be entitled to declarations in confirmation of the deeds tendered, and to recover the price of the lots. (4) That the defendants could not be evicted without compensation for the full value of the necessary and useful improvements so made upon the lands, with the knowledge and consent of the agent, without any deductions in respect of the rents, issues, and profits derivable from the lands. *Price* v. *Neault*, 12 App. Cas. 110, followed. *Lajoir* v. *Dean*, 3 Dor. Q. B. 69, discussed. *St. Lawrence Terminal Co.* v. *Halle, St. Lawrence Terminal Co.* v. *Rioux*, 27 C. L. T. 654, 39 S. C. R. 47.

See EASEMENT.

SEIZURE.

See ATTACHMENT OF DEBTS — EXECUTION —SAISIE-CONSERVATOIRE.

SELLING INTOXICANTS TO RAILWAY EMPLOYEES.

See CRIMINAL LAW.

SELLING LIQUOR TO INDIAN.

See CRIMINAL LAW—INDIAN.

SELLING OBSCENE BOOKS.

See CRIMINAL LAW.

SENATE AND HOUSE OF COMMONS.

Member of House selling goods to the Government of Canada — *Action to recover penalty under s. 16 — Venue—Imperial Act, 31 Eliz. c. 5.*]—Action to recover a penalty under s. 15 above, alleging that defendant, while a member of the House of Commons of Canada, sold goods to the Canadian Government and was interested in a contract with that government:—*Held*, that the action need not be tried at Ottawa, but the P. E. I. Courts have jurisdiction, c. 5 above having been repealed by c. 10 above. *McEachern* v. *Hughes*, 7 E. L. R. 227.

SENTENCE.

See CONSTITUTIONAL LAW—CRIMINAL LAW —INTOXICATING LIQUORS — STATUTES.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SEPARATE SCHOOLS.

See SCHOOLS.

SEPARATION.

See DOWER—HUSBAND AND WIFE.

SEPARATION DE CORPS.

See HUSBAND AND WIFE.

SEQUESTRATION.

Circumstances which justify it — *Sale—Titles—C. C. 1823.*]—The sequestration of an immovable whose ownership is in dispute before the Courts is an extreme measure which should not be ordered except for any serious circumstances which may expose one or other of the parties to irreparable prejudice. *Dubois* v. *Dufresne*, 16 R. L. N. S. 207, 16 R. de J. 57.

Hypothecary creditor — *Insolvency of debtor—Payment of taxes—Oppositions.*] — An hypothecary creditor cannot sequestrate an immovable upon the allegations that he has paid the taxes and the premiums of fire insurance due thereon; that oppositions by which rents falling due are claimed are pending; that the debtor is insolvent and the hypothecary creditor is in danger of losing his debt. *Caverhill* v. *Mackay*, 7 Que. P. R. 320.

Motion for writ — Disobedience to judgment — Strict legal rights — Motion

based on affidavit with interlineation and erasure not initialled—Rule 520—Dismissal of motion. *Dalton* v. *Toronto General Trusts Corporation*, 11 O. W. R. 667.

Movable effects seized in virtue of an attachment for rent and the immovable upon which they are situated should not be sequestrated, in any event, until judgment has been given in the suit. *Nugent* v. *Middleton* (1911), 12 Que. P. R. 228, 17 R. L., n. s. 199.

Petition — *Grounds.*]—In a petition for sequestration the grounds upon which the petition is based should be special, and it is not sufficient to allege simply that it is in the interest of the petitioner that the immovable should be judicially sequestrated. *Crevier* v. *Cloutier*, 4 Que. P. R. 347.

Petition — *Grounds — Administration.*]—In a petition for sequestration, the grounds upon which the demand is based must be special, and it is not sufficient to allege simply "that the immovables have not been leased nor administered," especially where the defendant, being absent from the country, has named an attorney to see to the administration of such properties. *Myers* v. *Ritson*, 4 Que. P. R. 394.

See CONTEMPT OF COURT—COSTS—PATENT FOR INVENTION—SALE OF GOODS.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

See WRIT OF SUMMONS.

SERVICE BY PUBLICATION.

See LIMITATION OF ACTIONS.

SERVICE OF PROCESS.

See PROCESS.

SERVITUDE.

See ARCHITECT — DEED — EASEMENT—VENDOR AND PURCHASER — WATER AND WATERCOURSES—WAY.

SESSIONS.

Appeal — *Order for costs — Distress warrant.*]—On an appeal to the General Sessions of the Peace from a conviction of a police magistrate, the chairman gave judgment, signing the following minute: "Appeal in this case dismissed with costs to be taxed by the clerk of the peace within five days." No formal order was ever drawn up in pursuance of this minute; but the clerk of the peace afterwards taxed the costs, and on his certificate, at a subsequent sittings of the Court of General Sessions, an order was applied for and obtained for the issue of a distress warrant for the amount of such costs: —*Held*, that under ss. 880 (e) and 897 of the Criminal Code, it was necessary for a formal order to be drawn up in pursuance of the above mentioned minute, and that, therefore, there was no warrant or authority for the certificate of the clerk of the peace, or for the order of the Court of General Sessions directing the distress warrant; and the same must be quashed. Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different. In this country, in view of s. 880 (e) and (f) of the Criminal Code, the necessary formal order in pursuance of the above minute might be drawn up at a future sittings of the Court of General Sessions, which is a continuing Court, and the costs included therein *nunc pro tunc* if necessary; and the power to grant costs and determine what costs are just and reasonable is not with us, as it is in England, confined to the justices at the same General Sessions at which the appeal is heard. *In re Bothwell and Burnside*, 20 C. L. T. 226, 31 O. R. 695.

Sessions — *Jurisdiction — Appeal from summary conviction — Recognizance—Payment of fine and costs — Bar to appeal — Order for repayment — Surplusage—Public Schools Act—Refusal of trustee to perform duty—Conviction for—Right of appeal.*] — The conviction was for that defendant, being a person who had been elected a school trustee for school section No. 18 in the township of Peel, in the county of Wellington, did on 5th January, 1905, refuse or neglect to perform the duties of the office by refusing or neglecting to engage a teacher, and by not providing the necessary school accommodation for the school. The defendant was adjudged to pay a fine of $20 and the costs of the prosecution, and he paid both:—*Held*, on appeal, that the conviction should be quashed, and repayment of the fine and costs ordered. Paymentof the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress. *In re Justices of York and Peel, ex p. Mason*, 13 C. P. 15, followed; *Rex* v. *Neuberger*, 9 B. C. R. 272, distinguished. A recognizance to appear at the general sessions and "enter an appeal," is sufficient. *Rex* v. *Geiser*, 21 C. L. T. 604, distinguished. Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered. *Regina* v. *McIntosh*, 28 O. R. 603, followed. Under R. S. O. c. 90, s. 7, any party who considers himself aggrieved by a conviction or order of a justice of the peace under any statute in force in Ontario, and relating to matters within the legislative authority of the legislature of Ontario, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the general sessions of the peace. There is no provision in the Public Schools Act which alters or limits the effect of the above section. *Rex* v. *Tucker*, 6 O. W. R. 533, 10 O. L. R. 506.

See APPEAL—COURTS—WAY.

SESSIONS OF PARLIAMENT.

See ELECTIONS.

SET-OFF.

Account — *Disputed items — Absence of liquidation.*] — Set-off will not be allowed when the amount of the account which the defendant assumes to set off cannot be determined without a long discussion and contestation of the majority of the items. 2. A defendant in such a case cannot complain of a judgment which allows him a set-off in part, to which he had no right, and properly rejects the remainder of his account. *Pharand* v. *Deslandes*, 24 Que. S. C. 324.

Action on contract — *Damages for breach.*]—Where an action is brought on a contract, and the defendant pleads non-fulfilment of contract, he may plead as a set-off damages which are alleged to have directly resulted from the negligence with the faults of the plaintiff in connection with the contract sued on. *Latour* v. *Yasinooski*, 20 Que. S. C. 292.

Action to recover balance due under a contract of work — *Amounts pleaded as set-off and arising from the same contract —Demurrer—C. P. 191, C. C. 1188.*]—1. In an action based upon a contract for the hire of work, the defendant can legally plead as set-off damages he has suffered under the same contract through non-execution by the plaintiff, particularly when a part of the plaintiff's claim is not clear and liquidated. Hence, a suit founded upon the balance due for work done and amounts paid to an architect for examining work which the defendant claims has not been done according to the rules of art, may be set-off by the price of materials removed by the plaintiff and by the cost of the repairs made to such work. 2. When the two debts arise from the same cause, the debt which is liquidated cannot be claimed until the other one is also liquidated. *Harvey* v. *Viens* (1910), 11 Que. P. R. 369.

Bank — *Winding-up — Promissory note maturing after order — Set-off of deposit to credit of indorser—Note made by municipal officers for municipal purposes — Personal liability — Set-off of deposit to credit of municipality.*]—The funds of a township corporation were deposited in a chartered bank to the credit of an account kept in the name of "A. M., treasurer of R." The township council purported, by by-law, to authorize the treasurer and reeve to borrow from the bank money to be used for drainage purposes. Accordingly the treasurer made a promissory note which he signed in his own name with the words "treasurer of the township of R." after it, in favour of the reeve, and the reeve indorsed it, signing his own name with the words "reeve of R." after it. This note was discounted by the bank, the proceeds placed to the credit of the account referred to, and paid out for the drainage purposes specified. The bank being in liquidation under the Dominion Winding-up Act, the liquidators sued the reeve and treasurer in their personal capacities upon the note, which matured after the winding-up order:—*Held*, that the defendants were personally liable upon the note, and were not entitled to set off, against the plaintiffs' claim upon it, the balance in the bank to the credit of the account kept in the name of the treasurer at the date of the winding-up order; but the defendant the reeve was entitled to set off the amount standing to the credit of his private account in the bank at the date of the winding-up order, and the defendants were allowed to amend their pleadings so as to claim that set-off. *Vanier* v. *Kent*, 11 Que. K. B. 373, not followed. *Kent* v. *Monroe*, 25 C. L. T. 40, 8 O. L. R. 723, 4 O. W. R. 468.

Bank — *Winding-up — Transfer of assets to debtor within 30 days—Moneys deposited by third parties to satisfy debt.*] — After a bank have suspended payment, and their insolvency is notorious, compensation of a debt due to the bank cannot be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made to the debtor after the suspension and within 30 days prior to winding-up proceedings under the Winding-up Act. This rule is not affected by the circumstance that the amounts offered in compensation consisted of moneys deposited with the bank by such third parties, for the special purpose of aiding the debtor to meet his indebtedness to the bank, but not transferred to the debtor until after the suspension of payment. *Communauté des Sœurs de la Charité de la Providence* v. *Kent*, 13 Que. K. B. 483.

Bank deposits against double liability.] — A contributory under the Dom. Winding-up Act, is entitled to set off a deposit account against claim made against him under the double liability clause of the Bank Act. *Re Central Bank; Ex p. Harrison & Standing* (1888), 30 C. L. T. 271.

Bank deposits against note.]—Liquidators of the Central Bank were ordered to allow by way of set-off, as against a note for $6,000, the amount of maker's deposit account, $1,406.76, an accepted but unpaid cheque for $74.76 and a dishonoured sterling draft on the Central Bank for $2,000. The maker of the note having paid liquidators $2,518.48, the note and $6,000 of debentures held as collateral security were ordered to be delivered up to maker. *Re Central Bank; Ex p. Reid* (1888), 30 C. L. T. 268.

Bank in liquidation — *Deposit—Note discounted and not yet due — Renunciation of term—Indorser — Intervention—Costs.*] —A deposit made in a bank is a loan to such bank, and Art. 1190, which says that a debt arising from a deposit shall not be the subject of a set-off, does not prevent the same deposit being set off by a debt due to the bank by the depositor. 2. The set-off of a debt due to a bank by the claim resulting from a deposit in such bank, may be effectuated up to the time of service of a petition for the winding-up of the bank, provided that both debts are equally liquidated and exigible. 3. Nevertheless, the term of the currency of a bill of exchange or promissory note is to be regarded as a stipulation in favour both of the creditor and of the debtor, and, therefore, the maker or indorser of a note discounted in a bank cannot, by re-

nouncing the benefit of the time which the note has to run, set off the debt arising upon such note by the sum which he has on deposit in the bank. 4. The indorser of a note discounted in a bank does not become the debtor of such bank until the note has been protested for non-payment and notice of protest given to him. 5. Although a creditor of a bank in liquidation has a right to intervene in a suit pending between the liquidators and a debtor of the bank, who alleges that his debt has been extinguished by set-off, in order to watch the proceedings and take measures necessary for the protection of his rights, such creditor will be ordered to pay the costs incurred by the debtor of the bank if he produces, in opposition of the demand of the latter, a useless contestation founded upon grounds which have already been set up by the liquidators. *Vanier* v. *Kent*, 11 Que. K. B. 373.

Claim — Counterclaim — Debt due by partners—Debt due to one partner—Contract—Extras. *Ross* v. *Redmond*, 2 E. L. R. 158.

Claim for board and money paid — *Prompt justification—Time for set-off.*] — A debt made up of items for board, clothing, travelling expenses, money lent, and funeral expenses, which the creditor can promptly justify, is not among those provided for in Art. 1194, C. C., but is subject to set-off as soon as it exists. *Fisher* v. *Sheridan*, 17 Que. K. B. 296.

Claim for counterclaim—Judgments—Debt and costs—Powers of trial Judge — Rules 253, 1130, 1164, 1165 — Solicitor's lien. *Levi, Blumenstiel & Co.* v. *Edwards*, 5 O. W. R. 796, 6 O. W. R. 734, 11 O. L. R. 30.

Claim on note — *Unliquidated claim—Cross demand — Pleading.*]—A defendant cannot, to an action for a money demand based upon a notarial instrument and a promissory note, set up a defence of set-off based upon a claim which is not liquidated even when his claim arises from the same transaction as the principal demand and when he asserts it by a cross-demand in the principal action. Judgment in 2 Que. P. R. 429 affirmed. *Lepitre* v. *King*, 9 Que. P. R. 453.

Claims of third persons — *Personal debt — Alimentary allowance.*]—A defendant cannot set off against the plaintiff's debt rights belonging to third persons, especially when an alimentary allowance is in question, which is a debt exclusively personal. *Ross* v. *McIntosh*, 7 Que. P. R. 392.

Costs — Damages — Different actions in same Court—Discretion—Solicitor's lien — Assignment to solicitor. *Hogan* v. *Baatz, Hogan* v. *Baatz and Taylor* (Y.T.), 1 W. L. R. 513.

Counterclaim — *Assignments Act, R. S. M. 1902, c. 8, ss. 6, 26—Right of action for damages—Solicitors' lien for costs — King's Bench Act, s. 39* (e)*, Rule 293.*]— Plaintiff sued for damages for deceit upon the sale by defendant to him of a business fraudulently represented to be of much greater value than it was. Defendant counterclaimed for the balance of the purchase money. After the trial, but before judgment, plaintiff made an assignment for the benefit of his creditors under the Assignments Act, R. S. M. 1902, c. 8, and the assignee was added as a co-plaintiff. In giving judgment the trial Judge awarded $750 damages to the plaintiff with the costs of the action, but he found also that the defendant was entitled to recover a much larger sum on his counterclaim which was not disputed. The Judge also ordered a set-off, and that judgment be entered for defendant for the balance and refused to allow the plaintiff's solicitor any lien for costs:—*Held*, on appeal, Howell, C.J.A., dissenting. (1) The plaintiff's claim against the defendant did not pass to the assignee by virtue of The Assignments Act, not being covered by any of the expressions "real and personal estate, rights, property, credits, and effects," used in s. 6 of the Act, and being something which could not be reached by creditors, under ordinary legal proceedings. (2) Such a right of action is not assignable under s.-s. (c) of s. 39 of the King's Bench Act. *Blair* v. *Asseltine* (1893), 15 P. R. 211, and *McCormick* v. *Toronto Rw. Co.* (1906), 13 O. L. R. 656, followed. (3) Even if the plaintiff's claim had been validly transferred to the assignee the defendant would be entitled to maintain his counterclaim and to have plaintiff's damages paid by deducting them from it, as both claim and counterclaim arose out of the same transaction, and Rule 293 of the King's Bench Act expressly provides that the Judge may order such set-off to be made. *Shrapnel* v. *Laing* (1888), 20 Que. B. D. 334; *Lowe* v. *Holme*, 10 Que. B. D. 286, and *Newfoundland* v. *Newfoundland Rw. Co.* (1887), 13 A. C. 199, followed. (4) The discretion of the Judge in making such order should not be interfered with, although the effect was to deprive the plaintiff's solicitor of any lien for costs on the amount awarded to his client whether for damages or costs. *Westacott* v. *Bevan*, [1891] 1 Q. B. 774; *Pringle* v. *Gloag*, 10 Ch. D. 680, and *McPherson* v. *Allsop*, L. J. 8 Ex. 262, followed. *McGregor* v. *Campbell* (1909), 19 Man. R. 38, 10 W. L. R. 326, 11 W. L. R. 153.

Counterclaim.]—Having regard to the provisions of Arts. 1031 and 1187, C. C. P. Q., creditors were allowed by the referee to set off claims of certain debtors, officers of a company, for salaries taken by them without proper authority, and for expenditures made by them out of the company's funds for a purpose *ultra vires* of the company. No objection was taken to this ruling before the referee, and the Court on appeal from his report confirmed such ruling, but expressed some doubt as to jurisdiction of referee to set off such claims. *Minister of Railways and Canals* v. *Que. Southern Rw. Co.* (*Hodge & White's Claim*) (1908), 12 Ex. C. R. 11.

Cross-demand — *A debt which may be easily and promptly liquidated — Limitation of actions — Short prescriptions — Hire of work and services rendered — Procedure — Incidental cross-demand and plea of set-off— Demurrer based upon short prescription.*]— A defendant who sets up in an incidental cross-demand the value of services rendered

to the plaintiff, may plead the same grounds in a defence of set-off to the principal action. —Set-off only takes place between debts which are or can be easily and promptly liquidated. A claim for innumerable steps, services, journeys, etc., in connection with negotiations for the sale of a railway is not a debt of this nature, and, consequently, set-off does not exist.—The above-mentioned services come within the category of those referred to in paragraph 6 of Art. 2260 C. C., and the suit to recover the value thereof is prescribed by five years.—The short prescriptions of articles 2250, 2260, 2261, and 2262 C. C. extinguish the right of action and may be pleaded by inscription in law. *Bank of St. Hyacinthe* v. *Bernier* (1909), 37 Que. S. C. 481.

Cross-demand.]—A plea that sets up by way of set-off or compensation, matter that is properly the subject of a cross-demand, will be allowed to avail as such, on an application at the hearing on the merits, if no special wrong is thereby caused the plaintiff, subject to payment of additional stamp duty, if any, and of such costs as the Court may see fit to order. *Brazer* v. *Elkin & Co.*, 37 Que. S. C. R. 154.

Damages — *Liquidated amount — Refusal to discharge mortgages.*]—A claim for damages resulting from the refusal of the plaintiff to cancel the registry of extinguished mortgages upon a property acquired by the defendant is not clear and liquidated, and cannot be pleaded by way of set-off to the plaintiff's claim in an action. *King* v. *Lepitre*, 3 Que. P. R. 216.

Debt due by mandatory — *Damages for non-performance.*]—Where the claim is for ascertained sums of money due by virtue of bills or notes or of the receipt of money as mandatory, the defendant cannot set off damages accruing by reason of the plaintiff having failed to discharge the obligations which he assumed by the contract of mandate. *London Guarantee and Accident Co.* v. *Groilt*, 18 Que. S. C. 398.

Debt purchased by defendant—*Signification — Costs — Firm of advocates — Partnership — Debts of members.*]—A defendant in a suit may set up in compensation of the demand, a debt due by the plaintiff bought by him, though signification of the act of sale has not been made; but he bears the costs incurred up to the production of the sale in the case, which avails as a signification.—A firm of advocates in Quebec is a juridical person (*personne morale*), distinct from the several members who compose it. Hence, debts due to it cannot be set up in compensation of debts due by its members. *Sale* v. *Crépeau*, 28 Que. S. C. 423.

Debt which is liquidated and demandable — *Contract — Damages—C. C. 1188.*]—A debt not liquidated and demandable may, nevertheless, be pleaded as set-off to another debt of the same nature, provided they both arise from the same contract.—2. Applying this principle, an action to recover under a contract for work done may be legally met by a plea alleging direct damages suffered by the defendant as a result of the execution of the contract. *Harvey* v. *Veins* (1910), 16 R. L. n. s. 500.

Defamation action — *Counterclaim for bills of exchange — Motion to strike out counterclaim.*]—Plaintiff brought action for defamation. Defendant counterclaimed for amount of certain bills of exchange. Master in Chambers struck out the counterclaim without prejudice to a fresh action being brought, there being no connection between the claim and the counterclaim. *Central Bank* v. *Osborne*, 12 P. R. 160, approved. *Still* v. *Alexander* (1910), 16 O. W. R. 930, 2 O. W. N. 23.

Disputed indebtedness — *Demurrer — C. P. 191, C. C. 1188.*] — Set-off may be pleaded even when the proffered indebtedness is not absolutely clear and determined, provided it can be easily proved. In the present case the indebtedness pleaded as set-off is not clear and determined inasmuch as plaintiff not only denies the amount of it but even its very existence. A plea of set-off of this character will be dismissed upon inscription in law. *Dore* v. *Charron* (1911), 12 Que. P. R. 380.

Goods sold — *Damages for short delivery —Cross-demand — Pleading.*]—In an action for goods sold and delivered, the defendant cannot plead set-off of damages alleged to have been suffered by him in consequence of the plaintiff's default to complete delivery of the whole quantity of goods stipulated in the contract. Such claim should be urged by cross-demand. *Walshaw* v. *Rosenfield*, 24 Que. S. C. 80.

Liquidated demand — *Stipulation for liquidated damages — Cross-demand—Pleading — Irregularity — Inscription in law.*]—A debt arising out of the stipulation in a contract for the performance of work on default of completing it by a fixed date, the contractor shall pay $50 as liquidated damages for every day of delay, is not a liquidated debt which may be set off according to the terms of Art. 1188, C. C.—2. Blanchet, J., dissenting, that the creditor may make such a debt available by recourse to the cross-demand mentioned in Art. 217, C. R. C.—*Semble*, that when a debt, not the subject of set-off, is set up in a defence of set-off, and the opposite party joins issue without raising any objection to the regularity of the procedure, the Court may decree a set-off.—3. The party against whom an unliquidated debt is set up in a plea of set-off may attack such irregularity without being obliged to inscribe in law. *Ottawa Northern and Western Ry. Co.* v. *Dominion Bridge Co.*, 14 Que. K. B. 197.

Money advanced by another — *Liquidated amount — Costs.*]—One who has paid money for the benefit of a third person, who has contracted to repay it, may claim such sum from the third person or set it off, although it is asserted that the money was furnished by another, to whom it must be repaid. 2. In order to have a set-off it is sufficient that the debt which the debtor asserts as a set-off shall be liquidated; it is not necessary that the debt against which the set-off is asserted shall be liquidated. 3.

Costs due to a party upon a verdict of acquittal, where the complainant has been ordered to pay the costs, may be the subject of set-off, for such costs may be easily ascertained. *Bérard* v. *Doré*, 24 Que. S. C. 208.

Operation de plein droit — *Necessity for giving credit — Scale of costs.*] — A creditor whose claim is in part set off by what he owes his debtor, can bring an action against the latter only for the difference, and costs appropriate to a judgment for such an amount. The creditor's contention that, never having been called upon to pay, he was not obliged to take the set-off into account, and could institute his action for the original amount of his claim, is answered by the fact that set-off operates *de plein droit*. *Turgeon* v. *Dubeau*, 35 Que. S. C. 211.

Plea — *Objection to — Practice.*]—The objection to a plea of set-off, as being a matter for an incidental demand and not a defence to the action, should be raised by means of exception to the form, not of inscription in law. *Levinson* v. *Renaud*, 6 Que. P. R. 114.

Pleading — *Acknowledgment — Trial—Counterclaim — Tender.*]—A plea of compensation, setting forth a contra-account, followed by an allegation of acknowledgment and promise to pay by the plaintiff, will not be rejected on a reply in law. 2. The Judge presiding at the trial has, however, power to order that the settlement of account and acknowledgment by the plaintiff, alleged by the defendant, be proved by him before he is allowed to prove his counterclaim. 3. The validity of a tender, especially in commercial matters, may be a question of fact, and allegations relating to a tender will not be rejected on answer in law, although the tender may appear not to have been made in the manner prescribed by law for legal tenders. *Laurentide Pulp Co.* v. *Curtis*, 4 Que. P. R. 109.

Pleading — *Damages — Construction of contract—Penal clause—Waiver.*]—A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under Art. 217, C. P. Q., of the province of Quebec; Nesbitt and Idington, JJ., dissenting. By a clause in a contract for the construction of works the completion thereof was to be made within a specified time, in default of which it was agreed that the contractor should pay "as liquidated damages and not as a penalty the sum of $50 for every subsequent day until the completion." The works were not completed within the time limited, and both parties joined in a petition to the municipal corporation for an extension of the time, during which subsidies it had granted towards the cost of the works should be earned. The petition was granted, and the works were completed within the extension of time so allowed: — *Held*, Nesbitt and Idington, JJ., dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained to be set off in compensation against a claim upon a promissory note.— *Held, per* Girouard and Davies, JJ. (Nesbitt and Idington, JJ., *contra*), that by joining in the petition for extension of time the party in whose favour the penal clause might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interest of both parties to the contract. *Ottawa Northern and Western Ry. Co.* v. *Dominion Bridge Co.*, 25 C. L. T. 123, 36 S. C. R. 347

Pleading — *Damages for tort — Liquidated debt.*]—A claim for damage caused by "keeping back a large quantity of logs and pulp wood at a boom, thus preventing the sale and manufacture of them during the season of 1906," is not a liquidated debt (*claire et liquide*), and cannot therefore be set up by a plea in compensation. *Lecours* v. *Price*, 33 Que. S. C. 181.

Principal action and cross-demand arose from same cause and compensation was demanded; *held* that the cross-demand should be treated for the purpose of compensation as a defence to the action and the peremption of the cross-demand could not be demanded independently of a demand for peremption of the principal action. *Carrier* v. *Easton* (1910), 12 Que. P. R. 277.

Promissory notes — *Account for board.*]—There is no right to plead to an action upon a covenant and promissory notes by asking to set off against it an account for board for several years. *Naud* v. *Marcotte*, 3 Que. P. R. 326.

Right of customer to set-off damages for breach of contract *made with company against claim for goods manufactured by receiver of company — Claim assigned to bank — Action by bank for price.*]—Defendants ordered goods from a manufacturing company. Later a receiver was appointed for the company and their business was carried on under the order of the Court. The receiver assigned and hypothecated their manufactured goods to plaintiff bank as security for advances. Later plaintiffs brought action to recover $15,028 for goods supplied defendants. Defendants pleaded a set-off for damages for breach of contract to supply goods, made with original company.—Britton, J., *held*, that the set-off could not be allowed. Order for Master in Ordinary to take accounts, unless plaintiff accepted judgment for $12,113.68. *Sovereign Bank* v. *Parsons* (1910), 16 O. W. R. 673, 1 O. W. N. 1079.

Salary — *Attachment of debts — Portion not attachable.*]—Set-off is not applicable to the portion of a salary not by law attachable. *Bacon* v. *Laurentides Paper Co.*, 16 Que. K. B. 97.

Set-off does not lie against an action on a promissory note for a litigious claim which cannot be liquidated without much proof and which is the subject of a distinct suit contested by the other party. *Verdun* v. *Theoret* (1911), 12 Que. P. R. 265.

Solicitor's lien — *Costs — Action and counterclaim — Set-off to prejudice of solicitor's lien — Con. Rules 252, 253, 1130, 1164, 1165.*]—Rule 1165 as to a set-off of damages and costs between parties not being allowed

to the prejudice of the solicitor's lien for costs, does not fetter the discretion of the trial Judge as to costs under Con. Rule 1130. —An action and counterclaim together constitute but one action for the purpose of ascertaining the ultimate balance for which execution is to issue; and, *per* Street, J., Con. Rule 1164 is special authority for setting off the costs taxable to the defendant against those taxable against him without any saving of the solicitor's lien. *Levi Blumenstiel & Co.* v. *Edwards*, 11 O. L. R. 30, 5 O. W. R. 796, 6 O. W. R. 734.

Unliquidated sum — *Pleading—Irregularity — Waiver — Allowance of set-off.*]— Where an unascertained and unliquidated debt is asserted as a set-off, and the opposite party joins issue, without in any way complaining of the irregularity of the proceeding, the Court may allow the set-off, upon proper proof. *Pontbriand Co.* v. *Morgan*, 9 Que. P. R. 340.

See BILLS OF SALE AND CHATTEL MORTGAGES — CHOSE IN ACTION, ASSIGNMENT OF —COMPANY — CONTRACT — CONTRIBUTION —COSTS — COURTS—HUSBAND AND WIFE— IMPROVEMENTS — JUDGMENT — MASTER AND SERVANT — MECHANICS' LIENS — PLEADING — PRINCIPAL AND AGENT — SALE OF GOODS — SHIP — VENDOR AND PURCHASER.

SETTING DOWN FOR TRIAL.

See TRIAL.

SETTLED ESTATES.

Leave to mortgage — *Express declarations in settlement.*]—This was an application by the trustees of a settled estate, under R. S. O. 1897 c. 71, for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof:" — *Held*, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of s. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage. *In re Curry and Watson's Settlement*, 24 C. L. T. 291, 7 O. L. R. 701, 3 O. W. R. 776.

Leave to petition under — Status of applicants. *Re Asselstine*, 1 O. W. R. 178.

Leave to sell land — *Trust for sale at named period — Acceleration with sanction of adult children—Advantage to beneficiaries —Death of one adult — Sale without sanction of survivor.*]—Lands were devised in trust for sale, but not till the youngest child should become of age, unless with the sanction of the two adult children. One of the adult children died and the youngest child had not yet become of age. Upon petition under the Settled Estates Act, R. S. O. 1897 c. 71, s. 2 (1), Chancellor Boyd held with some hestitation that the case came within the scope of the Act. *In re Cornell*, 5 O. W. R. 60, 9 O. L. R. 128.

Life tenant — *Lease by — Registration of lease — Death of life tenant before registration — Invalid lease.*]—A testator devised lands upon trust "to allow my wife so long as she remains my widow and no longer the use and occupation and the rents, issues, and profits for her own use absolutely." And he directed that upon re-marriage or death of his wife the land should be sold and the proceeds divided among his children. He died in 1897, and in January, 1906, his widow leased the land for five years with right of renewal, and died in April, 1906. The lease was registered in December, 1906. The executors of the testator received the rent monthly after the death of the widow till February, 1907, when they sold the land: —*Held*, that the land was a settled estate within the meaning of the Settled Estates Act, R. S. O. 1897 c. 71, and the estate during widowhood was an estate for life within s. 42 of that Act, and that the lease when registered took effect, notwithstanding the payment of rent in the meantime to the executors, the rights of a *bona fide* purchaser for value without notice not having intervened.—*Held*, also, that, if this were not so, the lease at any rate must be considered in equity as a contract for a valid lease, by virtue of R. S. O. 1897 c. 330, s. 24. *National Trust Co.* v. *Shore*, 16 O. L. R. 177, 11 O. W. R. 228.

Will — Life estate — Power of appointment — "Settlement" — "By way of succession" — Order for sale of lands — Payment of purchase money to surviving trustee — Investment — Security. *Re Denison*, 9 O. W. R. 740.

See LANDLORD AND TENANT.

SETTLEMENT.

Contingent or vested estate—*Children.*]—*Held*, affirming the judgment in 30 O. R. 517, 19 C. L. T. 171, that under the settlement in question the child who died before the period for conveying took a vested interest. *Lazier* v. *Robertson*, 20 C. L. T. 59, 27 A. R. 114.

Deed — *Substitution — Donatio mortis causa.*] — An *acte* by which the children assign to their mother the enjoyment of immovables devised by their father, and stipulate that after her death they shall enjoy them in the same fashion, and that the property will go to their children, does not effect a substitution but a *donatio mortis causa*, which is void. *Kannon* v. *Kannon*, 6 Que. P. R. 455.

Gift — *Stipulation in favour of third party — Revocation before acceptance—Relinquishment by grantee.*] — A stipulation made by a donor for the benefit of a third party, as a condition of the gift, can be revoked without the assent of the third party, so long as he has not given notice of his

intention to take advantage of it. A relinquishment by the donee of the charge in her favour is deemed a revocation of the stipulation made for the benefit of the third party. *Guérette* v. *Ouellet*, 27 Que. S. C. 45.

Life interest in land — *Gift over to children — Death of grantee without children—Testamentary disposition by grantee—Breaking of entail — Gift — Trust.*]—By deed of gift *inter vivos* the grantor granted to the grantee, *pour lui et les siens de son côté, estoc et ligne*, certain lands for the benefit of the grantee during his life, without power to dispose of the same in the meantime; and directed that the property upon his death should go to the children born of his marriage. On these conditions the grantor transferred to the grantee all his rights in the property given "to vest it in the grantee *et ses héritiers de son côté, estoc et ligne*:"—*Held*, that the deed of gift created an entail; and, in case of the death of the grantee in tail without children, this entail became broken, and a testamentary disposition of the property made by the grantee in tail was valid. (2) That this grant in tail did not extend to relations of the grantee other than children; and that the phrase "*pour lui et les siens de son côté, estoc et ligne*," did not constitute a *fidéicommis*, even under the law in force at the time the gift was made (1844), the only effect of this clause being to constitute an appointment in favour of the heirs who would have taken in succession to the grantee in case he should not have legally disposed of the property otherwise. (3) That the restraint on alienation in the deed applied only to the enjoyment of the property by the grantee in tail, and did not affect the entail created in favour of the children of the grantee, nor the power of the grantee to dispose of the subject matter of the gift, in case of the failure of the entail. *Crevier* v. *Cloutier*, 26 Que. S. C. 373.

Solicitor's advice — *Absence of fraud or mistake — Right to revoke — Reformation — Will — Trust deed.*]—In pursuance of an ante-nuptial agreement entered into by the testator and his intended wife, he, after his marriage in 1895, made his will, whereby he devised the interest he had in certain property to his executors and trustees, upon trust to pay the income thereof to his wife during her life, and after her death, to a son O.; and upon the death of O., or his, testator's wife, if she survived O., in trust for conversion, the proceeds to be divided amongst the children or the issue of any deceased children of his said son, and if there were no such children or issue, then amongst the children and the issue of any deceased children of another son W. In 1897 he assumed to revoke this will, but, after consultation with and on the advice of his solicitor, he executed another will, reviving and confirming the previous will; and subsequently on his solicitor's advice and after due consideration, he executed a deed of settlement, without any power of revocation, substantially carrying out the terms of the will. In 1901 he made another will whereby he assumed to revoke the settlement except in so far as regarded the provision made in favour of his wife:—*Held*, that, in the absence of anything to shew that the settlement was unreasonable or improvident, or that it was executed through fraud or misrepresentation, it was not revocable, nor, under the circumstances, was there anything to justify its being reformed. *Howland* v. *Macdonald*, 9 O. W. R. 337, 14 O. L. R. 110.

See Fraudulent Conveyance — Partnership — Pauper — Trusts and Trustees.

SETTLEMENT OF ACTIONS.

Agreement for compromise — Summary application to enforce — Jurisdiction of High Court — Unperformed terms of agreement — Application made after final judgment — No agreement to make terms a rule of Court — Terms not included in the relief claimed in the actions — Grounds upon which motion resisted — Perjury — Fraud — Concealment — Undue pressure—Failure of grounds — Costs of application. *McLeod* v. *Crawford*, *McLeod* v. *Lawson*, 10 O. W. R. 590.

Collusive settlement of action—Leave to proceed — Trial of question — Finding of true settlement — Costs — Solicitor's lien — Acquiescence. *Bonter* v. *Nesbitt*, 2 O. W. R. 610, 1043.

Collusive settlement of action—Notice of lien. *McCauley* v. *Butler*, 1 O. W. R. 72, 343.

Consideration — Forbearance — Costs —Enforcement — Judgment. *Anderton* v. *Montgomery*, 2 O. W. R. 413.

Discontinuance — *Judgment for costs —Costs of acte of tutorship.*]—If a discontinuance is filed in a suit without notice thereof being given to plaintiff's attorneys, and evident collusion is shewn against the latter by the plaintiff and defendant, the plaintiff's attorneys will be entitled to take judgment against the defendant for their costs. 2. Such costs do not comprise the costs of appointment of the plaintiff as tutrix to minors, there being no lien *de droit*, in respect thereof, between the defendant and the plaintiff's attorneys. *Skelly* v. *Thibault*, 5 Que. P. R. 75.

Fraud — *Costs.*]—As a general rule, a settlement of the suit by the parties thereto is valid, unless it be made in fraud of the rights of the plaintiff's attorney, in which case it will be carried out subject to the obligation to pay the plaintiff's attorney his costs. 2. The mere fact that the settlement was made by the defendant without paying the plaintiff's attorney his costs, although aware that the plaintiff was unable to pay them, does not constitute fraud, more particularly where it appears that the plaintiff's action was unfounded, and that the defendant was induced by her knowledge of the plaintiff's inability to pay costs, and her reluctance to continue the contestation under such circumstances, to make a settlement by which the plaintiff profited to some extent. *Larcau* v. *Martineau*, 21 Que. S. C. 469.

Partnership — Authority — Solicitors —Motion to enforce compromise — Validity —Issue. *Canadian Bank of Commerce* v. *Donoghue*, 7 W. L. R. 511.

See CONTRACT — COSTS — DAMAGES — DEFAMATION — INTERVENTION — JUDGMENT —PEREMPTION — PLEADING — RELEASE — SOLICITOR—TRIAL.

SEWERS.

See MUNICIPAL CORPORATIONS — NUISANCE —WATER AND WATERCOURSES.

SHARES AND SHAREHOLDERS.

See BROKER — BUILDING SOCIETY — COMPANY—RECEIVER.

SHARESMEN.

See PARTIES.

SHEEP.

See ANIMALS—JUSTICE OF THE PEACE.

SHEEP PROTECTION ACT.

See MUNICIPAL CORPORATIONS.

SHERIFF.

Action against sheriff for trespass.] —Action for damages for trespass. The defendant bailiff in making a seizure under an execution broke open a store door, the plaintiff residing over the store, both being under one roof:—*Held*, that breaking open the door was unlawful, and small damages allowed. Some of the property seized was the plaintiff's, the remainder was liable to the execution. The plaintiff gave the sheriff a written statement of what he claimed. As plaintiff put in no claim to the remainder to the sheriff he cannot now claim damages for the unlawful seizure of it:—*Held*, further, that there was no unreasonable delay in selling and that a fair price was obtained. *Hudson* v. *Fletcher* (1909), 12 W. L. R. 15.

Action to set aside sheriff's sale — *Particulars — Action or petition? — Delays —Beginning of a judicial demand—Affidavit —Costs — C. P. 76, 115, 117, 123, 149, 174, 784, 786, 787, 1209; Rule of Practice No. 47.*]—The absence of details in an action is a matter for a motion for particulars and not for an exception to the form.—The procedure by way of petition to annul a sheriff's sale provided by Art. 787 C. P. is not exclusive of the right to proceed by direct action, even if it cause more costs. — A judicial demand by a direct action is made by the issue of the writ of summons and the service thereof.—No affidavit is necessary in an action for the resolution of a sheriff's sale. *Thibaudeau* v. *La Banque Nationale* (1909), 11 Que. P. R. 310.

Bond — *Condition on appointment to office — Resignation of office — Re-appointment — Subsequent breaches — Liability— Res judicata.*] — The plaintiff resigned his office of sheriff, and the defendant was appointed in his place under a commission containing a condition that he should pay the plaintiff "out of the revenues of the said office" a certain sum for his life; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, the defendant resigned his office, and soon afterwards was re-appointed under a commission without any such condition. In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation. A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—*Held*, that want of good faith was not to be imputed to the Crown, who had the right to permit, and did permit, the defendant's resignation, and by accepting it made it effectual and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission, and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it.—*Semble*, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him:—*Held*, also, that the question was not *res judicata* by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment. *Smart* v. *Dana*, 2 O. W. R. 287, 3 O. W. R. 89, 5 O. W. R. 387, 5 O. L. R. 451, 9 O. L. R. 427, 23 C. L. T. 170, 24 C. L. T. 436, 25 C. L. T. 456.

Capias — *Gaol — Mileage.*]—A sheriff is required to safely keep a person arrested on a *capias*, and, as there is no common gaol in Vancouver, the sheriff of Vancouver is entitled to lodge a person arrested in his bailiwick in New Westminster gaol and charge mileage therefor. *Carson* v. *Carson*, 10 B. C. R. 83.

Certificates of satisfaction of executions against lands are required to be forwarded to Registrar of Land Titles, by the sheriff. His fees must be paid by execution creditor, unless some other party specially request sheriff to forward same. *In re Brown* (1904), 3 Sask. L. R. 94.

Deed under 11 Vict. c. 7 — *Want of notice cured by sec. 22—Void, if land not described at sale by metes and bounds.*]—

The 11 V. c. 7, s. 7, enacts that before proceeding to sell land taken in execution under that Act, the sheriff shall at the sale publicly declare the metes and bounds. Section 22 enacts that no omissions of any direction relative to notice or forms shall render the sale invalid. The *locus* was sold by the sheriff and bought by Y. for a trifling sum. Notice of sale had not been duly given by the sheriff, and at the sale the land had not been described by metes and bounds. Y. brought ejectment and obtained a verdict:—*Held*, on motion to set the verdict aside, that the want of notice being in a proceeding previous to the sale, was cured by s. 22, but that the want of description by metes and bounds was a defect not cured by s. 22, and rendered the sale invalid. *Yeo* v. *Betts* (1856), 1 P. E. I. R. 116.

Deputy of a sheriff is not bound to account to his principal for monies received by him in his capacity. *Perry* v. *Gugy* (1840), C. R. 3 A. C. 8, 2 R. de L. 327, 2 R. J. R. Que. 245.

Execution — *Wrongful act — Indemnity —Solicitor — Directions — Overcharges — Error — Knowledge — Recovery.*]—Where a sheriff had been mulct in the costs of an action brought against him for wrongfully charging certain lands with an execution, he was held entitled to recover in an action brought by him against the solicitor who gave him directions to charge the lands, for indemnity against such costs, although in giving such directions the solicitor acted merely as agent for his client. 2. Upon a counterclaim of the solicitor against the sheriff for alleged overcharges:—*Held*, assuming that there was an error in the charges, that, as there was no evidence that the solicitor was not aware of such error when he paid the charges, he could not recover. *Robertson* v. *Taylor*, 21 C. L. T. 270.

Executing writ — *Public officer — Notice of action.*]—The sheriff is not, when executing a *fi. fa.* at the suit of a private individual, a public officer entitled to notice and other protection under s. 468 of the Judicature Ordinance, R. O. 1888 c. 8. *McWhirter* v. *Corbett*, 4 C. P. 203, followed. *MacDonnell* v. *Robertson*, 1 Terr. L. R. 438.

Fees — *Fi. fa. lands — Certificate forwarded to Registrar of Land Titles without a special request — Land Titles Act (Sask.), ss. 92, 93—Judicature Ordinance, Rule 368 —Registrar's fees — Liability of advocate of execution creditor.*]—The sheriff is entitled to be paid his fees by the execution creditor whether he acts by request or takes steps which he is required to do by statute. *Re Solicitors* (1909), 12 W. L. R. 687.

Fees — *Lands taken in execution but not sold — Poundage.*]—Plaintiff was deputy sheriff of Prince county, and had extended an execution at Hunt's suit on lands of a judgment debtor of the latter. The debt was settled and the land was not sold. The plaintiff then brought his action in the Commissioners Court against Hunt for his expenses and poundage, and that Court gave judgment for the expenses but refused to allow the poundage, and from that judgment the plaintiff appealed:—*Held* (Peters, J.), that plaintiff was not entitled to poundage. *Creswell* v. *Hunt* (1862), 1 P. E. I. R. 191.

Fees — *Payment in advance — Fi. fa. — Mileage — Seizure — Conduct of solicitor.*] —The meaning and effect of the Judicature Ordinance, R. O. (1888) c. 58, s. 461, providing for the payment to officers, in advance, of the fees and allowances fixed by tariff, discussed:—*Semble*, a sheriff is not under that section entitled to demand in advance his charges for mileage or seizure before executing a *fi. fa.* goods:—*Held*, that the finding of the trial Judge that the conduct of the first execution creditor's advocate did not have such effect that the *fi. fa.* was not originally placed, or had ceased to be, in the sheriff's hands for execution, was justified by the evidence. *Parsons* v. *Hutchings*, 1 Terr. L. R. 317.

Fees — *Re-sale on false bidding.*]—When a property is resold upon false bidding, the sheriff is only entitled to one commission and tax, as if there had been but one sale. *Nieuwenhuyse* v. *Farnham*, 5 Que. P. R. 160.

Fees — *Seizure of land under execution—Division into lots.*]—An immovable, within the meaning of Art. 706, C. P. C., does not necessarily mean a cadastral lot, but an exploitation; and an immovable composed of several lots upon the official plan and book of reference constitutes, notwithstanding, only one immovable if it constitutes only a single exploitation. 2. Article 7 of the tariff of fees for sheriffs, allowing an additional fee for every additional lot seized, must be interpreted as referring to Art. 6 of the same tariff and as meaning every additional immovable; so, if the bailiff has grouped several lots according to their respective situations to constitute different immovables, the sheriff can charge an additional fee only for each group or additional immovable. *Gault* v. *Dufort*, 24 Que. S. C. 77, 5 Que. P. R. 353.

Insufficiency or nullity of security given by a purchaser of immovable property at sheriff's sale should be raised by direct action and not by petition for re-sale for false bidding. *Ross* v. *Johnson* (1911), 12 Que P. R. 378.

Interpleader — Seizure of goods—Claim of third party — Chattel mortgages—Rent—Withdrawal — Costs — Issues. *McNaughton Co.* v. *Hamel* (N.W.T.), 1 W. L. R. 169.

Interpleader — *Seizure of goods—Interest of execution debtor as co-owner.*] — A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein:—*Held*, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any, and if so what, interest in the hay and oats seized. *Lucas* v. *Holliday*, 24 C. L. T. 365, 8 O. L. R. 541, 3 O. W. R. 732.

Interpleader — *Writ of possession—Interference with execution—Claim to land — Costs.*]—Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, he was served with a notice by B. claiming the land mentioned in the writ, and informing the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest. *Semble*, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But, *held*, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order. Costs of sheriff ordered to be paid in the first instance by the party putting him in motion. *Hall* v. *Bowerman*, 20 C. L. T. 441, 19 P. R. 268.

Liability of sheriff for bailiff appointed under County Court Acts, 1873 and 1874.]—The County Court Acts, 36 Vic., s. 3, and 37 Vic., c. 1, enact that the sheriffs shall appoint bailiffs or deputies for each circuit of the County Court to whom all processes issued at that circuit should be delivered, and who might execute them without their being first placed in the hands of the sheriffs. Larkin had issued several executions from the County Court addressed to the sheriff of Prince County (defendant.) The breach of duty charged against the defendant was neglect in the execution of some of these writs and not accounting for the levies in others. At the trial plaintiff was non-suited. On motion to set aside the non-suit: — *Held*, (Peters and Hensley, JJ., Palmer, C.J., dissenting) that the sheriff was not liable and that the non-suit was right. *Larkin* v. *McNutt* (1880), 2 P. E. I. R. 300.

Limit bond — *Action for escape — Demurrer.*] — Prisoner was arrested by the sheriff (defendant) under an execution, and gave a limit bond under 12 Vict. c. 1, s. 1, was set at liberty before justification and continued at large. The sureties never justified, and an action of debt was brought against the sheriff for an escape. Defendant on demurrer, contended that the prisoner was lawfully at large under the authority of the Act, and that the only remedy against the sheriff was for breach of the bond before justification as pointed out by the Act: —*Held*, (Peters, J.) that an action for escape could not be maintained, and the only remedy was that given by the Act. *Bank of P. E. Island* v. *McGowan* (1870), 1 P. E. I. R. 304.

Mandamus — *Sale of lands.*]—A motion by the curator to force the creditor, requiring the issue of an order upon the sheriff to seize and sell the lands of the insolvent, to give him a description of the lands of such insolvent, will be dismissed, the law itself indicating to the sheriff what he ought to do. *Re Castonguay and Savoie*, 17 Que. S. C. 175.

Poundage — *Money paid before sale — Possession money.*]—Where a sheriff made a seizure under writs of *fieri facias* of property of the judgment debtor, and a few hours before the sale the judgment debtor came to the sheriff and paid the full amount of the judgment debt:—*Held*, that the sheriff was entitled to poundage on the full amount of the judgment debt, and not merely on the value of the property seized.—*Held*, also, that under the circumstances of this case $2.25 per day was not too much to allow for possession money. *In re Black Eagle Mining Co.*, 23 C. L. T. 331, 6 O. L. R. 512, 2 O. W. R. 797.

Poundage.] — Under the P. E. Island statute, 16 Geo. III. c. 1, the sheriff is allowed poundage "for levying, paying and receiving" moneys under executions. Under this provision he must not only levy, but actually sell, receive and pay over the purchase money before he is entitled to poundage. *Cox* v. *Murphy*, *Cox* v. *Rice* (1872), 1 P. E. I. R. 412.

Right to interplead — *Seizure of mortgage—Registration of notice—Assignment of mortgage—Execution creditor.*]—The right of a sheriff to an interpleader order depends upon his either having the subject matter of the interpleader in his possession or having the right under an execution accompanied with an intention to take possession. And where an execution debtor who was a mortgagee of lands had assigned the mortgage, although the assignment was not registered until after registration of a notice of seizure:—*Held*, that the mortgage could not be seized under the provisions of the Execution Act, R. S. O. 1897 c. 77, s. 23 *et seq.*, and that the sheriff could not proceed until the execution creditors had in an action obtained a declaration of the Court that the assignment was void; and that he could not interplead. *Keenan* v. *Osborne*, 24 C. L. T. 132, 7 O. L. R. 134, 3 O. W. R. 143.

Sale of land under writ of fi. fa. — *Authority of sheriff—Change in territory of judicial districts — Execution of writ—Inception—Filing in land titles office—Successor of sheriff—Application to confirm sale.*] —An application to confirm a sale of land made by the sheriff of Edmonton under a writ of execution against lands was opposed by a mortgagee of the land, upon the ground, among others, that the sheriff of Edmonton had no authority, because the land was in the judicial district of Wetaskiwin. The writ was issued before the creation of the judicial district of Edmonton and Wetaskiwin, the action in which the judgment on which the writ was issued was obtained having been brought in the judicial district of Northern Alberta. By Ordinance c. 6 of 1903, 2nd sess., it was provided that the Lieutenant-Governor might alter the boundaries of judicial districts, and make such provision as he might deem necessary to protect the interests affected thereby. Under the authority of this Ordinance, by order in council of the 1st September, 1906, the judicial district of Northern Alberta was wiped out, and the area comprised therein divided into three districts, Calgary, Wetaskiwin, and Edmonton. The order in council provided that "all writs . . . pending in the old judicial districts shall have effect and continue according to their tenor in the new judicial districts respectively within whose limits suit was first entered or proceedings begun." This suit was first entered in the sub-district of the Northern Alberta judicial district of the deputy clerk at Edmonton, which comprised the area of the two new districts of Edmonton and Wetask-

iwin: — *Held*, that, as there was nothing in the order in council authorizing a sheriff of one district to exercise any of his powers outside of his own district, the sale made by the sheriff of the Edmonton judicial district could have no local authority in the Wetaskiwin judicial district, unless he possessed such authority as the former deputy sheriff of the Northern Alberta judicial district. Nothing was done by the deputy sheriff of Northern Alberta except to receive the writ. He could not make a seizure for the debtor had no interest in the lands till long after the Northern Alberta district had ceased to exist. The writ was filed in the land titles office in July, 1906.—*Held*, following *Re Blanchard*, 5 Terr. L. R. 240, that such filing, even if the debtor owned the land at the time, would not constitute a seizure or inception of execution of the writ.—*Held*, therefore, that the sheriff of the Edmonton judicial district, either as such or as former deputy sheriff of the Northern Alberta judicial district, to whom the writ was directed and delivered, had no authority to sell these lands, which were in the district of another sheriff, who was the successor of the deputy sheriff of Northern Alberta, in so far as the lands in his district were concerned; and, in consequence, the sale was void, and the application to confirm it should be refused. *Reliance Loan & Savings Co.* v. *Goldsmith* (1910), 15 W. L. R. 53.

Sale of lands — Unless for exceptional reasons, the sheriff of the district is the officer ordinarily charged with the duty of selling immovable property. *Fortier* v. *Michaud* (1911), 12 Que. P. R. 259.

Sale under execution — *Proceeds stolen from sheriff's bailiff—Responsibility — Satisfaction of judgment—Advertisement of sale —Chattel mortgage.*] — 1. Notwithstanding the provisions of s. 21 of the Executions Act, R. S. M. 1902 c. 58, a sale of goods by a sheriff's bailiff under *fi. fa.* was, in the peculiar circumstances set forth in the statement below, held to have been good, although made immediately after seizure and without the notice required by that section. 2. A sheriff is responsible for all money realized by his bailiff by a sale under a *fi. fa.*, though the money be stolen from the bailiff as a result of his carelessness and never comes to the sheriff's hands. 3. A seizure by a sheriff of sufficient goods to satisfy a judgment in part will be a discharge to the debtor as to such part. 4. When the goods seized are subject to a chattel mortgage, the sale of the goods themselves, instead of only the equity of redemption, will be good unless objected to by the mortgagee. 5. It is not an absolute rule that a sheriff sale under execution must be for ready money; but, if the sheriff does not comply with such rule, he will be responsible for the money if he fails to collect it. 6. The fact that the sheriff failed to comply with s. 25 of the Executions Act, by advertising the amount realized and keeping the money to be distributed ratably, is no answer to the defendant's claim to have such amount credited upon the execution against him, when nearly three years have elapsed, and there is no evidence that any other execution against the defendant has been placed in the sheriff's hands. *Massey-Harris Co.* v. *Molland*, 15 Man. L. R. 364, 1 W. L. R. 424.

Seizure of company's property under execution — Interruption by winding-up order — Right to fees and poundage—Rule 1190. *Re Palmerston Packing Co., Allan's Claim*, 4 O. W. R. 339.

Seizure under execution — *Levy — Sale after commencement of action against sheriff—Damages—Value of goods sold.*]—Goods seized by the sheriff under an execution at the suit of *B.* v. *R.*, were claimed by E. R., the wife of R., as her property. After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution. After the seizure and before sale, a suit was commenced by E. R. against the sheriff, and a declaration was filed containing two counts: 1st, for seizing, taking away, and converting the plaintiff's goods; 2nd, for detention. Part of the goods seized were sold, and part released:—*Held*, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action; that, as far as the sheriff was concerned, the levy was effectual and complete. *Ridcout* v. *Tibbits*, 36 N. B. R. 281.

Theft of money received by bailiff under fi. fa. — *Entry of satisfaction — Liability of sheriff for acts of bailiff.*]—In January, 1900, the plaintiff recovered judgment against the defendant for $436.98, and issued to a sheriff *fi. fa.* against the defendant's goods. The same sheriff received a *fi. fa.* against the defendant's goods at the suit of H. & Co. The sheriff issued to one A. as his bailiff his warrants to realize under the writs. The defendant died, and his executors decided to sell his chattels by auction, and employed A., as auctioneer, to conduct the sale. He advertised the sale as being by order of the executors to be held on the 5th April, 1901. Some of the chattels were under mortgages from the defendant to a trustee for the Union Bank of Canada. A. sold the goods and placed the moneys received in a cash box which was stolen:—*Held*, that the judgment was discharged by the seizure and sale to the extent of the amount realized and applicable to the *fi. fa.* and that it has since been discharged in full by the payment made directly to the sheriff. Order made to dispense with the signature of the satisfaction piece and for satisfaction to be entered. The executors' costs of the motion and of entering satisfaction to be paid by the plaintiffs and the sheriff. A sheriff is liable not merely for moneys received by his bailiff, but also for those received by the bailiff's clerk: *Gregory* v. *Cotterell*, 5 E. & B. 571. A. sold the goods under the *fi. fa.* and received the proceeds for the sheriff, and his receipt was, in law, that of the sheriff. All the time he held the money he held it for the sheriff. The loss was the result of A.'s carelessness, and that must be held to be in law the carelessness of the sheriff himself, so far as liability to others was concerned. *Massey-Harris Co.* v. *Molland*, 24 C. L. T. 377.

Writs fi. fa. against railway—*C. R. R. 1190 (2).*]—In 1893 writs *fi. fa.* were placed in sheriff's hands to recover interest due on Cent. Ont. Rw. bonds. He advertised for sale the equity of redemption in the Rw. Co.'s lands, and the sale was adjourned 33

times. In 1902 the bonds matured and judgment was recovered thereon in 1903. A receiver of the road was appointed in 1902. In 1906 all the bonds were sold at 70 cents in the dollar and in 1907 the writs were withdrawn from the sheriff. In 1909 the money was paid over and the judgments and executions were satisfied. Then the sheriff moved for an order for payment of fees and poundage:—*Held*, that he could not recover as the first charge upon the road turned out to be more than it was worth, therefore there was no basis on which to say that any sum should be given as representing poundage. Motion dismissed without costs. *Re Hope and Central Ont. Rw. Co.* (1910), 15 O. W. R. 347.

SHIP.

1. Arrest of Ship, 3989.
2. Bills of Lading, 3991.
3. Charterparty, 3992.
4. Collision, 3997.
5. Judicial Sale, 4018.
6. Pilotage Dues, 4019.
7. Salvage, 4020.
8. Seamen's Wages, 4022.
9. Miscellaneous Cases, 4027.

1. Arrest of Ship.

Action in rem — *Jurisdiction of Exchequer Court of Canada—Arrest—Account — Co-owners.*]—The Exchequer Court of Canada has, in Admiralty, as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. *Cope* v. *The "Raven,"* 9 Ex. C. R. 404.

Arrest of ship.]—In certain cases proceedings in Admiralty actions in *rem* and in *personam* may be united in same suit for purposes of more complete justice, and the procedure recognizes no distinction between such actions. Under earlier practice in Admiralty the distinction between actions in *rem* and actions in *personam* depended upon whether the person (owner) or the property (ship) of defendant was arrested. If the person of defendant was arrested and he appeared, the procedure and effect of the action in *rem* thereupon became those also of an action in *personam*. Where in an action in *rem* against the ship to which the owner of ship was made defendant and appeared, the action proceeded as an action in *rem* and in *personam*. Where there is no consular officer in the district within which a foreign ship is arrested, the rule as to notice of action to a foreign consular officer does not apply. Marginal notices on writs issued out of the Admiralty Court are not required by practice. Where forms of notice are presented, slight deviations do not invalidate them. Irregularities in service of a writ of summons and in its non-attachment to the ship as required by the rules, was held to be waived by an agreement to put on a bond as security for the ship. *Gilmore* v. *"Marjorie"* (1908), 12 O. W. R. 749, 15 O. W. R. 52.

Co-owners — *Account — Jurisdiction of Exchequer Court.*] — The Exchequer Court of Canada, on the Admiralty side, has as large a jurisdiction as the High Court of Admiralty, and therefore in an action by one co-owner against another for an account, the ship may be arrested. *Cope* v. *The "Raven" and Mayhew*, 11 B. C. R. 486.

Release — *Bond—Jurisdiction—Waiver.*] —The giving of a bond to release a vessel under arrest constitutes a waiver of any objection that might be taken to the jurisdiction of the Court. *The "D. C. Whitney,"* 38 S. C. R. 303, distinguished. *Dunbar and Sullivan Dredging Co.* v. *The "Milwaukee,"* 11 Ex. C. R. 179.

Release — *Motion for pleadings—Bond.*] —No ship after being arrested can be released except by order of a Judge or by a release issued by the registrar. Where a ship escaped from the custody of the marshal, and no bond was given, an order for pleadings was in the meantime withheld. *Rex* v. *The "H. B. Tuttle,"* 11 Ex. C. R. 174, 5 O. W. R. 384.

Seizure and condemnation — *Behring Sea Award Act, 1894—Illegal sealing — Vessel arrested within prohibited zone with fresh skins on board — Log—Evidence — Irregularities connected with the seizure — Effect of proceedings — Practice.*] — The Behring Sea Award Act, 1894, forbids subjects of Great Britain from pursuing, killing, or capturing seals during the close season (beginning on the 1st May and extending to the 31st July) on the high seas north of the 35th degree of N. latitude and E. of the 180th degree of longitude. On the 29th May, 1907, a British sealing schooner was boarded, searched, and arrested by the United States revenue cutter "Rush" in the North Pacific Ocean off Yakutat Bay, in latitude 59° 10' N. and longitude 142° 19' W. There were found on board 77 fur-seal skins, 6 of them being green with fresh blood on them. The schooner's log was not written up at the time of search, but the master said he had a note-book with pencil entries containing the particulars of seals killed from which he was able to make entries in the log as required by Art. 5 of the first schedule of the said Act. The master afterwards did enter in the log that the last killing of seals had taken place on the 27th April. While not engaged in sealing at the time of being boarded, the schooner was admittedly within the prohibited zone, and was fully manned and equipped for sealing; and fur-seals had been seen by the "Rush" in the vicinity for several days before. The master did not give evidence at the trial, nor was any excuse given for his failure to do so. Expert evidence was given on behalf of the Crown that the seals from which the six skins were taken had been killed within four days before the 29th May, and possibly some of them not longer than 24 hours:—*Held*, that, upon the facts, the schooner was employed in the unlawful killing of seals as charged. 2. Where the offending vessel is properly before the Court and in the cus-

tody of its marshal, and antecedent irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of the Court, will not vitiate the proceedings. *Rex* v. *The "Carlotta G. Cox."* 11 Ex. C. R. 312, 8 W. L. R. 124, 13 B. C. R. 460.

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2. Bills of Lading.

Custom of port.]—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons in whose interests it would be to have a knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against the custom. *Parsons* v. *Hart*, 20 C. L. T. 372, 30 S. C. R. 473.

Delivery—*Shortage in goods—Carrier — Custom of trade.*]—Where the ship-owners and their agents never notified or requested the consignee to take delivery of the goods from the ship's side, after arrival at the port of destination, as they had a right to do by the terms of the bills of lading, but, on the contrary, retained possession of the goods, and proceeded, after they were landed, to sort the boxes and arrange them in separate lots, partly in their own shed, and partly upon the wharf itself, and caused the goods to be watched by their employees, without any interference or participation by the consignee, and where, in the opinion of the Court, the only delivery which took place was made by the ship-owners upon orders given by the consignee to the parties who had purchased the goods at an auction sale held five days after the arrival of the ship, the shipowners are responsible for any shortage in the quantity mentioned in the bills of lading as compared with the quantity delivered, notwithstanding the payment of freight made under reserve and before delivery. Judgment in 15 Que. S. C. 515, reversed. *Hart* v. *Parsons*, 10 Que. K. B. 555. (Reversed 20 C. L. T. 372, 30 S. C. R. 473.)

Exception in — *Voyage — Obligation to provide fit ship — Clause limiting liability of ship-owners.*] — The plaintiff shipped six cases of dry goods on board the defendants' ship for carriage from Vancouver to Skagway and thence to Dawson, under a bill of lading which provided that all claims for damage to or loss of any of the merchandise must be presented within one month. The grating on the outside of the hull of the ship and at the mouth of the pipe in which the seacock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the after-hold and damaged the plaintiff's goods. The plaintiff did not present his claim within a month, but subsequently sued for damages: —*Held*, that the stipulation in the bill of lading to the effect that no claim for loss should be valid unless presented to the company within a month, did not apply to damage occasioned by the defendants not providing a seaworthy ship. *Drysdale* v. *Union Steamship Co.*, 22 C. L. T. 74, 8 B. C. R. 228.

Limitation of time to sue — *Damage from unseaworthiness.*]—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred: — *Held*, reversing the judgment in 8 B. C. R. 228, 22 C. L. T. 74, Mills, J., dissenting, that this limitation applied to a claim for damages caused by unseaworthiness of the steamer. *Union Steamship Co.* v. *Drysdale*, 22 C. L. T. 278, 32 S. C. R. 379.

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3. Charterparty.

Action for freight — *Delay by master —Loss of cargo—Findings of trial Judge — — Reversal by appellate Court — Commission evidence.*] — A vessel owned by the plaintiff was chartered at a fixed rate per month, the time to commence on 2nd December, 1902, to proceed to Bonne Bay, Newfoundland, there to load a cago of herring, and thence with all possible dispatch to Halifax, etc. To an action to recover the freight agreed upon, the defence was set up that the master, although not prevented by dangers of the seas, wilfully and without reasonable cause or excuse, neglected and refused to leave the port of Bonne Bay, or to proceed with reasonable dispatch, although he knew the harbour was liable to freeze up, and, in consequence, the schooner was frozen in for the winter, and the cargo not delivered until the 27th April following, when it was worthless. The evidence shewed that the vessel arrived at Bonne Bay, and had completed loading and cleared on the 9th January, 1903, and could have got away on that day or any one of a number of days afterwards when the condition of wind and weather were favourable, and other vessels, either at Bonne Bay or at places in the immediate neighbourhood where similar conditions prevailed, put to sea: — *Held*, reversing the judgment of the trial Judge on the question of fact, that, under the circumstances stated, the plaintiffs could not recover. Where a large part of the evidence has been taken under commission, the Court on appeal is, to that extent, in as favourable a position to decide as to its effect as the Judge who tried the cause.—*Per*, Russell, J. —If the question were as to any one day on which it was contended the master might have sailed and did not, it might be difficult to say with certainty that his conduct was not consistent with the exercise of a *bona fide* judgment, but this difficulty is removed when it is found that there are at least seven different occasions as to which there is a strong body of testimony to the effect that the voyage might with safety have been undertaken. *Spindler* v. *Farquhar*, 38 N. S. R. 183.

Affreightment — *Discharge of cargo — Obligations of owner—Custom of trade.*]— A ship that carries a cargo of fruit to the port of Montreal, under a charterparty with a clause "that the cargo is to be brought to and taken from alongside at the shipper's expense, and to be stowed and discharged according to the custom of the fruit trade of the ports," etc., is not bound, as a part of its obligations when discharging, to provide (*a*) shed accommodation in which to store the fruit, (*b*) men to sort and check the same according to marks, numbers, and

grades, no custom of the fruit trade to that effect being proved to exist at the port of Montreal. *Tracuzzi* v. *Glasgow Navigation Co.*, 27 Que. S. C. 371.

Construction — *Implied obligation to unload with diligence—Jury—Misdirection—Non-direction.*]—Where a charterparty provides that a steamer is to be loaded with the greatest possible dispatch day and night, but there is no provision as to the time and manner of unloading, the law implies an obligation to discharge with all reasonable diligence, having regard to the situation and circumstances existing and the appliances in use at the time, at the port of discharge; and, where a jury were instructed that the provision in the contract that the steamer was to be unloaded with all possible dispatch night and day was an element to be taken into consideration in determining what should constitute reasonable diligence: — *Held*, that there had been misdirection. Rule as to non-direction discussed. *Van Buskirk* v. *North River Lumber Co.*, 40 N. S. R. 532.

Contract—Charter of steamer for certain voyage — Action claiming damages for injuries to plaintiffs' steamer resulting from a deviation from her voyage made at defendants' instance—Damage to ship—Liability of charterer. *Reid & Archibald* v. *Tobin & Co.* (N. S. 1910), 9 E. L. R. 180.

Contract — *Letters and telegrams.*] — plaintiffs, through their agent H., and defendants negotiated for the chartering by the plaintiffs to the defendants of the steamer T., then at Chatham, N.B. The defendant desired to have the steamer delivered to them at North Sydney, but, after some negotiation, on the 9th October offered to take delivery at Chatham and use the vessel for three months if navigation remained open. The plaintiffs declined to take the risk of navigation remaining open, and on the 15th October the plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day the plaintiffs' agent replied: "Have closed in accordance your telegram to-day and arranged delivery North Sydney." On the following day the defendants replied: "Telegram received closing T. Try to get her delivered North Sydney end October":—*Held*, that the defendants, by their telegram of the 15th October, in view of previous correspondence, disclosed an intention to authorize a contract according to what had already been embodied in writing, and that the reply to that telegram conveyed all that was required to embody the terms of the charter; and that the defendants, whose position was changed on the 22nd, could not, by continuing the correspondence and raising other questions, escape the effect of the mutual terms previously agreed upon. *Heckla* v. *Cunard*, 37 N. S. R. 97.

Covenant — *Negligent stowage—Exemption of owner—Law of England—Application of.*]—A stipulation or covenant in a contract that it shall be governed by the laws of a foreign country is valid and binding. Under the law of England, a stipulation in a charterparty that the owner or charterer of the vessel shall not be liable for damages to the goods carried, caused by improper and even negligent stowage, is valid and binding. *Canada Sugar Refining Co.* v. *Furness-Withy Co.*, *Tellier* v. *Furness-Withy Co.*, *Dobell* v. *Furness-Withy Co.*, 27 Que. S. C. 502.

Customary despatch — *Notice — Lay days—Demurrage.*] — By charterparty the defendant's ship was to proceed to the port of St. John for lumber for Buenos Ayres, to haul once to loading berth as might be required by the charterer, with the privilege to the charterer of moving the vessel afterwards at his own expense. It was provided that the cargo was to be furnished at the customary despatch; that lay days should commence from the time the vessel was ready to receive the cargo and written notice thereof given to the charterer, and that for each day's detention by the charterer's default he should forfeit $60. On arrival of the vessel the master was notified by the charterer to proceed to the government railway wharf to load. On the 28th August the master mailed a notice to the charterer that the vessel was then at loading berth and ready to receive cargo on the 29th. At the time notice was sent, the vessel was not at loading berth: — *Held*, that the vessel should have been at loading berth ready to receive cargo at the time notice was sent, and that the notice was insufficient. The words "customary despatch" in the above charter have not a recognized meaning at the port of St. John with reference to the loading of dry lumber for shipment to South American ports. They mean that the vessel shall be loaded at the usual rate or despatch of persons having a cargo ready for loading. Upon the evidence the Court found the rate to be 35M. per weather working day; substantial work, though not amounting to half a day, to count as half a day. *Cushing* v. *McLeod*, 20 C. L. T. 107, 2 N. B. Eq. R. 63.

Damages — Detention — Place of loading—Weather conditions—Pleading—Amendment—Evidence—Burden of proof. *Sarnia Transportation Co.* v. *Piggott*, 12 O. W. R. 121.

Foreign vessel — *Necessaries—Authority of Master—Liability of Owners.*]—Action against a foreign vessel and owners for necessaries supplied at a Canadian port to the vessel, which was under charter, the possession and control of the vessel being by the charterparty transferred to the charterers, who appointed the master, and he for them the crew, and who paid their wages and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter, but not the terms of the charterparty. The trial Judge found, on conflicting testimony, that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor:—*Held*, that the plaintiff ought to have the benefit of the finding in his favour, but, as the master was the servant of the charterers and not of the owner, he had no authority to pledge the latter's credit, and, as the owner was not liable, the vessel was not. *The "David Wallace"* v. *Bain*, 23 C. L. T. 103, 8 Ex. C. R. 205.

Goods supplied on credit of charterers — *Lien — Necessaries.*]—Goods, in the nature of ship's supplies, were furnished

by the appellants to the charterers of certain ships while in the possession of the charterers. It was shewn that the goods were not supplied on the credit of the ships, but were charged to the charterers in the appellants' books, and accounts therefor were, in the first instance, made out to the charterers:—*Held*, that the appellants could not assert a lien for necessaries against the ships. Judgment in 10 Ex. C. R. 176, affirmed. *Upson-Walton Co.* v. *The "Brian Boru,"* 27 C. L. T. 341, 11 Ex. C. R. 129.

"Last voyage" — *Participation in profits—Partnership—Liability for debts of ship—Lien—Seizure of ship—Privileged debt — Supplies—Charterer—Agents — Owner.*] — A steamship lying at the port of Liverpool was chartered by the owners to P. for 6 months, for voyages between certain European ports and Canada, the hirer to bear all expenses of navigation and upkeep until she was returned to the owners. The ship was delivered to the hirer at Rotterdam, where she took on cargo, and sailed for Montreal. On arriving at Montreal she unloaded and re-loaded for a voyage to Rotterdam, with the intention of returning to Montreal, and obtained a supply of coal from the plaintiffs, which was furnished on the order of the hirer's agent at Montreal. The ship sailed to Rotterdam and returned to Montreal in about one month, touching at Havre and Quebec, discharged her cargo, and proceeded to re-load, obtaining another supply of coal from the plaintiffs in the same manner as the first supply had been furnished. Within a few days, the price of these supplies of coal being still owing and unpaid, the hirer became insolvent, and the plaintiffs arrested the ship at Montreal, claiming special privilege upon her as *derniers équipeurs* in furnishing the first supply of coal on her last round voyage, the right of attachment before judgment in respect of both supplies and seizing her under the provisions of Art. 2391 of the Civil Code and 931 of the Code of Civil Procedure: — *Held*, *per* Fitzpatrick, C.J., and Davies, Maclennan, and Duff, JJ., that the voyage from Montreal to Rotterdam and return was not the ship's "last voyage" within the meaning of Art. 2383 (5) of the Civil Code; that the voyage out from Montreal and that returning from Rotterdam did not constitute one round voyage, but were separate and complete voyages; and that, consequently, there was no privilege upon the ship for the supply of coal furnished for her voyage from Montreal to Rotterdam; and also, that the provisions of Art. 2391 of the Civil Code did not render the ship liable to seizure for personal debts of the hirer, and, consequently, that she could not be attached therefor by *saisie-arret*. Judgment appealed from. *Jones* v. *Inverness Rw. and Coal Co.*, 16 Que. K. B. 16, affirmed, Girouard, J., dissenting. *Per* Davies, J.:—The "last voyage" mentioned in Art. 2383, C. C., refers only to a voyage ending in the province of Quebec. *Per* Idington, J.: — As the terms of the charterparty expressly excluded authority in the hirer to bind the ship for any expenses of supply, and as nothing arose later that could by any implication of law confer any such authority on any one, and especially so in a port where the owners had their own agents, any possible rights that might in a proper case arise under Art. 2383 of the Civil Code, did not so arise here; and, therefore, though agreeing to the result, he expressed no opinion on the meaning of the term "last voyage" therein. *Lloyd* v. *Gilbert*, 1 Que. L. R. 115, should govern this case. *Inverness Rw. and Coal Co.* v. *Jones*, 40 S. C. R. 45, 5 E. L. R. 1.

Maritime lien — *Right to pledge credit of ship.*]—The orders of a foreman of the charterers, not being the captain of a vessel, cannot create a maritime lien against such vessel.—Where a ship is chartered and supplies are furnished to the charterer with a knowledge of his position with regard to the ship, no maritime lien attaches to the ship. *Upson-Walton Co.* v. *The "Brian Boru," The "Shaughraun," The "Monroe Doctrine," The "Reciprocity,"* 10 Ex. C. R. 176, 7 O. W. R. 310.

Participation in profits — *Partnership — Liability for debts of ship — Lien —Privileged debt — Supplies — Charterer —Agents—Owner.*] — A stipulation in a charter-party that the owner will participate in the profits with the charterer does not establish a partnership between them so as to render them jointly liable for the debts of the ship. Cf. *Reid* v. *McFarlane*, 2 Que. Q. B. 130.—Furnishing coal to a ship for its next voyage does not create a privileged debt.—The words "last voyage" in clause 5 of Art. 2383, C. C., touching the furnishing of provisions and coal to a ship, have reference to the voyage as far as the port of destination, and the lien to which they apply, ceases to exist in regard to a subsequent voyage. — The lien of the last furnisher mentioned in Arts. 931 and 933, C. P. C., not being defined in the Civil Code, cannot be reconciled with the provisions of Art. 2383, C. C.; from which it must be concluded that it does not exist.—The charterer and his agents cannot contract debts involving a lien upon the ship in the ports where the owner has his domicile or business office. *Jones* v. *Inverness Railway & Coal Co.*, 16 Que. K. B. 16.

Renewal — *Option — Notice — Agents —Burden of proof — Jury.*]—A charter-party made between the plaintiff and defendant companies provided that the plaintiffs should have the right of renewal, upon giving notice on or before a specified date. On the date specified the plaintiffs gave notice of renewal to M. K. & Co., who had acted as agents of defendants in connection with the negotiation of the charterparty, and the receipt and remittance of the hire of the vessel. The defendants refused to renew, on the ground that the notice required had not been given:—*Held*, that the authority given by the defendants to M. K. & Co. was a special authority, and that the duty devolved upon the plaintiffs of shewing that, by usage or otherwise, they had authority to receive notice in connection with the extension of the time, such notice not being incidental or necessary to their original authority. The trial Judge having refused to submit to the jury a question tendered on behalf of plaintiffs as to the authority of M. K. & Co.:—*Held*, Graham, E.J., dissenting, that he was right in doing so.—*Held*, that the Judge was justified in deciding, as matter of law, that there was no proof of agency, and that there was, therefore, nothing that could properly be

submitted to the jury. *Dominion Coal Co.* v. *Kingswell S. S. Co.*, 33 N S. R. 499.

Time limit for loading — *Loading at port — Custom — Obligation of charterer.*] —A ship, by the terms of the charter, was to land grain at Fort William before noon of the 5th December:—*Held*, affirming the judgment of the Court of Appeal, 6 O. L. R. 432, 23 C. L. T. 319, Girouard and Nesbitt, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed, and left to save insurance, the obligation was not fulfilled, and the owner could not recover damages. *Midland Navigation Co.* v. *Dominion Elevator Co.*, 24 C. L. T. 202, 34 S. C. R. 578, 1 O. W. R. 593, 2 O. W. R. 754.

Voyage — Damages for short cargo — Demurrage—Delay and detention—Counterclaim — Inferior cargo. *Warren* v. *MacKay*, 2 O. W. R. 537, 3 O. W. R. 285.

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4. COLLISION.

Action for damages — *Insolvency of owners — Winding-up order — Independent jurisdiction of the Admiralty Court.*]—Plaintiff contended that defendants' ship being improperly navigated, collided with theirs, thereby damaging and disabling her. The defendant company was being wound up under the Dominion Act. The Quebec Superior Court gave plaintiffs leave to take an action *in rem* in Admiralty against defendants' ship. Plaintiffs demurred to a paragraph in the defence filed in Admiralty which alleged that the lien should have been enforced in the Supreme Court:—*Held*, that plaintiff's lien existed by law and should have been enforced before the winding-up Court, that is, the Superior Court. That Court has no power to delegate its authority to the Admiralty Court. It is not *res judicata*. *Richelieu* v. *Steamship "Imperial,"* 5 E. L. R. 64, 6 E. L. R. 64.

Action for damages — *Preliminary Act — English rules — Non-observance of sailing rules.*] — Action for damages sustained by the plaintiffs' steamer, "The Canadian," in a collision with the defendants' steamer, "The Merwin." The plaintiffs did not file a preliminary act, as required by Order XIX., r. 28, of the English Rules, which Dugas, J., held to be in force in the absence of a local rule:—*Held*, by Dugas, J., and by the full Court, that no evidence could be given in support of the plaintiffs' claim. "The Canadian," navigated by an American pilot, was making a landing against a current of about six miles an hour; "The Merwin," also navigated by an American pilot, was coming down stream. Both vessels before collision gave blasts which were interpreted by each ship according to American regulations. — *Held*, by Dugas, J., that under the circumstances "The Canadian" was alone to blame. — *Held*, in appeal, by Walkem and Drake, JJ., that both vessels were to blame, and the appeal should be allowed without costs. *Per* Irving, J., that both vessels were to blame, and that there should be a reference back to assess the damages to "The Canadian," and then the damages should be apportioned according to the Admiralty rule. *Per* Martin, J., that the appeal should be dismissed. Observations as to the undesirability of the importation of foreign sailing rules and as to the necessity of using in Canadian waters the signals authorised by the Canadian Rules. *Canadian Development Co.* v. *Le Blanc*, 21 C. L. T. 600, 8 B. C. R. 173.

Admiralty Court — Practice — Place of trial — Action at Quebec — Cross-action at Montreal. *Bouchard* v. *Elevator No. 7*, 2 E. L. R. 125.

Admiralty law — *Narrow channel — Risks — Rule of the road — Right of way — Blast signals.*]—The rule of the road on our rivers and lakes applicable to "narrow channels" is set out in Art. 21, R. S. C. c. 79, which applies to foreign as well as to British and Canadian ships, and is as follows: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship:"—*Held*, that a channel 800 feet wide comes within the designation of "narrow channels" as mentioned above, and that a ship violated said rule when she steered towards the westward and crossed towards the channel on her port side, instead of keeping in the channel on her starboard side.—2. When two steamers are meeting on the Detroit river the descending steamer shall have the right of way; and it is no defence to an action for collision to prove that at the moment of collision it was too late to take a precaution which ought to have been taken earlier to avoid the risk of a collision, the rule being that every steamship, when approaching another ship, so as to avoid the risk of collision, shall slacken her speed, or stop and reverse if necessary. The more imminent the risk of collision, the more imperative is the necessity for implicit obedience to the rule.—3. Where a steamer some distance from another has indicated by the course she is steering that she cannot be considered as a steamer "meeting another end on," the state of things does not arise which renders it incumbent on her to give blast whistles indicating which side she proposes to take on passing:—*Held*, on appeal, affirming the above, that when the master of a ship, in danger of collision with another ship, instead of porting his helm, puts it to starboard, and so makes the collision inevitable, the absence of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the collision from full liability, if the omission to give such signal did not contribute in any way to the accident. *Tucker* v. *The "Tecumseh,"* 6 O. W. R. 131, 10 Ex. C. R. 44, 149.

Anchor-light — *Look-out — Weight of evidence — Credibility.*] — A collision occurred between the A. L. T., a ship at

anchor, and a steamship, the L. O., proceeding in charge of a pilot to her dock, within the harbour of Halifax, N.S., at night in the month of January. The weather was blustering, and intermittently clear and cloudy. On arriving at the quarantine grounds the L. O. had signalled, by guns and whistles, for the medical officer of the port, and then proceeded up the harbour on the east side of George's Island. After passing the northern line of George's Island the L. O. changed her course westerly toward her berth, and in proceeding thereon passed between the lights of two vessels anchored on the northern side of the island. While doing so she suddenly came upon the A. L. T. lying at anchor, collided with and sank her. The only person on board of the A. L. T. was a caretaker, and while admitting that he was not on deck at the time, he swore that a proper anchor-light was burning on his ship. His statement as to the anchor-light was corroborated by the captain of a fishing schooner lying close by, and that of some boatmen and labourers on the wharves. On the other hand the pilot of the L. O., the captain and the first and third officers, boatswain and boatswain's mate, and four of the seamen, all swore positively that there was no light on the A. L. T. while they were approaching her, and that she was not seen by any one until their lookout called that there was something ahead. The evidence further shewed that both the officers and crew were alert at the time of the accident, and anxiously working the ship through anchored vessels in the darkness and blustering weather:—*Held*, that the state of facts as substantiated by the evidence for the owners of the L. O. must be accepted as correct, and that being so, the collision and subsequent loss were wholly attributable to the A. L. T. in not keeping a proper light and lookout. *Dominion Coal Co.* v. *The Lake Ontario*, 7 Ex. C. R. 403.

Appreciation of evidence — *Findings of fact — Appeal — Proper navigation.*]— In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance," the decision mainly depended on whether or not the lights of the lost schooner were burning, as the Admiralty rules required, at the time of the accident. The local Judge gave judgment against the "Reliance:" — *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the judgment, which should not, therefore, be disturbed on appeal. *Santanderino* v. *Vanvert*, 23 S. C. R. 145, and *Granby* v. *Menard*, 21 C. L. T. 7, 31 S. C. R. 14, followed. *The "Reliance"* v. *Conwell*, 22 C. L. T. 77, 31 S. C. R. 653.

Approaching vessels — *Change of course — Negligence — Nautical assessor in Appeal Court — Opinion not accepted by Court.*] — Where two steamships were approaching each other at night, green light to green light, so that if each ship had kept her course they would have passed each other safely, and one at a distance between one-fourth and one-half mile away from the other changed her course, shewing first her three lights, and then her red and masthead lights only, and then, when the other ship had put her helm hard to port, changed her course again, exhibiting her three lights, she was held solely responsible for a resulting collision.—2. In this case the Court on appeal availed itself of the services of a nautical assessor, but the Court declined to adopt his opinion as to the vessel at fault. *Joint Stock S. S. Co.* v. *The "Euphemia," The "Tordenskjold"* v. *Horn Joint Stock Co. of Shipowners*, 11 Ex. C. R. 234.

Barges in canal — *Negligence — Undue speed of tug — Liability.*]—While plaintiff's tug was going down Lachine Canal defendant's tug was coming up; there was a collision. As the latter obeyed all signals given by former no fault can be imputed to it. *Montreal Sand and Gravel Co.* v. *Sincennes-McNaughton Line Co.* (Que.), 6 E. L. R. 183.

Barque approached by steamer — *Manœuvres.*]—Where a steamer is proceeding on a course north seventy-two degrees west, and a barque is sailing on the starboard tack within about seven points of the wind, whose direction is east north-east, the barque is not an overtaken ship within the meaning of the regulations. *Smith* v. *The "Empress,"* 21 C. L. T. 430, 8 B. C. R. 122, 7 Ex. C. R. 430.

Between foreign vessels — Jurisdiction of Canadian Court — Arrest in Canadian waters — Inevitable accident — Lookout. *St. Clair Navigation Co.* v. *The "D. C. Whitney,"* 6 O. W. R. 302.

Boom — *Interference with navigation —Nuisance.*]—Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. —2. Where an interference with navigation is established, it is a public nuisance which any one specially injured or damnified by it has a right to remove.—3. While no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters, for the purpose of making up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation. *Kennedy* v. *The "Surrey,"* 10 Ex. C. R. 29, 2 W. L. R. 550, 11 B. C. R. 499.

Breach of regulations—*Minor breach not contributing — Lights — Negligence.*] —If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the regulations for preventing collisions at sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation, where such contravention could not by any possibility have contributed to the collision. 2. A vessel "hoveto" with her helm lashed is not obliged to carry the lights mentioned in article 4 of such regulations, as she is not "a vessel which from any accident is not under command. *The "Birgitte"* v. *Forward, The "Birgitte"* v. *Moulton*, 9 Ex. C. R. 339.

Canal bridge — *Rule 5 of Dominion Canals Regulations — Liability.*]—The de-

fendant steamer was using the waters of the Soulanges canal at night. On approaching the plaintiffs' bridge over the canal at or near Coteau Landing, and when about one mile distant, the steamer gave the proper signal that she intended to pass through the bridge. When she came within view of the bridge, a green light was displayed on the northern abutment, which, according to established custom and usage, indicated that the bridge was open for the passage of ships. Then the steamer repeated the signal that she intended to pass through the bridge; but before she reached the bridge those on board discovered that the bridge was not open. Everything was done by those on board to avert a collision as soon as they became aware that the bridge was not open, but such measures failed to wholly prevent a collision, although largely mitigating the force of the impact. It was proved that the bridge-keeper was asleep when the defendant steamer was approaching the bridge: —*Held*, that, upon the facts, the defendant steamer had not infringed rule 5 of the Dominion Canals Regulations or any rule of law, and was in no way at fault for the collision. *Canada Atlantic Rw. Co.* v. *The "Nicaragua,"* 11 Ex. C. R. 67, 3 E. L. R. 305, 32 Que. S. C. 134.

Canal regulations 1st May (1895), s. 19 (d) — *Construction of — Passage into Lachine Canal — Several vessels waiting to enter.*]—By the Canal Regulations of 1st May (1895), s. 19 (*d*), it is provided that "when several boats or vessels are lying by or are waiting to enter any lock or canal, they shall lie in single tier and at a distance of not less than 300 feet from such lock or entrance, except where local conditions may otherwise require, and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted as above."—The steamship "Havana" was about to enter the south lock (No. 1) of the Lachine Canal, when the lockmaster ordered her to keep back and let the "Prescott" enter first, the latter vessel being first-class and entitled to priority of passage under above regulation. At the time the "Havana" advanced to enter the lock, there was but one boat, a lumber barge, at the canal entrance, and she had waived her right of entrance, not desiring to go forward at that time. The "Havana" backed out just as the "Prescott" crushed into the lock, entering with such speed that she crashed through the upper gates, bringing down the contents of the upper basin. The rush of water drove the "Prescott" out of the lock and dashed her against the "Havana:"—*Held*, that the "Prescott" was solely to blame for the accident; the conduct of the "Havana" being proper in every respect.—Judgment of the Supreme Court of Canada, 6 E. L. R. 100, and of the Exchequer Court of Canada, 19 Que. K. B. 245, affirmed. *"Prescott" v. "Havana"; Taylor* v. *Richelieu & Ont. Nav. Co.*, C. R. [1910] A. C. 90; 7 E. L. R. 337.

Changing course.]—When a collision is inevitable, the vessel not in fault is justified in changing her proper course, with the object of avoiding or lessening the effect of the collision. *Rudolph* v. *The "Arranmore,"* 11 Ex. C. R. 21.

Contributory negligence.] — Facts of the case required that damages should be divided between the charterers of the tug and the owners of the barge in sums proportionate to the negligence of the persons in charge, and that, inasmuch as the sum to be charged against the tug was equal to amount of towage claim, the latter would be declared compensated as at the date of the judgment, the defendant to pay the costs of the principal demand and the principal plaintiff to pay the costs of the cross-demand. *International Paper Co.* v. *Webster* (1911), 17 R. de J. 266, 10 Que. P. R. 374.

Crossing ships — Negligence — Improper navigation — Manœuvre in agony of collision not proximate cause—Evidence —Amendment of preliminary act—Practice. *The "Ocland"* v. *The "Regulus"* (Ex. Ct. of Can.), 6 E. L. R. 587.

Crossing ships — *Regulations—Vessels crossing so as to involve risk of collision—Collision off the entrance to harbour.*] — Where two vessels were approaching each other in Canadian waters on courses which converged at a point outside a harbour where each vessel expected to pick up a pilot:—*Held*, that, as they were so doing on courses and at speeds which would probably bring them to that point so as to present a danger of collision when they reached it, they were vessels crossing so as to involve risk of collision within the meaning of Arts. 19, 22, and 23 of the Regulations of 1897, which had been substituted for those contained in Canadian R. S. c. 79; and that consequently it was the duty, negligently disregarded, of the respondents' vessel, which had the appellants' vessel on her own starboard side, to keep out of her way, there being no special circumstances within the meaning of Art. 27 to authorise a departure from that rule.—*Held*, also, that the appellants' vessel was not to blame under Art. 21. It was not shewn that with reasonable care she ought to have taken action thereunder earlier than she did. Judgment in 37 S. C. R. 284, reversed. *"Albano"* v. *Parisian*, C. R. [1907] A. C. 193.

Damages — Assessment by registrar—Items of damage—Use of pump — Services of tug — Surveyors' report — Salvage charges — Value of ship — Cost of repairs —Appeal — Costs. *St. Clair Navigation Co.* v. *The "D. C. Whitney,"* 7 O. W. R. 690.

Damages — Loss of fishing voyage. *Langille* v. *Ernst*, 2 E. L. R. 56.

Dredge at anchor and moving ship —Fairway — Negligence — English and American law. *Harbour Commissioners of Montreal* v. *The "Albert M. Marshall," Great Lakes and St. Lawrence Transportation Co.* v. *Harbour Commissioners of Montreal*, 4 E. L. R. 565.

Duty of overtaking vessel—*Onus of overtaken vessel to keep proper look-out — Narrow channel — Expert evidence — Will*

not be heard when Court assisted by nautical assessors.]—On 21st July, 1906, about 2.13 p.m. the steamer "Princess Victoria" (length 300 ft., speed 19 to 20 knots) collided with and sank the steamer "Chehalis" (length 59.3 ft., speed about 9 knots) both vessels being on their way westward out of Vancouver Harbour. The day was fine and clear. The "Princess Victoria" was headed straight down and through the Narrows, the intention being to pass between the "Chehalis" and a launch, which at that time where some 250 yards apart. The "Princess Victoria" sounded two whistles to indicate to the "Chehalis" that she would pass her on the port side. At the moment the signal was given the "Chehalis" changed her course from west to southward, bringing her across the bow of the "Princess Victoria." The engines of the latter were at once reversed at full speed but the two vessels collided and the "Chehalis" was swept under the "Princess Victoria" and sank. Six actions were brought to recover damages for loss of life and personal injuries and loss of effects on the alleged ground that the collision was caused by the negligent navigation of the "Princess Victoria." At trial, Martin, J., *held*, that the master of the "Princess Victoria" gave the signal indicating his course at the earliest time consistent with the position of the vessels, and that he did not neglect to take any proper precautions which a prudent and skilful navigator should have taken under the circumstances, and dismissed all the actions with costs. When the Court is assisted by nautical assessors, whose duty it is to advise on matters of nautical skill and knowledge, the evidence of witnesses, tendered for expert testimony purely, will not be received. The Supreme Court of British Columbia (Irving, J., dissenting) decided that the "Princess Victoria" was to blame and awarded damages and costs to all the plaintiffs except the master of the "Chehalis." The Judicial Committee reversed the judgment of Supreme Court of British Columbia and restored the judgment of Martin, J., at trial. *Bryce* v. *Can. Pac. Rw. Co.*, C. R. [1909] A. C. 490.

Fault of plaintiffs — Damages — Report of registrar and merchants — Rule for assessment of damages — Demurrage. *Magdalen Islands Steamship Co.* v. *The "Diana,"* 5 E. L. R. 530.

Fishing vessels — *Sufficiency of anchor light — Careless navigation — Costs—Witness fees — Parties.*]—The C. E. S., a fishing schooner, while lying at anchor on Bank Quero, was run into and sunk by another fishing vessel, the R., which was changing her berth in the night time. The weather was fine and the sea smooth. The C. E. S. was displaying a light in order to comply with the regulations; but it was claimed by the crew of the R. that they did not see the light until it was too late to avoid a collision. It was shewn that the R. had been fishing in a berth four or five miles distant from the C. E. S., that her crew knew that there were a number of vessels fishing in their vicinity, and that the master of the R. took no extra precautions in sailing at night over the closely crowded fishing grounds, but on the contrary went below himself, leaving the ship under full sail to the charge of those on deck:—*Held*, that the R. was solely to blame for the collision. The crew of the ship of the plaintiffs, twelve in number, were landed in Nova Scotia, and were maintained at Halifax until they gave their evidence on the trial, a period of about one week. Before the trial was commenced, they were added as plaintiffs in the cause. Judgment was given in favour of the plaintiffs, condemning the defendant ship in damages and costs to be taxed. Upon the taxation the plaintiffs sought to tax the amount expended in maintaining the crew while they waited for the trial, and also their ordinary witness fees during the trial, it having been shewn that they were kept for the sole purpose of giving evidence. Counsel for the defendant objected on the ground that the crew, having been made parties to the action, were not entitled to any fees as witnesses, and that it was unreasonable that they should receive any sustenance fees. The District Registrar referred the matter to the local Judge, who:—*Held*, that the parties to an action are entitled to the usual witness fees, when they attend the trial to give evidence. — *Held*, also, that the plaintiffs were entitled to tax a reasonable sum as sustenance fees for the crew while they awaited the trial. *Conwell* v. *The "Reliance,"* 21 C. L. T. 429, 7 Ex. C. R. 181.

Fog — *Sailing rules.*]—The defendant steamer bound for St. John, while steering in a dense fog, a N.-W. by N. course, heard three blasts of a fog horn from the plaintiff's vessel, a little before the beam on the port side. The steamer was then going at a speed of from 4 to 6 knots an hour, and kept on her course. The plaintiff's vessel continued sounding her horn at regular intervals, and was proceeding on a northerly course before a light wind barely sufficient to enable her to keep steerage way. About 10 minutes after the horn was heard by the steamer, she struck the vessel on her starboard side, and sunk her:—*Held*, that the steamer was solely to blame, as she had infringed Art. 16 of the regulations by not stopping after the horn was heard. *Roberts* v. *The "Pawnee,"* 7 Ex. C. R. 390, *The "Pawnee,"* 22 C. L. T. 129.

Fog — *Speed — Damages.*]—In an action for collision, where the Court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief, if not the sole, cause of the collision, the owner of the damaged ship was allowed to recover only half his loss. *Wineman* v. *The "Hiawatha,"* 7 Ex. C. R. 446.

Foreign waters — *Admiralty law — Foreign bottoms—Jurisdiction.*]—A foreign vessel passing through a river dividing Canada from the United States, under a treaty allowing free passage to ships of both nations, is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Court of Admiralty. The warrant to arrest a foreign vessel cannot be issued until she is within the jurisdiction of the Court.—*Quære*, have the Courts of Admiralty in Canada the same jurisdiction as those in England to try an action *in rem* by one

foreign ship against another for damages incurred by a collision in foreign waters? Judgment of the Exchequer Court, Toronto Admiralty District, 6 O. W. R. 302, 10 Ex. C. R. 1, reversed: Idington, J., dissenting. *The "D. C. Whitney"* v. *St. Clair Navigation Co.*, 27 C. L. T. 224, 38 S. C. R. 303.

Foreign waters — *Application of foreign rules — "Safe and practicable" — "Narrow channel" — Harbour.*] — Where a collision occurs in American inland waters and action is brought in the Exchequer Court of Canada for damages, the Court will apply the rule of the road as it obtains under the American Sailing Rules for the purpose of determining the question of liability for the collision. Article 25 of the American Rules provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fare-way or mid-channel which lies on the starboard side of such vessel:"—*Held*, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision. The inner harbour of Boston, Mass., containing wharves and anchorage for ships on either side, where ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of Article 25 of the above Rules, and the provisions of that Article do not apply to cases of collision there. *Lovitt* v. *The "Calvin Austin,"* 9 Ex. C. R. 160; *The "Calvin Austin* v. *Lovitt*, 25 C. L. T. 78, 35 S. C. R. 616.

Improper navigation — *Manœuvre in agony of collision not proximate cause.*]— Cross actions arising out of a collision of two steamers:—*Held*, defendant's steamer was in fault. Reference to ascertain damages. *"Ocland"* v. *"Regulus,"* 6 E. L. R. 587.

Interlocutory application for consolidation of two actions — *Appeal from order of local Judge — Costs.*] — An action for damages against the defendant ship for collision was brought in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th September, 1905. The following day a similar action was begun by the charterer and owner of the cargo of such injured ship. On the 28th September an application was made by the defendant to the local Judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisement be issued, to ascertain her value in her then condition. On the 3rd October the local Judge made an order that a commission of appraisement issue, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisement, or to the direction that the two actions be tried together, except so far as that direction might be held to affect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release of the ship if the actions were consolidated. It was, however, urged that the local Judge should have ordered the consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value: — *Held*, that it was a matter within the discretion of the local Judge to grant or refuse an order for consolidation, and as such ought not to be interfered with on appeal.—2. That the order should be varied to allow in the alternative the ship to be released in respect of both actions and claims made, upon payment into Court of her appraised value and the amount of her freight, if any. —3. This relief not having been asked before the local Judge, the Court on appeal declined to allow the costs of appeal to either party. *Acticselskabet Borgestad* v. *The "Thrift," Dominion Coal Co.* v. *The "Thrift,"* 26 C. L. T. 459, 10 Ex. C. R 97.

Investigation under Canada Shipping Act — Rules of navigation—Signals —Findings as to fault — Consequences. *The "Tartar"* v. *The "Charmer,"* 7 W. L. R. 417.

King's ship — *Negligence—Public work —Crown.*] — Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship. 2. In this case the steamship "Préfontaine," belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug "Champlain," and which the latter was towing, from the dredge "Lady Minto," then working in the Contrecœur channel of the river St. Lawrence. The dredge, steam-tug, and scow were the property of His Majesty:—*Held*, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (c) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16. *Paul* v. *The King*, 24 C. L. T. 389, 9 Ex. C. R. 245.

Liability — *Imperial regulations.*]—In a collision in Canadian waters between the steamship W. and the schooner M. A., the W. was found to be at fault in a matter that occasioned the collision. It was also found that the M. A. had contravened the regulations for preventing collisions in Canadian waters; but that such contravention did not contribute to the accident. In an action against the W. by the widow and universal legatee of the owner of the M. A.: —*Held*, that the W. alone was to blame, and that the plaintiff was entitled to recover. 2. Where a collision occurs on the high seas, and the provisions of s. 419 of the Merchants Shipping Act, 1894, and the Imperial regulations for preventing collisions at sea, are in force, the obligation is imposed on a vessel that has infringed a regulation which is *prima facie* applicable

to the case, to prove, not only that such infringement did not, but that it could not, by any possibility, have contributed to the accident; but when the collision occurs in Canadian waters, and the Act respecting the navigation of Canadian waters, R. S. C. c. 79, and the regulations for the prevention of collisions made by the Governor-General in council, are in force, the vessel which contravenes one of them will be held to be in fault unless such contravention has contributed to the collision. *The "Cuba"* v. *McMillan*, 26 S. C. R. 661, referred to. *Hamburg Packet Co.* v. *Desrochers*, 23 C. L. T. 214, 8 Ex. C. R. 263.

Liability in damages — *Breach of regulations — Presumption of fault—Vessel at anchor — Reasonable care and skill.*]—Contrary to the rule applied in England, a breach of the regulations of navigation creates no presumption, in Canada, that a collision following the same was due to it, and the party charging fault must establish it in the ordinary way.—2. Where a steamer collides with a dredge at anchor, it is no defence to an action for damages, that the dredge was brought up in an improper place and did not exhibit proper lights, if it be shewn that the collision could have been avoided by the exercise of reasonable skill and care on the part of the moving vessel. *Montreal Harbour Commissioners* v. *The "Albert M. Marshall,"* 34 Que. S. C. 299.

Lien for damages by collision of a vessel owned by a company in liquidation under Winding-up Act of Canada, is enforceable before the Winding-up Court, and no action in *rem* will lie against the vessel in Admiralty. Nor will leave granted by the Winding-up Court to proceed in *rem* before the Admiralty Division of Exchequer Court confer jurisdiction on the latter to deal with the case. *Richelieu & Ont. Nav. Co.* v. *"Imperial,"* 35 Que. S. C. 312, 10 Que. P. R. 167.

Narrow channel — *Rule of the road —Look-out — Meeting ships — Harbour—Lights and signals — Negligence—Evidence —Damages.*]—A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out within the rules of navigation for preventing collisions in narrow channels. Judgment of the Exchequer Court of Canada in *Richelieu and Ontario Navigation Co.* v. *The "Cape Breton,"* 25 C. L. T. 57, 9 Ex. C. R. 67, affirmed. Where meeting ships are in collision, and one of them has neglected to observe the regulations, there must be evidence of gross dereliction of duty or want of skill in navigation in order to make out a case for apportionment of damages against the other ship. Where a ship navigating a narrow channel has no proper look-out, and neglects to signal her course, at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident. Judgment below reversed, Girouard, J., dissenting. *The Richelieu & Ontario Navigation Co.* v. *"Cape Breton,"* C. R. [1907] A. C.

Nautical assessors — *Evidence of experts.*]—Where the Court at the trial of a collision action has the assistance of a nautical assessor to advise on all matters requiring nautical or other professional knowledge, the evidence of experts as to the management of the ships shortly previous to the collision is inadmissible. *Montreal Harbour Commissioners* v. *The "Universe,"* 10 Ex. C. R. 305.

Navigation—*Narrow channels—"White Law," Rule 24 — Right of way.*]—Rule 24 of the "White Law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take:"—*Held*, that this rule has no reference to the general course of vessels navigating the waters mentioned, but applies only to meeting vessels. Therefore a steamer descending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore. The "Shenandoah" with a tow was ascending the St. Clair river in a fog and hugging the United States shore; the "Carmona" was coming down the river; and they sighted each other when a few hundred yards apart. They simultaneously gave the port signal, which was repeated by the "Carmona." The "Shenandoah" then gave the starboard signal, and steered accordingly. The "Carmona," thinking there was no room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah," but on going ahead again collided with the vessel in tow.—*Held*, reversing the judgment of a local Judge, 8 Ex. C. R. 1, that the "Shenandoah" was not in fault; but that, as the local Judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels, was committed while in the agonies of collision, the judgment as to her should be affirmed. *Davidson* v. *Georgian Bay Navigation Co.*, 23 C. L. T. 79, 33 S. C. R. 1.

Navigation—Obstruction—Action claiming damages for injuries done to plaintiff's wharf as the result of defendant's ferry steamer "Chebucto" colliding with it in a fog, and carrying away part of the wharf—Nuisance —Abatement—Constitutional law. *Hunt* v. *Dartmouth Ferry Commission* (N.S. 1910), 9 E. L. R. 249.

Negligence.] — In a dangerous and crowded channel the captain of a vessel, especially going down stream, must slacken speed, and, if overtaking another vessel, is bound to pass at such a distance that no harm will result to the other vessel from suction or displacement waves.—The look-out man must devote himself solely to that duty, and if engaged at other work so that his attention is divided, it is not a proper compliance with the rule as to a proper look-out. *Cadwell* v. *The "C. F. Bielman,"* 10 Ex. C. R. 155, 7 O. W. R. 393.

Negligence—*Change of course—Appeal—New grounds — Assessors — Supreme Court of Canada.*] — A court of appeal should not consider a ground not previously relied on, unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under examination. — In this case damages were claimed from the owners of the "Euphemia" for collision with the plaintiff's ship, and the latter in their preliminary act charged that the "Euphemia" was in fault for not reversing her engines. The Exchequer Court judgment held the plaintiffs' ship alone in fault, and on appeal the majority of the Supreme Court refused to consider the ground, not previously urged, that the "Euphemia," when she saw the other ship attempting to cross her bow, held too long on her course instead of reversing.—Fitzpatrick, C.J., and Davies, J., were of opinion that under the circumstances this point was open to the plaintiffs.—Remarks upon the necessity for expert nautical advice in collision cases before the Supreme Court of Canada.—Judgment in *Joint Stock S. S. Co.* v. *The "Euphemia."* *The "Tordenskjold"* v. *Horn Joint Stock Co. of Shipowners*, 11 Ex. C. R. 234, affirmed. *The "Tordenskjold"* v. *The "Euphemia,"* 41 S. C. R. 154, 6 E. L. R. 90.

Negligence — *Failure to hear signal—Evidence.*]—The S.S. "Senlac" was coming out of Halifax harbour, taking the eastern side of the channel. There was a dense fog at the time and the fog signals were sounded at regular intervals. She was making about six knots, and having passed George's Island heard the whistle of an incoming steamer. Fog signals were given in reply, and when the incoming vessel, the "Rosalind," was estimated to be about half a mile off, the "Senlac" gave a single short blast and directed her course to starboard. The "Rosalind" replied to this signal and stopped her engines. Within a few seconds the "Senlac" was seen about a ship's length away on the port bow and almost at the same moment the latter gave two short blasts on her whistle and swung to port threatening to cross the "Rosalind's" bow. The "Rosalind's" engines were immediately put "full speed astern" but too late to avoid a collision in which the "Senlac" was seriously damaged. At the trial of an action by the latter reliance was placed on the failure of the "Rosalind" to respond to her signals but the first signal admitted to have been heard on the "Rosalind" was the one short blast when the "Senlac" went to starboard. The result of the trial was that both vessels were found in fault and on appeal by the "Rosalind:"—*Held*, that the "Senlac" was in fault in continuing on her course when the vessels were quite near together instead of stopping and reversing and was alone to blame for the collision, and that the failure to hear her signals was not negligence on the part of the "Rosalind," and did not contribute in any material degree to the accident. Judgment of Supreme Court of Canada, 41 S. C. R. 54, 6 E. L. R. 77, affirmed. Judgment of the Nova Scotia Admiralty District set aside. *Senlac Co.* v. *"Rosalind,"* C. R. [1909] A. C. 441.

Negligence — *Harbour—Regulations.*]—Articles 11 and 15 (d) of the Collision Regulations of the 9th February, 1897, do not apply to the case of a ship made fast to a lawful wharf in a harbour:—*Held*, on the facts, that a vessel which ran into another so moored was guilty of negligence. *Rank Shipping Co.* v. *The "City of Seattle,"* 24 C. L. T. 363, 10 B. C. R. 513.

Negligence—*Improper change of course—New view of facts presented to Court.*]—Appeal to Supreme Court of Canada; dismissed as a view of the facts was presented which had not been suggested either before the Local Admiralty Judge or the Exchequer Court. *The "Tordenskjold"* v. *The "Euphemia,"* 6 E. L. R. 90.

Negligence — *Ship at wharf — Regulations.*]—Articles 11 and 15 (d) of the Imperial Collisions Regulations of 1897 do not apply to the case of a ship made fast to a lawful wharf in a harbour. On the evidence, a vessel which ran into another so moored was held not guilty of negligence. *Bank Shipping Co.* v. *The "City of Seattle,"* 9 Ex. C. R. 146.

Negligence — *Sinking of vessel by swell of steamer — Proof of fault — Cargo — Insurance — Bar to action — Amendment of preliminary acts after trial.*]—In order to support an action for damages in a case where a vessel is sunk by the swell caused by a passing steamer, it is necessary distinctly to prove that the sinking was due to the fault of the persons on board the steamer charged as the wrongdoer, or from the fault of those persons and of those on board the vessel that was sunk.—2. The payment of insurance to the owner of the cargo is no bar to an action brought by him to recover its value from the steamer that caused the loss.—3. The Court will not allow the preliminary acts to be amended after trial. *Northern Elevator Co.* v. *Richelieu & Ontario Navigation Co.*, 32 Que. S. C. 52.

Negligence in collision cases discussed — Undue speed — Manœuvres in agony of collision—Rule of road. *The "Rosalind"* v. *The "Senlac,"* 6 E. L. R. 77.

Overtaking vessel — *Cause of collision — Signals — Onus — Opinion of assessors — Damages — Judgment — Antedating.*]—In a collision action, there is, in order to establish contributory negligence, an onus on the overtaking vessel to shew that the overtaken one also violated the regulations and thereby contributed to the disaster:—*Held*, on the facts in this case, that such onus had not been discharged.—*Per* Hunter, C.J.:—Article 24 of the regulations is meant to assure those on the overtaken vessel that they need not concern themselves with the movements of the overtaking ship, provided the former keeps its course and speed.—The sole question being whether either or both vessels committed a breach of the regulations, the Court alone must decide, regardless of the opinion of the assessors.—Rule for assessment of damages in Admiralty cases.—The judgment was antedated where one of the parties died after the argument, but

before judgment.—Decision of Martin, J., 13 B. C. R. 96, 6 W. L. R. 53, reversed; Irving, J., dissenting. *Bryce* v. *Can Pac. Rw. Co.*, 8 W. L. R. 230, 13 B. C. R. 446.

Pleading — Preliminary act — Amendment. *Northern Elevator Co.* v. *Richelieu & Ontario Navigation Co.*, 3 E. L. R. 311.

Reasonable care and skill — Admiralty law — Damages. *The "Havana"* v. *The "Prescott,"* 5 E. L. R. 219.

Reference to the registrar—*Inspection of ship and cargo.*] — On reference to a registrar, liability of damage caused by defendant ship having been admitted, it is not necessary to insert in the order a direction for the registrar to inspect the vessels concerned. *Stockham* v. *"Spray,"* 10 W. L. R 448.

Responsibility for damages — *Reference — Advice of assessors.*]—In an action by a steamship against a tug for damages arising out of a collision at the entrance to Vancouver harbour, it was *held*, upon the evidence, that the steamship was solely responsible for the collision, and a reference was directed to assess damages to the tug upon its counterclaim.—The case appearing to be eminently one to be decided by practical seamanship, the local Judge in Admiralty adopted the advice of nautical assessors who sat with him. *"Charmer"* v. *"Bermuda"* (1910), 15 W. L. R. 132.

Right of way.]—In the case of a river traversed annually by thousands of vessels and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding on foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river. *Georgian Bay Navigation Co.* v. *The "Shenandoah" & The "Crete,"* 8 Ex. C. R. 1.

Roller boat — Canada Admiralty Act, 1891 — Canada Shipping Act — Definition of "ship" — Contributory negligence — Inevitable accident — Pleading — Damages — Costs. *Turbine Steamship Co.* v. *The Knapp Roller Boat*, 12 O. W. R. 723.

Rule of road — *Evidence — Preliminary act — Amendment — Pleadings — Admiralty practice.*]—In an action in Admiralty claiming damages for injury to the plaintiffs' ship, the "Neepawah," through collision with the "Westmount," belonging to the defendants, the preliminary act and statement of claim alleged that the port quarter of the latter struck the stern of the "Neepawah." The local Judge, in his judgment, held that the evidence shewed a collision between the two ships stern to stern, and, against objection by the defendants' counsel, of his own motion allowed the statement of claim to be amended to conform to such evidence, stating that its admission had not been objected to, and that the defendants were not misled:—*Held*, that such amendment should not have been made; that it set up a new case and one entirely different from that presented by the preliminary act and statement of claim, and greatly prejudiced the defence; and that the local Judge was wrong in stating that the evidence was admitted without objection, as it was protested against at the trial.—*Held*, also, that errors in the preliminary act may be corrected by the pleadings, but, if not, the parties will be held most strongly to what is contained in their act.—*Held, per* Davies, Maclennan, and Duff, JJ., that the plaintiffs had not satisfactorily established that the collision, even that charged under the amendment, had actually occurred. — *Per* Fitzpatrick, C.J., that the evidence proved that no collision between the vessels took place.—Idington, J., concurred in the judgment allowing the appeal. — Judgment in *New Ontario S. S. Co.* v. *Montreal Transportation Co.*, 11 Ex. C. R. 113, reversed. *Montreal Transportation Co.* v. *New Ontario S. S. Co.*, 40 S. C. R. 160.

Rules of navigation — *Determination as to vessel in fault — Precautions—Special circumstances — Loss of profits.*] — Just after plaintiff's steamer, the "Caspian," had backed out of her slip and was starting on her voyage, the defendant's yacht backed out from her slip and a collision took place: —*Held*, that defendant's yacht neglected, in the special circumstances of the case, to observe the dictates of the highest prudence by moving ahead. The damages given included the loss of profits which plaintiff's steamer would have earned on Saturday following and the estimated profits lost by the cancellation of the proposed voyage then just begun. *Lake Ontario Steamboat Co.* v. *Fulford*, 13 O. W. R. 1217.

Rules of navigation — Negligence — Conflicting evidence — Damages — Costs. *Canadian Lake & Ocean Navigation Co.* v. *The "Dorothy,"* 7 O. W. R. 621.

Rules of road — Signals — Liability. *Tucker* v. *The "Tecumseh,"* 6 O. W. R. 131.

Ship at anchor — *Anchor light — Lookout — Findings — Negligence.*] — Judgment appealed from, 7 Ex. C. R. 403, affirmed. *Dominion Coal Co.* v. *The "Lake Ontario,"* 23 C. L. T. 33, 32 S. C. R. 507.

Steamer and sailing ship — Action by owner, master and crew of a schooner sunk in a collision with defendant steamer: —*Held*, that the cause of the collision was the schooner's going about without being compelled to and without any good reason for so doing, thereby embarrassing defendant ship which would otherwise have cleared her. *Watt* v. *"John Irwin,"* 7 E. L. R. 7; affirmed. *Ib.* 281.

Steamer and sailing vessel. *Butt* v. *Dartmouth Ferry Commission*, 1 E. L. R. 139.

Steamer and sailing vessel—*Collision Arts. 20, 22, 23, 25 — Liability.*]—The J. M., a sailing vessel, was proceeding, in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The T., a steamship, was on

her way into the harbour. When the T. was first seen by the J. M. the latter was on a course of W.S.W., standing across the harbour, towards, and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was under way on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre, nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the fore-rigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck: —*Held*, that the T. had infringed the provisions of Arts. 20, 22, 23, and 25 of the rules for preventing collisions at sea, and was responsible for the collision. *Brine* v. *The "Tiber,"* 6 Ex. C. R. 402.

Steamer approaching tug and tow —*Extra care.*]—*Held*, a tug with barges in tow not having full facility of movement, it is the duty of a steamer approaching them to allow for their encumbered and comparatively disabled state and to take additional care. 2. When a steamer going up the river is at the foot of a narrow and winding channel and has warning of a descending tug and tow, her proper course is to stop and wait till they have passed clear. If she undertakes to proceed up the channel and meet them in it, she does so at her own risk. 3. When a steamer collides with a tow, it is no defence to an action of damages that the tug and tow were not initially on their proper course, if it be shewn that the collision could have been avoided by the exercise of reasonable skill and care on the part of the unencumbered vessel. *Montreal Transportation Co.* v. *Steamer "Norwalk,"* 37 Que. S. C. 97, 7 E. L. R. 365, affirmed, 7 E. L. R. 389.

Strict observance of rules of road —*Look-out.*]—In a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules. On the contrary, a primary disregard of the rules by one vessel imposes on the other vessel the duty of special care, prompt action, and maritime skill, as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances. — Collision regulations have been framed for the protection of lives and property in navigation and are so strictly enforced that even where a vessel commits a comparatively venial error it cannot be absolved from the consequences.—The rules of the road must be strictly observed, and when they are violated by both vessels the Court will hold them equally liable. *Canadian Lake & Ocean Navigation Co.* v. *The "Dorothy,"* 10 Ex. C. R. 163, 7 O. W. R. 621.

Taxation of costs — *Commission on bail.* —*Held*, that a party putting in bail in a collision action in the form of a guarantee company's bond was entitled to a commission fee thereon not exceeding 10% of total amount of bond. (See English Admiralty Orders, 21*a*.) *Richelieu & Ont. Nav. Co.* v. *"Cape Breton,"* 11 Ex. C. R. 227.

Taxation of costs — *Commission on bail.*] — *Held*, that defendant was entitled to have costs of bond of a guarantee company, given as bail in a collision action, taxed in the bill of costs against the plaintiff at the rate of 1% on total amount of security given in said bond. *Montreal Harbour Commissioners* v. *"Universe,"* 11 Ex. C. R. 229.

Towboat — *Negligence — Injury to tow — Inevitable accident.*]—In an action against the owners of a tug for damages for negligence in towing the plaintiff's schooner, whereby she was injured, it appeared from the evidence that the schooner in tow, going up the Tusket river, arrived at a narrow part of the river, and, having to make a sudden turn at a critical point in the river, was struck by a sudden squall of wind and forced on shore:—*Held*, that the injury was due to inevitable accident, the tug being sufficiently powerful, and having been properly managed by those on board of it. The action was, therefore, dismissed. *Atwood* v. *Cann*, 40 N. S. R. 136.

Tug and tow — *Damage by overtaking ship — Displacement wave — Right of action — Pleadings — Amendment.*] — Actions arising out of the sinking of the barge "Huron" in the Soulanges canal on the night of the 8th May, 1905, the occurrence being charged by the plaintiffs to be due to the negligence of the defendants, owners of the steamer "Hamilton," which overtook and passed the "Huron" while being towed through the canal laden with wheat. The plaintiffs alleged that the "Hamilton" passed the tug and tow at such an excessive rate of speed that owing to the suction produced by the passage of the "Hamilton" through the water, and to her displacement wave, the "Huron" was driven against the bank of the canal and subsequently sank:—*Held*, that, as the plaintiffs had failed to shew that the accident to the "Huron" was the result of negligence of those on board the "Hamilton," and as the evidence supported the allegation of the defendants that the accident was due to the improper and unskilful navigation of the "Huron," the actions must be dismissed. *Northern Elevator Co.* v. *Richelieu & Ontario Navigation Co.*, 11 Ex. C. R. 25.

On appeal, *held*, that, as the essential question involved in the case was purely one of fact, there being no presumption one way or the other as to how the accident occurred, there was no reason to disturb the finding of the trial Judge. *Ogilvie Flour Mills Co.* v. *Richelieu & Ontario Navigation Co.*, *Northern Elevator Co.* v. *Richelieu & Ontario Navigation Co.*, *Canada Atlantic Rw. Co.* v. *Richelieu & Ontario Navigation Co.*, 11 Ex. C. R. 231.

Tug and tow — *Damage to tow by stranding — Negligence of tug — Inevitable accident — Damages — Limitation of liability.*]—The doctrine of "inevitable accident" as appearing in *St. Clair* v. *The "D. C. Whitney,"* 10 Ex. C. R. 1, is binding

in this case. On the evidence defendants, tug owners, held liable for damages to tow and cargo, having had no look-out, and improperly navigating the tug, thereby stranding plaintiff's barge:—*Held*, further, following *Sewell* v. *British*, 9 S. C. R. 530, that limitation clause 12 in The Canadian Shipping Act, applied only to cases of damages caused by colliding vessels, and that it cannot be invoked to limit defendants' liability in such a case as this. *Fullum* v. *Waldie Brothers*, 13 O. W. R. 236.

Tug and tow — *Lights — Look-out — Course of navigation.*] — The rule that where a vessel is being towed "the tug is servant of the tow" does not apply to the case of a steam-barge towing two other barges, the whole under the control of those on board the steam-barge.—A steam-barge towing two barges, not exhibiting her regulation lights before sunrise, having no proper look-out, too great a length of towline, no additional tug to assist, and proceeding on an improper course in view of obstacles ahead, is liable in damages for a collision that takes place in consequence. *Montreal Harbour Commissioners* v. *The "Bay State,"* 31 Que. S. C. 10.

Tug and tow — *Look-out — Absence of proper signals.*]—*Held*, under the circumstances of this case, that the Bay State and tow were in fault upon the following grounds: (1st) because the barge Bath had no pilot, and no proper look-out was kept on the Bay State or her tow; (2nd) those in charge of the Bay State and her tow neglected to take the precautions required under the special circumstances of the case, the tow ropes being too long, and no attempt having been made to shorten them; the Bay State had no look-out, and she made no signals to the tow or to the S.S. Universe, which she appeared to have sighted before the Universe saw her; (3rd) there was no additional tug to control the tow, more particularly the last barge, the Bath; (4th) neither the steam barge Bay State nor the barges in tow exhibited proper regulation lights, though they had got under way and the collision occurred before sunrise; (5th) the steam barge Bay State and tow should not have taken the St. Mary's current, as they did, with the tow in such condition as it was proved to be, more particularly in view of the position of the dredges of the Harbour Commissioners, and the place where they were moored, of which the pilots on board the Bay State and Berkshire were well aware; (6th) after the collision occurred the steam barge Bay State and her tow continued down to Quebec without stopping to inquire what damage had been done. — *Held*, further that the screw steamer Universe and the dredges of the Harbour Commissioners were not at fault, and that the Bontell Steel Barge Company, the owners of the steam barge Bay State, and of the barges Berkshire and Bath, and the said steam barges Bay State and Bath, were liable for all the damages resulting from the collision. *Montreal Harbour Commissioners* v. *The "Universe,"* 10 Ex. C. R. 352.

Tug and tow — *Ship at anchor—Negligence of tow.*]—A tug with the ship "Wandrian" in tow left a wharf at Parrsboro', N.S., to proceed down the river to sea. The schooner "Helen M." was at anchor in the channel, and the tug directed its course so as to pass her on the port side, when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course without giving any signal, and tried to cross her bow to pass down on the starboard side, and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M.," the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local Judge found as a fact that she was on the eastern side:—*Held*, affirming the judgment of the local Judge, 11 Ex. C. R. 1, that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel, as found by the Judge, there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel, she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard, when she was so near the "Helen M." as to render a collision almost inevitable, was negligence on the tug's part, and that the "Helen M." exercised proper vigilance and was not negligent in failing to lengthen her anchor chains, as the "Wandrian" was too close and had not signalled.—*Held*, also, that the tow was liable for such negligence in the navigation of the tug. *The "Wandrian"* v. *Hatfield*, 27 C. L. T. 312, 38 S. C. R. 431.

Undue speed — *Navigation during fog.*] —Judgment appealed from, 7 Ex. C. R. 390, 22 C. L. T. 129, varied; Girouard, J., dissenting. *The "Pawnee"* v. *Roberts*, 23 C. L. T. 33, 32 S. C. R. 509.

Vessel at anchor — *Proximate cause of injury to person—Negligence.*]—A tug attached to a scow loaded with coal approached a bridge, the piers of which were being repaired by a railway contractor. The fairway was partly obstructed by a scow connected with the work, but the captain of the tug, after viewing the situation, was of opinion that he could get through. In doing so, he brushed slightly against the scow, at the further end of which, on a boom stick in the water, was the plaintiff, engaged in an endeavour to swing or push the scow further around and out of the way of the tug. The plaintiff was crushed against a pile by the scow and severely injured:—*Held*, reversing the decision of Morrison, J., that the master of the tug was negligent in not stopping, and then making certain that it was safe to proceed. *Padularoga* v. *Canadian Canning Co.*, 5 W. L. R. 196, 12 B. C. R. 468.

Vessel "hove-to" — *Look-out—Manœuvre to avoid collision — Pleading—Preliminary act — Evidence — Salvage.*]—A schooner "hove-to," with her wheel made fast by a becket which could be removed instantly, her look-out and wheelsman properly stationed and maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated.—2. A vessel without

a sufficient look-out has the burden cast upon her of proving that such fact did not contribute to the collision.—3. Apart from the regulations, in a case of impending collision it is negligence for a steamship to fail to slacken speed, or to stop, or reverse, if such manœuvre is necessary to avoid collision.—4. Where the defendant's preliminary act alleged that at a certain point the bearing of the ship at fault was "a little abaft the starboard beam" of the injured ship, evidence was admitted to shew that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel.—5. The wrongdoer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision. *Magdalen Islands S. S. Co.* v. *The "Diana,"* 11 Ex. C. R. 40, 3 E. L. R. 158.

Vessel moored to another — *Negligence—Extraordinary storm—Act of God.*]—While the plaintiff's tug-boat the "Vigilant" was tied to a wharf in Vancouver harbour, the defendant brought his tug-boat the "Lois" alongside and tied her to the "Vigilant." The next night a violent storm arose—a storm of which there were no indications and which was the severest ever experienced in the harbour—and the "Lois," whose crew were absent, bumped against the "Vigilant," and damaged her:—*Held*, in an action for damages for negligence, that it had not been shewn that the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God. *Bailey* v. *Cates*, 24 C. L. T. 412, 11 B. C. R. 62.

Vessel moored to dock — Negligence —Inevitable accident. *Manley* v. *Rogers*, 2 O. W. R. 704.

Violation of rules not affecting accident — *Steering wrong course.*]—The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local Judge, unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The "Picton,"* 4 S. C. R. 648, followed.—A steamer coming up Halifax harbour ran into a schooner, striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow, and the latter starboarded her helm to pass astern, and then ported. He then was so close that he stopped the engines, but too late to prevent the collision:—*Held*, that the steamer alone was to blame for the collision.—*Held*, also, that though under the rules the schooner should have kept her course, and also was to blame for not having a proper look-out, neither fault contributed to the collision. *The "Arranmore"* v. *Rudolph*, 27 C. L. T. 152, 38 S. C. R. 176.

Wharf — *Hidden danger — Liability.*]—The owner of a wharf level with the water or projecting 5 or 6 inches above it is not liable for damage done to a vessel which runs foul of it. *Montreal Harbour Commissioners* v. *Montreal Grain Elevating Co.*, 17 Que. K. B. 385, 4 E. L. R. 78.

Wharf — *Negligence.*] — A ship was moored in her dock with her bow to the east. Her stern, being at the inner end of the dock, was partly protected by the wharf and stores to the south, while the bow and fore-part of the ship, extending easterly beyond any such protection, was exposed to the full force of a south-easterly gale. There was an anchor out, with 25 fathoms of chain, on the starboard bow of the ship; but it was not in a position to keep the ship from swinging against the wharf in the event of such a gale. A gale from that direction having sprung up, the master ran out a wire rope from the starboard side of the ship's stern to a wharf on the south of her berth; but the evidence shewed that this rope had no effect in preventing the collision of the port bow of the ship with the wharf, which was damaged by the pounding of the ship against it from the force of the wind and waves: — *Held*, that the master had failed to exercise seamanlike care, forethought, and skill, in omitting so to place his anchor as to protect his ship from the force of the gale and prevent her colliding with the wharf, and that the damage was attributable to his negligence and not to inevitable accident. *Boak* v. *The "Baden,"* 8 Ex. C. R. 343.

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5. JUDICIAL SALE.

Mortgage — *Judicial sale — Rights of mortgagee—Acquiescence.*]—Although a hypothec upon a ship does not make the hypothecary creditor owner of the ship, he can, nevertheless, dispose of it absolutely. 2. The sale of such a ship, even when effected judicially and with the authorisation of the Court, upon an assignment of the property of the owner of the ship, but without the consent of the hypothecary creditor, is without effect as regards such creditor, and the purchaser may refuse to pay the purchase price so long as the hypothec is undischarged. 3. The fact that such creditor has been present at the sale and has even been a bidder does not constitute acquiescence, the proceeds of the sale being insufficient to indemnify him. *In re Robert and Lamarche*, 18 Que. S. C. 101.

Purchaser refusing to complete — *Resale — Liability of purchaser for difference in price—Statute of Frauds.*]—A ship was sold at auction by the marshal under an order of Court in an action for seamen's wages. The ship was knocked down to J. for $2,000. J. refusing to complete the purchase, the ship was resold by the marshal for $1,500:—*Held*, that J. was liable for the difference in price and the costs occasioned by his default. 2. Judicial sales are not within the Statute of Frauds, and therefore no memorandum in writing of the sale to J. was necessary. *Attorney-General* v. *Day*, 1 Ves. Sr. 218, referred to. 3. For the purpose of establishing J.'s liability, an order for resale was not necessary. *Hackett* v. *The "Blakeley," In re Jones*, 8 Ex. C. R. 327, 9 B. C. R. 430.

Seizure by ordinary creditor—*Rights of hypothecary creditors — Sale subject to hypothecs — Consent — Order.*]—An hypothecated vessel cannot, to the prejudice of the hypothecated creditor and without his consent or the order of a competent Court,

be seized at the suit of an ordinary creditor of the owner of the vessel. 2. The fact that an ordinary creditor has advertised the sale of such a vessel subject to all registered hypothecs is not sufficient to relieve him from obtaining such consent or such order. *Daigneault* v. *Brulé*, 22 Que. S. C. 20.

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6. Pilotage Dues.

Barges towed by tugs — *Exemption from pilotage dues — Motive powers — R. S. C. (1886), c. 80, s. 2 (b), ss. 58 and 59 —"Ship"—"Navigation."*]— The defendants' vessels of about 440 tons, described as schooners, provided with masts, steering gear and anchors, which were built to run before the wind, but not to be safely navigated in the ordinary way of sailing vessels, were usually towed by a steam tug, in and out of the port of St. John:—*Held*, that these vessels were liable to pay pilotage dues, as they did not come within the exemption provided in s. 59 (c) of the Pilotage Act, R. S. C. (1886). The idea of traction or towage is not included in the words "propelled by steam."—Judgments of Supreme Court of Canada, 38 S. C. R. 169, 27 C. L. T. 239, Supreme Court of New Brunswick, 37 N. B. R. 406, 1 E. L. R. 397, and Hon. Mr. Justice McLeod at trial, set aside. *Cumberland Ry.* v. *St. John Pilot Com.*, C. R., [1910] A. C. 31, 7 E. L. R. 340.

Exemption — *Statute.* — Under the terms of the Pilotage Act, R. S. C. c. 8, s. 59, as amended by the Acts of 1900, c. 36, s. 14, the following ships, called "exempted ships," are exempted from the compulsory payment of pilotage dues: (c) Ships employed in trading . . . between any one or more of the provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island, and any other or others of them, or employed on voyages between . . . any port in any of the said provinces and any port in Newfoundland, etc.:—*Held*, that a ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries and back, calling on her outward voyage at Louisburg for coal, and at a port in Newfoundland for men and supplies, and again at Newfoundland, on her return, to dispose of her catch, was not an exempted ship within the terms of the Act. *Semble*, that what was contemplated by the Act, in providing for exemptions, was lines of steamers, or even one steamer, making regular periodical voyages, with termini as indicated in the Act, either throughout the year or during a certain season of the year. *Farquhar* v. *McAlpine*, 35 N. S. R. 478.

Liability of barge—"*Every ship which navigates.*"]—*Held*, affirming the judgment of the local Judge for the Quebec Admiralty District, that the expression "every ship which navigates," found in s. 58 of the Pilotage Act, R. S. C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel. *Corp. of Pilots for the Harbour of Quebec* v. *The "Grandee,"* 22 C. L. T. 428, 8 Ex. C. R. 54, 79.

7. Salvage.

Arrest — *Payment into Court — Release — Appeal — Security—Foreign owner —Extravagant claim.*] — An application by the defendant for payment out of Court of money paid in by him to obtain the release of his ship arrested to answer a claim for salvage, will, if the defendant be a foreign resident, be stayed wholly or in part, pending an appeal to the Exchequer Court to increase the salvage award. Observations upon the scope of bail bonds and the retention of security pending appeal. It is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 462, 10 B. C. R. 383.

Assessors — *Trial — Time.*]—Assessors will be appointed in salvage cases where necessary. The proper time to apply for assessors is on the application to fix the date of trial. *Vermont S. S. Co. The "Abby Palmer,"* 8 Ex. C. R. 469, 10 B. C. R. 380.

Basis of valuation.]—Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors, the *res* should be valued not on the basis of a forced sale, but as a "going concern" in the hands of a solvent owner, using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 446.

Danger and imminent loss.]—Salvage is an obligation of an exceptional nature, to indemnify those by whose assistance a ship, her cargo, or the lives of those on board are saved from imminent loss. The element of danger and imminent loss to the ship, etc., is essential, and, without it, no claim to salvage can arise. *Montreal Lighterage Co.* v. *Gordon*, 28 Que. S. C. 198.

Delivery of salved goods to receiver of wrecks — *Penalty.* —Under the provisions of s. 27 of the Wrecks and Salvage Act, R. S. C. 1886 c. 81 (now R. S. C. 1906 c. 13, s. 814), a salvor who has delayed the delivery of salved goods to the receiver of wrecks for a short time, not with the intention of retaining the goods, but merely for the purpose of having the amount payable to him for salvage determined before giving up possession, does not thereby forfeit his right to salvage, or incur the penalties mentioned in such section. *The "Manhattan"* v. *Sullivan*, 11 Ex. C. R. 151.

Injury to salving ship — *Necessities of service — Seamanship — Appeal on nautical questions — Findings of fact — Damages — Reduction — Assessors.*]—In an Admiralty case the Supreme Court of Canada must weigh the evidence for itself, unassisted by expert advice, and will, if the evidence warrants it, reverse the judgment appealed against on a question of seamanship or navigation.—The ship "M." brought an action for the value of salvage services rendered to the "N." part of the damages claimed being for injury to the

"M." in performing such services:—*Held*, Girouard and Maclennan, JJ., dissenting, that the evidence established that injury was not caused by necessities of the service, but by unskilful seamanship and improper navigation; the judgment appealed against should, consequently, be varied by a substantial reduction of the damages allowed by the local Judge.—The dissenting Judges were of opinion that sufficient ground was not shewn for disturbing the findings of the trial Judge. The *"Nana"* v. *The "Mystic,"* 41 S. C. R. 168, 6 E. L. R. 303.

Maritime lien — Agreement — Rights of salvor — Possession of salved goods — Removal — Purchaser for value — Conversion — Replevin — Costs. *Pearce* v. *Letherby*, 6 O. W. R. 77, 606.

Nature of — *Evidence — Remuneration —Assessment — Value of ship — Registrar's report.*]—Claim for value of salvage services:—*Held*, that plaintiff's tug properly saved defendant ship, which was in a dangerous position and would have sunk. In assessing value of ship, besides annual depreciation, original construction and subsequent care, as well as type of vessel, must be considered. Settlements made with other parties not considered. *Dunsmuir* v. *The "Otter,"* (Ex. C. of Can.), 10 W. L. R. 380.

Quantum of remuneration — *Mail steamer — Sailing ship.*]—Salvage services were rendered a distressed sailing ship on the high seas by a mail steamer. At the time the latter performed the salvage services, she was valued at $100,000, and, besides passengers and mails, she carried a cargo estimated to be worth $7,000. The time occupied in the performance of such services was about two and one-half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel of some thirteen miles in length. On account of the delay occasioned by the services, the steamer was obliged to consume additional coal to the value of $360 in making up her schedule time on the voyage. The sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas. Her cargo was worth $13,727.23, and her freight, as per bill of lading, $1,332.26. The value of the salved ship when taken into port in her damaged condition was placed at $2,290. The amount of salvage in respect of cargo and freight was settled before action brought:—*Held*, that the sum of $400 was a fair salvage award in respect of the ship alone. *Pickford & Black S. S. Co.* v. *The "Foster Rice,"* 9 Ex. C. R. 6.

Towage — *Sufficiency of tender—Costs.*] —A steam-tug was prosecuting her voyage in the lower St. Lawrence, when a slight accident happened to her boiler, in consequence of which her fires had to be extinguished in order that the boiler might cool to allow the engineer to make the necessary repairs. At that time the vessel was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p.m. Three hours afterwards, and before repairs could be made, a steamship F., of heavier burthen, approached the tug, and, at the request of her captain, took the tug in tow. The towage covered a distance of 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of the F. at any time in peril by reason of the services rendered to the disabled tug:—*Held*, that, as the services to the disabled tug were rendered under the easiest conditions, without increase of labour or delay to the F., it was clearly a towage and not a salvage service. 2. It not being a case of salvage, the officers and crew of the F. were not entitled to participate in the amount awarded for the towage, but it belonged to the owners of the ship. 3. The defendants having paid into Court an amount sufficient to compensate the plaintiff liberally for the services rendered, they were given their proper costs against the plaintiff. *Hine* v. *The "Thomas J. Scully,"* 20 C. L. T. 54, 6 Ex. C. R. 318.

S. Seamen's Wages.

Action by seaman for wages—*Arrest of vessel.*]—Proceedings in admiralty—Irregularity—Dominion Winding-up Act, s. 22. *Re Br. Col. Tie & Timber Co., Colan* v. *"Rustler"* (B. C. 1999), 10 W. L. R. 370.

Actions in rem — *Equality — Priority —Costs—Pro rata payment of subsequent claims.*]—*Held*, following The "Saracen," 6 Moo. P. C. 56, that when claimants against a fund in the registry are of equal degree, the Court will give priority to the diligent creditor. 2. Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards. 3. Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the Court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*. *Munsen* v. *The "Comrade," Saunders* v. *The "Comrade," Dickson* v. *The "Comrade,"* 7 Ex. C. R. 331.

Amount — *Jurisdiction of Supreme Court, N. S.*] — An action for seaman's wages, where the amount claimed is under £50, cannot be brought in a Supreme Court except where the owner or master, neither is, nor resides, within twenty miles of the place where the seaman is discharged, or put on shore. *Watson* v. *Leukten*, 24 C. L. T. 26, 36 N. S. R. 412.

Arrest on telegram — *Rescue — Contempt of Court — Ignorance of law.*]—It is competent for a deputy-marshal to arrest a ship, in an action for wages, upon a telegram from the marshal of the Admiralty district, having jurisdiction of the action, informing him that a writ of summons and a

warrant had been issued and sent to him by mail. 2. The master of the ship, although ignorant of the legal consequences of his act, was held guilty of contempt of Court in permitting the ship to be moved after the deputy-marshal had gone on board, read to the master a copy of the writ of summons, and of the marshal's telegram, informed him that the ship was under arrest, and tacked up a copy of the writ in the ship. *In re The "Ishpeming,"* 8 Ex. C. R. 379.

Contract — Correspondence — Desertion — Justification — Transportation money — Maintenance money — Action — Costs — Witness fees. *Porteous* v. *The "Lightning"* (Y.T.), 2 W. L. R. 199.

Cook — Claim for — Jurisdiction of Court — Amount under £50 — Merchant Shipping Act, 1894, s. 165—Exception — Contract — Whole voyage — Cook left behind at intermediate port because of illness — Proper sanction — Voyage terminating in United Kingdom — Section 166 (1) of Act — Discharge — Written consent of master — Ill-usage — Certificate — Termination of engagement — Costs. *Cable* v. *Socotra* (B.C. Admr.), 7 W. L. R. 25.

Engagement for return voyage — *Seaman left in foreign port by reason of sickness — Merchant Shipping Act, 1906 (Imp.), ss. 37, 38 — Merchant Shipping Act, 1894 (Imp.), ss. 158, 166 — Certificate of discharge — Mistake in computing wages —Action — Costs.*]—Section 166 (1) of Merchant Shipping Act, 1894 (Imp.), provides that where a seaman is engaged for a voyage which he is to terminate in the United Kingdom, he shall not be entitled to sue in any Court abroad for wages unless he is discharged with such sanction as is required by the Act, and with the written consent of the master, etc. By the Merchant Shipping Act, 1906 (Imp.), ss. 37 and 38, it is provided that where a master leaves a seaman behind on shore in any place out of the United Kingdom on the ground of his unfitness or inability to proceed to sea, he shall deliver to the person signing the required certificate of the proper authority, a full and true account of the wages due to the seaman. The master shall pay the amount of wages due to a seaman left behind on the ground of his unfitness or inability to proceed to sea, if he is left in a British possession to the seaman himself, and if he is left elsewhere to the British consular officer.—The plaintiff shipped for a voyage from Shields, England, to Victoria, B.C., and return. Before the termination of the voyage he was left at an American port by reason of illness, and remained in the hospital there for fifteen days, beginning on the 18th July, 1907. On the 18th July the master of the ship left a certificate of discharge with the British Vice-Counsul at such port, as required by s. 31 of the Act of 1906, but such certificate was not dated by the master, and the date of the 22nd August was inserted in the certificate by the Vice-Consul when the plaintiff called upon him after leaving the hospital. The master made an error in computing the amount of the plaintiff's wages due on the 18th July, and deposited less than the full amount due in the hands of the Vice-Consul. In an action for the recovery of wages by the plaintiff: — *Held*, that the requirements of the statute respecting the certificate of discharge was sufficiently complied with: that the plaintiff was properly discharged on the 18th July; and that he was entitled, under s. 158 of the Act of 1894, to the full amount of his wages up to that date.—2. That, as the master made an error, though unintentionally, in computing the wages, and the plaintiff had been obliged to bring action, he was entitled to his costs. *Cable* v. *The "Socotra,"* 11 Ex. C. R. 301, 7 W. L. R. 25, 13 B. C. R. 309.

Jurisdiction — *Action — Parties — Joinder of claims—Limitation of actions.*]—A numbeer of seamen forming part of the crew of a ship, to whom separate and varying sums are alleged to be due for wages, may combine in one action to recover the same. The limitation of actions to amounts over $200 discussed. *Beaton* v. *The "Christine,"* 11 Ex. C. R. 167.

Jurisdiction—*Action in rem.*]—Wages of seamen—Joinder of several claims in one action—Rule 29—Origin and history of Rule. *Beaton* v. *"Christine,"* 12 O. W. R. 1229.

Jurisdiction of Exchequer Court *to entertain claim for wages under $200 — Admiralty Act — Foreign ship—Costs.*] — When the exceptions in s. 56 of the Seamen's Act, R. S. C. c. 74, do not apply, the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. The *W. J. Aikens*, 7 Ex. C. R. 7, decided under similar provisions in s. 34 of R. S. C. c. 75, criticized and not followed. 2. The Admiralty Act, 1891, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implications the special provisions of s. 56 of R. S. C. c. 74, limiting the jurisdiction of this Court in proceedings for seamen's wages. 3. This Court has no jurisdiction to entertain a claim for seamen's wages under an amount of $200 earned on a ship registered in England, and to which the provisions of s. 165 of the Merchants Shipping Act, 1894, apply. 4. Costs in these actions were not allowed to the defendants because exception to the jurisdiction to entertain the claim sued for was not taken in *limine litis*. *Gagnon* v. *The "Savoy," Dion* v. *The "Polino,"* 25 C. L. T. 87, 9 Ex. C. R. 238.

Master — *Custom of port as to discharge of master without notice—Set-off — Passenger fare.*]—It is not the custom of the Port of Vancouver that masters of tug-boats and small coasting vessels may, on the one hand, be discharged without notice, and, on the other hand, leave their employers' service in the same manner, in either case receiving their wages up to the date of the termination of the service. 2. An item of set-off asserted by the owners against the master's claim for wages, consisting of an amount of $30.75 charged for the fare and board of a friend of the master who had been taken with him on one of his trips on the owner's tug-boat, was not allowed, because it was a general practice in the port

of Vancouver to allow the masters such a privilege. *Roberts* v. *The "Tartar,"* 11 Ex. C. R. 308, 13 B. C. R. 474.

Master — *Wrongful dismissal—Justification.*]—On the 27th January, 1905, the respondent entered into an agreement in writing with the appellants to proceed to Glasgow, Scotland, and take command of the steamer "Lady Eileen" and bring her to the port of Sydney, C.B. Thereafter he was, in the language of the agreement, "subject and obedient to the orders of the managers of said company to continue in command of the said steamship until the first day of January, A.D. 1906, or until such earlier time as may be ordered by the said managers." By another clause of the agreement it was provided that, "notwithstanding anything herein contained, it is the clear intention and meaning of these presents that for his services during the season of A.D. 1905, he, the said L. J. P., shall be paid at least the sum of $1,050, irrespective of the length of the season, unless for neglect or breach of duty he be sooner dismissed, or the company have a proper right of set-off against the same." The respondent brought the "Lady Eileen" to Canada, and the appellants placed her on the route between Campbellton, N.B., and Gaspé, P.Q., under the command of the respondent as master. A subsidy was obtained for carrying His Majesty's mails between the said ports twice a week, and the ship made her first regular trip on the 13th May, 1905. On the 29th June the ship left Gaspé for Campbellton, reaching Dalhousie about 9 p.m. After landing his freight at that place, the respondent thought it was not safe to proceed to Campbellton on account of the darkness and certain obstacles then in the channel. His view of the danger of proceeding in the darkness was shared by the pilot. At about 10.30 o'clock he received the following telegram from the appellant's manager: "Leave Dalhousie at once. Do not lay in Dalhousie. See that you follow these orders." To which he replied: "Will leave Dalhousie daylight to-morrow, or whenever I think proper." The ship arrived at Campbellton early the next morning, but too late to deliver the mails to the morning train. The respondent was then immediately dismissed from their service by the appellants:—*Held*, that the respondent's disobedience of the order given to him was, under the circumstances of the case, justified, and that his dismissal was wrongful. *The "Lady Eileen"* v. *Pouliot*, 11 Ex. C. R. 87.

Otter-hunting — *Claim of seaman to share in proceeds of skins.*]—The plaintiff claimed an interest in the proceeds of certain sea-otter skins obtained during a voyage of a schooner. He shipped as A. B. at monthly wages and so much "per skin," which meant sea skin. He founded his claim to an interest in the sea-otter skins upon an alleged oral agreement made by the captain with the plaintiff and the other A. B. seamen, by which they agreed to engage (and did engage) in sea-otter hunting upon the same terms as an Indian crew who were engaged for the purpose. The captain absolutely denied any such arrangement, and his evidence was in some degree corroborated by the mate. At the end of the voyage, the plaintiff, after receiving his wages, signed a release of "the ship and the master and owners thereof from all claims for wages or otherwise in respect of the voyage." The plaintiff's story was corroborated by other witnesses, but all of them, except one, were biassed:—*Held*, that the plaintiff had not advanced his case beyond the doubtful stage; and, the writings being relied on, the action should be dismissed:—*Quære*, whether, under ss. 152 and 157 of the Canada Shipping Act, such an agreement as that alleged by the plaintiff could be enforced. *Hansen* v. *The "Thomas F. Bayard"* (1911), 16 W. L. R. 527, Ex. C. R. , B. C. R. .

Refusal to pay — *Conviction — Jurisdiction—Criminal offence — Seamen's Act (D.)—Shipping Act (Imp.)—Rescission of Contract.*]—J. M., the master of the S. S. "Wobun," a British ship of Canadian register, was convicted before a stipendiary magistrate, for that he wrongfully and unlawfully refused to pay R., a seaman serving on board said ship, a sum of money claimed to be due him for wages, and, further, for refusing to discharge said M., he being then entitled to his discharge:—*Held*, quashing the conviction with costs, that the refusal to pay M. his wages, or to give him his discharge, was not a criminal offence, and that the proceedings taken were not warranted by the Seamen's Act of Canada, c. 74. That the ship being, at the time the proceedings were instituted, within the jurisdiction of the government of the British possession in which she was registered, the case was within the exception mentioned in s. 26 (d), and part 2 of the Imperial Shipping Act was not applicable. *Semble*, that if the magistrate had power to rescind the contract, and had undertaken to do so, the judgment would require to be in a different form. *Rex* v. *Meikle, Ex p. Ramsey*, 36 N. S. R. 297.

Seaman left in port en route—*Lawful discharge—Action—Mistake—Costs.*] — The plaintiff, who shipped for a voyage from Shields, England, to Victoria, B.C., and return, was left at Los Angeles for medical treatment, and remained in hospital there for 50 days. The master left with the British Vice-Consul at Los Angeles, on the 18th July, a certificate of discharge under s. 31, but this was not filled out until the 22nd August, when the plaintiff called at the consulate. The master also made an error in computing the amount of wages due. In an action for recovery of wages:—*Held*, that, in the circumstances, the leaving of the certificate with the "proper authority" was a sufficient "giving" thereof to satisfy s. 31, but, as there had been an error, though unintentional, in computing the wages, thus necessitating the plaintiff bringing the action therefor, he was entitled to his costs. *Cable* v. *The "Socotra,"* 7 W. L. R. 25, 13 B. C. R. 399.

Seamen's Act — Fisherman — Refusal to join ship—Conviction—Right to look at depositions—Costs. *Rex* v. *Wilneff*, 1 E. L. R. 168, 267.

Seizure for wages of sailors—*Internal navigation.*]—Save in the case provided for by cl. 2 of Art. 955, C. P., a *saisie conservatoire* does not lie for the wages of sailors in respect of services rendered on ships employed in internal navigation. *Bertrand* v. *Anderson*, 4 Que. P. R. 387.

Stipendiary magistrate — *Jurisdiction—Complaint.*]—A seamen sued the master of a vessel for wages in the Court of a stipendiary magistrate. The magistrate made an order that the master should pay the sum of $42.20 for wages, besides costs. The magistrate's order having been brought up on *certiorari*, a motion was made to quash it, on the ground that the complaint made before the magistrate did not shew that the vessel was registered in any Province of Canada. It was proved at the trial before the magistrate that the vessel was registered at the port of Dorchester, in the county of Westmoreland and province of New Brunswick:—*Held*, that the subsequent evidence did not cure the defect in the complaint, and the rule to quash must be made absolute. *In re Gamble* v. *Ward*, 30 C. L. T. 462.

Term of hiring — *Accrual of wages de die in diem — Desertion—Forfeiture of wages — Jurisdiction of County Court — —Amount involved.*] — A County Court Judge has jurisdiction, in an ordinary action for wages of a seaman, to try a claim for more than $200, where the plaintiff has a good demand at common law; that is, where his cause of action is complete without the aid of the statute. Section 52 of the Seamen's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for wages. The plaintiff shipped for a voyage of three months. The period expired before the voyage was completed, and, while the ship was calling at a port, he went ashore, without leave, to seek legal advice. While thus absent the ship sailed:—*Held*, that he could not be classed as a deserter. *Cairns* v. *British Columbia Salvage Co.*, 6 W. L. R. 47, 458; 13 B. C. R. 83.

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9. Miscellaneous Cases.

Account — *Co-owners — Jurisdiction of Court of Equity.*]—The jurisdiction of the Court of Equity in a suit for account between co-owners of a ship has not been taken away by 54 & 55 V. c. 29 (D.), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit. *Perry* v. *Hanson*, 21 C. L. T. 358, 2 N. B. Eq. R. 233.

Action for price — *Set-off — Counterclaim—Repairs — Place of trial—Balance of convenience.*]—In an action in the Exchequer Court of Canada (Admiralty jurisdiction) for the price of a ship, where the circumstances entitle the defendant to a reduction of the amount claimed, if such claim can be substantiated, the Court will not exclude the proposed set-off. Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience is in favour of trying out any disputes concerning those repairs at the place where the ship is, rather than at the place where she was built. *Bow, McLachlan & Co.* v. *The "Camosun" (No. 2)*, 12 B. C. R. 368.

Action in rem—*Counterclaim—Appeal from order striking out—Exchequer Court—Jurisdiction.*]—The jurisdiction which the Exchequer Court of Canada may exercise under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891, is the admiralty jurisdiction and not the general or common law jurisdiction of the High Court in England. *The Cheapside*, [1904] P. 339, referred to. 2. In an action *in rem* for a claim arising upon a mortgage of a ship, the Court has no jurisdiction to entertain a counterclaim for breach of contract to build the ship in accordance with certain specifications. *Union S. S. Co. of British Columbia* v. *Bow, McLachlan & Co., Limited, The "Camosun,"* 26 C. L. T. 780, 10 Ex. C. R. 348.

Action in rem — *Foreign fishing boat —Illegal fishing — Customs and Fisheries Protection Act—Jurisdiction of High Court.*] —Section 18 of the Customs and Fisheries Protection Act, R. S. C. 1906 c. 47, provides that every forfeiture under the Act may be enforced "in any Superior Court in the province in which the cause of prosecution arose." A writ of summons was issued against a boat, and service of the writ effected "by posting the same up on the defendant." On a motion being made for judgment in default of defence:—*Held*, that, as there are no provisions in the High Court of Justice for proceedings *in rem*, any declaration of forfeiture or judgment for the sale of the boat would be a nullity, and no order could therefore be made. *Rex* v. *American Gasoline Fishing Boat*, 15 O. L. R. 314, 11 O. W. R. 135.

Action in rem — *Mortgage — Set-off —Practice.*]—In an action *in rem* to enforce the payment of money due upon a mortgage given to the builders to secure the purchase price of a ship, defendants were allowed to plead a set-off for the amount of moneys expended by them to replace defective work and materials in order to bring the ship up to the requirements of Lloyds A1 Class and Board of Trade. *Bow, McLachlan & Co., Limited* v. *Union S. S. Co. of British Columbia*, 10 Ex. C. R. 403.

Action in rem for wrongful delivery of goods—Owners domiciled in Canada—Colonial Courts of Admiralty Act 1890 (Imp.) s. 2 (2) — Admiralty Act 1861 (Imp.), s. 6 — The Admiralty Act 1891 (Canada)—"British possession"—Construction. *McGregor* v. *Ship "Strathlorne"* (P.E.I. 1910), 9 E. L. R. 119.

Advances — *Equitable lien.*]—A master of a ship with the representative of the owners borrowed from W. $2,000, giving as security an agreement which provided among other terms that if the master received any money from the owners or otherwise on account of the sale of vessel or cargo the same or a sufficient part thereof should be applied first in repayment of said loan. Subsequently when the ship had to be sold the master and representative gave W. an order on the adjuster for the above amount, who accepted same payable when in funds: — *Held*, that the agreement and order were good equitable assignments, and plaintiff was entitled to be paid in full. *Halifax* v. *Magliulo*, 5 E. L. R. 553, affirmed *sub nom.*, *Halifax* v. *Williams*, 6 E. L. R. 333.

Affreightment — *Carriers — Bill of lading—Conditions — Notice.*]—The appel-

lant, on the 12th July, 1897, embarked on the S. S. "Baltimore City," which was owned and controlled by the respondents, certain sheep and cattle, for shipment from the port of Montreal to the port of Manchester, England, under two bills of lading, which were issued and signed by the agents of the company respondent, and were received and accepted by a shipping broker of Montreal, the agent of the appellants. One of the conditions of the bills of lading reads as follows: "That the freight, whether payable by shipper or by consignee, is to be paid, ship lost or not lost, upon the total number of animals embarked, without regard to and irrespective of the number or condition of those landed, and in cash or demand, without deduction or abatement of any kind." The ship was wrecked in the Straits of Belle Isle on 17th July, 1897, and became a total loss. Part of the sheep and cattle were jettisoned, and the remainder were salved and accounted for in general average. The company respondent sued to recover payment of freight for the whole consignment:—*Held*, that a bill of lading is, at first, a written acknowledgment, by the owners of a ship of their agents, of the receipt of certain goods intrusted to them, and of their undertaking to transport and deliver them to the consignee or his assigns; but it becomes a binding contract, if it be accepted by the shipper, or his representative, without any objection, as he is then presumed to have agreed to its terms, and, in the absence of fraud or mistake, he cannot plead that he did not read it and did not know its contents. 2. That the provisions of Arts. 2442 and 2451, C. C., that freight is not due upon goods lost by shipwreck, nor until their carriage has been completely performed, are to be applied only in the absence of an agreement to the contrary. 3. That a clause in a bill of lading, stipulating that the freight is to be paid at all events, "ship lost or not lost," upon the total number of animals embarked irrespective of the number landed, and in cash on demand, without deduction or abatement of any kind, is a valid and binding condition. *Glengoil Steamship Co.* v. *Pilkington*, 28 S. C. R. 146, followed. *Dean* v. *Furness*, 9 Que. Q. B. 81.

Blockade — *Breaking.*] — Blockade of Martinique. The vessel contended to have committed a breach of the blockade, restored; the blockading squadron having gone on an expedition to Surinam, and left no adequate force behind to maintain the blockade. *The Nancy* (1809), C. R. 3, A. C. 306.

Blockade — *Breaking.*] — Blockade of Martinique. Evidence of the fact and knowledge of the parties.—Condemned. *The Nancy* (1810), C. R. 3, A. C. 309.

Bottomry bond — *Authority of master to pledge ship for necessaries of ship.*] — The authority of the master of a ship to pledge by bottomry for the purpose of raising money for the absolute necessaries of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner; and such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there is no means of communication with the owner, and the exigency of the case requires it. A bottomry bond was granted in New York by the master of a ship, to obtain money for necessary repairs; the owner whereof was residing at St. John, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously acted as the general agent of the owner, and no intimation of the transaction was made by the master to the owner until after the execution of the bond:—*Held*, upon appeal (reversing the sentence of the Admiralty Court) that the master having the means of communication with the owner, no such absolute necessity existed as to authorize him to pledge the ship without communication with the owner, and the bond declared void.—*Semble*, the agent of the owner may take a bottomry bond as a security for advances made by him. *Wallace* v. *Fielden* (1851), C. R. 2 A. C. 33.

Careless mooring of vessels — *Negligence—Extraordinary storm—Vis major.*]—The plaintiff's tug "Vigilant" was moored at a wharf in Vancouver harbour, with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night, with no one in charge, and no fenders out on the side next the "Vigilant." During the night a heavy gale came up, and the "Lois" pounded the "Vigilant," causing her considerable damage:—*Held*, affirming the judgment of the Supreme Court of British Columbia, 11 B. C. R. 62, 24 C. L. T. 412, that, as the defendant was not a trespasser, he was not guilty of negligence, in the circumstances, in leaving his tug as he did, and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence. *Bailey* v. *Cates*, 25 C. L. T. 28, 35 S. C. R. 293.

Carrying passengers without a certificate — *Con. Stat. c. 115.*]—The respondents, who are the owners of the steamship "Regulus," were charged before the magistrate at St. John's with carrying passengers coastwise without having the certificate required by Con. Statutes c. 115, s. 4. Those on board were men who had been engaged in dismantling a whale factory at St. Lawrence, and who had induced the captain to take them to St. John's without charge. The magistrate dismissed the complaint, and at the request of the complainant stated a case for the opinion of the Court:—*Held*, that the "Regulus" was not a passenger ship, that those on board were not passengers, and that the magistrate was right in dismissing the complaint. *Bynne* v. *Regulus S. S. Co., Royal Gazette, Nfld.*, 22 Feb., 1910.

"Cash before delivery" — *Possession taken by vendee—Attachments by unpaid vendor and judgment creditor of vendee — Irregularity in process.*] — Appeal to Supreme Court of Canada from a judgment of the Court of King's Bench, Montreal, confirming a judgment of the Superior Court by which the sale of a steamer's hull, purporting to have been made under judicial process, was set aside. Appeal dismissed. *Brook* v. *Booker*, 6 E. L. R. 435.

Certificates of origin—Certificates of origin not a ground for confiscation. *The Brig American* (1809), C. R. 3 A. C. 368.

Certiorari — *Public wharf — Construction of statute abridging a public right — Lieut.-Governor in council has not power under 15 Vict. c. 34, s. 12, to impose rates on boats or head money on passengers using wharf—Term "vessel" does not comprehend "boat."*]—The 15 Vic. c. 34, s. 12, gives the Lieutenant-Governor-in-Council control of Minchin's Point wharf, with power to establish rates of wharfage for vessels, and to make such rules and regulations as he may think fit. By an order under this section it was provided that any boat or vessel used by any one but the licensed ferrymen in ferrying passengers or landing or taking off the same from the wharf should pay 1s. for each passenger landed or taken off; also 2s. 6d. for each time such boat or vessel should touch at or land passengers on the wharf, to be paid by the persons owning or working such boat or vessel. A boat of the defendant's, used in ferrying without hire, on 16th May, touched several times at the wharf and sixty passengers embarked in the boat from the wharf. Judgment had been given for plaintiff in the Mayor's Court, and it was now removed by *certiorari* to the Supreme Court. The defendant's counsel contended that under the Act the Governor-in-Council had power to impose rates on vessels only, that a boat was not a vessel and the order was therefore void as to boats; that the Act gave no power to impose a charge of head-money in respect of persons embarking from the wharf in such a boat:—*Held*, Peters, J., Hodgson, C.J., concurring, that the Act is one abridging a public right and must be strictly construed and it did not give power to impose such rates, and that the judgment in the Mayor's Court must be quashed. *Bourke* v. *Murphy* (1856), 1 P. E. I. R. 126.

Claim against tug.]—A party who has inscribed his case before Court of Review does not acquiesce in the judgment of Superior Court rejecting his claim by filing in Exchequer Court of Canada the same claim against owners of a tug which is advertised to be sold, said tug being the cause of damages sued for. *Webster* v. *International Paper Co.* (1909), 10 Que. P. R. 374, 17 R. de J. 266.

Claimant — *Further proof.*] — Further proof not allowed to a claimant, who had been guilty of fraud and perjury in a recent case. *The Three Brothers* (1808), C. R. 3, A. C. 348.

Condemnation of shipment — *Colourable transfer.*] — Condemnation of a shipment of the enemy's colonial produce, though colourably transferred to a neutral merchant, and bills given for the amount. *The Hope* (1809), C. R. 3, A. C. 328.

Contraband of war — *Carrying.*]—St. Domingo a French colony in 1805.—Arming for defence against French cruisers lawful. —Carrying contraband on outward voyage, confiscation. *The Happy Couple* (1808), C. R. 3, A. C. 334.

Contraband of war.]—Contraband on the outward voyage, ground of condemnation. *The United States* (1807), C. R. 3, A. C. 350.

Contract by master — *Effect of — Seizure of vessel — Action against Master alone—Particulars—Certificate.*]—A captain contracting in his own name for the needs of his vessel and its navigation, at a place where neither the owner nor the agent of the vessel lives, binds himself, the vessel, and its owner. 2. The vessel may be seized for a debt contracted for the purpose of a voyage, or for the fees of a consul, in an action begun against a captain in his capacity as such, and without making the owners parties. 3. Among the principal provisions of the certificate of ownership which the *proces-verbal* of the seizure must contain, when production of the certificate is refused, are the number of the vessel and its tonnage engraved upon the main beam; and the bailiff may cause the hatchway to be opened in order to find out these particulars; and upon refusal an order for its opening may be made. *Fréchette* v. *Martin*, 21 Que. S. C. 417.

Contract of affreightment — *Construction — Control of vessel left to owner—Payment of freight—Lien on cargo—Saisie-conservatoire.*]—"I agree to engage you at $15.50 per day for the season of navigation of 1906, and I guarantee you 6 months' work. After 6 months, from day to day, I reserve to myself the privilege of restoring your barge either at Montreal or at Quebec at the end of the season." This agreement was signed "St. Lawrence S. S. Co., W. G. McConell." There had been a previous contract by which one of the signers of the document alone had loaded the barge of the owner, who was to navigate it himself at $15.50 per day during the season of 1906:—*Held*, that the agreement did not operate as a novation; the effect was only to add a new debtor engaging himself, jointly and severally with the charterer, to the owner. 2. A contract in the above terms does not take away from the owner the control of the vessel, because the charterer has not the exclusive control of the vessel; the only obligation which arises from it is that the owner of the vessel is obliged to make the voyage indicated, receive the cargoes consigned to the charterer or unload them, as the case may be, according to the orders and directions of the latter. 3. Hence it follows that the owner preserving the possession of his vessel has the right of retention of the cargo for the payment of his freight, and may accompany the remedy which he exercises against the charterer for such payment by a conservatory seizure. *Dancau* v. *St. Lawrence S. S. Co.*, 33 Que. S. C. 9.

Contract to build a ship — *Principal and agent — Right of lien for money advanced.*] — A mercantile house at Newry directs a house at Quebec to contract for the building of a ship, for which they (the Newry House) would send out the rigging. The Quebec House enter into a contract with some ship-builders accordingly. The Newry House then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Quebec House:—*Held*, that the property in it was vested in the Newry House, and

that the Quebec House had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builder and had registered it in the name of one of the partners in their house. Judgments of the Court of Appeal and of the Court of King's Bench at Quebec, set aside. *Reid* v. *Rogerson* (1893), C. R. 1 A. C. 8.

Contract to sell—Co-owners—Partnership—Authority of one to bind the other — Ratification — Specific performance — Contract under seal—Co-owner not named — Principal and agent—Evidence of agency — Bill of sale—Possession. *Bentley* v. *Murphy*, 1 O. W. R. 273, 726, 845, 2 O. W. R. 1014.

Contract to serve as fisherman on shares — *Desertion — Forfeiture of share —"Season"—"Voyage" — Assault — Provocation.*]—The plaintiff shipped as a fisherman for the "present fishing season" upon a schooner of which the defendant was master and part owner. The term "fishing season" was defined to mean, from the date when the vessel set out on her first trip until the 20th October of the same year, but with power in the master to terminate the season at an earlier date. The schooner left port early in May, 1904, and returned and landed her catch on the 5th July, and then refitted for another trip. On the second trip the plaintiff left the vessel, and payment of his share of the proceeds of the first trip was refused, under a clause in the articles providing that if any of the crew refused duty, or absented themselves from the vessel when required, they should forfeit the whole of their share of the proceeds of that fishing voyage in the vessel: — *Held*, that the words "fishing season" and "voyage" were not to be taken in the same sense, but that it was contemplated that there might be more than one fishing voyage in a season, and that the plaintiff, by leaving the vessel before the end of the season, did not forfeit his share of the proceeds of the voyage then terminated:—*Held*, also, that insulting or profane language used by the plaintiff towards the defendant was not a justification for an assault committed by the latter upon the former. *Wentzell* v. *Winacht*, 3 E. L. R. 94, 41 N. S. R. 406.

Contract with owners — *Master's powers.*]—The master of a ship has no express or implied power to alter or vary a contract made directly with the owners. *Perry* v. *P. E. I. Steam Nav. Co.* (1874), 1 P. E. I R. 476.

Conversion—*Ship seized under warrant issued on judgment for seamen's wages—Magistrate — Jurisdiction — Justification.*]—Appeal from the judgment of Laurence, J., in favour of defendant in an action of replevin to recover possession. *Horwood* v. *Nicholson* (N.S. 1911), 9 E. L. R. 309.

Dominion steamer — *Negligence — Stoker undertaking to perform an engineer's duty at his request but contrary to chief engineer's instructions — Liability.*] — The suppliant was employed as a stoker on board the Dominion steamer "Montcalm." Instructions had been given by the chief engineer of the ship, and communicated to the suppliant, that "no employee on board, including stoker or 'graisseur,' was to touch the machinery without a special order from the chief engineer." On the evening before the accident to the suppliant, one of the engineers, who was ill, asked him if he was competent to start the machinery. The suppliant replied that he was, and the said engineer asked him to start the machinery for him early the following morning. To oblige the latter, the suppliant undertook to do this. The machinery was in perfect order, but owing to the negligence or unskilfulness of the suppliant in handling a steam pump an accident happened by which he lost three fingers of his left hand:—*Held*, upon the facts, that the Crown was not liable under c. (20) of c. 140, R. S. C. 1906. *Lamontagne* v. *The King* (1909), 12 E. C. R. 284, 29 L. T. 714.

Exchequer Court of Can. as an Admiralty Court constituted under the Colonial Courts of Admiralty Act (Imp. 1890), and the Admiralty Act (Dom. 1891), has no greater jurisdiction than the Admiralty jurisdiction of High Court in Eng. In an action in *rem* brought to enforce payment of money due upon a mortgage given to builders to secure contract price of a ship:—*Held*, that owners of ship are not entitled by way of defence to set-off a claim for unliquidated damages against mortgagees for alleged breach of contract relating to building of the ship. *Mondel* v. *Steel*, 8 M. & W. 858, 10 L. J. Ex. 426, explained and distinguished. Judgments of Supreme Court of Can., 40 S. C. R. 418; Exchequer Court of Can., 11 Ex. C. R. 214, and Martin, J., at trial, 10 Ex. C. R. 403, set aside. *Bow McLachlan* v. "*Camosun*," *C. R.* [1909] A. C. 306, [1909] A. C. 597, 79 L. J. P. C. 17, 25 T. L. R. 833.

Fishing voyage — *Liability for supplies—Owner—Contract.*]—In an action by plaintiff, part owner of a fishing vessel, against defendant, managing owner of the vessel, for supplies furnished and advances made to the captain and crew in connection with a fishing voyage, it appeared that prior to the time of the alleged furnishing of supplies, etc., the vessel was let to the captain on the "quarter lay," viz., on terms that the captain and crew should prosecute the voyage, and should, at the end of the fishing season, or sooner, dispose of the fish caught and render to the owners of the vessel one-quarter of the proceeds, the remaining three-quarters to be the property of and to be divided among the captain and crew:—*Held*, there being no legal liability on the part of defendant, that it was incumbent upon plaintiff to establish a contract against defendant, and there being no evidence, express or implied, of such contract, the action should be dismissed. *Crowell* v. *Smith*, 32 N. S. R. 505.

Foreign seaman on British ship — *Committal for trial.*]—Admiralty jurisdiction of England—Jurisdiction of justice—Consent of Governor-General—Criminal Code, s. 591—Application to preliminary proceedings—Imperial Territorial Waters Jurisdiction Act, 1878, s. 4. *R.* v. *Tano* (B.C.) (1909), 10 W. L. R. 522.

Foreign vessel — *Foreign judgment—Comity of Courts—Account between co-owners.*]—The ship was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charterparty as security for such advance. By the last mentioned instrument, the control and possession of the ship were handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to a United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent Court in the United States the rights of S., under the instruments mentioned, were held to give him priority over the claim of R., and he was confirmed in possession of the ship. The plaintiff herein was the owner of 1,764 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V.:—*Held*, that as by the proceedings taken in the Exchequer Court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent Court in the United States, the action should be dismissed. *Castrique* v. *Imrie*, L. R. 4 H. L. 414, referred to. *Semble*, that in so far as the plaintiff sought to obtain an account between the parties who were co-owners the Court would have directed an account if it had been shewn that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan. *Michado* v. *The "Hattie and Lottie,"* 9 Ex. C. R. 11.

Foreign vessel—*Illegal fishing—Seizure of vessel — Evidence of vessel's position.*]—The American vessel "Kitty D." was seized by the government cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture, the evidence was conflicting as to the position of both vessels at the time of seizure, and a local Judge in Admiralty held (2 O. W. R. 1065) that the vessel seized was not in Canadian waters at the time. On appeal by the Crown:—*Held*, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances, and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the "Kitty D." and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book; and as the local Judge had misapprehended the facts as to the course sailed by the "Petrel" and the rules of navigation; the evidence of the officers of the "Petrel" must be accepted; and it established that the "Kitty D." had been fishing in Canadian waters, and her seizure was lawful. *Rex* v. *The "Kitty D.,"* 24 C. L. T. 261, 34 S. C. R. 673. P. C. reversed above judgment and restored judgment of Hodgins, Loc. J., in Adm., 2 O. W. R. 1065. See 26 C. L. T. 75.

Foreign vessel—*Illegal fishing—Three-mile limit—Capture outside limit — Continuous pursuit—Jurisdiction—Governments of Dominion and province.*]—The American schooner "North" was discovered by the Dominion government steamer "Kestrel" hove-to engaged in halibut fishing in Quatsino Sound, Vancouver Island, and within the three-mile limit. She had at the time all her fishing boats out, but, on observing the approach of the "Kestrel" some four or five miles off, but also within the three-mile limit, the schooner picked up two of her dories and stood out to sea. The "Kestrel" made pursuit, deviating slightly from her course in such pursuit to pick up one of the schooner's fishing boats with its crew, and overhauled and seized the schooner about one and three-quarter miles outside the three-mile limit. At the time of seizure there were freshly caught halibut lying about on the schooner's decks:—*Held*, that the pursuit having been begun within the three-mile limit, and having been continuous, the seizure was lawful. The stopping to pick up the fishing boat and its crew, as evidence of the offence committed by the schooner, was not a break in the continuity of the pursuit. Observations as to the jurisdiction of Canada and the province, respectively, over fisheries. *Rex* v. *The "North,"* 11 B. C. R. 473, 2 W. L. R. 74.

Foundering at sea — *Presumption — Accident — Vis major—Seaworthiness — Responsibility of owner to crew—Warranty —Inspection— R. S. C. c. 113, s. 342 — Criminal consequences—Master and servant —Liability of owner for fault of captain.*]—When a ship founders at sea without any one knowing the cause, there is a presumption that the disaster is the result of its unseaworthy state. Where the owner sets up accident or *vis major*, he is bound to prove it. 2. The owner of a ship warrants its navigability to the crew, and is not released from the responsibility which proceeds from this warranty by an inspection of the ship, made according to the terms of s. 587 *et seq.* of R. S. C. 1906 c. 113. Statutes affecting civil responsibility being beyond the competence of the Federal Parliament, the reservation in s. 342 of the same chapter touching the sending of ships to sea "reasonable and justifiable," applies only to the criminal consequences of the sending ships to sea in an unseaworthy state. 3. The owner of the ship is responsible for the fault of the master as employers are for that of their employees, according to the terms of Art. 1054, C. C. *Grenier* v. *Connolly*, 34 Que. S. C. 405.

Freight — *Tackle — Freight.*] — The sentence of a Vice-Admiralty Court having condemned the ship with her tackle, freight, etc., and the vessel being afterwards restored upon appeal, a lien for freight upon the cargo accrues to the master or owners. *The Jennet* (1810), C. R. 3, A. C. 332.

Further proof of property.]—Further proof of property admitted as to a ship and cargo claimed for a neutral merchant, although both appear to have been purchased in the enemy's colony by his asserted resi-

dent agent, without particular instructions to make the purchase, but acting under a general permission given him to originate speculations for account of the neutral merchant. *The Mercury* (1809), C. R. 3, A. C. 324.

Illegal fishing — *Foreign vessel—Evidence—Condemnation.*] — The method of catching fish has no bearing upon a violation of the provisions of R. S. C. c. 94. The fact of taking fish without a license in the territorial waters of Canada constitutes the offence. *Semble*, that coming into the territorial waters of Canada to cure fish caught outside the limits of such waters, will subject the offending vessel to forfeiture. *Rex* v. *The "Samoset,"* 25 C. L. T. 128, 9 Ex. C. R. 348.

Injury to boom in river — Negligence —Right to moor boom along bank—Interference with navigation—Nuisance—Reasonable user—Action *in rem*—Delay in commencing—Change in ownership—Damages—Reference. *Kennedy* v. *The "Surrey* (B. C.), 2 W. L. R. 550.

Injury to raft from swells — Negligence—Onus—Rules of navigation. *Adams* v. *British Yukon Navigation Co.* (Y.T.), 2 W. L. R. 476.

Joint capture.] — Joint capture, conjunct expedition pleaded in an allegation not proved by the evidence actual and constructive, assistance not proved. *La Furieuse* (1811), C. R. 3, A. C. 379.

Joint property — *Proof.*]—Proof of a joint property with enemy in a shipment subjects such to condemnation. If the shipment be innocent it does not necessarily affect the ship. *The Zulema* (1810), C. R. 3, A. C. 320.

Jurisdiction of Exchequer Court of Canada — *Claim under mortgage on ship —Action in rem—Pleading—Abatement of contract price—Defects in construction — Damages.*] — In an action *in rem* by the builders of a ship to enforce a mortgage thereon, given to them on account of the contract price for its construction, the owners, for whom the ship was built, may plead as a defence *pro tanto* that the ship was not constructed according to specifications, and claim an abatement of the price in consequence of such default, and that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage. *Bow, McLachlan & Co.* v. *The "Camosun,"* 40 S. C. R. 418. See 10 Ex. C. R. 403, 11 Ex. C. R. 214, 26 C. L. T. 780.

License to trade.] — Trade to Vera Cruz.—License not produced, and proof of property not satisfactory, on further proof. —Condemned. *The Fly* (1809), C. R. 3, A. C. 357.

Loading of cargo — *Superintendent —Injury to workman—Defective cable — Liability of master of ship.*] — When a hold-stower is specially employed to see to the loading and unloading of the cargo of a vessel, the captain of the vessel is not responsible for an accident happening in consequence of defects in a cable belonging to the ship, of which the hold-stower had the use at the time of the accident. *Bédard* v. *Perry*, 9 Que. P. R. 81.

Local Judge in Admiralty has jurisdiction under the Admiralty Act, R. S. C., c. 141, s. 19, s.-s. 2, to order the transfer of an action from the registry in his district to the registry of another Admiralty district in Canada. *Montreal Transportation Co.* v. *"Norwalk,"* 11 Ex. C. R. 321.

Maritime lien — *Goods supplied without knowledge of owners — Attachment of ship—Parties—Costs.*]—There is a privilege under Art. 2383 (5), C. C., upon a steamer for coal supplied to her on her last voyage by the order of the master and of the charterers, through their agent, without the knowledge or participation of the owners, who incur no personal liability therefor. Such a privilege may be enforced by attachment of the vessel before judgment, and the owners may be made parties to the suit *pour voir dire*, but they will be liable for costs in case of contestation. *Inverness Rw. and Coal Co.* v. *Canadinn Lines Limited*, 29 Que. S. C. 151.

Materials used in construction and repair — *Lien — Continuance of.*]—One who furnishes materials which are used in the construction and repair of a vessel intended for inland navigation has a right to the *"privilége de dernier equipeur."* The right is not limited to the last voyage, nor confined to the person who last furnishes such materials, but continues during the period that elapses between two seasons of navigation. *Cantin* v. *Brulé*, 26 Que. S. C. 40.

Medical attendance — *Duty of shipowner.*] — A ship-owner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. *Morgan* v. *British Yukon Navigation Co.*, 24 C. L. T. 38, 10 B. C. R. 112.

Merchant Shipping Act, 1854 — *United States ship—Sailing under certificate illegally granted liable to forfeiture.*] — E. Marshall, a citizen of the United States, in 1867, built the "S. G. Marshall" and, knowing he could not get a British register in his own name, took his son, a boy of eight years, to the registrar's office, where he had the builder's certificate filled up, stating E. Marshall, junior (the son), to be the owner, he himself signing as builder. The declaration of ownership was also filled up with the name of E. Marshall, junior, and signed by the boy making his mark. The boy's real name was E. H. Marshall, and he was a British subject. The vessel was always navigated under the register so obtained, E. Marshall, the father, commanding her. In 1870 she was seized while fishing about eight hundred yards from the shore, by Captain Hardinge of the "Valorous," one of H. M. ships engaged in protecting the fisheries. The questions raised were, (1) whether the vessel was a British ship, and (2) whether she was not liable to forfeiture for sailing under a register illegally issued, flying the British flag and falsely assuming the British national character:—*Held* (Peters, J.), that she was

liable to forfeiture on the latter charge. *R.* v. "*S. G. Marshall*" (1870), 1 P. E. I. R. 316.

Merchant Shipping Act, 1854—*Vessel, "her tackle, apparel and furniture" includes her equipments necessary for the purposes of her voyage and adventure—Forfeiture.*]—Under the general order of the Court of Vice-Admiralty for the sale of the "S. G. Marshall," "her tackle, apparel and furniture," the defendant, who was marshal of that Court, sold a seine, a lot of barrels, salt, bait, bait-mill, nets and a seine boat, which she had on board, though they were not mentioned before the Vice-Admiralty Court nor any judgment given against them specifically. The plaintiffs, who were joint owners of these articles, and of all other outfits on board, brought an action of trespass against the defendant. At the trial a verdict was found for plaintiffs, and leave given defendant to move to set it aside and to enter a verdict in his favour. The question then was whether these articles, being the vessel's outfit for her voyage and adventure, were included in her "tackle," apparel and furniture:" — *Held*, (Peters, J., Hodgson, C.J., concurring; Hensley, J., dissenting), that the articles were part of the ship's tackle, etc., and that the verdict must be entered for the defendant. *Hall & Marshall* v. *Yates* (1871), 1 P. E. I. R. 331.

Mortgage — *Registration — Priority — Right of execution creditors against holder of unregistered mortgage—Bills of Sale Act —Exemption of ships from provisions of — Merchants Shipping Act.*] — In an interpleader issue held, that there is nothing in the Imperial Act which requires a mortgage of a ship to be registered on penalty of being postponed to an execution creditor. The Bills of Sale Act above does not apply to ships:—*Held*, that the defendants under their mortgage are entitled to the ship as against the plaintiffs, execution creditors. *Imperial Timber and Trading Co.* v. *Henderson* (B.C.), 10 W. L. R. 595.

Mortgage — *Security for "account current"—Construction — Advances.*] — The plaintiff, being indebted to B. on a current account, gave B. a mortgage of a vessel of which he was owner. The mortgage contained a recital that B. had advanced and was advancing certain sums of money to the plaintiff for purposes connected with shipping and trade, the amount of which was to be ascertained and the account current balanced on the 31st December, yearly. B., in addition to supplying the plaintiff with cash and goods, procured goods from other persons to a considerable amount, paying for them in cash and delivering them to the plaintiff:—*Held*, that the trial Judge was right in declining to restrict the terms of the mortgage to cash advanced for purposes connected with shipping and trade, and that in interpreting the document, the nature and course of dealing between the parties must be taken into consideration, and that the words "account current" did not mean money advanced only, but clearly included money used in advances and such articles as had been charged in accounts current from year to year. *Cleveland* v. *Boak*, 39 N. S. R. 39, 1 E. L. R. 64.

Motions to consolidate and transfer actions *from one registry to another — Quebec Admiralty District—Jurisdiction of Local Judge and Deputy Judge to remove causes.*]—There is at present only one registry in admiralty district of Quebec, and the provisions of the Admiralty Act, 1891, as amended by s. 3 of the Act, 63 & 64 V. c. 45 (now R. S. C. 1906, c. 141, s. 18 (2), which enact that when a suit has been instituted in any registry no further suit shall be instituted in respect of same matter in any other registry of the Court, do not prevent a further proceeding being instituted in the office of the deputy registrar at Montreal, in respect of the same matter as to which prior proceedings have been instituted in the registry at Quebec.—2. The deputy Judge has jurisdiction equally with the local Judge in Admiralty, in cases instituted within Que. admiralty district, to order consolidation of such cases for purposes of trial. *Bouchard* v. *Montreal Grain Elevator Co., Montreal Grain Elevating Co.* v. "*Gaspesien*," 11 Ex. C. R. 220.

Necessaries — "*Owner*" — "*Domiciled*" —*Lien.*]—An action *in rem* for necessaries will not lie against a ship if supplied to a charterer, who also engages the crew in a port other than her home port, if it is shewn that at the time the writ issued an owner or part owner was domiciled in Canada. 2. The word "owner" used in s. 5 of the Imperial Admiralty Act of 1861 (which is in force in Canada by virtue of the Colonial Courts of Admiralty Act, 1890, and the Canada Admiralty Act, 1891), means "registered owner" or "person entitled to be registered as owner," and not a *pro hac vice* owner; the word "Canada" is to be read in the place of "England and Wales;" and the word "domiciled" must be understood in its ordinary legal sense. *Semble*, that wherever a maritime lien is created in favour of any one against a ship, it is not essential to establish further personal liability against the owner. *Rochester and Pittsburg Coal and Iron Co.* v. *The "Garden City,"* 7 Ex. C. R. 34.

Necessaries — *Owner domiciled in Canada—Jurisdiction.*]—No action will lie on the Admiralty side of the Exchequer Court against a ship for necessaries when the owner of the ship at the time of the institution of the action is domiciled in Canada. *Rochester and Pittsburg Coal and Iron Co.* v. *The "Garden City,"* 21 C. L. T. 283, 7 Ex. C. R. 94.

"**Owner**" — *Action against — Expenses of seaman — Evidence — Board of trade— Certificate — Merchant Shipping Act.*]—In an action brought before the police magistrate for the city of St. John to recover hospital fees, board, and cost of conveying from Hong Kong to London a seaman of the ship "Troop," a certificate of the payment of the said expenses by the board of trade, signed by the assistant secretary of the board, was put in evidence. The present ownership of the ship was proved by a copy of the registry certified under the hand of the Registrar-General at London, the ship being registered at Liverpool. The expenses for which the action was brought were incurred in 1891, and the defendants did not

become owners of the ship until 1892: — *Held*, that the words "owner for the time being" in s. 213 of the Merchant Shipping Act, 1854, mean the person who is owner when the action is brought, and not him who was owner when the expenses were incurred. 2. That the payment of the expenses, etc., was sufficiently proved by the certificate of the assistant secretary of the board of trade: s. 227. 3. That the certificate of the Registrar-General was insufficient under s. 107 to prove the ownership, there being nothing to shew that he had charge of the original registry. *Ex p. Troop Sailing Ship Co.*, 34 N. B. R. 451.

Papers concealed and fraud detected.—*The Venus* (1809), C. R. 3 A. C. 346.

Perils of the sea — Unseaworthy ship —Evidence—Warranty—Inspection of shipping — Certificate of seaworthiness—Construction of statute—R. S. C. 1906, c. 183, s. 342—Drowning of sailors—Negligence of master—Liability of owner. *Connolly* v. *Grenier, Connolly* v. *Martel*, 42 S. C. R. 242.

Personal injury done by — *Jurisdiction of Admiralty Court — Negligence — Sufficiency of machinery—Fellow-workmen—Evidence — Hospital Expenses—Particulars —Summons.*]—An engineer while working on a steamer was injured by the breaking of a stop valve: — *Held*, that the Admiralty Court has jurisdiction to try a suit for damages done by a ship to a person. 2. Adequacy of construction is to be determined by the generally approved use at the time of manufacture; and the absence of the best possible construction is not of itself conclusive evidence of negligence. 3. The officers of the ship as well as the men are fellow-workmen and for the negligence of the one the steamer is not liable to the other. 4. Improving machinery after an accident is not evidence of insufficiency of its former state. 5. A seaman shipped in Canada and injured in Canada has no claim for hospital expenses under the Merchants Shipping Act, 1894. 6. A plaintiff's claim is confined to the particulars indorsed on the summons. *Wyman* v. *The "Duart Castle,"* 6 Ex. C. R. 387.

Possession fees.]—Where the marshal had been in possession of a ship under warrants issued simultaneously in two cases, he was allowed only one set of fees. *The Rio Lima*, L. R. 4 Ad. & Ec. 157, followed. *Sundback* v. *The "Saga,"* 6 Ex. C. R. 305.

Practice—*Third parties—Persons out of jurisdiction.*]—There is no provision in the Rules of Admiralty Division of Exchequer Court for an order for issue of third party notice under an alleged indemnity, especially if parties sought to be brought into Court in that way reside out of jurisdiction. *MacKay* v. *"Polluæ,"* 11 Ex. C. R. 210, 12 O. W. R. 751.

Repairs — Advances—Attaching creditors—Priority — Equitable lien—Notice — General average — Adjuster's commission. *Halifax Graving Dock Co.* v. *Magliulo*, 5 E. L. R. 553.

Sale of a ship — *Mode of putting in default to sign deed—Can judgment serve as a bill of sale?*]—In an action demanding the carrying out of an agreement for the sale of a vessel registered as a ship, it appeared that by the contract, it was agreed that part of the price would be paid cash on execution of the bill of sale and the balance as specified future dates with interest. It further appeared that the purchaser (plaintiff) had tendered (notarially) the cash portion of the price and called upon the seller (defendant) to sign a bill of sale by the terms of which it was declared that the entire price had been paid. It was, however, also proved that a deed of "mortgage" for the balance of price had been drawn up and that the plaintiff had offered to sign in defendant's presence upon the latter signing the bill of sale and procuring registry, which offer was renewed by the action. That there had been a sufficient putting in default of the defendant notwithstanding the terms of the draft bill of sale whereby payment of the entire price purported to have been acknowledged, the seller's claim for the balance in such case being properly established by separate deed by way of "mortgage." That though it would not be adjudged in such a cause, that, in default of the defendant duly executing the bill of sale, the judgment shall avail as such bill of title (*Fox* v. *Beaton*, 10 L. N. 387), the defendant would nevertheless be adjudged to sign and execute the bill of sale and in case of his default so to do, leave would be granted to the plaintiff to have an officer of the Court directed to make a declaration of transfer of the ship pursuant to the Imperial Act, 57-58 Vict. s. 60, s. 29 (printed in Statutes of Canada of 1895) R. S. Q., Arts. 6257 and 6258. *Noel* v. *Gagnon* (1909), 16 Que. R. de J. 267.

Sale of vessel—*Statute of Frauds, R. S (1900) c. 141, s. 11—Sufficiency of memorandum.*]—A statement in a letter written to a third person by one of the defendants, that he had an offer from plaintiff for the purchase of a schooner, but not stating in the letter that he had accepted it, is not a sufficient memorandum in writing within The Statute of Frauds, R. S. N. S., 1900, c. 141, s. 11., to enable the party making the offer to recover damages for breach of contract against the writer for failure to deliver the schooner, the trial Judge having found that the contract had been orally made, by an offer and its acceptance, on contradictory but insufficient evidence.—*Per* Graham, E.J.—The contents of the letter could not be used as proved, unless loss of the original letter was accounted for. *Allen* v. *Graves*, 43 N. S. R. 249, 6 E. L. R. 347.

Shares in ship — *Receiver — Writ of summons — Service out of jurisdiction.*] — Action by execution creditors against a mortgagee of a British ship to recover the surplus of sale proceeds under power of sale: — *Held*, that the creditors not having got a receiver appointed of the shares, they had passed to the purchaser. 2. That an order for service out of the jurisdiction on the mortgagee could not be made. *Wilson* v. *Donald*, 7 B. C. L. R. 33.

Towage — *Contract — Negligence — Inevitable accident — Damages.*]—Where a towage contract is made, it implies an undertaking that each party will duly perform his share of it; that proper skill and diligence

will be used on board both tug and tow; and that neither party by neglect or mismanagement will create unnecessary risks to the other, or increase any risk which might be incidental to the service undertaken.—2. If, in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action will arise. *The "Julia,"* 14 Moo. P. C. 210, at p. 230, followed. *Read* v. *The "Lillie,"* 11 Ex. C. R. 274.

Towage — *Injury to tow — Liability of owners — Evidence — New trial.*]—Appeal (pursuant to 62 & 63 V. c. 11, s. 7) from a judgment of Dugas, J., in the Territorial Court of the Yukon. The defendants' steamer, which previously had been employed carrying freight and passengers between White Horse and Dawson, had gone out of commission on the 23rd September, 1898, and on that day, and while on her way down Lake Lebarge to winter quarters, she took in tow the plaintiffs' scow loaded with goods. After proceeding some way the weather became bad, and in endeavouring to get into shelter the scow foundered, and the whole cargo was lost. In an action for damages against the owners of the steamer, evidence was tendered by the owners that those in charge of the steamer had been particularly warned not to do any towing, but this evidence (being objected to by the plaintiffs) was ruled out. Dugas, J., *held* that the defendants were common carriers and therefore liable. An appeal from the judgment was allowed with costs, but the plaintiffs were granted the option of a new trial upon payment of the costs of the first trial. *Courtnay* v. *Canadian Development Co.*, 21 C. L. T. 319, 8 B. C. R. 53.

Transport — *"Foreign-going ships" — Imperial Merchant Shipping Act — Sailors— Certificate of discharge — Penalty — Conviction — Right of appeal.*]—A ship engaged in maritime transport service between Quebec and Anticosti does not come under the designation "foreign-going ship" in the Imperial Merchant Shipping Act, 1894, s. 127.—The captain of such a ship is not obliged to deliver to his crew, at the end of their engagement, the certificate of discharge provided for by s. 128 of that Act, and is not, on that ground, liable to the penalty imposed upon persons for disobedience thereto.—An appeal lies to the Court of King's Bench, criminal side, from a decision of a police magistrate condemning a captain to pay the penalty provided by s. 128. *Bélanger* v. *Gagnon*, 14 Que. K. B. 340.

Vessel in distress — *Borrowing money to defray expense of discharging cargo — General average — Equitable assignment — Authority of master — Notice — "Future properties, possibilities, or expectations."*]—Appeal from *Halifax* v. *Magliulo*, 6 E. L. R. 103, dismissed. *Halifax* v. *Williams*, 6 E. L. R. 333.

Vessel in distress in foreign port — *Authority of master to borrow money—Agreement in writing, charging funds—Sufficiency of—Trust — Notice.*]—The Italian barque "Affezione," with a cargo of lumber, bound from a port in Nova Scotia to Buenos Ayres, put into H. in distress, leaking badly, after having cut away her sails and jettisoned her deck load at sea. It was necessary to discharge the cargo immediately and to make repairs, and the master, being without funds for that purpose, borrowed a sum of money from plaintiff under an agreement in writing whereby it was provided that any money received by the master while in Halifax from the owners, on account of advanced freight, general average or other charges, or upon bottomry bonds or other security, &c., should be applied, first, in payment of the sum of money borrowed from plaintiff, with interest, or any unpaid balance thereof.—Subsequently F., representing the insurance upon cargo, upon giving the usual bond, obtained possession of the cargo and sold it, realizing a considerable sum of money, and the master gave plaintiff an order upon the adjuster S., for the amount due him, which S. accepted, payable when in funds.—As between plaintiff and other persons who sought to attach the money in the hands of F., in proceedings against the owners as absent or absconding debtors: — *Held*, that, under the circumstances, the master, being in a foreign port, had a right to borrow the money and to give the documents which he did, and that express authority from the owners might be inferred. —*Also*, that the contribution from the cargo to the ship was sufficiently described and could be easily identified, and the fact that other possible funds were mentioned, all being on account of the barque or her cargo, did not render the description too wide.—*Also*, that the agreement given by the master met all the requirements of law, and that F., who had notice of the trust created in respect to the fund, and particularly of the order which it was contemplated would reach it when collected by S., could not pay it over to anyone else, and would be discharged by paying it over to him.—Drysdale, J., dissented on the ground that there must be an intention to deal with or charge a particular fund, and that no such intention was shewn. *Halifax Graving Dock Co.* v. *Magliulo*, 43 N. S. R. 174, 5 E. L. R. 553, affirmed 6 E. L. R. 333.

SHOOTING WITH INTENT.

See CRIMINAL LAW.

SLANDER.

See CONTEMPT OF COURT—COSTS—CRIMINAL LAW — DEFAMATION — INJUNCTION — PARTICULARS—REVIVOR.

SMALL DEBT PROCEDURE.

Counterclaim — Discontinuance of action — Practice — Summary judgment — Default in reply. *Cosgrave* v. *Duchek* (N.W.T.), 3 W. L. R. 194.

Debt — *Conversion — Tort waived — Goods sold — Rule 602.*]—A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may

be sued under the small debt procedure. The plaintiff, in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort, and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service, upon the ground that the claim was not for one debt within the meaning of Rule 602, which brings "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100, within the small debt procedure, was refused. The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned. *Henry* v. *Mageau*, 5 Terr. L. R. 512.

Judicature Ordinance — *Counterclaim — Costs.*] — In an action under the small debt procedure, the defendant may under Rule 612 set up a counterclaim, the amount of which exceeds the small debt jurisdiction. Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of 10 per cent., on the amount under Rule 617, which extends to counterclaims. *Cox* v. *Christie*, 5 Terr. L. R. 475.

Nature of claims — "Debt"—Claim for value of goods—Agreement to deliver—Damages for non-delivery—Two claims — One within small debt jurisdiction. *Cosgrave* v. *Duckeck* (N.W.T.), 3 W. L. R. 320.

Nature of claims — *"Debt"—Claim for value of goods—Rent payable in kind —Damages for non-delivery—Two claims— One within small debt jurisdiction.*]—In an action for $60, being the value of twelve loads of straw at $5 a load, the unpaid balance of rent for a farm leased by the plaintiff to the defendant at a rental of a two-thirds share of the whole crop, and also to recover $15 for money had and received: —*Held*, that the claim for the value of the straw was not properly brought under the Small Debt Procedure. The words "all claims and demands for debt, whether payable in money or otherwise," do not extend beyond cases where there is a debt created in the proper sense of the word, clearly recognised as such, and there is an agreement that such debt is to be paid in something other than money.—*Held*, also, that, although a claim clearly within the Small Debt Procedure was joined with such claim, the process was nevertheless bad and must be set aside. *Paradis* v. *Horton*, 3 W. L. R. 317, 6 Terr. L. R. 319.

SMUGGLING.

See BILLS AND NOTES — CRIMINAL LAW—REVENUE.

SOCAGE.

See GUARDIAN.

SOLICITOR.

1. ADMISSION — SUSPENSION, ETC., 4046.
2. AUTHORITY TO ACT, 4050.
3. CHANGING SOLICITORS, 4054.
4. COSTS, 4055.
   i. *Agreements as to*, 4055.
   ii. *Recovery of*, 4057.
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5. NEGLIGENCE, 4068.
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1. ADMISSION — SUSPENSION, ETC.

Advocate — Motion to suspend—Allegations of misconduct — Misappropriation of money—Analysis of evidence—Disproval of charge. *Re Harris* (N. W. T.), 3 W. L. R. 167.

Annual certificate — *Disqualification of advocate for non-payment of annual fee.*] —*Held*, that an advocate who neglects to pay his annual fee to the Law Society becomes disqualified from practising only after the expiry of the service of time limited in the notice required to be given by the rules. *Maxfield* v. *Inskip* (1904), 6 Terr. L. R. 81.

Application of Law Society to strike off roll or suspend — *Improper retention of client's moneys — Restitution — Release —Deception of client — False statements on oath — Weight of oath of solicitor—Punishment — Suspension — Conditions of removal.*]—Under sec. 52 of the Alberta Legal Profession Act, it is specifically a ground for a punishment of a solicitor that he has made default in payment of a client's money, in addition to what would be a ground in England: and the solicitor, by making payment after default, cannot escape the consequence of his breach of trust in neglecting to pay at the time when he should have done so. Upon an application against the solicitor, the Court will not accept as conclusive a statement on oath made by him if in conflict with the sworn statement of others. The solicitor is entitled to require that the case against him shall be proved, and, all other things being equal, his statement will be accepted in preference to a statement by some one else to the contrary. Upon an application by the Law Society of Alberta to strike off the roll or suspend a solicitor charged with neglecting and refusing to pay over moneys in his hands collected for a client, where the solicitor, before the final hearing, had paid over a large part of it and obtained a release in full from the client, the Court found that the client had been deceived as to the amount received for the client, and that the statements sworn to by the solicitor about his communications to his client regarding the amount received were not true. It was ordered that the solicitor should be suspended until a subsequent sittings of the Court, at which such further disposition of the application should be made as should

seem proper, leave being reserved to either party to apply at such sittings, and it being a condition to any order terminating the suspension that it should be shewn that the solicitor had paid to the client the balance still in his hands, and to the Law Society their costs of the application. *Re Harris* (1910), 13 W. L. R. 131.

Conviction for usurping functions of —*Resolution of Bar Council — Person assuming to act as advocate — Accountant.*] —The defendant, a chartered accountant, sent out a notice, at the head of which were printed his name and description as chartered accountant, requesting payment of a sum of money due to an estate, and concluding in these words, "If I do not hear from you within three days, action will be taken for recovery without notice." At the foot of the letter, there was an entry "Charges, $1.50." He was adjudged to pay a fine of $25 under s. 3562a of R. S. Q. as amended by 61 V. c. 27, s. 5:—*Held*, reversing that judgment, that a resolution of the council of the Bar of the section, authorising the syndic to institute a prosecution, under s.-s. b of s. 5, 61 V. c. 27, for usurping the functions of the profession, was insufficient to support a condemnation (apparently based on s.-s. f of the same section), for acting in such manner as to lead to the belief that he (the defendant) was authorised to fulfil the office of or to act as an advocate. 2. Even if the resolution were sufficient, the defendant, in the circumstances stated above, was not guilty of practising as an advocate or of usurping the functions of the profession, nor was he guilty of acting in such manner as to lead to the belief that he was authorised to act as an advocate. Chartered accountants are authorised by law to collect debts, and, although the demand of $1.50 for charges was illegal, it was not sufficient to shew an intention to lead the recipient of the letter to the belief that the writer was authorised to act as an advocate, his true description as a chartered accountant being printed at the head. *Montreal Bar* v. *Duff*, 24 Que. S. C. 478.

Legal Profession Ordinance — *Advocate undertaking to repay — Failure to repay — Application to suspend — Attachment.*]—Where costs have been paid to an advocate upon his undertaking to repay them in the event of the ultimate success of the party by whom the payment is made, no order can be made against him under the summary punitive jurisdiction of the Court until after the advocate has made default in complying with a special order to repay by which a time is set for repayment. *In re Harris (No. 2)*, 3 Terr. L. R. 105.

Legal Profession Ordinance — *Disqualification of advocate for non-payment of annual fee.*]—*Held*, that an advocate who neglects to pay his annual fee to the Law Society becomes disqualified from practising only after the expiry of the time limited in the notice required by the Rules to be given. *Maxfield* v. *Inskip*, 6 Terr. L. R. 81.

Legal Profession Ordinance — *Solicitor's agent — Misconduct of agent—Privity between client and agent — Practice as to striking advocates off the rolls — Partner of agent.*]—The client has a *locus standi* to apply to strike off the roll agents of his advocates by whom moneys have been collected and who fail to pay them over, and the affidavit of the principal is sufficient evidence of non-payment without any affidavit from the client.—The partner of an advocate who has failed to remit moneys will not be struck off where he has not himself been guilty of misconduct.—Statement of the practice to be followed in case of applications to strike advocates off the rolls for non-payment of moneys. *Re Harris & Burne*, 3 Terr. L. R. 70.

Legal Professions Ordinance—*Striking off roll — Suspension.*]—Under the provisions of the Legal Professions Ordinance, No. 9 of 1895, s. 16, which enacts that "the Supreme Court may strike the name of any advocate off the roll of advocates for default by him in payment of moneys received by him as an advocate," the Court has no power merely to suspend an advocate temporarily from practice. *In re Forbes* (No. 1), 2 Terr. L. R. 410.

Reinstatement — Grounds for refusal.] —The Legal Professions Ordinance, 1895, confers no jurisdiction on the Supreme Court of the N. W. T. to reinstate an advocate who has been struck off the rolls.—*Semble*, that in this case had there been jurisdiction the application must have been refused on the grounds: (1) that the applicant was in default in not paying the costs which by the order striking him off he had been ordered to pay; (2) that there was no evidence that the advocate was not liable to an application to strike off in respect of moneys other than those in respect of which he had been struck off; and (3) that the lapse of time since the misconduct charged was unusually short. *In re Forbes* (No. 2), 2 Terr. L. R. 423.

Rescission of order — Jurisdiction.]—The Court, having no jurisdiction to reinstate an advocate struck off the rolls, cannot effect the same result by rescinding the order. *In re Forbes* (No. 3), 2 Terr. L. R. 447.

Misconduct — *Failure to pay over moneys placed in his hands by client — Application of Law Society to strike name off roll — Leniency—Special circumstances —Order for payment of costs.*]—The solicitor received from his client the amount necessary to pay the defendants' costs of an action brought by the client, which had been dismissed, and gave a receipt therefor, but did not pay over the money to the defendants. Execution for these costs was issued by the defendants, but the sheriff, when he learned that the client had paid the amount to the solicitor, did not levy upon the writ, and drew a bill upon the solicitor, which was accepted, but not paid. The solicitor said that he kept the money until his own costs of the action were paid by the client. The client did not complain of this, but the defendants in the action reported the matter to the Law Society, who moved to strike the solicitor off the roll. When the application was heard the solicitor had paid the money:—*Held*, that the application need not be made by the client, but could be made by the Law Society or any one interested;

that the solicitor had been guilty of misconduct; but that sufficient had not been shewn to justify his suspension. He was ordered to pay the costs of the application, the costs of the execution, and the costs of another application against him, which was also dismissed. Leave was reserved to the Law Society to mention and rely upon the facts arising in these two cases if any future complaint should be made. *Re a Solicitor*, 63 L. J. Q. B. 397, followed. *Re Solicitor* (1910), 15 W. L. R. 727.

Order suspending from practice — *Irregularity — Order rescinded by Privy Council.*]—A solicitor having been arrested for debt claimed his privilege as a practising attorney and was discharged. The Chief Justice of P. E. I. at the same time by an *ex parte* judgment suspended him from practice. The Privy Council rescinded the order on the ground that if he were not entitled to his privilege as a *bona fide* practising attorney, he ought not to have been protected if on the other hand, he had such right, he ought not to have been suspended. Order of Supreme Court of Prince Edward Island set aside. *In re Monckton* (1837), C. R. 1 A. C. 113.

"Practising" — *Law Society—Annual fees.*]—A solicitor who has not obtained his annual certificate from the Law Society cannot, without rendering himself liable to suspension, etc., under the provisions of ss. 22, 23, and 24 of R. S. O. c. 174, practise as such, even in an isolated instance, and he is not relieved by the fact that he is interested in the subject-matter of the litigation. *In re Clarke*, 32 O. R. 237.

"Practising" — *Law Society—Annual fees.*]—Having regard to the provisions of the Law Society Act, R. S. O. c. 172, and the Solicitors Act, R. S. O. c. 174, the taking out of the annual certificate entitling a solicitor to practise is voluntary and not compulsory, and practising without it only subjects the solicitor to the penalties and consequences imposed by statute; if he practises without taking out the certificate, he does not make himself liable for payment of the fees for such certificate. *Law Society of Upper Canada* v. *Clarke*, 20 C. L. T. 245.

Readmission to practice.]—A solicitor who had abandoned practice for more than five years was readmitted by the Court upon passing an examination to the satisfaction of the council of the barristers' society of New Brunswick. *In re Deacon*, 36 N. B. R. 3.

Right to practise — *Non-payment of fees — Suspension — Law society.*]—A solicitor cannot, without paying his annual fees and taking out the certificate of the Law Society, practise as such, even in an isolated instance, or even where he is joined as plaintiff himself with another who holds his claim in the interest of and for the solicitor, without making himself liable to the provisions as to suspension of R. S. O. c. 174. *In re Clarke, a Solicitor*, 21 C. L. T. 30, 32 O. R. 237.

Striking name from rolls — *Cause to the contrary to be shewn in four days — Enlargement to prepare defence refused — Order reversed.*]—An order *nisi* for striking an attorney and practitioner of the Court of Newfoundland off the Rolls of that Court, unless cause to the contrary should be shewn in four days, made absolute upon no cause being shewn, notwithstanding an application made by him for enlargement of time to enable him to prepare his defence, reversed by the Judicial Committee as being irregularly and improperly made by the Court. *Emerson* v. *Justice of Nfld.* (1854), C. R. 2 A. C. 81.

Uncertificated attorney — *Void proceedings — Waiver.*]—Proceedings by an attorney who has not paid the fee required by C. S. N. B. c. 34 s. 4, are void, and the right to set aside the proceedings is not waived by the opposite party contesting the suit to judgment. *Rex* v. *Sisk*, *Sisk* v. *Foley*, 35 N. B. R. 560.

Uncertificated solicitor—*Right of client to party and party costs.*]—The plaintiff was deprived of costs on the ground that her solicitor had failed to take out a certificate, as required by the Nova Scotia Barristers and Solicitors Act, 1899, s. 27:—*Held*, that the procedure to enforce compliance with the provisions of the Barristers and Solicitors Act being by fine and suspension, under ss. 31 and 32 of the Act, and there being no provision enacting in express terms that attorneys who failed to take out certificates as required should be debarred from recovering their costs, or that parties employing such attorneys should be debarred from recovering, there was nothing to prevent the plaintiff from recovering her attorney's costs from the opposite party to the suit. *Wallace* v. *Harrington*, 34 N. S. R. 1.

Usurping professional functions — *Mercantile agency — Collecting letter.*]—A mercantile agency firm who sent a letter to a debtor demanding payment from him of a certain sum due by him to a third person, and intimating that legal proceedings would be immediately taken to recover the amount in default of payment, should be regarded as having exercised the profession of an advocate in violation of 61 V. c. 27 (Q.) *Montreal Bar Association* v. *Sprague's Mercantile Agency*, 25 Que. S. C. 383.

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2. AUTHORITY TO ACT.

Acting without instructions—*Release of moneys — Prejudice of client — Damages.*]—In the circumstances set out in the judgment of Galliher, J.A., a solicitor was held liable to his client for negligence in releasing certain moneys which were to be held for his client pending his obtaining possession of property which he had purchased, with a right to deduct therefrom expenses incurred in getting possession. The solicitor acted honestly, but under the mistaken view that he could release the moneys without instructions from his client; instructions were necessary, and he acted without them; and the client, having been prejudiced by the release of the moneys, was entitled to recover damages from the solici-

tor. Judgment of Hunter, C.J., reversed. *Parsons* v. *Wootton* (1910), 13 W. L. R. 321.

Action in name of company — Determination of question—Stay or dismissal of action — Adding shareholders as parties: *Saskatchewan Land & Homestead Co.* v. *Leadlay*, *Saskatchewan Land & Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378.

Action in name of municipality — *Resolution of council — Substantial compliance with.*]—A municipal council having resolved to join in an action already launched by an individual against the defendant: the reeve, after consultation with the solicitor, gave instructions to commence an independent action on behalf of the municipality: —*Held*, that, as the municipal council had shewn an intention to sue the defendant, the action of the reeve was a substantial, if not a strict, compliance with that intention. *South Vancouver* v. *Rae*, 12 B. C. R. 64, 3 W. L. R. 346.

Attorney cannot cease to represent a party and a party cannot revoke the powers of his attorney without leave of the Court or of a Judge. Superior Court Rules 43 and 45, which require this condition, are not incompatible with provisions of Civil Code respecting mandate nor with Code of Civil Procedure as to change of attorneys.—The permission will be refused if it appears to the Court or to the Judge that the reasons given for the revocation or renunciation are insufficient and, particularly, if the object is to delay or complicate the suit. *Tranchemontagne* v. *Legare* (1910), 38 Que. S. C. 406.

Attorneys are considered as authorised to act for a party so long as he has not been disavowed, and an opposition cannot be contested on the ground that it has been made without the knowledge of the opposant. *Drainville* v. *Savoie & Drainville* (1910), 11 Que. P. R. 437.

Authority of an attorney *ad litem* cannot be cancelled by the opposite party through a single denial of his authority, but proceedings in disavowal by the attorney's client, according to the provisions of the Code of Procedure, are the only means of contestation recognised by law. *Drainville* v. *Savoie* (1910), 17 R. de J. 108.

Compromise action after judgment —Issue of execution—*Ex parte* order. *Norquay* v. *Broggio* (Y.T.), 2 W. L. R. 108.

Instructions—Imprisonment of plaintiff —Dismissal—Costs. *Pine* v. *McCann*, 2 O. W. R. 546.

Mandate — *Rule of Practice, No. 43— Repudiation of mandate — Judge's permission.—C. C. 1732, 1733, 1759, 1796; C. P. 73, 260, 264; R. P. 43, 45.*]—1. Rule of Practice No. 43 of the Superior Court which declares "In addition to the notice prescribed by the code of procedure, the permission of the Judge must be obtained by an attorney before he ceases to represent a party," is valid.—2. An attorney *ad litem* cannot cease to represent a party in a case and give notice of his intention to the adverse party without having obtained permission from a Judge of the Court having jurisdiction over the case. *Tranchemontagne* v. *Legare* (1910), 16 B. L. n.s., 460.

Mandate ad litem — *Challenge — Disavowal.*]—The authority of attorneys and advocates, who have acted for and represented a party in judicial proceedings, cannot be challenged otherwise than by disavowal. *In re Great Northern Construction Co.*, 34 Que. S. C. 432.

Mortgage — *Collection.*]—In the absence of legal proceedings to enforce a mortgage security, there is nothing in the mere relation of solicitor and client from which an authority may be implied to the solicitor to receive interest or principal due the client on the mortgage, even though the solicitor arranged the mortgage loan. The solicitor must have either express authority for the purpose, or the course of dealing between the parties must have been such as to necessarily imply such an authority; and the onus of establishing that is upon the mortgagor. An authority to receive interest confers no authority to receive principal, and the possession of the mortgage securities is no evidence of authority to receive money due on them. *Foreman* v. *Seely*, 22 C. L. T. 67, 2 N. B. Eq. R. 341.

Nominal plaintiff — *Parties.*]—An action begun in the name of the attorney of the real creditor will be dismissed upon exception to the form, the plaintiff, being without interest in the cause, not being permitted to plead in the name of another. *Meunier* v. *Drolet*, 7 Que. P. R. 426.

Power of attorney in favour of another.]—The power of attorney or procuration of a plaintiff not residing in the province, need not necessarily be made in favour of the advocate of the plaintiff; it is sufficient if it is given to a person resident at the place where the action is begun. *Spencer* v. *Strathcona Rubber Co.*, 24 Que. S. C. 323.

Ratification — *Right to recover costs.*] —A piano belonging to the defendant having been seized in the possession of one H., the plaintiffs, advocates, upon instructions received from H., who alleged that he was authorised by the defendant, made, in the name of the latter, an opposition demanding the withdrawal of the piano from the seizure which had been made. The defendant's agent, having learnt that the opposition had been filed, went to the office of the plaintiffs and told them that he would not pay the costs of it, but did not order them to discontinue the proceedings, and, the opposition having been maintained, he re-took his piano:—*Held*, that, in these circumstances, the defendant was liable to pay the plaintiffs the costs of the opposition. *Semble*, that the defendant, if he wished to avoid the payment of the costs, should have disavowed the proceedings taken in his name. *Delisle* v. *Lindsay*, 23 Que. S. C. 313.

Retainer — *Evidence of.*] — A commencement of proof by writing is not neces-

sary in order to allow an advocate to prove a retainer. *Mircault* v. *Bissonnette*, 24 Que. S. C. 25.

Retainer — Instructions — Annuity — Judgment — Assignment — Setting aside proceedings — Costs. *Quantz* v. *Quantz*, 2 O. W. R. 326.

Retainer — *Settlement for professional services rendered — Further proceedings in respect of matter, which was the subject of original retainer—Estoppel—Lack of instructions or new retainer—Effect of on solicitor's rights to costs.*]—Appeal from a judgment of Russell, J., in favour of plaintiff in an action for services rendered as a solicitor in opposing a second application for the discharge of seamen convicted and imprisoned for desertion.—Supreme Court of N. S. *held* that the defendant was not liable for plaintiff's services on the second application, and that the appeal should be allowed with costs, and judgment entered for defendant with costs of trial. *Lane* v. *Duff* (1911), 9 E. L. R. 484, N. S. R.

Retainer — *Termination of — Costs subsequent to judgment — Limitation of actions.*]—The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and even, in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract. Where, therefore, after the giving of judgment in an interpleader issue, the solicitor for the defendant, against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain bills which the defendant was entitled to set off, his appointment continued until the completion of those proceedings, so that as against a claim for the amount of his bill of costs, the Statute of Limitations began to run only from the date of such completion. *Millar* v. *Kanady*, 5 O. L. R. 412.

Retainer — Trading company — Contract — Absence of seal — Letter written by authority of president — Actual owner of all shares in company — Statute of Frauds — Powers of president — Sanction of directors and shareholders — Ratification — Estoppel — Change of interest in company — Joint contract — Separation of joint contractors — Termination of retainer — Costs. *Gwillim* v. *Dawson Electric Light & Power Co.* (Y.T.), 6 W. L. R. 800.

Retainer in action — Duration after judgment — Service of interpleader summons on solicitor. *Dunbrack* v. *Dunbrack*, 40 N. S. R. 623.

Retainer in action — *Termination — Authority — Judgment — Extension of time for payment — Disavowal — Ratification — Estoppel.*] — The retainer of an attorney *ad litem* is terminated after proceedings for execution of the judgment; and in a case where there still remains a balance due upon the judgment, he has no right to extend the time for payment of such balance.—The party who wishes to set aside an act of his attorney done without authority, can only do so by an action in disavowal, and not by a simple denial made in the course of the proceedings.—However, a party will be held to have ratified such an act of his attorney *ad litem* when he has, for example, accepted the amount received on account by his attorney, when the latter has assumed to grant the delay, and in such case he will not be allowed to exercise the right of disavowal. *Courchaine* v. *Courchaine*, 9 Que. P. R. 54.

Retainer in litigation — *Functions—Consent binding on client — Entry of action.*]—The office of the advocate being to protect his client, and for that purpose to take all necessary measures to safeguard his interests, the advocate may validly give a consent to the opposite party that the action shall not be entered as of the day of the return.—*Semble*, that the advocate who so acts does not go beyond the mandate of an attorney *ad litem*. *Gilbert* v. *Moore*, 9 Que. P. R. 316.

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3. Changing Solicitors.

Action in forma pauperis — *Security for costs.*] — Even in an action *in forma pauperis*, a motion by the plaintiff to allow a change of attorneys will be granted only upon the plaintiff giving, previously, sufficient security, to the amount at which the costs of his present attorney are then payable, that said costs will be paid if the plaintiff settles the case, or if judgment is rendered in his favour. *Bellemare* v. *Dominion Park Co.*, 9 Que. P. R. 159.

Action pending — *Payment of costs — Agreement not to charge client.*]—A party to an action cannot change his attorney or solicitor in the course of the action without paying the attorney who is superseded his fees and disbursements taxed adversely or on notice, even where there is a written agreement between the two by which the attorney is not to claim costs from his client, but is to collect them from the opposite party. *Riopelle* v. *Montreal*, 10 Que. P. R. 179.

Costs — *Instruction of new solicitor.*]—An advocate substituted in a cause after inscription for trial on the merits has a right to a reasonable remuneration for examining and studying the record, instructions, preparation for trial, etc. *Lafortune* v. *Marchand*, 9 Que. P. R. 36.

Informality — *Exception.*]—An *exception à la forme* signed by an attorney other than the one who has appeared, without disavowal or substitution, will be dismissed as irregular. *Moreau* v. *Lamarche*, 3 Que. P. R. 121.

Leave of Court — *Personal appearance of party.*]—An attorney *ad litem* cannot be replaced without leave of the Court; if he is still of record, the party cannot appear personally to continue the proceedings in the cause. *Giraud* v. *Chamy*, 9 Que. P. R. 29.

Motion for substitution of attorneys made on behalf of plaintiff when the firm of lawyers representing him has been changed, is a useful proceeding which interrupts preemption. *Gorey* v. *Can. Pac. Rw. Co.* (1911), 12 Que. P. R. 230.

Order — *Costs — Forum — Judge in Chambers.* —If a party asks for a substitution of attorneys, not necessitated by the death or by the appointment of any member of the firm to any public office, or any other analogous reason, he has no right to demand costs on said motion. If he does so, the adverse party who appears to oppose such condemnation will himself be entitled to his costs.—2. A Judge in Chambers has the power to hear and adjudicate on a motion for substitution of attorneys. *Sicily Asphaltum Co.* v. *Grenier*, 10 Que. P. R. 61.

Payment of costs of solicitor reserved — *Insolvent estate — Curator.*]—When the curator to the plaintiff's estate proposes to relieve the plaintiff's attorney *ad litem* of his mandate as such, he must first pay to the latter his expenses and fees for services incurred and rendered which have accrued to the benefit of the estate in direct relation to said cause. *McGee* v. *McCoy*, 9 Que. P. R. 63.

Praecipe order issued by one of two plaintiffs — Setting aside. *Port Hope Brewing and Malting Co.* v. *Cavanagh*, 9 O. W. R. 994.

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4. Costs.

i. Agreements as to.

Agreement to pay double costs.]—An agreement between a lawyer and his client, in a suit wherein the latter claims an inheritance, whereby the client obliges himself to pay to the lawyer, in addition to the fees fixed by the tariff, a further amount, if the case is successful, and after the client has been placed in possession of his inheritance, with a stipulation that the additional sum will be doubled if the mandate is withdrawn, is legal and valid. It follows that the double amount may be claimed from the client who revoked the mandate, although the revocation resulted from the death of the defendant, one of whose heirs the client was, and from family considerations which induced the client to discontinue the case. *Riou* v. *Fraser & Buckley*, 37 Que. S. C. 1. (An appeal to the C. K. B. is still pending.)

Agreement with client as to costs of litigation — Bill of costs — Taxation — Claim against solicitors — Set-off — Statutory provisions affecting solicitors — English Solicitors Act—North-West Territories Ordinance — Jurisdiction of Court over solicitors — Delivery and taxation of bills of costs. *Bowcher* v. *Clark* (Y.T.), 4 W. L. R. 292.

Champerty.] — A solicitor agreed with his client to get $2,000 and taxed costs if the action were successful, if not he was to get $500. Agreement held champertous, but he has his lien for costs. *Williams* v. *McDougall* (1909), 12 W. L. R. 381.

Confession of judgment — *Agreement with counsel — Overcharge.*]—A solicitor may take security from a client for costs incurred, though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements. A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him:—*Held*, that, though the arrangement was improper, it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom. *Knock* v. *Owen*, 24 C. L. T. 287, 35 S. C. R. 168.

Contract with client — *Share in fruits of litigation — Illegal bargain — Champerty —Appeal.*] — The confidential relationship existing between a solicitor and his client forbids any bargain between them whereby he is to draw a larger return out of the litigation than is sanctioned by the tariff and the practice of the Courts, and especially any agreement whereby the solicitor is to share in the proceeds of a litigated claim as compensation for his services, as being in contravention of the statute relating to champerty, and a violation of the oath of a barrister on his being called to the bar; nor is it open to a solicitor, during the progress of a case, to call upon his client to pay a round sum, or any sum (other than the costs), before he will go on with the action.—A barrister and solicitor was, therefore, held, disentitled to enforce a bargain made with the client whereby he was to be paid 25 per cent. of the amount recovered in the action, as also payment of a sum of $200, which the client had agreed to pay him in case the solicitor succeeded in upholding the judgment on an appeal. *Re Solicitor*, 10 O. W. R. 226, 14 O. L. R. 464.

Misrepresentation — *Pressure — Manitoba Law Society Act — Interest — Consideration.*]—Section 68 of the Law Society Act, R. S. M. c. 83, making it legal for a solicitor to bargain with his client, does not preclude the Court from determining the validity of any such agreement upon equitable principles, although it contains no express provision. In the course of negotiations leading up to such an agreement, the solicitor overstated the amount of his disbursements, and threatened to dispose of a judgment which had been assigned to him:—*Held*, that the mis-statement and threat were such as to render the clients incapable of

acting freely and independently, and therefore the agreement should be set aside. Forbearance to sue may be a sufficient consideration for an agreement by a client to pay interest to his solicitor upon an amount agreed on as due for costs, although there is no legal liability for such interest, and although the client acted without independent advice. *Preston* v. *Nugent*, 21 C. L. T. 543, 13 Man. L. R. 511.

ii. Recovery of.

Acquiescence — *Revision.*] — A party who pays under protest a bill of costs, after having discussed it and obtained several reductions, will be held to have acquiesced in it, and cannot afterwards demand the revision of it. *Beaudoin* v. *Lamothe*, 5 Que. P. R. 358.

Action for costs — *Lump charge for professional services — Champerty — Agreement.*] — The plaintiffs, advocates in the Yukon, sued the defendant for a lump sum for professional services in obtaining a judgment for the defendants against one H., it being alleged by the plaintiffs that they were to charge $600 if the amount was collected, and by the defendant that they were to get ten per cent. if collected by them:—*Held*, in appeal, *per* Drake, J., that by Yukon law an advocate cannot legally obtain a lump sum for professional services under R. 524 of the North-West Territories Judicature Ordinance of 1893. *Per* Martin, J., that the plaintiffs failed to prove any agreement. *Robertson* v. *Bossuyt*, 8 B. C. R. 301.

Action for costs—*Prescription*—"*Final judgment*" — *Costs of action — Plea offering judgment.*]—The words "final judgment," in Art. 2260, C. C., which enacts that the action "for professional services and disbursements of advocates and attorneys is prescribed by five years, reckoning from the date of the final judgment in each case," mean final as opposed to interlocutory, and not final in the sense of being the judgment in the Court of last resort; and consequently prescription of an attorney's claim against his own client for the taxed costs in a cause commences to run from the rendering of the final judgment in the Court in which such costs are taxed, notwithstanding the fact that the case may have been taken to review and conducted by the same attorney in that Court. 2. Where the defendant, by his plea, offers judgment for part of the sum claimed, and the plaintiff does not accept such offer, but proceeds to proof and is unsuccessful in establishing any greater sum than that admitted, he is entitled only to costs up to plea filed, and will be condemned to pay the defendant's costs of contestation after plea filed. *Poulin* v. *Prevost*, summarised in *Bertrand* v. *Hinerth*, 25 L. C. J. 168, followed. *Gilman* v. *Cockshutt*, 18 Que. S. C. 552.

Action to recover fees.]—The defendant's wife having sued him for alimony, they met by arrangement in the office of the wife's solicitor, and in his presence agreed to become reconciled and to resume cohabitation and to settle the suit, and the defendant, as a part of the settlement, agreed to pay directly to the wife's solicitor her costs of the action, which were then fixed at $50. This action was brought by the solicitor in a County Court to enforce payment of that sum. The particulars of the claim were stated thus: "The plaintiffs claim from the defendant the sum of $50, being the amount of the costs of suit of defendant's wife against the defendant, which the defendant agreed to pay as one of the terms of settlement between the said parties:"—*Held*, that the plaintiffs could not recover in an action in that form, as the plaintiffs in such an action would be strangers to the contract; neither could the plaintiffs sue as *cestuis que trust* claiming a beneficial interest under the agreement, for the evidence did not shew that the $50 was to be paid to the defendant's wife as trustee for the plaintiff; but that there was, under the circumstances, an equitable assignment of the wife's claim for costs to the solicitors, which was assented to by the three parties all present together, and which enabled the plaintiffs, by an amendment of their particulars of claim, to maintain an action in their own name for the costs in question. *Andrews* v. *Moodie*, 6 W. L. R. 185, 17 Man. L. R. 1.

Against opposite party in litigation.]—In the absence of any special provision of law, the advocate is not a party in the cause, but merely the agent of the party whom he represents. 2. There being no provision of law by which an advocate appearing in a cause before the Recorder's Court of Montreal, is granted distraction of costs awarded to his client, there is no lien *de droit* between him and the city of Montreal, the other party to the cause, and he, therefore, has no action in his own name against the city for the costs of a cause in which costs were awarded in favour of his client. *Beaudin* v. *Montreal*, 20 Que. S. C. 32.

Application for charging order on fund in Court, and upon land for costs—Con. Rule 1129—Lands and money recovered through instrumentality of solicitor — Conflict of evidence as to—No allegation of fraud —Riddell, J., *held*, that solicitor had made out his case—Order granted. *Meakins* v. *Meakins* (1910), 17 O. W. R. 298, 2 O. W. N. 150.

Attorneys may recover from their clients not only the reimbursements of the advances and fees allowed to them by the tariff, but also additional fees for unusual trouble and special steps taken by them on their behalf. *Boumar* v. *Carbonneau* (1910), 12 Que. P. R. 47.

Company — Contract — Retainer — Evidence — Conflict — Credibility of witnesses — Corroboration — Finding of trial Judge — Appeal. *Staunton* v. *Kerr* (1910), 1 O. W. N. 497.

Consolidation of actions.] — *Re Wickett*, 1 O. W. R. 554.

Counsel fees — *Action for — Liability of solicitor or client — Supreme Court of Canada — Quantum meruit.*]—An advocate of the Territories (in whom are combined the functions of both barrister and solicitor) retained a member of the plaintiff firm

(Ontario barristers and solicitors) as counsel, and the firm as solicitors, on an appeal for certain clients to the Supreme Court of Canada from a judgment of the Supreme Court of the North-West Territories:—*Held, per* Curiam, that the contract was to be spelled out of the correspondence which took place up to the time the services sued for were performed, and that for the purpose of ascertaining the terms of that contract, the subsequent letters should not be looked at. 2. That if the clients were liable by virtue of the original contract, the plaintiffs charging the advocate in mistake of their legal rights would not release the clients. 3. That the advocate's letters were merely of such character as an advocate engaging counsel in the ordinary course would naturally write, and were not such as, under *Armour* v. *Kilmer*, 28 O. R. 618, would render the advocate personally liable; but, *held*, McGuire, J., dissenting, and the majority of the Court declining to follow *Armour* v. *Kilmer*, that on the retainer of counsel by an advocate, the advocate, and not the client, is *prima facie* liable:—*Held*, also, *per* Curiam, that an action lies for counsel fees. *McDougall* v. *Campbell*, 41 U. C. R. 332, and *Armour* v. *Kilmer* (on this point) followed. 2. That, inasmuch as the tariff of the Supreme Court of Canada does not apply as between solicitor and client, the plaintiffs were entitled to recover on a *quantum meruit*. *O'Connor* v. *Gemmill*, 29 O. R. 47, 26 A. R. 27, followed. *Armour* v. *Dinner*, 4 Terr. L. R. 30.

Distraction of costs — *Foreign law — Code of Civil Procedure in Quebec — Recovery of costs — Interest.*]—"Distraction of costs," as provided for in s. 553 of the Code of Civil Procedure in the Province of Quebec, is the diverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled. The plaintiffs were the attorneys on the record for one R., against whom an action was brought in the Province of Quebec by the defendant, and an interlocutory motion therein had been dismissed with costs, taxed at $238.20, and judgment entered therefor in the Superior Court at Montreal:—*Held*, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario, without the intervention of their client.—*Quære*, as to interest on the account. *Hutchinson* v. *McCurry*, 23 C. L. T. 111, 5 O. L. R. 261.

Letter before action—*Payment of sum demanded — Right of action against debtor —Absence of distraction — Client's right.*]—An advocate has no direct recourse against a debtor to whom he has written a letter demanding a payment of a sum due to his client, and that in spite of the fact that the debtor admits owing the money and pays it. The right to obtain payment from the debtor of the advocate's charges for the letter must be exercised by the client himself, in view of the fact that the advocate has not obtained distraction for his costs, and that the statute 3 Edw. VII. c. 34 does not authorise him to bring the action in his own name. *Demers* v. *Gendreau*, 9 Que. P. R. 426.

Lien — *Charging order — Lands in question in redemption suit — Registry of lis pendens — Discharge of.*] — Rule 1129, which empowers the Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality, is construed liberally, so as not to deprive the solicitor of his lien. A *lis pendens* registered by the solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the solicitor, will not be discharged on a motion therefor in Chambers, but will be left for the decision of the trial Judge after the hearing of the evidence. *O'Flynn* v. *Middleton*, 23 C. L. T. 230, 5 O. L. R. 621.

Lien — *Money paid into Court as security for costs — Priority of execution creditor.*]—Money paid into Court by a plaintiff in an action, as security for costs, is not property "recovered or preserved" by the solicitor for the plaintiff within the meaning of Con. Rule 1129 on which the solicitor's lien for costs will attach as against an execution creditor who has obtained a stop order. *Gibson* v. *Le Temps Publishing Co.*, 10 O. L. R. 434, 6 O. W. R. 410.

Lien on fund in Court — Charging order — Priority over garnishing orders — Costs — Taxation. *Murray* v. *Royal Ins. Co.* (B.C.), 1 W. L. R. 8.

Lien on fund in Court for costs of preserving fund — *Charging order — Priorities.*]—H. had been, by order of the Court, declared entitled to a fund in Court; and, by a subsequent order, a charge was made thereon in favour of M., a creditor of H. Upon application by M. for payment out of Court, the solicitor of H. asserted a prior lien against the fund for his costs of preserving it for H.:—*Held*, upon the evidence, that it was by the solicitor's efforts that the fund was preserved for H.; that his lien could not be defeated by the charge in favour of M., which was in the same position as if it had been made by H.; and that H. was entitled to a lien for his remuneration for work done as a solicitor (but not as a barrister) in recovering or preserving the fund. *Coupez* v. *Lear* (1911), 16 W. L. R. 407, Man. L. R.

Lien on title deeds — Relationship of solicitor and client — Proceedings for partition — Conveyancing charges — Assault—Costs. *Dainard* v. *Macnee*, 2 O. W. R. 284.

Money lent — Account — Contra-account for services as physician — Interpleader issue — Evidence. *Thompson* v. *Sparling* (Y.T.), 6 W. L. R. 439.

Professional services—*Payment for—Agreement with client fixing amount—Payment on account—Action for balance—Defence—No bill rendered before action—Solicitors' Act, ss. 34, 49.*]—Plaintiffs, solicitors, rendered services to defendant, and while they had in their possession a cheque from the department for a portion of the amount recovered, an agreement was made by which the plaintiff's charges were fixed at $1,200. A portion of this was paid, and on the faith of the defendant's promise to pay the balance,

the cheque was handed over to him. On defendant's refusal to make any further payments, plaintiffs brought action to recover the balance due, $400. The only defence suggested in this action which required consideration was that no bill was rendered before suit. Section 34 of the Solicitors' Act requires the delivery of a bill of fees, charges and disbursements for business done by a solicitor as such as a condition precedent therefor. The trial Judge found the agreement proved, and, under the circumstances of the case, that it was fair.—Divisional Court *held*, that above finding could not, upon the evidence, be successfully attacked. The question of what constituted payment to preclude taxation under s. 49 was not considered, but merely the question arising under s. 34. Appeal dismissed with costs. *Belcourt* v. *Crain* (1910), 17 O. W. R. 1067, 2 O. W. N. 508.

Remuneration for services ont of Court — *Quantum meruit — Percentage.*]— The services of an attorney in procuring an option on and the purchase of an immovable, for a client, are purely a matter of *quantum meruit*, which the Court will fix at 5 per cent. upon the price. *Aylen* v. *Lindsay*, 23 Que. S. C. 345.

Sale of mining property—*Solicitor—Professional services.*]—Plaintiff, a solicitor, claimed 7-125ths of 600,000 shares of Peterson stock, the profit made by defendants in connection with the sale of a mining property. According to the statement of claim this was for his interest in the property, but according to his evidence at the trial 2-125ths was for professional services, the balance being for his interest in the property. The trial Judge gave judgment for 2-125ths, and held there was no consideration for the 5-125ths. On appeal action dismissed, no bill of costs having been delivered and no contract in writing as to plaintiff's services, but without prejudice to any action he might bring. *Curry* v. *MacLaren*, 12 O. W. R. 1108.

Solicitor-trustee — *Profit costs — Lien.*] — *Held*, that, notwithstanding the provision in s. 40 of the Manitoba Trustee Act, R. S. M. c. 146, the rule of English law that a sole trustee who is a solicitor cannot charge against the trust estate profit costs for acting as solicitor for the estate, still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solicitor. *Meighen* v. *Buell*, 24 Gr. 503, followed. *Cradock* v. *Piper*, 1 Macn. & G. 664, distinguished.—*Held*, also, that neither the Imperial Act 23 & 24 V. c. 127, nor the Ontario Rule 1129 founded upon it, gives a solicitor an absolute right to a lien for his costs upon property recovered or preserved through litigation, but only a discretionary power in the Court to charge the property. *Turriff* v. *McDonald*, 21 C. L. T. 545, 13 Man. L. R. 577.

Tariff — *Retention — Accounting — Attachment after judgment — Open account— C. C. 1031, 1713, 1722; C. P. 264.*]—An advocate has the right to claim from his client fees for the trouble he has taken and steps he has taken to protect his client, in addition to the amount allowed him by the tariff in the shape of taxed costs.—An advocate has the right to retain possession of money and other objects placed in his care and belonging to his client until he is paid in full for his fees and disbursement.—An advocate is obliged to account to his client for his acts, but until the rendering of such account he owes him nothing and he is not subject to an attachment after judgment at the suit of one of his client's creditors.—When there is an open account between two persons, neither the one nor the other is debtor or creditor so long as the account remains open; that such account cannot be the subject of an attachment after judgment.—An attachment after judgment cannot issue to seize a balance of account when it is only problematical and for the future and when it has not been definitely settled, and the defendant, or the creditor exercising his rights, should first of all account so that the balance due may be agreed upon. *Beaumar* v. *Carbonneau & Bernard* (1910), 16 R. L. n. s. 431.

Taxed costs — *Additional charges.*] — The solicitor can recover from the client only the amount of the bill of costs taxed, unless under agreements to the contrary or for extraordinary services rendered necessary in a cause. *Surveyor* v. *Drainville*, 18 Que. S. C. 527.

iii. Taxation.

Agent — *Principal solicitor — Payment.*] —A solicitor rendered his bill to a company for $769.59, of which there was $414.25 charged as fees, and $355.34 as disbursements. H. had been employed by the company through the company's Toronto solicitors. As to the Toronto solicitors, he seemed to have understood that he was acting on agency terms, and that he was to remit them one-half his fees. Pursuant to that understanding, on rendering his bill of costs he sent to the Toronto solicitors $207.15, half of $414.25, charged as fees, leaving a balance of $562.44, which he claimed from the company, with, however, an intimation to the solicitors that, as between the company and himself, the bill was rendered for $769.59, though he only claimed $562.44. The bill was taken before the taxing Master, as a whole, for $769.59; he taxed off $221.40, leaving a balance of $548.19. On the ground that more than one-sixth of the whole bill was taxed off, the Master allowed the costs of the reference to the company and taxed the costs to the company against the solicitor:—*Held*, reversing the decision in 19 C. L. T. 290, that there was not sufficient evidence that the Toronto solicitors were authorised to bind the company by the receipt of any of the money. Their position as general solicitors of the company involved no such authority of itself. A portion of the cheque was paid to the Toronto solicitors for their own use. The intention was to allow them half the fees charged by the Winnipeg solicitor, and that was what was paid by that portion of the cheque. It might be that the Toronto solicitors were not entitled, as between themselves and the company, to derive a profit from the transaction, or that such an allowance to them was a breach of the Law Society Act, but since the Winnipeg solicitor chose to make them

the payment for themselves, he could not subsequently insist that it was received by them for the company. *In re H., a Solicitor*, 20 C. L. T. 140.

Allowance of lump sum — *Work done out of Court — Power of Taxing Officer.*]—A solicitor employed by the assignee of a number of life insurance policies to collect $82,000 from eleven different insurance companies, of which payment was resisted on the ground that they were gambling policies, while the widow of the insured set up a trust for herself and her family, subject only to a lien for premiums paid and interest, after long negotiations, collected from nine of the companies, in all, $70,000, without suit, and also compromised the widow's claim, leaving $60,000 to his client, who by another solicitor then sued unsuccessfully upon the remaining policies. The former solicitor rendered a bill shewing in detail the negotiations and charging disbursements and ordinary costs in connection with an action by the widow and for drawing claim papers and affidavits, and a further lump sum to cover the negotiations out of Court. On taxation of the bill the taxing officer allowed $3,200 in respect of the lump sum charged, having first, with the acquiescence of the parties, conferred with various referees, officers of the Court, and solicitors, as to charges usually made in such matters, and then determined the amount to be allowed in the light of his own general knowledge and experience:—*Held*, that the ruling of the taxing officer should be affirmed; and that, after himself issuing the order for taxation, the client could not claim to have the solicitor's remuneration assessed in an action. *In re Attorneys*, 26 C. P. 495, followed. *In re Johnston*, 21 C. L. T. 561, 22 C. L. T. 24, 3 O. L. R. 1.

Between solicitor and clients—One charge for several items — Taxing officer ruled the facts brought the case within *Re Johnston*, 3 O. L. R.—Middleton, J., dismissed an appeal.—Not a case for costs. *Re Solicitors* (1911), 18 O. W. R. 366, 2 O. W. N. 596.

Bill of costs — Order for taxation — Amendment of bill. *Re Solicitors*, 13 O. W. R. 57.

Collection of moneys — *Commission.*]—A bill of costs was rendered by the solicitor to the appellant in respect of services of the solicitor in collecting $70,000 of insurance moneys. The principal item was a commission amounting to $3,200 upon the amount collected, and this was allowed on taxation:—*Held*, having regard to *In re Richardson*, 3 Ch. Ch. 144, and the line of practice founded thereon as manifested in the certificate of the taxing officer appended to *In re Attorneys*, 26 C. P. 495, that the conclusion of the taxing officer should not be disturbed. The circumstances surrounding the professional employment in this case were very exceptional, and justified the somewhat liberal allowance ascertained upon the reference. *In re Solicitor*, 21 C. L. T. 561.

Counsel fees — *Allocatur — Tariff — Notice.*]—The Judicature Ordinance (R. O. 1888 c. 58), s. 462, enacted: "In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed the fees in the 'Advocates' Tariff' appended to this Ordinance, or as the same may be from time to time varied by the Judges of the Supreme Court *in banc*." In view of this provision, on a taxation of a bill of costs by an advocate against his client it was *held*: — 1. That counsel fees are on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action. 2. That an allocatur can be granted for such fees only as are prescribed by the tariff. 3. That any Judge of the Court may grant an allocatur for counsel fees before the Court *in banc*, and the giving of notice to the client of application for an allocatur for fees is discretionary. *Hamilton* v. *McNeill* (No. 2), 2 Terr. L. R. 151.

Delivery — *Application for taxation — Substituted service on solicitor — Practice.*]—Under Rule 368 of the King's Bench Act, R. S. M. 1902 c. 40, an order may be made for service substitutionally on a solicitor, who has left the jurisdiction and cannot be found, of a notice of motion for an order to refer to taxation his bill of costs rendered. *Re Reid*, 8 W. L. R. 393, 17 Man. L. R. 652.

Delivery and taxation of bill of costs — Præcipe order — Agreement with clients — Special order. *Re Solicitors*, 3 O. W. R. 771, 4 O. W. R. 217.

Delivery of new bills — *Action—Election — Costs.*]—Solicitors delivered to their client bills of costs which at his request they summarised as much as possible. On application by client for taxation the Master directed that solicitors be allowed to deliver new bills or bring an action for what entitled to within a week. *Re Solicitors*, 13 O. W. R. 273.

Delivery of unsigned bill—*Amended bill after order.*]—Solicitors having delivered an unsigned bill of costs, the clients applied for and obtained an order that the solicitors should deliver a bill and for taxation of the same when delivered. Under this order the solicitors delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged. Objection was taken on the part of the clients that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed:—*Held*, that by applying for an order for delivery of a bill the clients must be considered to have consented to the old bill being withdrawn; and the objection could not prevail. *In re Solicitors*, 24 C. L. T. 57, 7 O. L. R. 41, 2 O. W. R. 220, 268, 409, 618, 1082, 3 O. W. R. 1, 4 O. W. R. 137, 302.

Discretion of taxing officer.]—Where a taxing master has made no mistake in principle, he having in his discretion awarded a smaller sum than a Judge would do,

this furnishes no grounds for the latter interfering. *Re Solicitor*, 12 O. W. R. 1074.

Expiry of year — *Special circumstances —Receipt of client's moneys—Commission.*] —An order for the taxation of an advocate's bill of costs ought not to be granted on the *ex parte* application of the client, where the bill has been rendered more than twelve months before the application to tax. Orders of course defined.—*Semble*, (1) on an application to set aside an *ex parte* order to tax, if special circumstances are shewn by the client which would, in the opinion of the Judge, have warranted an order to tax on a special application, the *ex parte* order will be allowed to stand. (2) The receipt by the advocate from time to time of moneys belonging to his client, does not constitute such special circumstances, nor, although overcharges would, in certain circumstances, constitute such special circumstances, does the mere fact that a commission of 5 per cent. is charged on the collection of a sum of $1,200. On the trial of an action on an advocate's bill, the trial Judge may, without special circumstances appearing, and notwithstanding the lapse of twelve months from delivery, direct a reference or enquiry as to any disputed items, although no application to tax has previously been made. *Re McCarthy, McCarthy v. Walker*, 2 Terr. L. R. 346.

Lump sum allowed for collecting moneys — Percentage — Quantum — Discretion of taxing officer — Appeal. *Re Solicitor*, 12 O. W. R. 1074.

Motion for — Submission to arbitration —Construction. *Re Solicitor*, 7 O. W. R. 827.

Order for — Obtained by solicitors *ex parte* — Services rendered by solicitors as parliamentary agents — Presumption as to professional character — Absence of tariff —Nature of services rendered — Agreement for fixed remuneration — Conflict of testimony — Reference to taxing officer—Costs. *Re Solicitors*, 10 O. W. R. 951.

Order for taxation — *Effect of client obtaining — Judgment — Certificate of taxation—Review—Time—Extension.*]—Where a client has obtained an order in the usual form for the taxation of an advocate's bill of costs upon which he has been sued, and for a stay of the action pending the taxation, although he has made no submission to pay the amount found due, the advocate, after the taxation is ended and the clerk's certificate signed, is entitled to an order giving him leave to sign judgment against the client for the amount found due. The certificate of the clerk is final and conclusive as to the amount due to the advocate unless an application be made for a review of the taxation under s. 529 of the Judicature Ordinance, 1893. That section applies to taxations between solicitor and client, as well as between party and party. There is no necessity for an application on behalf of the advocate to confirm the certificate of the clerk as a report. The clerk's certificate is not a report and need not first be set aside before the application for a review, and the intention of s. 529 is, that a review thereunder should be had after the clerk's certificate has been signed. Since the repeal of s.-s 7 of s. 491 of the Judicature Ordinance, 1893, there is no provision in our Rules as to the time within which a review of taxation can be made, and therefore the provisions of English Order 65, Rule 27 (41), so far as they relate to the time within which an application to a Judge for a review shall be made, are now in force in the Territories by virtue of s. 556 of the Judicature Ordinance, 1893. Where the time for review has expired, the Judge has power under s. 555, in a proper case, to extend the time for making the application for review. *In re McCarthy—McCarthy v. Walker* (No. 2), 4 Terr. L. R. 1.

Payment — *Connected charges — Agreement—Unsigned bills—Delay—Overcharges.*] —A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the money collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by the executors for taxation of all the bills after the eight years: —*Held*, that this could not be regarded as one continuous dealing, keeping the right to tax in suspense till the collection or exhaustion of all the securities.—*Held*, also, upon the evidence, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors. As to certain of the bills of costs said not to have been actually signed by the solicitors. — *Held*, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation after years of delay, and no specific overcharges being indicated. *In re Solicitors*, 20 C. L. T. 438, 19 P. R. 271.

Payment or retention of lump sum for costs — *Waiver of bill—Subsequent application within a month—Bill for larger amount than that paid.*]—When in a moment of generosity a client saying he did not want a bill pays his solicitor's account, but subsequently repents, an order for delivery will be made, but the solicitor will not be debarred from shewing he is entitled to more than he had received. *Re Solicitor*, 13 O. W. R. 357.

Review — Necessity for filing objections —Rules of Court—Leave to file objections after issue of allocatur of taxing master. *Re Solicitor, Ex p. Day and Henwood* (Alta.), 8 W. L. R. 533.

Right to taxation — *Time of application—Payment — Acceptance of promissory notes—Conditional payment unless otherwise agreed—Evidence.*]—Clients applied to tax bills of costs for which promissory notes now

overdue and unpaid had been given. If clients will make an affidavit that there never was an agreement, that the notes were to be taken as payment, and that there was to be no taxation, and if on cross-examination sufficient admissions not made to justify solicitors' position, usual order to go. *Re Solicitors*, 13 O. W. R. 683.

Services — *Retainer — Cesser on death of client—Evidence as to further retainer by executors — Reference to taxation.*]—Action on a bill of costs. Bill prior to death of testator to be taxed but no evidence as to retainer by executor. *Royce & Henderson* v. *National Trust Co.*, 13 O. W. R. 1159.

Solicitor and client costs — Proof of services—Onus — Necessary work—Evidence —Report of taxing master—Appeal. *Bowcher* v. *Clark* (Y.T.), 6 W. L. R. 433.

Special circumstances — *Agreement.*] —Plaintiff claimed to have made a contract whereby he was to receive part of the profits on sale of certain property. Trial Judge gave him judgment for a large amount in stock, but Divisional Court set it aside. See (1908) 12 O. W. R. 1108. Then the solicitor rendered a bill and took out order to tax, which Cartwright, Master, set aside: (1909), 14 O. W. R. 2, 80. Appeal from this order was dismissed by Meredith, C.J.C.P. Plaintiff appealed to Divisional Court:—*Held*, that the question of retainer (which was denied by defendants), should be tried in the ordinary way rather than by a taxing officer. Judgment of Cartwright, Master (1909), 14 O. W. R. 2, 80, affirmed. *Re Solicitor* (1909), 14 O. W. R. 707, 1 O. W. N. 51.

Tariff.]—A charge on a bill of costs, although not justified in the item under which it is framed, may nevertheless be allowed if it can be sustained under any other item of the tariff. *In re* 7 B. C. R. 353.

Tariff — Conclusiveness on taxation between solicitor and client as to charges for services covered by tariff—Rules of Court — Items of bill objected to—Counsel fees — "Retainer" fee—Special retainer of counsel —Fee not paid in cash—Advising on evidence—Other fees—Charges not prescribed by tariff—Fiat for counsel fees granted *ex parte*—Effect of—Appeal from taxation. *Re Solicitors, Ex p. Day and Henwood* (Alta.), 8 W. L. R. 536.

Terms of bill — *Multiplicity of proceedings — Postponement of mortgage sale—Retainer—Counsel fees—Commission on collections.*] — Where separate proceedings were taken by plaintiff advocate upon two mortgages, one made to the plaintiff in her personal capacity, and the other made to a deceased person of whose will the plaintiff was executrix, and the plaintiff, on taxation at her instance of the advocate's bill of costs, failed to shew that the claim upon the first mentioned mortgage arose with reference to the deceased estate, the advocate was held entitled to charge his client, the plaintiff, with separate bills of costs in respect of each of the separate proceedings. Where proceedings for the sale of property in question in mortgage actions were postponed from time to time upon the solicitation of the mortgagor, and without instructions or consent of the plaintiff, the mortgagee, for the purpose of enabling the mortgagor to raise the necessary money to pay off the mortgage debt, and where successive postponements resulted in securing for the mortgagee a larger sum than could have been realized by a forced sale, and the mortgagee accepted the benefit thus secured for her, she was held liable to pay to her advocate the costs and expenses incurred in connection with the various postponements. Where the order for taxation of an advocate's bill of costs, obtained at the instance of the client, did not reserve to the client the right to dispute retainer: — *Held*, that the retainer must be taken to be admitted; and where in such a case the advocate had stated in writing that he did not intend to charge anything for certain proceedings taken without special instructions, but it appeared that the statement was made without consideration, the advocate was allowed his costs of such proceedings. Upon the taxation of an advocate's bills of costs no counsel fee should be allowed in respect to an application made by a clerk of the advocate, and evidence should be given on the taxation that the applications for which a counsel fee is asked were in fact made by an advocate. An application to postpone a sale is a common application for which $2 only should be allowed. Upon the taxation of his bill, the advocate will not be allowed a lump sum as commission upon a collection made for his client, unless such evidence is produced before the taxing officer as will enable him to ascertain that the commission represents reasonable and proper charges for services actually rendered. *In re McCarthy—McCarthy* v. *Walker* (No. 3), 4 Terr. L. R. 9.

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5. NEGLIGENCE.

Advice — *Established jurisprudence — Territories Real Property Act—Charge on land—Execution—Sheriff — Tort—Pleading — Interpleader — Counterclaim — Bill of costs.*]—Where a sheriff and an execution creditor are sued together in respect of an alleged irregular levy, the sheriff is not obliged to interplead, but may defend with the execution creditor.—2. A solicitor who advises his client according to the established jurisprudence is not guilty of actionable negligence if the decision upon which he relies is overruled.—3. Neither a solicitor nor a sheriff becomes a tort-feasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of his duty, an execution of a judgment against lands of the judgment debtor.—4. The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy.—5. In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested, because such overcharges, if recoverable, do not belong to the solicitor, but to his clients. In such an

action, however, the solicitor may counterclaim for costs in a former suit in which he acted for the sheriff, notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. Judgment in 21 C. L. T. 270, 4 Terr. L. R. 474, reversed. *Taylor* v. *Robertson*, 22 C. L. T. 80, 31 S. C. R. 615.

Conduct of cause — *Illegal arrest by attorney, at instance of client — Responsibility.*]—The Court refused to disturb a verdict for the defendant in an action by a client against his attorney for negligence and want of skill in the conduct of a suit in which the attorney had caused an illegal arrest, in consequence of which the client was mulct in damages at the suit of the party arrested; the client having insisted that the arrest be made after being advised by the attorney that it would be irregular and illegal. *Kenen* v. *Hill*, 38 N. B. R. 342, 4 E. L. R. 180.

Construction of statute — *Disagreement of jury—Payment of second jury fee—Practice.*]—Action by a client against his solicitor for damages for negligence. Defendant in an action in which this plaintiff was defendant, as instructed, had served a jury notice and paid the jury fee. At the first trial the jury disagreed. For the second trial this defendant gave a new jury notice, but did not pay a jury fee again, believing it was unnecessary. The Court held it was. The case was placed on the non-jury list and defendant consented to judgment: — *Held*, that action should be dismissed as no gross negligence or gross carelessness. *Farquharson* v. *Weeks*, 7 E. L. R. 547.

Instructions to proceed under Workmen's Compensation Act — Failure to observe requirements of Act—Action against solicitor—Non-suit because no damage shewn —Plaintiff injured in mine not owned by his employers—"Undertakers"—No remedy available — "Owners"—Burden of proof. *Scott* v. *McCarter* (B.C.), 8 W. L. R. 228.

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6. Partnership.

Change in firm — *Service of demand — Peremption.*]—Where a party plaintiff or defendant is represented by a firm of attorneys, one of whom is appointed to a judicial position incompatible with the exercise of the profession of an advocate, a peremption of the suit may, nevertheless, be demanded against such party by serving the demand upon those of his attorneys who are still practising. *Bremner* v. *Hibbard*, 3 Que. P. R. 89.

Death of partner — *Motion for peremption.*]—Where one member of a firm of advocates had died, and there has been no substitution of attorney, the remaining members of the firm continue to represent the party for whom the firm was acting, and are entitled to make a motion for peremption of suit, but a motion signed with the old firm name "by A. B. one of the said firm," is illegal and will be rejected. (Gill, J., diss.) *Wright* v. *Can. Pac. Rw. Co.*, 19 Que. S. C. 105.

Death of partner — *Signature of firm —Peremption.*] — Although the surviving members of a firm of solicitors dissolved by the death of one of its members have a right to make and sign a motion for peremption of the suit, they cannot add to their signatures that of the deceased partner, and if they do it will amount to an absolute nullity. Judgment in 3 Que. P. R. 161, reversed. *Wright* v. *Canadian Pacific Rw. Co.*, 20 C. L. T. 442, 3 Que. P. R. 316.

Departure of partner from province —*Notice of peremption—Service on remaining partner.*]—Where a member of a firm of solicitors and advocates has notoriously ceased to be a member of the Bar or profession in the province, the service of a motion for peremption made on the remaining partner in the firm is valid service, the firm being the plaintiff's solicitors of record. *Chouinard* v. *Thompson*, 3 Que. P. R. 476.

Dissolution of firm — *Effect on subsequent proceedings—Peremption.*]—When one member of a firm of solicitors dies or ceases practice, in consequence of a public appointment incompatible with the exercise of his profession, a party to an action represented by the firm is sufficiently represented by the remaining member or members of the firm. 2. If two solicitors have dissolved partnership, but have both continued to practise their profession, the client's mandate is held by both of them, and not by either of them acting alone, and therefore, a motion for peremption served on one only of the then partners is irregular and illegal. *Glass* v. *Eveleigh*, 21 C. L. T. 51, 3 Que. P. R. 357, 18 Que. S. C. 531.

Dissolution of firm — *New partner — Mandate — Pending suit — Notice of motion—Peremption.*]—The defendant was represented in this case when it was first instituted, by a firm of three solicitors, one of whom was subsequently raised to the Bench. Another solicitor then became a partner in the firm. The defendants presented a motion for peremption of the suit signed by the new firm. The plaintiff opposed the motion, on the ground that it was not shewn that the new firm, although containing two members of the former firm, had any mandate from the defendant to act for him in the case, in so far at least as the new member of the firm was concerned:—*Held*, dismissing motion for peremption with costs, that a member of a firm of solicitors who joins the firm after the institution of an action must shew that he is authorised to act therein. 2. If he does not do so, the subsequent proceedings must be signed by the remaining members of the firm alone. *Landry* v. *Pacaud*, 19 Que. S. C. 171.

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7. Miscellaneous Cases.

Action — *Necessity for separate solicitors for opposite parties.*] — The same attorney cannot act for both plaintiff and defendant, even if the latter submits his rights to the Court; such a joinder of functions is irregular and incompatible with the interests of the parties. *Lefebvre-Descoteaux* v. *Lefebvre-Descoteaux*, 8 Que. P. R. 319.

Action against, by client for an account — *Taxation of costs — Special agreement as to costs—Stay of proceedings pending taxation—Trial — Provision for payment.*]—In an action against a firm of solicitors for the recovery of money collected by them for the plaintiff, the solicitors claimed the right to retain the money for extra costs between solicitor and client in proceedings which they had conducted for the plaintiff. The plaintiff, however, alleged that there had been a special agreement precluding any such claim:—*Held*, that an order for taxation of the defendants' bill of costs should not have contained a stay of proceedings in the plaintiff's action, as he was entitled to have the question of the existence of the alleged agreement determined by a trial in the ordinary way.—*Held*, also, that under Rules 965-967 of the King's Bench Act and 6 & 7 Vict. (Imp.) c. 73, s. 37, such order for taxation, obtained on the application of the defendants, should not have contained a clause directing the client to pay the amount, if any, found due.—*Re Debenham and Walker*, [1895] 2 Ch. 430, followed.—*Quære*, whether there should have been any order for taxation of the defendants' bill before the other questions raised had been decided at the trial. *Myers* v. *Munroe*, 4 W. L. R. 221, 16 Man. L. R. 112.

Action against client for costs—*Proceedings in name of client for benefit of others—Proof of guaranty of third persons — Consent of solicitor—Error of solicitor — Forfeiture of costs.*]—The remedy of an action is open to an advocate for the recovery of his costs, against a client for whom he has acted and in whose name proceedings have been taken. The defendant in such an action will not be heard to allege that the proceedings were taken nominally for him, but really for the benefit of third persons, unless he can prove that the third persons guaranteed the costs with the consent of the advocate claiming them. The defence that the taking of a proceeding, the success of which depends upon the admission of the opposite party, is the fault of the advocate which involves the forfeiture of his right to costs, is equally inadmissible. *Mount* v. *Provencher*, 34 Que. S. C. 144.

Action against solicitor — *False imprisonment — Enforcement of invalid conviction — Trespass — Absence of malice — Privilege.*]—The plaintiff was convicted for unlawfully selling liquor to an Indian in violation of the Indian Act, before the defendant as a stipendiary magistrate, who sentenced him to fine and imprisonment absolute. He appealed to a County Court, where both penalties were reduced, in his absence, as he was confined in gaol on a conviction under another penal statute. On the hearing of the appeal the defendant acted as counsel for the prosecutor, prepared the conviction and warrant, and by appointment handed them to the sheriff, who executed them. The plaintiff had been discharged by the Court *in banco*, under a writ of *habeas corpus*, on notice to the defendant, the order reciting an adjudication that the conviction was illegal and without jurisdiction (*Rex* v. *Johnston*, 41 N. S. R. 105), and on that application the defendant filed an affidavit against the motion. In an action by the plaintiff against the defendant, in his capacity as solicitor, for false imprisonment, the trial Judge withdrew it from the jury at the close of the plaintiff's case, on the ground that there was no evidence of malice, and that the defendant's privilege as a solicitor protected him:—*Held*, dismissing the plaintiff's appeal and motion for a new trial, that the plaintiff could be legally sentenced to imprisonment absolute, in his absence, by the County Court Judge on the appeal, but, assuming that he could not, that the action of the County Court Judge in so sentencing him was a mere error, which did not invalidate the conviction, and, as the defendant was not shewn to have acted maliciously or officiously, he was not liable in trespass. — *Per* Townsend, C.J., dissenting, that the conviction having been adjudged illegal, and without jurisdiction, by the Court on the return to the *habeas corpus*, and the defendant being shewn to have been the instrument in procuring, enforcing, and upholding the invalid conviction, he was liable in damages, and the case should be remitted for a new trial. *Johnston* v. *Robertson*, 42 N. S. R. 84.

Action by, for compensation for services — Prosecution of claim against Dominion Government—*Quantum meruit*—Nature of service — Commission. *Murphy* v. *Corry*, 7 O. W. R. 363.

Action in damages against a lawyer for the use of unprivileged words during the hearing of a case — *Costs allowed by the Superior Court reduced by the Court of Review—Costs in review.*]—An action in damages will lie against a lawyer for using irrelevant and unprivileged words at the hearing of a case, although such words may have been used without malice and apparently in answer to unfounded observation made by the opposite party. It results from the evidence in the present case that, under the circumstances, the judgment under review should be varied as to costs in so far as it condemns the defendant to pay the costs of an action for $100, and confirmed to the extent of $20 only, but with costs of an action against the defendant and with costs in Review against the plaintiff. *Dorion* v. *Paquin*, 16 R. de J. 226.

Advocate acting as agent for sale of land — Right to commission. *Cruikshank* v. *Prudhomme*, 3 E. L. R. 23.

Affidavit — *Scandal — Confidential communication by client — Privilege.*] — The plaintiff's claim was for payment of $6,000 which she alleged the defendant had received for her as the purchase-money of certain real estate belonging to her, which she had employed the defendant to sell for her. She alleged that he had only paid over $500 of the money. The defendant, who was a solicitor, applied for an order for security for costs, on the ground that the plaintiff was permanently resident out of Manitoba, and, in support of the application, filed his own affidavit in which he set forth certain communications alleged to have been made by the plaintiff to him as her solicitor, and which, if true, shewed that she was not legally married to her alleged husband, and stated in effect that the plaintiff had returned to and was living with such alleged husband, who was a non-resident. On the plaintiff's ap-

plication to have the affidavit taken off the files of the Court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether the plaintiff was permanently resident out of the jurisdiction or not, as tending to shew that she was greatly under the influence of the alleged husband, and therefore, likely to remain permanently with him:—*Held*, that the affidavit should be ordered off the files as containing matter which the plaintiff was entitled to have treated as privileged from disclosure and which was scandalous and irrelevant to the application. *A. v. B.*, 24 C. L. T. 249, 14 Man. L. R. 249.

Attorney ad litem — *His renunciation of his mandate — Reasons which justify it —Permission of the Court—C. P. 73, 260; C. C. 1759; R. P., Nos. 43, 45.*]—Rule of Practice No. 43, which declares that, in addition to the notice prescribed by the code of procedure, the permission of the Judge must be obtained by an attorney before he ceases to represent a party, is legal, and does not conflict with Art. 260 C. P. and Art. 1759 C. C. (*Hillock* v. *Croizard*, 3 Que. P. R. 225, discussed).—In the absence of some special good reason, permission to an attorney to cease from representing a party in a case will not be granted by the Court. *Trachemontagne* v. *Legare* (1910), 11 Que. P. R. 374.

Attorney's fees upon contestation of abandonments.]—Article 76 of the tariff of fees of attorneys does not determine such fees as regards the contestation of the statement abandonment of insolvent debtors. Nor does the general tariff provide for such case. Under such circumstances, Art. 6 of the tariff confers upon the Judge the power of determining what such fees shall be. Attorneys' fees in second-class actions seem to offer a reasonable compensation in such cases of contestation of statement, and in this case it is ordered that the fees of the contestants' attorneys be taxed as those of an action of the second-class in said Superior Court, including the costs of petition for taxation of said costs. *McManamy* v. *Glascott*, 16 R. de J. 42; 11 Que. P. R. 162.

Bar council — *Appeal from rulings of— Excess of jurisdiction — Prohibition.*]—Although the law (61 Vict. c. 27, s. 2), forbids all appeals from rulings of sectional Bar councils pronounced against their members on complaints lodged against them, the Superior Court has, by virtue of Art. 50, C. P., a right of control and surveillance over the tribunals formed by these sectional councils in such cases. This right and control will be exercised by a writ of prohibition, but only when the council dealing with the complaint exceeds its jurisdiction and not otherwise. *Semble*, that informalities so grave that they amount to an excess of jurisdiction would justify the issue of a writ of prohibition, in spite of the wording of Art. 1003, C. P., which seems to deny this right. Thus a writ of prohibition would not be granted when its object was an indirect appeal from the ruling of the council acting within the limits of its powers in enquiring into a complaint. In the case in hand the advocate against whom the complaint was lodged could not prevent the council hearing the complaint because there is an action for damages pending between the same parties based on the same facts before the Superior Court, the jurisdiction of the two tribunals being absolutely distinct; and, therefore, the Bar tribunal, in investigating such complaint, is not guilty of contempt of Court; and, besides, it is not for the member against whom a complaint is made to raise this objection. *Vidal* v. *The Bar of Quebec*, 27 Que. S. C. 115.

Charge on property recovered or preserved, for costs of proceedings — *23 & 24 V. (Imp.) c. 127, s. 28—Attachment—Parties.*]—Notwithstanding the wording of Rule 852 of the King's Bench Act, which provides that, in case of attachment, "the proceeds of the property and effects attached in the sheriff's hands shall be ratably distributed among such plaintiffs as in due course obtain judgment and execution . . in proportion to the sum actually due upon such executions," an order may be made under s. 28, of the Solicitors' Act, 23 & 24 Vict. (Imp.) c. 127, giving the solicitor for the plaintiff in whose action the order for attachment was made, a charge upon the net proceeds of the attached property in the sheriff's hands for the amount of his taxed costs, charges, and expenses in the action, including the costs of interpleader proceedings in which claims to the goods are successfully resisted, in priority to the claims of other execution creditors, when it appears that such proceeds have been "preserved" by the labour, time, and money expended by the solicitor, within the meaning of that section. *Darling* v. *Smith*, 10 P. R. 360, followed. Richards, J., dissented.—It is quite immaterial that some of the parties for whose benefit the property has been recovered or preserved are not parties to the action. *Greer* v. *Young*, 24 Ch. D., at p. 549, *Emden* v. *Carte*, 16 Ch. D. 311, and *Leacock* v. *McLaren*, 9 Man. L. R. 599, followed. *Valentinuzzi* v. *Lenarduzzi*, 16 Man. L. R. 121.

Client acting for himself — *Discontinuance—Settlement of action by parties — Rights of solicitor, in absence of fraud.*] — The parties to a suit have a right to settle the same as they see fit, without the presence or assistance of their attorneys, provided such settlement be not made in fraud of their attorneys' rights. 2. Where an action was settled by the parties themselves without fraudulent intent, and in the settlement no mention was made of costs, a general inscription by the defendant on the whole of the issue as joined was held to be irregular; but the Court reserved the right of the defendant's attorney to proceed for his costs, and also the plaintiff's right to file a discontinuance of the action upon such terms as he might be advised. *Delaney* v. *Lionais*, 19 Que. S. C. 288.

Client acting for himself — *Discontinuance.*]—The solicitor being merely the agent of the party to the action whom he represents, and the principal being at liberty to act without the concurrence of the agent, the former may personally file a discontinuance of the action, without the knowledge or consent of his solicitor. *Levasseur* v. *Levis*, 19 Que. S. C. 212.

Client's money retained — *Bill of costs ordered to be delivered—Disobedience*

of order—Attachment — Settlement and receipt given in full—Agreement with client—Retainer—Costs.]—Client moved to commit a solicitor for contempt for not bringing in his bill of costs and disbursements for taxation pursuant to an order so to do.—Middleton, J., *held*, 16 O. W. R. 237, 21 O. L. R. 255, 1 O. W. N. 837, that the order should go for attachment. The attachment not to issue for two weeks, and if in the meantime the solicitor delivered a bill, or a statement in writing that he makes no claim against the client for costs or disbursements, it shall not then issue. The solicitor to pay costs of these proceedings in any event of the reference under the order already made and the amount of such costs to be taken into account in ascertaining the balance upon the reference.—Divisional Court dismissed solicitor's appeal with costs. *Re Solicitor* (1910), 17 O. W. R. 2, 2 O. W. N. 67, 22 O. L. R. 30.

Expert advice — Fee for — Account of one solicitor against another—Assigned to book-keeper—Action to recover — Solicitor personally liable—Judgment entered. *Goodwin* v. *Dancey* (1910), 17 O. W. R. 361.

Intervention — *Withdrawal—Service—Filing.*]—An attorney who has agreed to make an intervention on behalf of a person who has interests opposed to those of the defendant whom he represents, may and ought to cease to represent him. — 2. The fact that the intervention is regarded as dismissed because it has not been served, as provided by Art. 223, C. P., does not alter the attorney's position, if the record shews that he has accepted instructions to make the intervention, and that it is opposed to the claims of the defendant.—*Semble*, that, in spite of Rule of Practice 43, an attorney *ad litem* may renounce his instructions without the permission of a Judge, such Rule being incompatible with Art. 260, C. P., and Arts. 1732 and 1759, C. C., and consequently illegal and void.—*Semble*, also, that the intervention should be served on all the parties to the cause and filed at the record office within the three days following its reception by the Judge. *Hillock* v. *Croizard*, 3 Que. P. R. 225.

Investment of money — Liability to client—Guaranty. *Lewis* v. *Ellis*, 1 O. W. R. 356.

Maintenance and champerty—*Action on bill of costs — Defence — Agreement of solicitor to conduct action without remuneration — Cross-action — Consolidation.*] — The bill of costs sued upon was incurred in respect of an action brought by plaintiff as solicitor for defendant. At the end of the litigation plaintiff rendered a bill for $1,755.89. He gave credit for $1,473.23. This left a balance of $282.66. For this, as well as for an $82.50 note, which was not paid, an action was brought. The bill was rendered more than a year previous, and no order for taxation was taken out, because negotiations were pending for settlement, it was said. On motion for summary judgment, defendant also denied that he ever consciously signed a retainer; and further alleged that plaintiff "took up the case on condition that he was to get his costs out of defendants; that if they failed all he would have to pay was the defendants' costs:"—*Held*, the agreement alleged was not champertous, nor in any way within the prohibition against maintenance. "It was never doubted that a solicitor might lay out his own moneys, as disbursements on his client's account, and a solicitor can conduct a case gratuitously out of charity or friendship towards his client." *In re Solicitor, Clark* v. *Lee*, 5 O. W. R. 631, 9 O. L. R. 708.

Misconduct — *Accepting transfer of client's property after judgment—Defeating anticipated execution—Fraud on plaintiffs—Summary jurisdiction.*]—Before the trial of action for damages for tort the defendant's solicitor wrote to one of the defendants warning him of a possible judgment against him and advising him to make disposition of his property in anticipation of it. After verdict against the defendants, and pending argument on the motion for judgment, council (who was also one of the solicitors) for the defendants, obtained a transfer to himself of certain property belonging to the defendant union, which he credited with $500 on account of costs; subsequently judgment was entered for the plaintiffs for $12,500 and costs, and the plaintiff obtained the appointment of a receiver and issued executions, but nothing was realized:—*Held*, reversing the decision of Irving, J., Martin, J., dissenting, that the solicitor in obtaining the transfer to himself of the property was guilty of a fraud on the plaintiffs; and upon a summary application in the original action he was ordered to restore it or pay its value into Court, under penalty of attachment. *Centre Star Mining Co.* v. *Rossland Miners' Union, No. 38 Western Federation of Miners*, 11 B. C. R. 194, 1 W. L. R. 244.

Moneys collected compensated by professional services — *C. P. 191, 217; C. C. 1188.*]—If an action for the recovery of moneys collected by the defendant for the plaintiff, the former, by a cross-demand, alleges compensation by professional services, commission, etc., an inscription in law asking the rejection of this cross-demand, will not be granted on the ground that the debts are equally clear and liquidated, and that the defendant should merely have pleaded to the principal action; but *preuve avant faire droit* will be then ordered. *Drouin* v. *Patry* (1910), 11 Que. P. R. 266.

Moneys in hands of solicitor — *Payment over — Summary application — Contract — Dispute.*]—The Court will not, on a summary application, compel an attorney to pay over money the right to which is dependent on the existence of an agreement between the attorney and the client, which the latter disputes. *Ex p. Kierstead, Re Robertson*, 38 N. B. R. 463, 5 E. L. R. 389.

Payment into Court of money as security for costs of review by Superior Court — *Distraction of costs — Right of solicitor to payment out—Reversal of judgment by Court of King's Bench—Return of deposit.*]—When a judgment affirming the judgment below is given by the Court in review, the attorney of the party who succeeds, being entitled to distraction of costs, has a right to withdraw the deposit made by the opposite party (the appellant), and, if the judgment of the Superior Court in re-

view is subsequently reversed by the Court of King's Bench, he is not obliged to repay the deposit or account for it to the party who made it, although the latter has finally succeeded in the action. *Delisle* v. *McCrea*, 32 Que. S. C. 1.

Payment of bill — *Bailiff's fees — Action for.*]—A bailiff has no recourse against a client who has paid his solicitor the amount of a bill of costs taxed, including the fees of such bailiff. *Decelles* v. *Pauette*, 18 Que. S. C. 124.

Purchase of property through solicitor having option for purchase—*Breach of duty of solicitor—Non-disclosure of existence of option—Want of independent advice—Secret profit retained by solicitor—Recovery by client.*]—The two defendants were in partnership as solicitors. One of them, having secured an option for the purchase of a property at $55,000, negotiated with the plaintiff for the sale of it to him at $65,000, concealing from the plaintiff the fact that he had the option, and, upon the plaintiff agreeing to purchase at $65,000, the transaction was carried out as one between the owners of the property and the plaintiff, the plaintiff entering into an agreement with the owners to purchase at $65,000, and the defendant B. receiving $10,000 from the owners:—*Held*, upon the evidence, that the defendants were acting as the solicitors for the plaintiff, and it was their duty to disclose to the plaintiff the fact that B. had an option on the property, and to insist that the plaintiff should consult another solicitor, and refuse to complete the purchase until he had obtained independent advice; and, this not having been done, the plaintiff was entitled to recover from B. the $10,000 net profit received. *Amphlett* v. *Blaylock* (1910), 13 W. L. R. 515, Alta. L. R. .

Retaining fee — *Assignment to solicitor of fruits of litigation as security for sale of litigious rights—Champerty.*]—A transfer made by a plaintiff to his advocate of the amount in question in the action as collateral security for a sum of money, which he has engaged to pay him by way of retainer in the cause, is not tainted with the nullity which proceeds from Art. 1485, C. C., touching the acquisition of litigious rights by the officers who are named in that article. *Lamothe* v. *Montreal Street Ry. Co.*, 16 Que. K. B. 1.

Right of retention — *Moneys deposited in bank instead of in Court—Remuneration for services—Action—Quantum meruit—Ascertainment — Elements — Tariffs — Opinion evidence.*] — An attorney who has received from his client a sum of money to deposit in the office of the Court, and who, by arrangement with the attorney of the opposite party, makes a joint deposit with him of this sum in a bank, has parted with the money and is not the holder of it. He cannot, therefore, assume to exercise a right of retention in respect of it.—2. The value of the services of an advocate is recoverable by action. The value depends upon (a) the age, the experience, and the reputation of the advocate; (b) the importance of the matter in which the services are rendered; (c) the work and research which it requires; (d) the amount which is ordinarily paid for services of the same nature. The means of the client have nothing to do with the matter.—3. The Court has the power absolutely to estimate and determine the value without being obliged to follow tariffs or opinions expressed by witnesses at the hearing. *Prattle* v. *Holt*, 52 Que. S. C. 323.

Right to commission on sale — Disclosure of agency. *McCullough* v. *Hull*, 1 O. W. R. 451.

Service on defendant's solicitor — *Dismissal of action—Default of plaintiff — Application by plaintiff for relief—Duration of retainer—Absent defendant.*]—Owing to a change in the plaintiffs' firm of solicitors an order for security for costs was not complied with and an order was made under Rule 1203, dismissing the action with costs, but no judgment was entered or costs taxed. When the order came to the knowledge of the plaintiff's solicitors they at once moved under Rule 358 to be allowed to put in security and proceed with the action. Notice of this motion was served on the defendant's solicitors who, however, did not consider himself any longer entitled to act as his client had left the province when the action was dismissed and had left no address. The Master in Chambers held that so long as Rule 358 can be invoked, the action is still pending, and the solicitor on the record is still solicitor. *Muir* v. *Guinane*, 5 O. W. R. 324, 9 O. L. R. 324.

Settlement of action by parties — *Lien for costs — Notice—Collusion.*]—Apart from any question as to there being fruits of the action and the absence of collusion, the lien of a solicitor for his costs of the action is dependent upon notice, which must be clear and explicit to the opposite party, that his costs are unpaid, and that he looks to the proceeds of the action for the payment thereof. *De Santis* v. *Can. Pac Rw. Co.*, 9 O. W. R. 331, 14 O. L. R. 108.

Settlement of action by parties — Payment by defendants of plaintiffs' solicitors' costs—Practice—Consent — Motion — Præcipe order for taxation—Offer to pay sum for costs—Reference to taxation—Costs of. *Marjoram* v. *Toronto Rw. Co.*, *Re Solicitor*, 10 O. W. R. 562.

SPEAKER OF LEGISLATIVE ASSEMBLY.

See ASSAULT—CONSTITUTIONAL LAW.

SPECIAL CASE.

Forum.]—*Quære*, whether a special case stated under 53 V. c. 4, s. 139 (N.B.), should not be first heard by the Judge in Equity. *Ward* v. *Hall*, 34 N. B. R. 600.

See COURTS.

SPECIAL DAMAGE.

See DEFAMATION—PLEADING — SEDUCTION.

SPECIAL INDORSEMENT.

See WRIT OF SUMMONS.

SPECIAL JURY.

See TRIAL.

SPECIAL OCCUPANT.

See WILL.

SPECIAL PARTNER

See PARTNERSHIP.

SPECIALTY.

See LIMITATION OF ACTIONS.

SPECIFIC PERFORMANCE.

Agent — Fraud — Amendment—Delay. *Aitcheson* v. *McKelvey*, 1 O. W. R. 51, 355.

Agreement for lease — Rent to be fixed by percentage on cost of building to be erected — Amount of rent — Consent of lessees to extra cost of building — Construction of agreement — Dependent or independent covenants. *Joseph* v. *Anderson & Macbeth Co.*, 9 O. W. R. 482.

Contract — *Option — Purchase of land —Time — Ejectment — Injunction to restrain.*]—Time is of the essence of unilateral agreement, such as an option to purchase land. On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the Court ordered that, on the defendant confessing the action of ejectment, the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed. *Semble*, that relief by specific performance cannot be obtained under s. 283 of 60 V. c. 24. *Freeman* v. *Stewart*, 2 N. B. Eq. R. 365; *Stewart* v. *Freeman*, 22 C. L. T. 211.

Contract for lease — Rent to be fixed by percentage on cost of building to be erected — Amount of rent — Consent of lessees to extra cost of building — Architect — Burden of proof. *Joseph* v. *Anderson*, 7 O. W. R. 582.

Contract for lease — Statute of Frauds —No time fixed for commencement or duration of term — Alteration of contract after execution — Materiality. *Acme Oil Co.* v. *Campbell*, 8 O. W. R. 627.

Contract for sale and purchase of land — *Agent of purchaser — Action by agent — Delay of purchaser — Resale — Right of sub-purchaser to join vendor as party.*]—Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract. Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude, upon pain of losing them. The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although $50 was to be paid down, and $200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale:—*Held*, that the whole course of proceedings on the part of the plaintiff's principal (set out in the case) shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate, and the action should be dismissed as against both defendants.—*Held*, that the owner was properly joined as a defendant; the foundation of the right against him being that the plaintiff or his principal was the equitable owner under the contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract. *Smith* v. *Hughes*, 23 C. L. T. 108, 5 O. L. R. 238, 2 O. W. R. 19.

Contract for sale and purchase of land — *Bill of complaint — Allegation of tender — Demurrer — Evidence.*]—Where in a suit for specific performance of an agreement for the sale of land, the question whether the plaintiff had made a tender of the purchase money within the time limited by the agreement was one of evidence, a demurrer to the bill on the ground that it did not allege a tender in time was overruled. *Stewart* v. *Freeman*, 22 C. L. T. 399, 2 N. B. Eq. R. 408.

Contract for sale and purchase of land — *Judgment for payment of price — Extension of time — Payment on account— Liquidated damages — Forfeiture — Relief against.*]—After judgment in an action by the vendors of land for specific performance, and before issue of the same, the vendors agreed to extend the time for the payment of the purchase money for three months, upon the terms of the purchaser paying down $500; which extension was embodied in the judgment, and it was agreed between the parties as follows: "If the defendant shall pay the balance of the purchase money within the time limited by the judgment, the plaintiffs shall give credit to the defendant upon the said balance for the said sum of $500, but, if the defendant shall fail to make payment of the said balance within the time limited by the said judgment, then the plaintiff shall not be bound to give credit to the defendant upon the said balance for the said sum of $500, and in this respect time shall be of the essence of the

contract." A few days after the expiry of the time limited by the judgment, the defendant tendered the purchase money, less $500, which the plaintiffs refused to accept:—*Held*, that the above provision was in the nature of a forfeiture, and not of liquidated damages, and the purchaser was entitled to be relieved from the terms of the judgment and to have a conveyance of the property upon paying the balance due after credit given for the $500. *Empire Loan & Savings Co.* v. *McRae*, 23 C. L. T. 229, 5 O. L. R. 710, 2 O. W. R. 325, 405.

Contract for sale and purchase of land — *Oral contract — Statute of Frauds —Part performance — Possession — Note or memorandum — Delivery of deed in escrow.*]—Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds. *Quære*, whether a conveyance of land defectively executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed. *McLaughlin* v. *Mayhew*, 23 C. L. T. 277, 6 O. L. R. 174, 1 O. W. R. 308, 2 O. W. R. 10, 590.

Contract for sale and purchase of land — *Taking possession — Acts constituting part performance.*] — Possession is part performance of a contract for the sale and purchase of land both by and against a stranger and the owner. On negotiations for the purchase of land the agent of the plaintiff, vendor, told the defendant, purchaser, that the lot was his. The defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase:—*Held*, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance. *Bodwell* v. *McNiven*, 23 C. L. T. 107, 5 O. L. R. 332, 1 O. W. R. 841.

Contract for sale of land — Alteration of written offer — Onus — Damages—Pleading — Division Court — Claim within jurisdicton of — Costs — Solicitor. *Prittie* v. *Laughton*, 1 O. W. R. 185.

Contract for sale of land — Correspondence — Statute of Frauds — Agent. *White* v. *Malcolm*, 1 O. W. R. 302.

Contract for sale of land — *Fraudulent scheme—Costs.*]—The plaintiff brought his action against P., R., and H., for specific performance of an agreement for sale of land by H. to the plaintiff, and alleged that both P. and R. had notice of his claim as a *bona fide* purchaser from H., and that they had dealt with the land in pursuance of a fraudulent scheme and device to deprive him of his interest. P. set up that he was a *bona fide* purchaser for value, without notice. R. set up that the plaintiff was in default under the covenants in the agreement, and that as assignee he had cancelled the same and declared it void:—*Held*, that the circumstances shewed a dishonest and fraudulent design, devised and carried out by R., to get the land of the plaintiff; to have the benefit of the $200 the latter had paid to H. and all the improvements, including a good house, without any compensation, all in violation of the promise made and in fraud of the undertaking given in his (R.'s) name, so that the plaintiff was entitled to relief against R. The plaintiff having omitted to register his agreement, P. was not shewn to have had knowledge of his interest in the land; there was not against him any proof of actual notice, and the evidence of constructive notice through one Haney was far from being conclusive. As to R. he was guilty of fraud in dispossessing the plaintiff of his land, after promising and undertaking to protect him. The plaintiff should recover by way of damages what he paid to H. as purchase money, with interest. Verdict for the plaintiff for $200 with interest from the 1st December, 1902. R. to pay all costs of suit, those incurred by his co-defendants as well as those of the plaintiff. *Czuack* v. *Parker*, 24 C. L. T. 272.

Contract for sale of land — Possession. *Abbott* v. *Gustin*, 1 O. W. R. 482.

Contract for sale of land — Possession — Waiver — Improvements — Account —Title by possession — Costs. *Rankin* v. *Sterling*, 3 O. L. R. 646, 1 O. W. R. 243.

Contract for sale of land — Shortage —Statement of vendor — Laches. *Reilly* v. *McDonald*, 1 O. W. R. 196, 721, 723, 784, 849.

Contract for sale of land — Time — Essence of — Delay — Waiver. *Long* v. *Eby*, 1 O. W. R. 420.

Contract for sale of land by one executor without authority — *Personal liability of executor for misrepresentation—Statute of Frauds.*]—An offer in writing was made on behalf of the plaintiff to R., one of three executors of S., for the purchase of land belonging to the estate. This offer was accepted by R., and a formal agreement of sale by the executors to the plaintiff was drawn up in R.'s office on the form used by the executors, which embodied the full terms and conditions of the sale. This agreement was forwarded to be executed by the plaintiff, the letter accompanying it being signed by R. The plaintiff executed the agreement and returned it to R. with a cheque for $250, being the cash payment on the sale. The agreement and cheque were received by R., but were almost immediately returned by him, upon the ground that he had previously offered the property to another person: — *Held*, that there was an

agreement for the sale of the land in question sufficient to satisfy the requirements of the Statute of Frauds, entered into between the executors and the plaintiff, but R. had on the evidence no power to bind his co-executors. R. was liable for the misrepresentation of authority; where a man pretends to act on behalf of others, he impliedly promises that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to his representation: *Halbot* v. *Lens*, [1901] 1 Ch. 344; *Starkey* v. *Bank of England*, [1903] A. C. 114. *Maneer* v. *Sanford*, 24 C. L. T. 70, 15 Man. L. R. 181, 1 W. L. R. 128.

Contract for sale of land by trustees — *Evidence of concurrence by all — Statute of Frauds — Correspondence — Authority of trustees to bind co-trustee.*]—A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for $12,000, and giving reasons why it should be accepted. The co-trustee replied concurring in those reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G., and at their suggestion offered to sell the same property to G. for $13,000, but without further notice to his co-trustee. The offer was accepted by the solicitors, whereupon the person who had offered $12,000 raised his offer to $14,000, and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance:—*Held*, affirming the judgment of the Court of Appeal, 9 O. L. R. 522, 5 O. W. R. 554, that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only, and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could, there were circumstances which occurred between the time it was written and the signing of the contract with G. which should have been communicated to the co-trustee before he could be bound by the contract. *Gibb* v. *Mahon*, 26 C. L. T. 383, 37 S. C. R. 362; 3 O. W. R. 645.

Contract for sale of mining land — Formation of company—Construction of contract — Rectification — Shares — Breach—Time — Forfeiture — Waiver — Counterclaim — Work and labour — Assignment of chose in action—Notice — Part performance. *Clark* v. *Walsh*, 1 O. W. R. 228, 2 O. W. R. 72

Contract to convey land — Consideration—Satisfaction of indebtedness to plaintiff's husband—Statute of Frauds — Correspondence — Offer to convey—Failure to comply with terms—Contract with husband —Laches—Concealment of facts. *Osment* v. *Blount* (N.W.T.), 1 W. L. R. 497.

Contract to convey land — *Description — Quantity of land — Measurements —Occupation—Abatement of price.*]—In an action for specific performance of a contract to convey lands, it appeared that the lands were described in the contract as "the house and premises on P. street, now occupied by Mrs. L., 32 feet more or less frontage on P. street and 67 more or less in depth," and that such lands did not possess a uniform depth of 67 feet, a piece 13 feet by 14 having been taken out of one side at the rear:—*Held*, that the implication as to the uniform depth of the lot, which would arise from the measurements given ought not to prevail, there being a certain description expressed in the agreement, viz., the occupation by L.; also, assuming that the distance to the rear line, from the measurements given, must be assumed to be equal, that the case was one in which the maxim *falsa demonstratio non nocet* applied, it being absolutely necessary to take the occupancy of L. in order to obtain the base line: and also, that the description answering to the holding ought to prevail over the implied description, or subsequent addition, which would be false. *MacEchen* v. *MacDonald*, 37 N. S. R. 59.

Contract to divide land to be acquired — *Acquisition of part — Right to less than half with abatement in price — Railway — Board of commissioners — Evidence—Reference—Validity of agreement not to bid.*]—In 1901 the province of Ontario offered for sale by tender a triangular piece of land, comprising 19 acres, lying between the tracks of the plaintiffs' and defendants' railways, which were to the north and south thereof respectively. Both railway companies were desirous of acquiring the land, and it was arranged, instead of both putting in bids, that the defendants should put in a bid for the whole, and, if they procured it, the plaintiffs were to have the right, within 5 years, to a conveyance of half the land, stated in their proposal to be "surrounded green on the enclosed blue print," on paying half the purchase money and interest. The plaintiffs thereupon refrained from bidding, and the defendants put in their bid. They, however, actually acquired only 17 acres, the province having withdrawn two acres at the north-west angle of the land, being on that half which would have come to the plaintiffs under the original contemplated purchase:—*Held*, that the agreement was for an equal division of whatever land should be procured, which the plaintiffs were entitled to enforce, and to have a conveyance of the half. —*Held*, also, that the fact of certain proceedings having been taken by the defendants before the Railway Commission, under which an order was obtained by the defendants for a crossing over the land, did not constitute any answer to the plaintiffs' claim, for, even if admissible in evidence, it could not affect the plaintiffs except as to the mode of division, no declaration of right against the plaintiffs' lands having been claimed before the Commission, nor were the plaintiffs notified therof; nor could the defendants, under the circumstances, set up that the whole parcel was necessary for the purposes of the railway; the evidence, moreover, shewing that such was not the fact.—*Held*, also, that an agreement such as this, not to bid against each other, was not an illegal one, and was enforceable. A declaratory order was made directing a conveyance by the defendants to the plaintiffs of half the land, and in case the parties could not agree on the mode of division, the matter was referred to the Master to settle the same, and the form of the conveyance. Judgment of Teetzel, J., 8 O. W. R. 254, reversed; Meredith,

J.A., dissenting. *Can. Pac. Rw. Co.* v. *Grand Trunk Rw Co.*, 9 O. W. R. 158, 14 O. L. R. 41. Affirmed by the Supreme Court of Canada (Maclennan and Duff, JJ., dissenting); but judgment varied by striking out the part directing a reference. *Grand Trunk Rw. Co.* v. *Can. Pac. Rw. Co.*, 27 C. L. T. 652, 39 S. C. R. 220.

Contract to divide specified land to be acquired by defendants — Acquisition by defendants of part only—Claim of plaintiffs to half of land actually acquired—Right to less than half with abatement in price. *Can. Pac. Rw. Co.* v. *Grand Trunk Rw. Co.*, 8 O. W. R. 254.

Judgment — Extension of time — Payment—Forfeiture — Relief—Final order of sale. *Empire Loan Co.* v. *McRae*, 5 O. L. R. 710, 2 O. W. R. 325, 405.

Lands abroad — *Jurisdiction.*] — The plaintiff, a resident of Buffalo, agreed in writing with the defendant to exchange certain lands situate in Ontario; and now brought this action for a specific performance of this contract:—*Held*, that the plaintiff having brought his action in this Court, and thereby submitted to its jurisdiction, the Court had jurisdiction to decree specific performance. *Montgomery* v. *Ruppersbury*, 20 C. L. T. 13, 31 O. R. 433.

Lease — Possession — Verbal agreement for purchase—Acts referable to agreement. *Howard* v. *Quigley*, 1 O. W. R. 96, 2 O. W. R. 694.

Lease — *Undertaking to build — Non-performance in lifetime of lessor — Devise to lessee — Damages.*]—By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of $200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease:—*Held*, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build. *Cooper* v. *Jarman*, L. R. 3 Eq. 98, and *In re Day*, [1898] 2 Ch. 510, distinguished. *In re Murray*, 22 C. L. T. 373, 4 O. L. R. 418, 1 O. W. R. 576.

Timber limits — Contract for sale of—Correspondence — Completed contract — Statute of Frauds — Misunderstanding — Title — Judgment—Reference. *Burton* v. *Playfair*, 1 O. W. R. 599.

Vendor and purchaser — *Landlord and tenant — Rescinding agreement of sale — Waiver — Laches.*]—The plaintiff became tenant of a farm under a lease from C. for seven years at an annual rental of $450, payable on the 15th October in each year. Contemporaneously with the lease an agreement of purchase of the property was entered into between the plaintiff and C., by which the latter agreed to accept as part payment of the purchase money all sums of money which should be paid by the plaintiff as rent under the lease, and the plaintiff covenanted, at the expiration of eight years from the date of the instrument, to pay the balance of the purchase money with interest. There was also the covenant of C. to convey upon payment, an option to the plaintiff to pay off the full amount and receive a conveyance at any time, and finally the following proviso: "It is expressly understood and agreed that time is to be considered the essence of this agreement, and unless the payments are punctually made the said party of the first part shall at his option declare this agreement null and void, all payments made thereunder shall be forfeited, and the said party of the first part shall be at liberty to resell the said land, the said party of the second part hereby agreeing to convey to the said party of the first part his interest in the same when and as soon as such default occurs." The lease contained a proviso for re-entry, the statutory short form, for non-payment of rent. C. afterwards conveyed the land in fee to the defendant Palmatier subject to the lease and agreement. Default having occurred in payment of the rent due on 15th October, 1897, the defendant Palmatier leased the property to the defendant Mills with an option of purchase before the end of the first year of the term, and Mills at once entered into possession:—*Held*, that the lease and agreement between C. and the plaintiff should not be considered as independent contracts, and that C. or his assignee might rescind the agreement of sale for default in payment of any rent called for by the lease.—2. That a formal notice or declaration of rescission of the contract was not necessary, as the plaintiff was aware of the lease to Mills, his taking possession under it, and of Palmatier's intention to rescind.—3. The plaintiff, having made default as regards an essential term of the agreement, was not entitled to the exercise of the discretion of this Court to order specific performance in his favour after the position of the parties had been entirely changed:—*Held*, also, *per* Richards, J., that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills, who had made valuable improvements without notice that the plaintiff intended to claim specific performance. *Moir* v. *Palmatier*, 19 C. L. T. 287, 20 C. L. T. 89, 13 Man. L. R. 34.

SPEEDY TRIAL.

See TRIAL.

SPRINKLER LEAKAGE INSURANCE.

See INSURANCE.

STAKEHOLDER.

See INTERPLEADER.

STAMP ACT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

STAMPS.

See COSTS — CRIMINAL LAW — PRACTICE —WRIT OF SUMMONS.

STATED ACCOUNT.

See PARTNERSHIP.

STATED CASE.

See APPEAL—ARBITRATION AND AWARD — CRIMINAL LAW — INDIAN—LANDLORD AND TENANT—PARLIAMENTARY ELECTION.

STATEMENT OF CLAIM.

See PLEADING—PROCESS—SERVICE OUT OF JURISDICTION.

STATEMENT OF DEFENCE.

See PLEADING.

STATEMENT OF DEFENCE AND COUNTERCLAIM.

See PLEADING.

STATEMENT OF DEFENCE TO COUNTERCLAIM.

See PLEADING.

STATUTE LABOUR.

See ASSESSMENT AND TAXES.

STATUTE OF DISTRIBUTION.

See DISTRIBUTION OF ESTATES.

STATUTE OF FRAUDS.

See BANKS AND BANKING—BILLS AND NOTES — CONTRACT — GUARANTY — MASTER AND SERVANT — PARTNERSHIP —RAILWAY—SALE OF GOODS — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS — RECEIVER.

STATUTES.

Abolition of penalty pendente lite—*Second offence — Pleading.* —Action to recover a penalty for a breach of the Pharmacy Act of Quebec:—*Held*, that a statute passed after the action had been begun, permitting the sale of medicines prohibited by the original statute, prevents the imposition of a penalty which no longer exists.—2. To establish a second offence, it is not sufficient that two breaches have been successively committed; it is necessary that the first shall have been followed by the infliction of a penalty, and that after that a new breach shall have taken place, and that the infliction of the first penalty shall be alleged in the action to recover the second. Judgment in 16 Que. S. C. 536 affirmed. *L'Association Pharmaceutique de Québec* v. *Livernois*, 9 Que. Q. B. 243.

Amending Act — *Retroaction — Sale of land—Judgments and orders — County Courts.*]—Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 *et seq.* of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following year the Legislature passed an Act providing that "in case of a County Court judgment an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment:"—*Held*, Sedgewick, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments, and not to orders and judgments of the County Courts.—*Held*, further, reversing the judgment of the Queen's Bench, 13 Man. L. R. 419, 21 C. L. T. 396, Davies, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made.—*Held, per* Sedgewick, J., that the clause had no retroactive operation at all. *Ritz* v. *Schmidt*, 22 C. L. T. 79, 31 S. C. R. 602.

Bankruptcy and insolvency — *Examination of insolvent—Fraud before statute.*] —The provisions of s. 36 of R. S. O. c. 147, for the punishment of an insolvent assignor who has concealed or made away with his property in order to defeat or defraud his creditors do not apply to his acts disclosed on examination as having been done before the date of the passing of the original Act, 58 V. c. 23. *In re Lucas, Tanner & Co.*, 20 C. L. T. 276, 32 O. R. 1.

Bills and notes — *Place of payment — Abrogation of right to elect domicil — Current instrument.*]—Although the provision of Art. 85, C. C.—by virtue of which the indication of a place of payment in a bill or note or other writing, whatever be the place where it is dated, is equivalent to an election of the place so indicated as a domicil—has

been abrogated by 63 V. c. 36 (Q.), such abrogation does not affect the election of domicil so made in a note signed before such abrogation. Therefore, it was open to the plaintiff in this case to sue the defendant at Montreal upon a promissory note dated at Montreal and payable there, although such note was really signed by the defendant in the Province of Ontario, where he was domiciled. *Merchants Bank of Halifax* v. *Graham*, 19 Que. S. C. 319.

B. N. A. Act, 1867, s. 91, s.-s. 29, s. 92, s.-s. *10 (a)*, *Can. Pac. Rw. Co.* v. *Toronto*, C. R. [1908] A. C. 402, digested under Railways.

B. N. A. Act, 1867, s. 92. *Atty.-Gen. for Ont.* v. *Woodruff*, C. R. [1908] A. C. 352, digested under Revenue.

B. N. A. Act, 1867, ss. 92 and 101. *Day* v. *Crown Grain Co.*, C. R. [1908] A. C. 150, digested under Constitutional Law.

Bush Fire Act — Construction — Fire caused by sparks from engine—Conviction. *Rex* v. *Hawthorne* (B.C.), 5 W. L. R. 279.

Can. Ry. Act, 1888, ss. 187, 188. *Can. Pac. Rw. Co.* v. *Toronto*, C. R. [1908] A. C. 402, digested under Railways.

Canada Temperance Act, 51 V. c. 34, s. 10. *Townshend* v. *Cox*, C. R. [1907] A. C. 26.

Civil Code, Art. 710 — *Derogation from common law—Strict construction — Assignment by co-heir of share in part of succession—Retrait successoral.*] — Article 710 of the Civil Code, permitting *retrait successoral* where a co-heir has assigned his right to the inheritance, derogates from the common law, and ought to be strictly interpret d. Therefore, the assignment by a co-heir of his share in land belonging to the succession, which does not form the whole of it, does not afford ground for the exercise of this right. *Bélanger* v. *Gauvin*, 35 Que. S. C. 118.

Code of Civil Procedure; its interpretation — *Affidavit — Can a notary receive it?—Motion to dismiss on opposition—C. P. 23, 651; 62 Vict. c.* 13.]—The Code of Civil Procedure is a statute, and it must be interpreted in such a way as to harmonize with other statutes, and it cannot be considered as being a special law of itself and without relationship with the other laws of the province. An affidavit to an opposition to withdraw or annul received before a notary is valid. *Massey-Harris Co.* v. *Thompson*, 11 Que. P. R. 140.

Colonial Acts — *Imperial Acts — Ship —Deserters from—Conviction.*]—Under the provisions of the Colonial Laws Validity Act, 28 & 29 Vict. c. 63 (Imp.) any colonial law repugnant to the provisions of an Imperial statute having force in Canada is inoperative to the extent only of such repugnancy, and not otherwise. The only repugnancy between s. 134 of the Seamen's Act, Canada, R. S. C. c. 74, and s. 236 of the Imperial Merchant Shipping Act, 1894, is where the ship from which the desertion takes place is a British ship. Hence, cases which relate to deserters from ships which are not alleged and proved to have been registered as British ships, alone fall under the operation of the Canadian Act.—2. A case of harbouring seamen deserting from a ship not alleged and proved to be a British ship, and which at the time of the alleged desertion was lying in the port of Montreal, was rightly brought under the Seamen's Act, Canada. *O'Lea* v. *The Queen*, 9 Que. Q. B. 158.

Construction — *British Columbia Dentistry Act, 1908, s. 39—Retroactivity—Professional misconduct before registration — Jurisdiction of council.*]—Section 39 of the Dentistry Act, empowering the council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act. *G.*—— v. *College of Dental Surgeons of British Columbia*, 14 B. C. R. 129, 9 W. L. R. 650.

Construction — *Customs Act — Non-payment of duty.*]—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, which is not comprised in their words, and which is manifestly not intended by the legislature. Applying this principle to s. 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 s. 197 was, to make the person liable to punishment who illegally imported goods without paying the duties lawfully payable, whether the goods were found or were not found in his possession or keeping. *O'Grady* v. *Wiseman*, 9 Que. Q. B. 169.

Construction — *Expropriation of private property.*]—Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness. *Smith* v. *Public Parks Board of Portage La Prairie*, 15 Man. L. R. 249, 1 W. L. R. 237.

Construction — *Limitation of monopoly —Bridge.*] — Every limitation imposed by the legislature in creating a privilege, in this case a monopoly in favour of the owner of a bridge, must be interpreted as having for its object the diminishing as far as possible of the public inconvenience or the burden imposed by such monopoly. *Rouleau* v. *Pouliot*, 25 Que. S. C. 88.

Construction — *North-West Territories' Act, s. 11—Infants' Relief Act, 1874 (Imp.) —Ratification of infants' contract.*] — *Held*, that s. 2 of Infants' Relief Act, 1874 (Imp.), is not by s. 11 of North-West Territories Act in force in Alberta. Defendant was held liable on a contract entered into when an infant and ratified in writing after attaining his majority. *Brand* v. *Griffin*, 9 W. L. R. 427.

See S. C. *ante* col. 798.

Construction — Repeal — City charter —Revocation—Change in governing body — Preamble of statute—Inconsistency with enacting parts. *Rex* v. *Pickering* (Y.T.), 1 W. L. R. 521.

Construction — *Toll-bridge — Franchise —Exclusive limits—Measurement of distance —Encroachment—58 Geo. III., c. 20 (L. C.).*]—The Act 58 Geo. III., c. 20 (L. C.), authorized the erection of a toll-bridge across the river Etchemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thèrese, or as near thereto as may be in the county of Dorchester," and by s. 6 it was provided that no other bridge should be erected or any ferry used "for hire across the said river Etchemin, within half a league above the said bridge and below the said bridge:"—*Held*, Nesbitt and Idington, JJ., dissenting, that the statute should be construed as intending that the privilege defined should be measured up-stream and down-stream from the site of the bridge as constructed. *Per* Nesbitt and Idington, JJ., that there was not any expression in the statute shewing a contrary intention, and, consequently, that the distance should be measured from a straight line on the horizontal plane. But, *per* Idington, J.: In this case, as the location of the bridge was to be "opposite the road leading to Ste. Thèrese," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should be maintained. *Roulleau* v. *Pouliot*, 25 C. L. T. 122, 36 S. C. R. 224.

Construction of 7 Edw. VII. c. 19, ss. 8, 9 — *9 Edw. VII. c. 18, s. 10—Power of Hydro-Electric Power Commission to enter private lands against will of owner.*]—Plaintiff brought action for trespass to her land. Defendants pleaded justification and relied on the legislation respecting the Hydro-Electric Com., 7 Edw. VII., c. 19, and 9 Edw. VII., c. 18, s. 10. The whole question resolved itself into the single question of whether the above statutes or either of them, authorised an entry under the direction of the Commission, upon private property, against the will of the owner before payment of compensation.—At trial Falconbridge, C.J.K.B., *held*, that the statutes were a good defence, and dismissed the action.—Court of Appeal dismissed plaintiff's appeal therefrom. *Felker* v. *McGuigan Construction Co.* (1910), 16 O. W. R. 417, 1 O. W. N. 946.

Crown Procedure Act, R. S. B. C., 1897, c. 57, s. 4. *Norton* v. *Fulton*, C. R. [1908] A. C. 416, digested under DAMAGES.

Division Courts — 4 Edw. VII. c. 12, s. 1 (O.)—Application to pending action. *Re Thom* v. *McQuilty*, 4 O. W. R. 522.

Error in printing — *Effect of amending statute — Retroactivity — Assessment and taxes—"Exempted."*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4, s.-s. (p), by the accidental insertion of the word "exempted," rendered liable to assessment property of the plaintiff's previously exempted. It was admitted that the word imposing the liability was not contained in the manuscript revision of the statutes, but was inserted, by error, in the printed copy, deposited in the office of the Provincial Secretary, which, it was declared by the Act respecting the Revised Statutes, Acts of 1900, c. 44, s. 5, should be held to be the original. By an Act of the following year (Acts of 1902, s. 25), the error was corrected, by striking out of s. 4 (p) the word "exempted:"—*Held*, that, by this amendment, the Court was precluded from coming to the conclusion that the insertion of the word "exempted," in the chapter of the Revised Statutes amended, was a mistake, and inserted and printed accidentally, it being assumed, in the amending Act, that the section amended was in full force and effect from the time it came into operation, the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there; that, in the absence of words giving the amendment a retroactive effect, it could not be so read, and that the Act, as amended, would only apply to future assessments; and that the liability of the plaintiffs having been fixed by c. 73, and there having been no appeal, the amendment would not have the effect of preventing the collection of the rate complained of. *Dominion Iron & Steel Co.* v. *McDonald*, 37 N. S. R. 1.

English and French texts.]—The charter of the town of Lévis, in its French version, enacts that the qualification of councillors shall be $1,000; in its English version $5,000 is the sum mentioned. Both texts are clear and precise. The section of the general Act respecting town corporations which fixed the qualification for councillors was by a special enactment declared not to apply to the town of Lévis:—*Held*, that the two texts, being contradictory, were mutually destructive, and therefore no property qualification was necessary. *Lacerte* v. *Verrault*, 16 Que. S. C. 230.

Esquimalt Waterworks Act, B. C. (1902) c. 10. *Esquimalt Waterworks Co.* v. *Victoria*, C. R. [1907] A. C. 388.

Imperative provisions — *"Is hereby authorised" — "May" — Boys' Industrial Home—Warrant of Chairman—Custody of boy convict—Establishment of home as prison—Dominion statute—Intra vires—Certificate of sentence.*]—In an application for a *mandamus* to the chairman of the Boys' Industrial Home to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under 56 V. c. 33 (D.), it appeared that s. 6 of the Act authorizes the gaoler to retain the boy "until there is presented to such gaoler a warrant from the chairman of the governing board (which warrant the chairman is hereby authorized to issue under his official seal) requiring the sheriff or constable or other officer to deliver such boy to the superintendent of such industrial home;" and that s. 9 of 56 V. c. 16 (N.B.), says, "the said chairman may thereupon (referring to what shall precede the issuing of the warrant) issue his warrant," etc.:—*Held*, that the words "is hereby authorised" in s. 6, and "may" in s. 9, are not only enabling words but imperative as well, and the chairman has no discre-

tionary power as to the issue of the warrant. That the Dominion Act establishing the home as a prison, is not *ultra vires*. That the chairman was not justified in refusing to issue the warrant because the certificate of sentence did not contain all the items of information specified in schedule A of the Provincial Act. *Ex p. The Attorney-General, In re Goodspeed*, 36 N. B. R. 91.

Implied repeal — *Municipal corporations — Local improvements.*]—A provision in a city charter that one-half of the cost of certain improvements shall be levied upon a class of taxpayers by 10 annual instalments is not impliedly repealed, as to the division of the assessment into instalments, by a subsequent statute which alters the proportion of the amount to be levied from one-half to three-eighths, without mention of the mode of payment. *City of Montreal* v. *Milligan*, 30 Que. S. C. 394.

Inadvertent use of word — *Intention of legislature — Way — Municipal corporations — Property fronting on street.*] — 1. Where it is clear on the face of a statute that it was intended to govern and provide for a particular state of facts, the Court will modify the ordinary meaning of words so as to permit such intention to have effect. Therefore, in 57 V. (Q.) c. 57, s. 1, the word "widening," in reference to Milton street, being used evidently by inadvertence for "opening," the statute should be read in connection with other statutes relating to the same subject, and should be interpreted so as to give effect to the intention of the legislature. *Joseph* v. *City of Montreal*, 10 Que. S. C. 531, referred to.—2. The clause "properties fronting" on the line of a street includes properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other, and the properties are only bounded on the side line by the street first mentioned. Judgment in 15 Que. S. C. 268, affirmed. *Watson* v. *Maze*, 17 Que S. C. 579.

Inspection of Metalliferous Mines Act — *Amending Act — Construction — Penal statute — "Machinery hereinafter mentioned."*]—Rule 21a of s. 25 of the Inspection of Metalliferous Mines Act, as enacted by s. 12 of c. 37 of 1901, provides that "every person . . . employed in or about a metalliferous mine, in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four, (1) operates any direct-acting, geared, or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse power, and shall perform any such duties for more than eight hours in any twenty-four, shall be guilty of an offence under this Act:"—*Held*, that the phrase "machinery hereinafter mentioned" must be read distributively, or as meaning "any of" the machinery hereinafter mentioned.—*Held*, also, that the words "preceding section," in rule 21b, refer to the preceding rule. Decision of Duff, J., 12 B. C. R. 116, affirmed. *McGregor* v. *Canadian Consolidated Mines Limited* (No. 2), 12 B. C. R. 373.

Inspection of Metalliferous Mines Act — *Penal statute — Construction — "Machinery hereinafter mentioned."*] — In construing a penal statute, the rule to be followed is that by which that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature.—The paramount object in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.—*Semble*, the phrase "machinery hereinafter mentioned" in r. 21a of s. 25 of the Inspection of Metalliferous Mines Act, as enacted by c. 37 of 1901, means "any of the machinery hereinafter mentioned." *McGregor* v. *Canadian Consolidated Mines Limited*, 12 B. C. R. 116.

Inspection of Metalliferous Mines Act — Penalty — Conviction—Employment of person in mine — Hours of labour. *Rex* v. *Canadian Consolidated Mines Limited* (B.C.), 4 W. L. R. 101.

Interpretation — *Dual language — Different versions.*]—Where the text of one version of a statute appears to be in conformity with the intention of the legislature, such version may be followed in the interpretation of the statute, notwithstanding that an ambiguity exists in the text of the other version. *Coaticook* v. *People's Telephone Co.*, 19 Que. S. C. 535.

Interpretation — *Reference to prior statute — Amendments — Incorporation—Declaratory Act — Expropriation of land—Charter of Montreal.*]—Where a statute declares that proceedings for expropriation shall be taken in conformity to a previous statute, it is the latter, with all its subsequent modifications, and notably that allowing an appeal from an award fixing the compensation to be paid for the lands expropriated, which regulates the proceedings for expropriation, and that in spite of the fact that the legislature has only indicated that statute, without mentioning the amendments which have been made to it. 2. A statute in its nature declaratory, adopted at the session following the passing of the statute in question, adding to the mention of the previous statute that of the statute which had amended it so as to allow an appeal from an award, applies to expropriations commenced during the time allowed for such purpose. *Montreal* v. *Poulin*, 25 Que. S. C. 364, 6 Que. P. R. 457.

Jurisdiction of Court — *County Court judgment — Judicial sale of land.*]—Rule 807 (a), added to the King's Bench Act by 60 V. c. 4, is retrospective, and was intended to apply not only to orders which had been previously made and which had not been attacked, but also to the proceedings which had been taken under them, so as to validate judicial sales of land that had been made under orders to realise County Court judgments without the bringing of a separate action, which it had been held in *Proctor* v. *Parker*, 11 Man. L. R. 485, 18 C. L. T. 128,

there was no jurisdiction before 60 V. c. 4 to make. *Ritz* v. *Schmidt*, 21 C. L. T. 396, 13 Man. L. R. 419.

Limitation of Actions, R. S. O. 1897, c. 133. *McVity* v. *Tranouth*, C. R. [1908] A. C. 1, digested under LIMITATION OF ACTIONS.

Man. R. S. c. 110, s. 36, limiting appeal to Supreme Court of Canada, *ultra vires*. *Day* v. *Crown Grain Co.*, C. R. [1908] A. C. 150, digested under MECHANICS' LIEN.

Motor Car Regulation Act — Inconsistent municipal by-laws. *Peck* v. *Ogilvie*, 2 E. L. R. 545, 31 Que. S. C. 227, 8 Que. P. R. 392.

Ontario Medical Act — "Practising medicine" — Use of drugs or other substances — Application of statute to Christian Scientists and others — Statute for protection of public — Reference of question by Lieutenant-Governor in council under R. S. O. 1897 c. 84 — Question of provincial concern — Scope of Act — Jurisdiction of Court — Application of existing law — Authority of decided cases. *Re Ontario Medical Act*, 8 O. W. R. 766.

Parliamentary elections — *Controverted election — Petition — Trial—Time —Amendment — Retroaction — Public Act.*]—The Quebec statute respecting controverted elections, 1 Edw. VII. c. 7, enacting that "the trial of every election petition now pending, or which shall be pending in the future, must be commenced within the three months which follow the publication, pursuant to Art. 213 of the Quebec Elections Act, 1895, in the Quebec Official Gazette, of the notice of the election of the member, given by the Clerk of the Crown in Chancery, and in default the petition shall be absolutely extinguished, perempted, void and of no effect," extinguishes and nullifies an election petition pending at the time of its coming into force, where the trial has not been commenced within the three months; and this although the petitioner has proceeded with all diligence required by the previous statute. 2. If a party may derogate from and renounce certain statutes having the character of public order, which confer private rights upon him, he may not, by his mere act and will, hinder and arrest the effect of a statute of public order. 3. The statute respecting controverted elections, being a law politic, has a retroactive effect. *Sweeney* v. *Lovell*, 19 Que. S. C. 558.

Performance of public duty.]—The respondents were municipal councillors of Verdun, where the petitioners owned property. On the 23rd August the secretary of the council gave notice that, in accordance with Art. 746A of the Municipal Code, a session would be held on the 4th September for the purpose of revising the valuation roll. On the latter day an adjournment was made for two weeks. The petitioners obtained an interlocutory injunction restraining the respondents from proceeding with the proposed revision:—*Held*, that the words of Art. 746A did not make it imperative that the revision should take place in June or July: Endlich on Construction of Statutes, s. 295.—*Held*, further, that, even if the words were imperative, the Court had power to compel the performance of a public duty by public officers, though the statutory time for performing the duty had passed: *Dechene* v. *Fairbairn*, 2 M. L. R. 442. Injunction dissolved and petition dismissed with costs. *Can. Pac. Rw. Co.* v. *Allan*, 20 C. L. T. 444.

Private Act — Public Act — Conflict—Limitation of actions — Time for bringing action under Families Compensation Act (B.C.) — Application of defendants' Act of incorporation. *Green* v. *British Columbia Electric Rw. Co.* (B.C.), 3 W. L. R. 347.

Private Act — *Rights of persons not named — Public Act for purposes of proof —Private Act in other respects.*]—Declarations in a private Act of the legislature do not affect the rights of third parties not specially named therein.—An Act is not the less a private Act because it has been declared public in order to facilitate the proof thereof. For all other purposes, it is public or private according as it has a general application in view of the public welfare or affects only private and personal interests. *Price* v. *Chicoutimi Pulp Co.*, 30 Que. S. C. 293.

Procedure — *Peremption.*]—A suit begun under the old Code of Procedure can be perempted where no useful proceeding has been taken during two years since the coming into force of the new Code; Art. 279 can be invoked in such a case without giving it a retroactive effect. *Coulture* v. *Duclos*, 2 Que. P. R. 433.

Que. 60 Vic. c. 95. *Prévost* v. *Prévost*, C. R. [1908] A. C. 94, digested under WILL.

Quebec Pharmacy Act — *Retrospective legislation — Suit for joint penalties — Second offences — Unlicensed sale of drugs.*]—The amendment of the Quebec Pharmacy Act by 62 V. c. 35, s. 2 (Q.), adding Art. 4039 (b), R. S. Q., has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. Penalties for several offences under the Act may be joined in one action, and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a Court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the province of Quebec. It is improper in such an action to describe subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged. The sale in the province of Quebec by an unlicensed person of drugs by retail, whether or not such drugs be poisonous, or partly composed of poison, or absolutely free from poison, is a violation of the prohibition contained in Art. 4035, R. S. Q., and whether or not the articles sold be enumerated in the Quebec Pharmacy Act as poisons or as containing an enumerated poison. Judgment in 2 Que. Q. B. 243 reversed; Taschereau and Gwynne, JJ., dissenting. *Pharmaceutical Association of Quebec* v. *Livernois*, 21 C. L. T. 8, 31 N. S. R. 43.

Re-enactment — *Change in wording — Interpretation.*] — Where a statute is re-enacted in different words, and thereby becomes susceptible of more than one interpretation, it will not be construed as altering the previous statute unless such alteration is clearly expressed. *Laird* v. *McGuire*, 40 N. S. R. 129.

Registry Act. R. S. O. 1897, c. 136. *McVity* v. *Tranouth*, C. R. [1908] A. C. 1, digested under LIMITATION OF ACTIONS.

Repeal by implication — *Municipalities — School corporations — Extinction.*] —A legislative enactment is not to be held to be repealed by implication unless such an interpretation be inevitable. When, therefore, it was enacted in a statute that each municipality existing at the time, or which might be established thereafter, should be a municipality for school purposes, etc., an enactment, in a subsequent statute, that the municipalities adjoining a city might be annexed thereto for municipal purposes and thereafter cease to exist, did not mean by implication that such annexation should extinguish the corporate bodies formed for school purposes under the previous statute, but the latter continued to exist notwithstanding. *Montreal Protestant School Commissioners* v. *Montreal*, 32 Que. S. C. 90.

Repeal by implication.] — The Rule that repeal by implication of an existing enactment will not be inferred from a subsequent one, unless both are incompatible, applies in the case of a statute "to revise and consolidate" those on a given subject, *v.g.*, a city charter. Hence, if, in an existing Act, a right to redeem property sold for taxes by a city is given with a proviso that privileged and hypothecary claims shall thereby revive, a subsequent Act "to revise and consolidate the different Acts of the legislature relating to that city," that embodies for the sale of property for taxes and its redemption, but omits the proviso for the revival of privileged and hypothecary claims, will not be deemed to repeal the latter by implication and it continues in force and vigour. *Kennedy* v. *Godmaire* (1910), 38 Que. S. C. 527.

Appealed to Court of Review.

Repeal of statute — *Effect on municipal by-law passed under statute—Recovery of money paid — Tax — Re-enactment of statute.*]—The repeal of a statute which permits a city corporation to impose a tax by a by-law involves the repeal of every by-law passed by virtue of such statute. Therefore, a ratepayer who has paid a tax imposed by a by-law after repeal of the statute under which it was passed, has a right to recover back the money paid; and the city corporation will not be permitted to plead that since the payment, and before the institution of the action, the statute has been re-enacted. *Montreal* v. *Royal Insurance Co.*, 15 Que. K. B. 574.

Repeal of statute — Exception as to action or proceeding pending — Municipal corporation — Notice of intention to take over street railway. *Re Berlin and Waterloo St. Rw. Co.*, 8 O. W. R. 284.

Retroactivity — Interest — Money Lenders Act. *Tapley* v. *Marks*, 2 E. L. R. 555.

Retroactivity — Miners Lien Ordinance —Contract made before Ordinance came into force — Work done after — Postponement of time for coming into force—Lay agreement — Time of expiry of credit given by workmen to laymen — Proceeds of operation of lay — Application to past debts — Assignment of lien debt. *Sidback* v. *Field* (Y.T.), 6 W. L. R. 309.

Retroactivity — *Ultra Vires Act — Validating Act of Dominion Parliament — Construction — Execution — Exemption— Homestead.*]—The Exemption Ordinance, c. 45, R. O. 1888, s. 1, s.-s. 9, exempted from seizure under execution the homestead, to the extent of 160 acres, of the execution debtor. This sub-section having been declared *ultra vires* of the Legislative Assembly in *In re Claxton*, 1 Terr. L. R. 282, the Dominion Parliament, by 57 & 58 V. c. 29, declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law:" — *Held*, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted—but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute—a charge upon the homestead. Rules for construction of statutes considered. *Massey* v. *McClelland*, *Baker* v. *McClelland*, 2 Terr. L. R. 179.

Retroactivity — 6 Edw. VII. c. 19, s. 22 (O.) — Procedure — Division Courts —Contract — Provision for determination of forum for possible actions — Prohibition. *Re Sylvester Manufacturing Co.* v. *Brown*, 8 O. W. R. 984, 9 O. W. R. 89.

Retrospective.—In an action to recover a commission on sale of land, Rose J., *held* that a County Court had no jurisdiction. D. C. *held* that the Act 54 Vic. c. 14 (O.), passed after above decision, was retrospective, and enabled the action to be transferred to the High Court. *Re McKay* v. *Martin* (1890), 21 O. R. 104.

Right of appeal.]—A new statute giving a right of appeal which the previous statute denied is not applicable to an action begun under the operation of the old statute, even when such action is adjudicated upon after the coming into force of the new statute, which cannot be invoked in a cause begun while the previous statute was in force unless it merely changes the form of an already existing appeal. *Renoault* v. *Gagnon*, 18 Que. S. C. 127.

Solicitor — *Action for costs — Delivery of bill.*]—By the Acts of 1899 c. 27, s. 69, to amend and consolidate the Acts relating to barristers and solicitors, passed 30th March, 1899, it was enacted that "no action shall be brought for the recovery of fees, costs, charges, etc., by a barrister or solicitor, as such, until one month after the bill therefor, signed by such barrister or solicitor, has been delivered to the party to be charged," etc. By s. 81 it was provided that the Act should not come into force until

the 1st July, 1899. On 4th May, 1899, plaintiffs caused a writ to be issued for the recovery of an amount claimed to be due them from defendants for professional services, and for moneys expended by plaintiffs as solicitors of defendants, upon their retainer and at their request. The statute was pleaded, and it was admitted on the part of the plaintiffs that no bill had been delivered as therein provided:—*Held*, that the delivery of a signed bill, in accordance with the provisions of s. 69, and proof thereof upon the trial, involved a matter of procedure only, or, at most, a mere alteration in the matter of proof necessary to sustain the action, and, therefore, was within the rule stated by Blackburn, J., in *Gardner* v. *Lucas*, 3 App. Cas 603, that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be.—*Held*, also, that the enactment, being a remedial one, should receive a liberal construction. *Harrington* v. *Peters*, 32 N. S. R. 464.

See RULES OF COURT.

Special Act — *Repeal by implication—Repugnancy to subsequent general Act — Rule of construction — Assessment and taxes — Exemptions — Railway—By-law of municipality — Commutation — School rates.*]—A city council in 1897 passed a by-law providing that a certain annual sum should be accepted from a railway company for 15 years "by way of commutation and in lieu of all and every municipal rate or rates and assessment," in respect of certain lands owned by the railway company. This by-law was passed under the authority of a special Act respecting the railway company, 48 V. c. 65 (O.), s. 3 of which provided that it should be lawful for the corporation of any municipality through which any line of the railway had been constructed to exempt the company and its property within such municipality, in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment of all municipal rates. By a subsequent general enactment, 55 V. c. 60, s. 4 (O.), it was declared that no municipal by-law thereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, should be held or construed to exempt such property from school rates. The general Act did not by express words repeal the special Act:—*Held*, that it did not effect a repeal by necessary implication—*generalia specialibus non derogant.*—*Held*, also, that there was nothing to shew that the sum which the railway company were to pay was not more than the school taxes which they would be liable to pay if they were not entitled to any exemption. *Way* v. *St. Thomas*, 12 O. L. R. 240, 7 O. W. R. 194, 731.

St. John's Rw. Act, 1896, s. 42. *Reid-Newfoundland Co.* v. *Shea*, C. R. [1908] A. C. 530, digested under STREET RAILWAYS.

Timber Manufacture Act, B.C., 1906 — *Timber cut on Crown lands — Prohibition as to export — Retroactivity—Powers of chief commissioner — Crown.*]—Section 2 of the Timber Manufacture Act, 1906, provides that all timber cut on ungranted lands of the Crown, or on lands thereafter granted, shall be used or manufactured in the province. Section 4 gives to the chief commissioner of lands and works, his officers, servants, and agents, power to do all thing necessary to prevent a breach of s. 2, including seizure and detention of all timber so cut until security shall be given to His Majesty that such timber will be used and manufactured as provided by s. 2. The plaintiff had in his possession, and was about to export, a quantity of logs, cut before the passing of the Act, which were seized by the provincial timber inspector:—*Held*, that the rule requiring the Courts not to construe Acts of the legislature to the prejudice of existing proprietary rights, if the language bears another sensible meaning, excludes from the operation of this statute all timber cut before the passing of it.—The authority to seize, under s. 4, is not conferred upon the Crown. The chief commissioner acts thereunder, not as the organ of the Crown, but as the grantee of legislative authority, and does not purport to act other than as a statutory officer. The timber in question, consequently, not being in the possession of the Crown, there was no seizure by the Crown.—The maxim the "King can do no wrong" considered. *Emerson* v. *Skinner*, 12 B. C. R. 154, 3 W. L. R. 558, 4 W. L. R. 255.

Transfer of cause — *Jury trial — Security for costs.*]—Upon a motion under the Nova Scotia Act of 1899 c. 39, to transfer an action upon a promissory note from a County Court to the Supreme Court for the purpose of a jury trial, where the only question to be tried was whether a proper tender was made before action, involving only a question of costs, and the transfer would cause delay in trial:—*Held*, nevertheless, that the defendant having made the affidavit required by the statute, there was no discretion to refuse the order, the statute being in its terms imperative; but as a term of the order the defendant was required to deposit in Court $80 as security for costs. *Forsyth* v. *Shipley*, 20 C. L. T. 415.

Transfer of property from one institution to another — *Future tense — Present transfer — Bornage — Action — Costs.*]—The following terms in an Act of the legislature, "All the movable and immovable property given to the *Institut du Bon Conseil* by Mgr. Guay or other persons . . . shall be transferred to the corporation of the Hospital Guay de St. Joseph de Lévis, to be by it enjoyed and disposed of, etc., according to the intentions of the donors and testators," import a declaration that the property given to the defendants is presently transferred to the hospital and actually made over, without formality, the statute imposing none. The future tense used in the statute is equivalent to the present tense.—2. In the case of land given to the *Institut du Bon Conseil*, in respect of which a demand *en bornage* is made upon the Institute, and the Institute does not repudiate the Act of the legislature, an ac-

tion *en bornage* will be dismissed without costs.—3. It is clear by the Act of the legislature that it is the Hospital Guay and not the *Institut* which is the owner of the land, and therefore an action will not lie against the latter. *Guay* v. *L'Institut du Bon Conseil*, 34 Que. S. C. 346.

STATUTORY DECLARATION.

See CRIMINAL LAW — DEFAMATION — ELECTIONS — FRAUD AND MISREPRESENTATION.

STAY OF EXECUTION.

See APPEAL.

STAY OF PROCEEDINGS.

Action against municipal corporation — Injunction against illegal acts — Attorney-General—Validating legislation — Application for. *Attorney-General ex rel. Boulter* v. *Brampton*, 9 O. W. R. 218.

Action by company for price of shares — Application for winding-up order pending. *Canada Consolidated Mineral Co.* v. *Savoie*, 11 O. W. R. 380.

Action for partition — *Appeal to Privy Council in previous action.*] — The plaintiff having had the will of her husband, which revoked a previous will in her favour, set aside by the Supreme Court of Canada, brought an action for partition of the property of a partnership of which her husband was a member:—*Held*, that the defendant in the action for partition was not entitled to have it stayed until a petition for leave to appeal from the judgment of the Supreme Court should be presented and decided by the Judicial Committee of the Privy Council. *Maynard* v. *Dusseault*, 8 Que. P. R. 285.

Action for tort — *Concurrent criminal prosecution — Criminal Code, s. 866.*] — Notwithstanding s. 866 of the Criminal Code, a plaintiff has the legal right to prosecute the defendant criminally, and at the same time to sue him for damages for the same illegal act. Application to stay proceedings in civil action refused. *Hamilton* v. *Crowe*, 40 N. S. R. 217.

Action in foreign Court —*Reasons for bringing—Judicature Act, s. 57 (10).*]— Where there are substantial reasons for the double litigation, the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court. The power to stay proceedings under s. 57, cl. 10, of the Judicature Act, R. S. O. 1897 c. 51, is a discretionary one, and the English cases are authorities as to the exercise of the discretion, although there is no similar statutory provision in England. Where the defendant, resident in Ontario, was sued there upon a promissory note, the Court refused to stay the action until after the determination of an attaching proceeding in a foreign Court, the effect of which, if successful, would be to make available towards payment of the note certain stock in a company domiciled in a foreign country. *First Natchez Bank* v. *Coleman*, 21 C. L. T. 437, 2 O. L. R. 159.

Action on fire insurance policy — *Statutory conditions — Arbitration Act — Application too late—Powers of Court.*] — After issue had been joined in this action against the defendants, a fire insurance company, on a policy containing the statutory condition as to reference to arbitration, a motion was made on their behalf to stay the action. On the motion all defences were withdrawn, and it was represented that the whole matter in dispute was the amount of the loss:—*Held*, that under s. 6 of the Arbitration Act, R. S. O. 1897 c. 62, the application being made after delivery of the statement of defence, was too late.—(2) This was not a case within the powers of the Court to stay an action under the O. J. A., s. 57. *Cole* v. *Canadian Fire Insurance Co.*, 10 O. W. R. 906, 15 O. L. R. 336.

Action on fire insurance policy — Variation of statutory condition 16—Not "just and reasonable"—Onerous terms — Appraisement—Arbitration—Expiry of time for moving under Arbitration Act, s. 6. *Cole* v. *London Mutual Fire Insurance Co.*, 10 O. W. R. 930.

Agreement to refer — *Application to stay action—Time.*]—An application under s. 11 of the Common Law Procedure Act, 1854, to stay proceedings in an action for the purpose of compelling the plaintiff to carry out an agreement to submit the matters in dispute to arbitration, must, under the practice now in force in Manitoba, be made before the filing of the statement of defence. *Northern Elevator Co.* v. *McLennan*, 22 C. L. T. 302, 14 Man. L. R. 147.

Appeal from judgment at trial — —Security—Money in Court—Receiver — Interest—Jurisdiction. *Canadian Bank of Commerce* v. *McDonald* (Y.T.), 3 W. L. R. 396.

Application for — Release of plaintiff's claim—Payment to plaintiff — Pleading — Counterclaim — Amendment. *O'Brien* v. *Michigan Central Rw. Co.*, 12 O. W. R. 1060.

Claims in contestation — *Payment by defendant.*]—A motion by the defendant to stay the proceedings because of claims in contestation, in order that he may pay them, will be dismissed with costs; Art. 1198, R. S. Q., indicates how, in such circumstances, the defendant should dispose of the sums which he owes. *Montambault* v. *Brien*, 4 Que. P. R. 328.

Costs of former proceeding unpaid— *Identity—Discontinuance.*]—Article 278, C. P., does not require payment of costs as a condition precedent to the institution of a new proceeding except where the first proceeding upon which the party owes costs is identical with that which he proposes to take, and where he has discontinued the first proceeding. And therefore a motion to stay proceedings, where the plaintiff, after his

petition for leave to proceed in *formâ pauperis* had been dismissed with costs, was proceeding in the ordinary way, without having paid the costs of the petition, was dismissed. *Christin* v. *Christin*, 3 Que. P. R. 203.

Counterclaim — Breach of charterparty —Provision for arbitration—Refusal to stay proceedings on counterclaim; allowing action to proceed—Appeal. *Musgrave* v. *Mail*, 40 N. S. R. 624.

County Court action — *Injunction against — Declaratory judgment — Jurisdiction—Practice.*]—Where no consequential relief is claimed, the Court's jurisdiction to make a declaratory order will be exercised with great caution. A declaration that the defendant is not entitled to proceed on a judgment recovered by him in another action against the plaintiff, will not be granted if, on a proper case being made out, the proceedings could have been stayed in the original action, except in special circumstances. A County Court Judge has jurisdiction to stay proceedings on a judgment in his Court, on a proper case for a stay beeing made out, such, for instance, as that the judgment has in effect been satisfied. In such a case an action in the Supreme Court to restrain the defendant from proceeding with his action in the County Court will be dismissed. *Williams* v. *Jackson*, 11 B. C. R. 133.

Ejectment — *Action en bornage—Consolidation.*]—The defendant in an action *en bornage* canot answer by a dilatory exception asking that the action be stayed until judgment in an action of ejectment brought by him against the plaintiff. The two actions should not be consolidated. *Mahoney* v. *Mahoney*, 2 Que. P. R. 395.

Exception a la forme — *Notice—Default—Costs.*]—A motion in the nature of an *exception á la forme*, accompanied by a certificate of deposit but without notice of a day for its presentation, has not the effect of stopping the running of the time for pleading; and the plaintiff has a right to his costs upon default of pleading and setting the cause down *ex parte* in the interval. *Lainé* v. *Powell*, 3 Que. P. R. 135.

Former action pending — Identity — Consent judgment. *Campbell* v. *Baker*, 2 O. W. R. 504.

Injury to person — Negligence—Accident — Evidence — Misdirection — Damages — New trial. *Witty* v. *London Street Rw. Co.*, 1 O. W. R. 228, 2 O. W. R. 578.

Injury to person — Negligence—Collision—Contributory negligence — Proximate cause. *O'Hearn* v. *Port Arthur*, 4 O. L. R. 209, 1 O. W. R. 373.

Injury to person — Negligence—Duty —Jury — Damages — Reduction of. *Ford* v. *Metropolitan Rw. Co.*, 4 O. L. R. 29, 1 O. W. R. 318.

Judgment — *Disavowal — Delay.*] — Where an order for a stay has suspended the execution of a judgment until the party against whom the judgment is, who has disavowed his attorneys, has obtained an adjudication upon his disavowal, a motion of the other party to force the disavowing party to proceed at once upon his disavowal, made twenty-three days after the order for the stay, will be granted. *Sylvestre* v. *Struthers*, 2 Que. P. R. 512.

Judgment — Motion for stay—Notice to opposite party—Order XXXVII., Rule 8—Order LII., Rule 3. *Fitzrandolph* v. *Mutual Relief Society*, 40 N. S. R. 616.

Jurisdiction of Local Master. *McAllister* v. *McEachren*, 3 O. W. R. 509, 641.

Litispendence — *Identity of demands.*] —To afford reason for an exception on the ground of litispendence, there must be identity of demands in the terms of Art. 1241, C. C. *Canada Industrial Co.* v. *Roddick*, 3 Que. P. R. 468.

Motion for — Other actions arising out of same contract—Different causes of action. *Black* v. *Ellis*, 8 O. W. R. 303.

Municipality — Agreement with — Specific performance—Bond—Injunction — Reference as to damages—Transportation of freight—Resolution of Council — Statutes. *Ottawa* v. *Ottawa Electric Rw. Co.*, 1 O. W. R. 830, 2 O. W. R. 719.

Principal demand — *Recours en garantie.*]—A defendant who is sued for a debt as the principal debtor cannot, by dilatory exception, stay the principal demand by alleging that he is entitled to *recours en garantie* against a third person who has engaged to pay such debt for him to the plaintiff. *Rocher* v. *David*, 18 Que. S. C. 156.

Prior action pending — Motion to dismiss action as frivolous—Forum—Rule 261 —Security for costs—Substantial interest—Parties. *McConvey* v. *Macdonald*, 11 O. W. R. 492, 569.

Prior action pending — *Parties.*] — In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were landowners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favour, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought:—*Held*, that the present action should not be stayed until after the determination of the appeal in the other. *Tilbury West* v. *Romney*, 20 C. L. T. 378, 19 P. R. 242.

Release of plaintiff's claim — Payment to plaintiff—Pleading — Fraud — Delay in applying. *Doyle* v. *Diamond Flint Glass Co.*, 3 O. W. R. 320, 356, 921.

Sale of land in action to enforce mechanic's lien — Appeal pending an action for redemption — Identity of land — Identity of parties. *Black* v. *Weibe* (Man.), 4 W. L. R. 218.

Several actions by different plaintiffs against same defendant — *Consolidation.*] — Twenty-nine actions having been brought by different persons against the defendant company for damages caused by the death of relatives in an explosion in the company's coal mine, and twenty-nine summonses for better particulars of the plaintiffs' claims having been dismissed, the defendants appealed:—*Held*, that the Court, by virtue of its inherent jurisdiction to prevent the abuse of its process, could and would, on the application of the defendants, stay proceedings in twenty-eight of the actions (upon defendants consenting to be bound in all the appeals by the result of one) until after the decision of the appeal in the remaining action—proper provisions being made in case that appeal did not properly dispose of the questions in all. The proper practice would have applied to have the actions consolidated. *Bodi* v. *Crow's Nest Pass Coal Co.*, 9 B. C. R. 332.

Succession — *Action against heirs — Statutory delays—Inventory—Deliberation—Liability—Service of writ of summons — Motion.*] — Defendants sued as heirs may ask suspension of proceedings until the expiry of the delays to make an inventory and deliberate as to their acceptance or renunciation of the succession. A defendant, sued as having himself personally contracted the debt, cannot stay proceedings even by alleging that he is jointly and severally liable with the other defendants. Service of a writ of summons upon heirs of a deceased person collectively, and without mentioning their names or residence, does not deprive them of their right to the delays: Art. 135, C. P. Defendants are entitled to all delays granted to them by Art. 8 C. P., amended by 4 Edw. VII. c. 45, respecting the service and presentation of motion. *Chevalier* v. *Trépanier*, 7 Que. P. R. 446.

Surety — *Appeal by principal debtor — —Garnishment.*]—A surety, against whom suit has been brought, after the plaintiffs have obtained judgment against the principal debtor, from which the latter is appealing, and after attachment of the amount recovered by a creditor of the plaintiffs, is entitled, upon a dilatory exception, to have the proceedings stayed while the appeal and the garnishment proceedings are pending. *Goulet* v. *Fenlin*, 2 Que. P. R. 572.

Two actions against same defendant —Inconsistent claims—Stay of one action—Pleading. *Smith* v. *Smith*, 12 O. W. R. 678.

Vexatious action — *Security for costs.*] —A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were, after notice to the plaintiff, passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation: —*Held*, on the evidence, that there were grave doubts as to the *bona fides* of the action; that an order to stay proceedings would be justified; but that in the exercise of discretion the action might be proceeded with upon security for costs being given. *Smith* v. *Clarkson*, 24 C. L. T. 255, 317, 7 O. L. R. 460, 8 O. L. R. 131, 3 O. W. R. 593, 4 O. W. R. 55.

See Appeal—Bills of Exchange and Promissory Notes — Constitutional Law —Contract—Costs—Courts — Damages —Discovery—Interpleader—Judgment — Municipal Corporations — Opposition— Vendor and Purchaser—Writ of Summons.

STAY OF TRIAL.

See Trial.

STEAM BOILERS ORDINANCE.

See Contract.

STEAMBOAT INSPECTION ACT.

See Negligence.

STENOGRAPHERS' FEES.

See Costs.

STIFLING PROSECUTION.

See Bills and Notes—Chose in Action—Contract—Mortgage.

STIPENDIARY MAGISTRATE.

Jurisdiction — *Appointment — Proof— —Towns Incorporation Act — Effect of appointment of police magistrate of town — Canada Temperance Act.*]—T. was convicted of an offence against the Canada Temperance Act by C., who, in making the conviction, professed to be acting as stipendiary magistrate for the county of W. No record of his appointment to this office could be found either in the minutes of the executive council or in the office of the provincial secretary; but there was a record of his appointment to the office of stipendiary magistrate for the parish of S.; C. swore (and Lerein he was corroborated) that upon it being discovered that his commission as stipendiary magistrate for the parish of S. was illegal, a new commission appointing him as stipendiary magistrate for the county of W. was issued to him, which commission had been lost, but under which he had been acting without objection for many years. Afterwards, when the town of S. was carved out of the parish of S. and incorporated under the Towns Incorporation Act, C. was appointed police magistrate for the town. Sub-section (2) of s. 131 of the Towns Incorporation Act

provides, *inter alia*, that on an appointment of a police magistrate for a town incorporated thereunder, the appointment and commission of a police or stipendiary magistrate theretofore acting in such town shall thereupon *ipso facto* be cancelled, and he shall cease to hold office as such police or stipendiary magistrate: — *Held*, that there was sufficient proof of C. having been duly commissioned to act as stipendiary magistrate for the county of W., and that under the above sub-section he did not vacate such office upon being appointed police magistrate for the town of S. *Rex* v. *Cahill, Ex p. Tait*, 37 N. B. R. 18.

Jurisdiction — Summons not served by constable or peace officer — Service by prosecutor—Effect of. *In re William Kennedy*, 3 E. L. R. 554.

See APPEAL — CRIMINAL LAW — INTOXICATING LIQUORS — JUSTICE OF THE PEACE —SHIP.

STOCK.

See BROKER.

STOCK EXCHANGE.

See BROKER.

STOCK SPECULATIONS.

See BROKER — BILLS OF EXCHANGE AND PROMISSORY NOTES—JUDGMENT.

STOLEN GOODS.

See REPLEVIN.

STOLEN PROPERTY.

Bank notes — Rights of finder — Proof of ownership—Inference from facts—Action against finder—Costs. *Union Bank of Canada* v. *Sheridan*, 3 O. W. R. 714.

See SALE OF GOODS.

STOP ORDER.

See MONEY IN COURT — PAYMENT OUT OF COURT.

STORAGE.

See BAILMENT — NEGLIGENCE.

STORAGE OF GOODS.

See TROVER—WAREHOUSEMEN.

STORAGE OF GRAIN.

See CONTRACT.

STREAMS.

See RIVERS AND STREAMS — WATER AND WATERCOURSES.

STREET.

See MUNICIPAL CORPORATIONS—WAY.

STREET RAILWAYS.

1. CONTRACTS WITH MUNICIPALITIES, 4108.
2. NEGLIGENCE, 4123.
3. ONTARIO RAILWAY AND MUNICIPAL BOARD, 4139.
4. MISCELLANEOUS CASES, 4140.

1. CONTRACTS WITH MUNICIPALITIES.

Act of incorporation — *Construction of, by Ont. Rw. and Mun. Board — Other Acts considered—General Rw. Act—St. Rw. Act 1888—Town's By-law granting franchise to company—Occupation of streets unconditional—"Railway" or "Street Railway."*]— The Ontario Rw. and Mun. Board made an order declaring that defendants had a mere license to occupy the streets of the town of Sandwich under a by-law of said town passed 22nd February, 1873, and that the town did not grant the railway company a perpetual franchise, and had not the power so to do, at the time the by-law was passed; also, that the railway was a street railway and that the agreement between the parties, dated 27th May, 1891, was subject to the provisions of the Street Railway Act, and, further, that the right of the railway company to use and occupy the streets of the town expires on 15th December, 1912. — Court of Appeal *held*, that the appeal should be allowed with costs, and the mattter be remitted to the board for further hearing upon the matters reserved to itself when disposing of the question of construction. *Sandwich* v. *Sandwich, Windsor & Amherstburg Rw. Co.* (1910), 17 O. W. R. 45, 2 O. W. N. 93.

Board of Railway Commissioners— *Jurisdiction—Railway Act, 1903, ss. 23, 184 —Use of highway—Consent of municipality —By-law.*]—In the case of a street railway, or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law, approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. *Montreal Street Rw. Co.* v. *Montreal Terminal Rw. Co.*, 25 C. L. T. 121, 36 S. C. R. 369.

By-law — *Intra vires* — *"Workmen's Tickets"—Amendment—"School Children's Tickets"—Action to enforce contract—Parties—Attorney-General — Specific performance — Injunction — Declaration of right.*] —*Held*, upon the proper construction of the defendants' Act of incorporation, 36 V. c. 100 (O.), the amending Act, 56 V. c. 90, and the contract and by-law contained in the schedule to the latter Act, that the defendants were bound to sell the tickets called "workmen's tickets" upon their cars to the public and to receive them in payment of fares at the hours mentioned in the by-law, not from workingmen only, but from the public generally; and that the provision of the by-law in that behalf was not *ultra vires* of the plaintiffs. 2. The aforementioned contract was modified, in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any children between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents."—*Held*, that there was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours. 3. That the plaintiffs could maintain an action for *mandamus* or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public. 4. The defendants, having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in the by-law. *Kingston* v. *Kingston, etc., Electric Rw. Co.*, 28 O. R. 399, 25 A. R. 462, distinguished. *Hamilton* v. *Hamilton Street Rw. Co.*, 25 C. L. T. 15, 8 O. L. R. 642, 4 O. W. R. 311, 411, 10 O. L. R. 594, 6 O. W. R. 207.

Affirmed, 39 S. C. R. 673.

By-law — Passenger fares — School children — Reduced rates. *In re Sandwich East and Windsor and Tecumseh Electric Rw. Co.*, 12 O. W. R. 370, 16 O. L. R. 641, 8 Can. Ry. Cas. 125.

By-law — *Passenger fares — School children — Reduced rates.*]—Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by parents, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5-cent cash fare; children's and school children's tickets, ten for 25 cents, each ticket to be taken for a 3-cent fare, as above provided; workingmen's special tickets, eight for 25 cents, to be taken for a 5-cent fare:—*Held*, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the later were actually attending school. *In re Sandwich East and Windsor and Tecumseh Electric Rw. Co.*, 12 O. W. R. 370, 16 O. L. R. 641.

By-laws — *Construction — Highway—Liability for costs of construction of new pavement between rails.*]—On a special case stated for the opinion of the Court the questions submitted, namely, as to defendants being liable to pay for asphalting between their rails, were answered in the negative. *St. Catharines* v. *Niagara* (1909), 14 O. W. R. 116.

Construction of contract — *Operation of railway—Right of municipality to direct —Service—New lines—Extension of municipal boundaries—City engineer—Specific performance—Special case.*]—Under the agreement between the corporation of the city of Toronto and the Toronto Railway Company, which is set out in 53 V. c. 99 (O.), the right to determine what new lines shall be established and laid down, is vested in the city, and applies as well to the streets within the city, as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it, and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others. The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council; but the city have no power to compel the company to continue to run, after midnight, any car which, having started before midnight, cannot in due course finish its route by that time. On a special case stated in an action only such questions will be answered as must necessarily arise in the action. The Court, therefore, in view of 63 V. c. 102, ss. 1 and 5 (O.), being made applicable to the city, declined to answer a question raised in a special case as to the right of the city to have specificially performed those provisions of the agreement found in its favour; and an expression of opinion previously given against granting such specific performance, following *Kingston* v. *Kingston Electric Rw. Co.*, 25 A. R. 462, was withdrawn. *Toronto* v. *Toronto Rw. Co.*, 25 C. L. T. 72, 9 O. L. R. 333, 4 O. W. R. 330, 446, 6 O. W. R. 677, 10 O. L. R. 657.

Construction of contract — *Snow and ice.*]—The city council of Montreal being bound as the road authority to remove the ice and snow on the street from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the sidewalks:—*Held*, that the respondent street railway company, having contracted with the city to keep their track free from snow and ice, did not, having regard to the surrounding circumstances, and in the absence of words expressly forbidding it, commit a nuisance by sweeping their snow into the street. *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111, distin-

guished.—*Held*, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers. Judgment in 11 Que. K. B. 458, affirmed. *Montreal* v. *Montreal Street Rw. Co.*, [1903] A. C. 482.

Decision of Judicial Committee — *55 V. c. 99 (O.)—8 Edw. VII., c. 112 (O.).*]—Upon appeal from a decision or order of the Ontario Railway and Municipal Board upon the hearing of an application to it involving the same question as that dealt with by the Judicial Committee of the Privy Council in *Toronto* v. *Toronto Rw. Co.*, [1907] A. C. 315:—*Held*, that inasmuch as it could be said that it manifestly appeared that the decision of the Judicial Committee was founded solely upon the effect of the provisions of the Act, 55 V. c. 99 (O.), and not, to some extent at least, upon the language of the agreement validated and confirmed by that Act, the only course open was to affirm the order of the Railway and Municipal Board, notwithstanding s. 1 of the Act, 8 Edw. VII., c. 112 (O.) *Re Toronto Rw. Co. and Toronto* (1909), 14 O. W. R. 578, 1 O. W. N. 5, 19 O. L. R. 396.

Duty as to highways.]—By R. S. O. 1897, c. 208, s. 23, defendants had to keep clean and in repair between their tracks and 18 inches on either side thereof. Their charter was subject to that Act:—*Held*, that the repeal of this Act did not affect their rights and obligations, at any rate so far as not inconsistent with the repealing Act or its intent or object. *Fox* v. *Cornwall*, 12 O. W. R. 942.

Duty of railway to repair highway next to rails — *Order of Ontario Railway and Municipal Board.*]—The Ontario Railway and Municipal Board ordered the Hamilton Street Rw. Co. to forthwith put in good repair, that portion of the pavement, in the city of Hamilton, on King street from James street to Bay street, for two feet outside of the outer rails of the company's tracks according to the provisions of by-law No. 624. Court of Appeal dismissed the company's appeal with costs. *Re Medland and Toronto*, 31 O. R. 243, distinguished. *Re Hamilton & Hamilton Street Rw. Co.* (1910), 16 O. R. 279, 1 O. W. N. 948.

Establishment of new lines—Territory added to municipality — By-law — Notice — Electric Railways Act—Application of proclamation — Statutes — Specific performance — Special order — Mandamus —City engineer — Judicial powers—Notice —Option to grant powers to other persons —Places for stopping cars — "Service" — Determination — Recommendation — Approval by council — Resolution instead of by-law. *Toronto* v. *Toronto Rw. Co.*, 6 O. W. R. 871, 11 O. L. R. 103.

Extension of limits — *Operation of cars — Action — Ratepayer.*]—The promoters of a street railway company entered into an agreement with a city corporation in 1888, and agreed to run cars along Douglas street to the northern boundary of the city limits. They became incorporated as a joint stock company, and in 1890 obtained a charter authorizing the construction of tramways connecting the country districts with the city system, and in pursuance of the new powers continued the Douglas street tramway northerly along the Saanich road. Traffic on this extension was discontinued in 1898, because it did not pay. In 1892 the city limits were extended so as to include a portion of the Saanich road on which the tramway had been built. In 1894 the company obtained a private Act for the consolidation and confirmation of their rights, powers, and privileges, and ratifying the agreement of 1888, between the city and the original promoters:—*Held*, in an action for a declaration that the company were bound to operate their tram system along Douglas street to the extended city limits, that the company were not bound to do so. *Quære*, whether a ratepayer could sue. *Yates* v. *British Columbia Electric Rw. Co.*, 20 C. L. T. 428, 7 B. C. L. R. 323.

Extension of lines — *Municipal by-laws—Changes in lines—Validity — Mandatory order — Injunction — Estoppel — Resolution.*]—The city of London council passed certain resolutions authorising the extension of the lines and changing the routes of the plaintiffs' railways. The plaintiffs relied upon a by-law being passed later to affirm the resolution and went on with certain work and incurred expense. The by-law No. 2083 was afterwards passed, read a first, second and third time, at one meeting of the council, signed by the clerk, sealed with the municipal seal, but the mayor refused to sign it. An action was brought to compel the mayor to sign the by-law and to compel the defendants to accept the agreement:—*Held*, that the company took the risk of the by-laws being carried, and that they were not misled; and it was incomplete and invalid without the mayor's signature.—*Held*, also, that two by-laws as to the routes and speed of the plaintiffs' cars were under the circumstances valid as being within the defendants' power and authority under 59 V. c. 105 (O.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway. By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of McMahon, J., 2 O. W. R. 44, the defendants were bound to establish new lines, as might be directed by by-laws of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company, in relation thereto, should have all the rights and be subject to the terms of the by-law. A local municipality, London West, was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track: — *Held*, Maclennan, J.A.,

dissenting, that under the original by-law when the population was raised by the absorption of the municipality of West London, the track mileage in that municipality could not be treated for the purposes of by-law 916, as extension *quoad* the increased population of the city, no matter how its borders were extended, which gave the council the right under the prescribed conditions to require the extension of the existing track mileage, whatever that might be. *London Street Rw. Co.* v. *London*, 3 O. W. R. 123, 9 O. L. R. 439.

Extension of lines of tracks—*Rights of city as to — Time tables — Open cars — Night cars — 55 V. c. 99 (O.) — 63 V. c. 102, ss. 1 and 5 (O.) — Construction.* — The Toronto Rw. Co., under an agreement with Toronto, confirmed by 55 V. c. 99 (O.), acquired for a term of years the property in and the right to operate the street railways of the city. The agreement provided that the company should be required to lay down such extensions and new lines as might be recommended by the city engineer and approved by the city council, and that on the company's failure so to do the privilege of laying down such new lines and extensions might be granted by the city council to any other person or company, and that the company in such case should have no right to compensation against the city. Privy Council *held* that neither the city nor the company had any street railway powers over new territorial additions to the city made during the term created. That the only remedy open to the city for failure of the company to lay down such new lines was the right to grant the privilege to another person or company. That it was for the company, not for the city engineer, nor council, to determine what new lines should be laid, what routes should be adopted, and the places for stopping the cars on the streets within the city as existing at the date of the agreement. Judgments of Supreme Court of Canada, 37 S. C. R. 430, Court of Appeal for Ontario, 10 O. L. R. 657, and Anglin, J., 9 O. L. R. 333, varied. *Toronto* v. *Toronto Rw. Co.*, C. R. [1907] A. C. 96.

Grading street — *Liability for loss of support.*]—A street railway company in grading a street in Vancouver, in accordance with an agreement entered into with the corporation, pursuant to the Vancouver Incorporation Act and amendment of 1895, are not liable for damages for loss of support caused to lands adjoining the street. *Macdonell* v. *British Columbia Electric Rw. Co.*, 9 B. C. R. 542.

Injunction — *By-law or resolution — Approval of plans—Conditional approval — Winnipeg charter, s. 472.*] — 1. Notwithstanding the provision of s. 472 of the Winnipeg charter that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," the approval by the city council of the construction by the defendants of a loop line on certain named streets of the city may be given by resolution. *Toronto* v. *Toronto Rw. Co.*, 12 O. L. R. 534, followed. 2. It is not a valid objection to such a resolution that it was one approving a report of the board of control, even if such board had no power to deal with such a matter. 3. The council had power to give an approval coupled with a condition that the company should also construct another loop line on certain other streets, although the council might be unable afterwards to enforce the condition. 4. Under the law governing such construction the approval of the detailed plans by the city council is not required, so that the making of a change in the plans by the city engineer which had not been approved by the council, was no ground for an injunction. *Black* v. *Winnipeg Electric Rw. Co.*, 6 W. L. R. 238, 17 Man. L. R. 77.

Interference with operation of railway — Motion for injunction—Exclusive jurisdiction of Ontario Railway and Municipal Board. *Toronto Suburban Rw. Co.* v. *Toronto Junction*, 11 O. W. R. 108.

Laying double track on street — Injury to abutting land — Injunction — Permission of municipality—Resolution — By-law—Altering grade — Compensation—Obstruction — Nuisance — Special injury. *Johnston* v. *London Street Rw. Co.*, 2 O. W. R. 1003.

Mileage payments — *Construction of portion of railway—Ontario Judicature Act —Construction — Interest on payments in arrear.*]—The Ontario Judicature Act, R. S. O. 1897 c. 51, s. 313 enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it;"—*Held*, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.—An order by the Court below, *Toronto* v. *Toronto Rw. Co.*, 5 O. W. R. 130, that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed. *Toronto Rw. Co.* v. *Toronto*, [1906] A. C. 117.

Municipality assuming ownership—Award — Value of railway—Franchises and privileges—Principle of valuation — Addition of percentage to value as found — Expiry of time for assuming ownership—Estoppel by proceeding with arbitration. *Re Berlin and Berlin and Waterloo Street Rw. Co.*, 9 O. W. R. 412.

Municipality assuming ownership—*Award of arbitrators — Principle of valuation—Allowance for value of franchise — Allowance for compulsory taking — Street Rw. Act, s. 41.*] — Arbitrators were appointed under the Street Railway Act, R. S. O. 1897, c. 208, to determine the value of the appellants' railway and all real and personal property in connection with the working thereof, the ownership of which had been assumed, under the provisions of s. 41 (1) of the Act, by a town corporation, part of the railway being laid within the town. The arbitrators in their award fixed on a certain sum as "the actual present value of the railway and of the real and personal property in connection with the

working thereof," and stated that in arriving at that value they had "valued the railway as being a railway in use and capable of being used and operated as a street railway," and that they had "not allowed anything for the value of any privilege or franchise whatsoever," in either of the municipalities in which the railway was laid. They further stated that they had not been able to assent to the contention of the company that the proper mode of valuation should be to capitalize the amount of the permanent net earning power of the railway, and that they had not reached their valuation in any way on that basis, but had "considered only the actual present value:"—*Held*, Moss, C.J.O., dissenting, that the arbitrators had erred in their method of valuation, and that in the case of a railway producing, as the appellants' railway did, a considerable permanent profit, the proper method of valuation was to take its net permanent revenue and capitalize that, the result representing its real value. *Stockton and Middlesbrough* v. *Kirkeatham*, [1893] A. C. 444, distinguished. Right of owner to allowance of 10 per cent. as for compulsory taking discussed. Judgment of Britton, J., reversed, and award remitted to the arbitrators for reconsideration. *Re Berlin & Waterloo Street Rw. Co. and Berlin* (1908), 19 O. L. R. 57, 13 O. W. R. 157.

Municipal by-law — *Highway — Removal of snow—Indemnity.*]—By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such a manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—*Held*, that the company had not discharged their obligation, and that they were liable to indemnify the city against damages recovered against the city by a person who had, in consequence of the bank, been upset while driving along the street. *Mitchell* v. *Hamilton*, 21 C. L. T. 372, 2 O. L. R. 58.

New lines of track—*Right to lay — 55 Vict., c. 99 (O.)—8 Edw. VII., c. 112 (O.).*]—Privy Council in 1907, *held*, that subject to certain conditions contained in an agreement between the parties validated and confirmed by 55 Vict. c. 99 (O.), it was for the company and not the city—to determine which new lines of tracks should be laid down on streets of Toronto.—Ont. Rw. and Mun. Board in 1909 ordered the company to construct between 10 and 15 miles of new tracks. The company selected certain streets for that purpose.—Court of Appeal for Ont., *held*, that the order of the Board should be affirmed, and the city engineer from doing any act to prevent the company from constructing the lines of railway upon said streets, notwithstanding 8 Edw. VII., c. 112 (O.).—Privy Council *held*, that their decision in 1907 was perfectly clear and not affected by 8 Edw. VII., c. 112 (O).—Judgments from the Court of Appeal for Ontario and the Ontario Railway Board and Municipal Board affirmed. *Toronto* v. *Toronto Rw. Co.*, C. R., [1910] A. C. 137.

Operation — *Municipal franchise — Construction of contract—"Whole operation of its railway"—Suburban lines — Percentage upon earnings outside city limits.*]—By Art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act." The appellants having contracted with the respondents to pay annually certain specific precentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the respondents considered that territories of outside municipalities were not included within the scope of the municipality, and that they could only deal with the streets within their jurisdiction, and that the appellants had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—*Held*, that by the true construction of the contract the respondents were only entitled to percentages on the gross earnings arising from the whole operation of the lines within their own limits.—Judgment in *Montreal* v. *Montreal Street Rw. Co.*, 34 S. C. R. 459, 24 C. L. T. 165, reversed. *Montreal Street Rw. Co.* v. *Montreal*, [1906] A. C. 100, 15 Que. K. B. 174.

Operation — *Powers of municipal corporation—Legislative authority — Use of streets — By-law — Conditions — Penalty for breach of conditions—Repeal of by-law—Contractual obligation — Offence against by-law—Jurisdiction of Recorder's Court — Prohibition.*]—A city corporation enacted a by-law granting a company permission to use its streets for the construction and operation of a tramway, and, in conformity with the provisions and conditions of the by-law, the city corporation and the company executed a deed of agreement respecting the same. A provision of the by-law was that "the cars shall follow each other at intervals of not more than five minutes except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes. The council may, by resolution, alter the time fixed for the circulation of the cars in the different sections." For neglect or contravention of any condition or obligation imposed by the by-law, a penalty of $40 was imposed, to be paid by the company for each day on which such default occurred, recoverable before the Recorder's Court, "like other fines and penalties." An amendment to the by-law, by a subsequent by-law, provided that "the present disposition shall be applicable only in such portion of the city where such increased circulation is required by the demands of the public:"—*Held*, that default to conform to the conditions and obligations so imposed on the company was an offence against the provisions of the by-law, and that, under the statute 29 & 30 V. c. 57, s. 50 (A.), the exclusive jurisdiction to hear and decide in the matter of such offence was in the Recorder's Court of the city of Quebec. Judgment appealed from 17 Que. K. B. 256, affirmed. *Quebec Railway Light and Power Co.* v. *Recorder's Court of Quebec*, 41 S. C. R. 145.

Operation of railway — *Breach of conditions—Liquidated damages—Penalty—*

Cumulative remedy—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract — Abandonment of monopoly.]—Except where otherwise specially provided in the agreement between the Toronto Railway Company and the corporation of the city of Toronto, set forth in the schedules to 55 V. c. 99 (O.), the right of the city to determine, decide upon, and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment in *Toronto* v. *Toronto Rw. Co.*, 10 O. L. R. 657, 6 O. W. R. 677, reversed: Girouard, J., dissenting.—The city, and not the company, is the proper authority to determine, decide upon, and direct the establishment of new lines, and the service, time-tables, and routes thereon. Judgment appealed from affirmed; Sedgewick, J., dissenting.—As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon, and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heating. Judgment appealed from reversed; Girouard, J., dissenting. — Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, they cease to have any right of action against the city for subsequent grants of the privileges to others: the right of making such grants accrues, *ipso facto*, to the city, but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed; Sedgewick, J., dissenting.—The cars started out before midnight as day-cars may be required by the city to complete their routes so connected, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight, *eo instanti*, their character would be changed to night-cars, and all passengers entering them after that hour could be obliged to pay night fares; Sedgewick, J., dissenting. *Toronto Rw. Co.* v. *Toronto*, 26 C. L. T. 454, 37 S. C. R. 430.

Operating car without proper vestibules — *Persons operating car.*]—Conviction of a street railway company for that they did run and operate a street car which was not provided with proper and sufficient vestibules to protect the motormen and persons in charge of such car from exposure to cold, snow, rain, and sleet, while engaged in operating such car, contrary to the by-law of the municipality passed on the 24th September, 1894, numbered 3280, and intituled "A by-law to provide for the construction of vestibules for the shelter of motormen and others upon the cars of electric railway companies:"—*Held*, on motion to quash, that the conviction was valid upon its face, being in the terms of the by-law, and that the offence was sufficiently stated; also that the by-law was warranted by the statute. *Semble, per* Armour, C.J.O., that the conductor, unless he is acting instead of the motorman, is not a person engaged in operating the car; but that point would only arise upon the evidence, which the Court would not look at where the conviction was valid on its face and the magistrate had jurisdiction. *Regina* v. *Toronto Rw. Co.*, 21 C. L. T. 120.

Operation — *Municipal franchise—Construction of contract — Suburban lines — Percentages upon earnings outside city limits.*]—The corporation of the city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city, which extended into adjoining municipalities. The contract, dated the 8th March, 1893, granted the franchise to the company for the period of 30 years from the 1st August, 1892. A clause in the contract provided that the company should pay to the city, annually during the term of the franchise, "from the 1st September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on the 1st September, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits, and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramways both inside and outside of the city limits:—*Held*, reversing the judgment below, Taschereau, C.J.C., and Killam, J., dissenting, that the city corporation were entitled to the specified percentages upon the gross earnings of the company arising from the operation of the tramway both within and without the city limits. *Montreal* v. *Montreal Street Rw. Co.*, 24 C. L. T. 165, 34 S. C. R. 459.

Operation — Right of municipality to direct — Service — New lines — Extension of municipal boundaries — Time tables and routes — City engineer — Details as to cars —Specific performance — Private statute—Special case — Hypothetical question —Refusal to answer—Costs. *Toronto* v. *Toronto Rw. Co.*, 4 O. W. R. 330, 446.

Operation of cars — Sunday cars — Injunction. *Sarnia* v. *Sarnia Street Rw. Co.*, 6 O. W. R. 367.

Payment of proportion of "gross receipts" — *Intra vires.*]—A covenant by the defendants to pay to the plaintiffs a certain proportion of the defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and the defendants, a street railway company. Upon the proper construction of the covenant, the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where the passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstand-

ing. *Hamilton* v. *Hamilton Street Rw. Co.*, 24 C. L. T. 372, 8 O. L. R. 455, 4 O. W. R. 47, affirmed. 6 O. W. R. 206, 10 O. L. R. 575.

Penalty — Breach of statutory duty — Fender at "front" of car—Car moving reversely. *Toronto* v. *Toronto Rw. Co.*, 6 O. W. R. 574, 10 O. L. R. 739.

Percentage on earnings.]—The parties contracted that the company defendant should establish and operate lines of railway for the conveyance of passengers in the city, and should pay to the city annually a certain percentage of its gross earnings. The company also operated lines of railway outside of the city, which connected with those within the city, and passengers were carried over both for one fare; but the outside lines were operated under concessions from outside municipalities in which they were situate:—*Held*, that the revenue derived by the company from the operation of the outside lines was not subject to the payment of the percentages set forth in the contract. *Montreal* v. *Montreal Street Railway Co.*, 17 Que S. C. 439.

Privileges and hypothecs — *Sale of tramway by sheriff as "going concern.*]— A company operating an electric tramway, by permission of the municipal corporation, on rails laid on public streets vested in the municipality, to secure the principal and interest of an issue of its debenture bonds, hypothecated its real property, tramway, cars, etc., used in connection therewith, to trustees for debenture-holders and transferred the movable property of company, and its present and future revenues to the trustees. By 3 Edw. VII., c. 91, s. 1 (Que.), the deed was validated and ratified. On the sale, in execution of the tramway as a going concern:—*Held*, that whether, at the time of such sale, the cars in question were movable or immovable in character, the effect of the deed and ratifying statute was to subordinate the rights of other creditors to those of the trustees, and, consequently, that unpaid vendors thereof were not entitled, under article 2,000 of the Civil Code, to priority of payment by privilege upon distribution of moneys realised on sale in execution. After the cars in question had been delivered to company, and used in the operation of their tramway, they became immovable by destination. *Ahearn & Soper* v. *N. Y. Trust Co.* (1909), 42 S. C. R. 267, affirming 18 Que. K. B. 82.

Removal of snowfalls — *Electric sweeper — Construction of agreement — Deposit of snow — Removal of.*] — The agreement with the plaintiffs under which the defendants' railway is operated provides that the track allowances shall be kept free from snow at the expense of the defendants, so that the cars may be in use continuously; and that if the fall of snow is less than six inches at any one time, the defendants must remove the same from the tracks, and shall, if the city engineer so directs, evenly spread it on the adjoining portions of the roadway, but should the quantity of snow at any time exceed six inches in depth, the whole space occupied as track allowances shall be at once cleared of snow, and the snow removed and deposited at such points on or off the street as may be ordered by the city engineer. 55 V. c. 99, s. 25 (O.), passed to construe the above, enacts that the defendants shall not deposit snow on any street, square, highway, or other public place in the city of Toronto, without first having obtained the permission of the city engineer:—*Held*, that there was nothing in the above to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (Meredith, J.A., dissenting), the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed.—*Per* Osler, J.A.: When the snowfall was less than six inches at a time, the company might leave it at the side of the road unless that would create a nuisance. —*Per* Garrow and Meredith, JJ.A.: In all cases the company were bound to remove the snow and ice after sweeping it aside, unless the city engineer directed that it be spread there. *Re Toronto and Toronto Rw. Co.*, 16 O. L. R. 205, 11 O. W. R. 275.

Removal of snow from tracks — *Levelling snow on side of tracks to depth prescribed by city engineer — St. John's Street Railway Act, 1896, s. 42.*] — The plaintiffs were granted a special Act to remove snow and ice from their tracks so as to enable them to operate their cars subject to the condition that they should, within 48 hours, level the said snow and ice on each side of their tracks to a uniform depth, to be determined by the city engineer so as not to impede the ordinary traffic of the streets: —*Held*, that the plaintiffs were bound to remove, at their own expense, such snow or ice from off the streets, as should be necessary to comply with the order of the city engineer. Judgments of the Supreme Court of Newfoundland and of Mr. Justice Johnson, set aside. Dissenting judgment of Sir Wm. Harwood, C.J., affirmed. *Reid-Newfoundland Co.* v. *Shea*, C. R., [1908] A. C. 530.

Sale of workmen's limited tickets —School children's tickets — Specific performance — Mandatory injunction—Interim order — Convenience — Parties — Attorney-General. *Hamilton* v. *Hamilton Street Rw. Co.*, 4 O. W. R. 207. 311, 411.

Service — *Parts of outside municipalities.*]—A covenant in a contract between a city and a street railway company, that the latter, in case of annexation by the former "of any of the outside municipalities, shall extend its system" thereto, is binding only as to the outside municipalities that were, at the time of the contract, contiguous to and adjoining the city. A company cannot be compelled to execute a covenant into which it has no power to enter under its charter. When a contract between a city and a street railway company to build and operate a railway, designates the street in which this is to be done, and a covenant is added that in case of the annexation of neighbouring territory, the company shall extend its railway to it, when ordered to do so, the order to be effective, must designate the streets in the new territory to which it is meant to apply. A covenant to extend a railway into "outside municipalities" thereafter to be annexed, does not apply to "parts of outside

municipalities" which are annexed. Nor can the company be compelled to carry it out, until the city has complied with subsequent legislative enactments of a public nature, for the protection of interested parties. *Montreal St. Rw. Co.* v. *Recorder's Court*, 37 Que. S. C. 311.

Specific performance — *Damages — Impossibility—Railway committee of Privy Council — Bond — Substituted agreement.*] —Specific performance of an agreement by a street railway company with a municipal corporation to construct, equip, and operate a line of rails along certain streets in the municipality, cannot be enforced, nor can damages be awarded for non-performance of the contract, if the construction of the street railway has been rendered impossible, through the action of the Railway Committee of the Privy Council in refusing to sanction a crossing, or by reason of the occupation of the street by another railway company, whether with or without lawful authority, the duty of the municipality in the case of unlawful occupation being to restore the street to a condition to permit of the construction. When the obligor in a bond agrees, if required by the obligee, to perform certain work, and subsequently, by agreement between the successors in law of the obligor and the obligee, an absolute obligation to do the work is substituted, the effect of the latter agreement is to discharge the obligation created by the bond. *Ottawa* v. *Ottawa Electric Street Rw. Co.*, 21 C. L. T. 289, 1 O. L. R. 377, 1 O. W. R. 830, 2 O. W. R. 719.

Streets in newly annexed territory —*Extension of road into — Stopping places —Right to fix — Determination of engineer —Injunction.*] — Section 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 V. c. 99 (O.), whereby the defendants were required to establish and lay down new lines and to extend the tracks and street car service on such streets as might be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement, but has subsequently been annexed to and become part thereof. *Toronto Rw. Co.* v. *Toronto*, 37 S. C. R. 430 (reversing the judgment of the Court of Appeal, 10 O. L. R. 657), followed.—By s. 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by s. 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds 600 feet: —*Held*, subject to the limitations of clause 39, that the regulating of the places at which cars shall be stopped came within condition 26, relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council.—The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council:—*Held*, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law.—*Held*, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places.—Judgment in 11 O. L. R. 103, 6 O. W. R. 871, varied. *Toronto* v. *Toronto Rw. Co.*, 12 O. L. R. 534, 8 O. W. R. 179.

Sunday cars — Breach — Forfeiture— Injunction — Damages — Liability of plaintiffs for costs. *Sarnia* v. *Sarnia Street Rw. Co.*, 6 O. W. R. 478.

Use of streets — *By-law — Operation of cars — Penalty — Contract—Franchise.*] —A municipal corporation authorised by its charter to grant street railway companies permission to use the streets and to determine the conditions on which such use may be had, has the power to ordain, in the by-law passed for the purpose, that the cars shall follow each other at stated intervals of time, under pain of a fixed penalty recoverable in the usual way. The fact that the charter makes provision for a contract between the corporation and company, as a means of acceptance, by the latter, of the franchise granted and of the conditions imposed by the by-law, does not alter the nature of the obligations flowing therefrom, so as to make them merely contractual and not penal.—Judgment in 32 Que. S. C. 489, affirmed. *Quebec Railway Light and Power Co.* v. *Recorder's Court of Quebec*, 17 Que. K. B. 256.

Use of streets — *Payment for — Percentage of receipts — Traffic beyond city —Validity of agreement.*] — By agreement between the city of Hamilton and the Hamilton Street Railway Co, the latter were authorised to construct their railway on certain named streets, and agreed to pay to the city, *inter alia*, certain percentages on their gross receipts:—*Held*, following *Montreal Street Rw. Co.* v. *Montreal* [1906] A. C. 100, that such payment applied in respect to all traffic in the city, including that originating or terminating in the adjoining township of Barton. — *Held*, also, that, as when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic, and not on the portion within the city only.— *Held*, further, that the power of the company to construct their railway was not derived wholly from their charter, but was subject to the permission of the city corporation; the city had therefore a right to stipulate for payment of such percentages, and the agreement therefor was *intra vires*. —Judgment of the Court of Appeal in *Hamilton* v. *Hamilton Street Rw. Co.*, 10 O. L. R. 575, affirmed. *Hamilton Street Rw. Co.* v. *Hamilton*, 27 C. L. T. 154, 38 S. C. R. 106.

2. NEGLIGENCE.

Alighting from car — Negligence — Contributory negligence — Finding of jury —Nonsuit. *Cooledge* v. *Toronto Rw. Co.*, 9 O. W. R. 222, 623, 10 O. W. R. 739.

Alighting from car — *Negligence — Contributory negligence — Regulations — "Crossing" — Case for jury — Costs — Discretion — Appeal.*]—The plaintiff was a passenger on a car of the defendants, and stepped from it while it was in motion, as it reached a street crossing; the motorman had been signalled to stop, but failed to do so. The plaintiff alighted safely, but found himself in front of a horse and cab driven swiftly toward him. In order to avoid a collision with the horse, and also in order to cross to the west side of the street, the plaintiff turned behind the car he had just left and passed on towards the other track; as he reached it, he became aware of a car coming towards him at a rapid rate, and to avoid being run down he flung himself on the fender, thus saving his life, but he was seriously injured. In an action to recover damages for his injuries he was a witness at the trial, and said that it was impossible to get out of the way of the car; he did not hear the gong sound, although if it had been rung he would have heard it. By one of the regulations forming part of the agreement between the city corporation and the defendants validated by 57 V. c. 76 (O.), under which the defendants operated their cars on the city's highways, it was provided that each car was to be supplied with a gong, to be sounded by the driver when the car approached to within 50 feet of each crossing. This was not brought to the attention of the Judge at the trial. The plaintiff, however, was aware that it was the usual practice to sound the gong at crossings, and he expected it to be done when a car was approaching a crossing:—*Held*, that, even if the regulation had not the force of a statutory requirement, the proof of failure to comply with a precaution which the defendants had recognised as important for the safety of persons using the crossing on streets occupied by the railway, was evidence for the jury of negligence in the conduct of the car; and the question whether the gong was sounded was for the jury.—*Semble*, *per* Moss, C.J.O., that the term "crossing" in the agreement, is intended to indicate any place on or along the streets occupied by the railway where there is a walk laid for the purpose of enabling foot passengers to cross from one side of the street to another, and where the cars would stop to take up or let down passengers; and is not confined to the crossing of an intersecting street.—The Court declined to interfere with the discretion of the Court below in withholding costs from the plaintiff, in setting aside a nonsuit and granting a new trial. *Wallingford* v. *Ottawa Electric Rw. Co.*, 9 O. W. R. 49, 14 O. L. R. 383, 6 Can. Ry. Cas. 454.

Bicycling on highway — Crossing behind car — Approach of car from opposite direction — Failure to sound gong — Negligence — Contributory negligence — Nonsuit — New trial. *Preston* v. *Toronto Rw. Co.*, 8 O. W. R. 504.

Child crossing track — *Negligence — Contributory negligence — Infant of four years — Finding of jury — Charge of trial Judge — Evidence of negligence — Damages —Fatal Accident Act — Reasonable expectation of pecuniary benefit — Questions for jury.*]—In an action by a parent for the death of child of four years, caused by negligence, it is not necessary to shew any pecuniary advantage derived from the deceased; it is sufficient if there is evidence to justify the conclusion that there is reasonable expectation of pecuniary benefit in the future capable of being estimated. *Pym* v. *Great North. Rw. Co.* (1862), 2 B. & S. 759, *Ricketts* v. *Markdale* (1900), 31 O. R. 610, and *Blackley* v. *Toronto Street Rw. Co.*, *per Osler, J.A.* (1900), in note to 27 A. R. 44, followed. Judgment of Divisional Court (1908), 12 O. W. R. 1297, affirmed. *McKeown* v. *Toronto* (1909), 14 O. W. R. 572, 1 O. W. N. 3, 19 O. L. R. 361.

Child on track — *Negligence — Failure of motorman to stop car — Absence of fender.*]—In an action brought in the name of an infant to recover damages for injuries occasioned through the alleged negligence of the defendant company in the operation of their electric tramway, the evidence shewed that the infant, a child aged one year and eleven months, was seen approaching the track upon which one of the defendants' cars was moving slowly. The whistle was sounded, and the child stopped for a moment and then moved quickly towards the car and was struck, and received injuries for which the action was brought. Upon seeing the child stop when the whistle was blown, the motorman immediately applied speed without waiting to see whether the child was going to retreat or making any effort to remove it from its dangerous position:—*Held*, that this was a clear case of reckless conduct, for which the defendants were responsible; that the failure to take proper precautions to avert injury to the child was not to be excused by the alleged necessity of complying with the time table and preventing delay to passengers; and that the failure of the defendants to provide the car with a fender was clear evidence of negligence. *Lott* v. *Sydney and Glace Bay Rw. Co.*, 2 E. L. R. 309, 41 N. S. R. 153, 8 Can. Ry. Cas. 276.

Collision — *Contributory negligence.*]—The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track, and the waggon was struck by a car which was coming behind, at what was held to have been a reasonable rate of speed. The plaintiff said that one hundred feet from the point at which he had tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross:—*Held*, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. *Danger* v. *London Street Rw. Co.*, 30 O. R. 493, applied. *O'Hearn* v. *Port Arthur*, 22 C. L. T. 255, 4 O. L. R. 209, 1 O. W. R. 373.

Comments of Judge.]—There can be no valid objection to a Judge cautioning a jury against deciding from an enumeration of witnesses. An inference to alight can be drawn by the jury from the conduct and actions of the conductor. The Judge's summing up is not to be rigourously scrutinised. The damages claimed were $2,500, but the jury gave $3,000, and an amendment of the claim was allowed. A new trial will not be ordered where the appellate Court cannot say the damages are excessive. *Tidy* v. *Toronto*, 12 O. W. R. 994.

Contributory negligence.]—The plaintiff with his coachman was driving east along W. street, Toronto, and on approaching C. street he saw a street car of defendants coming south. Both he and his coachman thought that they could safely cross C. street, it being usual for defendants' cars to stop at the north intersection of the latter street. The car did not stop and ran into the plaintiff's carriage, the plaintiff being seriously injured. The jury found in plaintiff's favour. An appeal was dismissed, the Court being unable to say that plaintiff had acted so recklessly that all question of the exercise of reasonable care on his part should have been withdrawn from the consideration of the jury. Reasonable care is a matter of fact, and if there is any evidence must be for the jury. It cannot be said that there was no evidence at all upon the subject proper for the jury. *Milligan* v. *Toronto*, 12 O. W. R. 967.

Crossing cars — Undue speed—Sounding gong — Findings of jury.—Judgment of the Court of King's Bench, Quebec, 14 Que. K. B. 355, affirmed. *Montreal Street Ry. Co.* v. *Deslongchamps*, 37 S. C. R. 685.

Crossing track — *Collision with car —Negligence — Contributory negligence — Findings of jury.*]—Action for damages for personal injuries sustained by plaintiff, and for loss of a horse by collision with defendants' street car. The jury found that the car was travelling at too high a rate of speed and negatived contributory negligence:—*Held*, on appeal, that the Court could not say that the jury should not have found other than they did. *Goodyear* v. *Toronto and York Radial Ry. Co.*, 13 O. W. R. 648.

Crossing track — Collision with motor-car — Negligence — Recklessness of deceased — Findings of jury — Evidence to support — New trial. *King* v. *Toronto Ry. Co.*, 8 O. W. R. 507.

Crossing track — *Negligence — Contributory negligence — Findings of jury.*]—In an action brought against an electric railway company for damages, by a person struck by one of their cars, the evidence shewing that the accident was mainly the result of the plaintiff's imprudence, but being contradictory as to whether the gong was sounded at the time, as required by the company's by-laws, a verdict that the accident was caused by the negligence of the defendants is not clearly against the weight of evidence, and will not be set aside on that ground. Judgment will therefore be rendered upon it in favour of the plaintiff. *Montreal Street Ry. Co.* v. *Deslongchamps*, 14 Que. K. B. 355.

Crossing track — Negligence — Contributory negligence — Findings of jury — Action under Fatal Accidents Act — Right of both father and mother to recover for death of child — Damages. *Mulvaney* v. *Toronto Ry. Co.*, 7 O. W. R. 644.

Crossing track — Negligence — Excessive speed — Contributory negligence — Findings of jury — Evidence to support. *Taylor* v. *Ottawa Electric Co.*, 8 O. W. R. 612.

Damages — *Improper evidence — Misdirection — New trial — Foreign commission.*]—On the trial of an action against a street railway company to recover damages for personal injuries, the vice-president of the company, called on the plaintiff's behalf, was asked on direct examination the amount of bonds issued by the company, the counsel on opening to the jury having stated that the company were making large sums of money out of the road. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, and on re-examination the plaintiff's counsel interrogated him at length as to the selling price of the shares on the Montreal exchange, and proved that they sold at about 50 per cent. premium. The Judge in charging the jury directed them to assess the damages "upon the extent of the injury plaintiff received, independent of what these people may be, or whether they are rich or poor." The plaintiff obtained a verdict with heavy damages:—*Held*, that on the cross-examination of the witness by defendants' counsel the door was not opened for re-examination as to the selling price of the stock; that in view of the amount of the verdict it was quite likely that the general observation of the Judge in his charge did not remove its effect on the jury as to the financial ability of the company to respond well in damages. The injury of which the plaintiff complained was the crushing of his foot, and on the day of the accident the medical staff of the hospital where he had been taken held a consultation and were divided as to the necessity for amputation. Dr. W., who thought the limb might be saved, was, four days later, appointed by the company, at the suggestion of the plaintiff's attorney, to co-operate with the plaintiff's physician. Eventually the foot was amputated, and the plaintiff made a good recovery. On the trial the plaintiff's physician swore to a conversation with Dr. W., four days after the first consultation and three days before the amputation, when Dr. W. stated that if he could induce the plaintiff's attorney to view it from a surgeon's standpoint and not use it to work on the sympathies of the jury, he might consider more fully the question of amputation. The Judge in his charge referred to this conversation, and told the jury that it seemed to him very important if Dr. W. was using his position as one of the hospital staff to keep the limb on when

it should have been taken off, and that he thought it very reprehensible:—*Held*, Strong, C.J., and Gwynne, J., dissenting, that, as Dr. W. did not represent the company at the first consultation, when he opposed amputation; as others of the staff took the same view; and there was no proof that amputation was delayed through his instrumentality; and as the jury would certainly consider the Judge's remarks as bearing on the contention made on the plaintiff's behalf that amputation should have taken place on the very day of the accident, it must have affected the amount of the verdict. To tell a jury to ask themselves, "If I were plaintiff, how much ought I to be paid if the company did me an injury?" is not a proper direction. A party to an action who procures a commission for taking evidence abroad has no right to prevent its return. *Hesse* v. *St. John Rw. Co.*, 20 C. L. T. 113, 30 S. C. R. 218.

Danger to public — *Avoidance of — Notice of action.*] — An electric tramway company ought to avoid everything which, without being absolutely necessary for its service, constitutes a danger to the public, and if the company does not do so it is guilty of actionable negligence. 2. The fact that a cause of danger can be suppressed only by means of an increase of labour or expense, is not an excuse for allowing it to subsist. 3 A provision of the charter of the Montreal Street Railway Company which obliges those who wish to sue it for damages to give a thirty days' notice, does not make of such notice a condition of the right of action against the company; it is but one of those prejudicial obligations the non-observance of which must be invoked by a dilatory exception. *Mattice* v. *Montreal Street Rw. Co.*, 20 Que. S. C. 222.

Ejected from car — *Refusal to pay fare* — Appeal from order of a Divisional Court dismissed. *Paget* v. *Toronto*, 12 O. W. R. 1102.

Evidence — *Misdirection — Foreign Commission — New trial.*]—The Supreme Court of New Brunswick, *in banc*, granted a new trial for misdirection, but this decision was reversed by the Supreme Court of Canada. *Hesse* v. *St. John Rw. Co.*, 35 N. B. R. 1, 20 C. L. T. 113, 30 S. C. R. 218.

Excessive speed — *Contributory negligence.*]—A cab-driver was endeavouring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the tramway company for damages, it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and, that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident; that the driver was negligent in not looking more sharply for the car; and that, notwithstanding such negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care:—*Held*, affirming the judgment in 32 N. S. R. 117, that the last finding neutralised the effect of that of contributory negligence; that, as the car was on a down grade and going at an excessive rate of speed, it was incumbent on the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to anyone on the highway; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. *Inglis* v. *Halifax Electric Tramway Co.*, 20 C. L. T. 195, 30 S. C. R. 256.

Excessive speed — *Injury to married woman—Collision.*]—See *McFarran* v. *Montreal Park & Island Rw. Co.*, 15 Que. S. C. 390, 9 Que. Q. B. 367, 30 S. C. R. 410, 20 C. L. T. 323, 373.

Falling from car — Fare not demanded by conductor — Willingness to pay fare if demanded — Status as passenger — Duty of conductor — Misconduct — Proximate cause of fall — Avoidance of kick aimed by conductor at passenger — Responsibility of owners of railway — Negligence—Contributory negligence. *Wells* v. *Port Arthur*, 10 O. W. R. 1098.

Finding of jury.] — Defendants held liable for damages for injuries received while alighting from defendants' street cars. Several of the answers by the jury shewed contributory negligence. Judgment for plaintiff with unusual doubt and hesitation. *Letcher* v. *Toronto*, 1 O. W. N. 59, affirmed, 14 O. W. R. 1240, 1 O. W. N. 273.

See also *Mazza* v. *Port Arthur*, 14 O. W. R. 1108, 1 O. W. N. 223.

Frightening horses.] — The plaintiff, who was driving a carriage with a pair of horses, stopped near a railway crossing to allow a train to pass. An electric car of the defendants coming in the opposite direction stopped on the other side of the railway crossing for the same reason. The plaintiff's horses were frightened by the train and became restive, and after the train passed the plaintiff waved his hand to the motorman of the electric car as a signal, as he contended, not to start the car. The horses were apparently under control, and the motorman started the car, when the horses became frightened again and ran away:—*Held*, reversing the judgment in 20 C. L. T. 35, 31 O. R. 309, that, as the plaintiff's signal was ambiguous, and as there was apparently no danger, the motorman could not be said to have been guilty of negligence. *Myers* v. *Brantford Street Rw. Co.*, 20 C. L. T. 346, 27 A. R. 513.

Injury to child crossing track — Negligence — Failure of motorman to look —Contributory negligence. *Mitchell* v. *Toronto Rw. Co.*, 5 O. W. R. 128.

Injury to passenger — *Car running backwards — Jury — Answers to questions.*] —The plaintiff was injured by a waggon in which he was being driven being struck by

an electric car of the defendants which was running backward in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed: — *Held*, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question. *Per* Armour, C.J.O.: Questions to the jury must be in writing. *Per* Osler, J.A.: While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course. *Balfour* v. *Toronto Rw. Co.*, 23 C. L. T. 241, 5 O. L. R. 735, 2 O. W. R. 671.

Injury to passenger — *Conductor attempting to pull passenger on moving car —Scope of authority—Question for jury — New trial.*]—The plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down, but did not stop, and, as it was passing, the conductor seized the plaintiff's hand, and, while attempting to help her on board, signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—*Held*, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it is slowing up; that the question as to the scope of the conductor's authority is one of evidence; that there was evidence to go to the jury, and the effect of it was for them to consider; and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. *Dowdy* v. *Hamilton, Grimsby, and Beamsville Rw. Co.*, 23 C. L. T. 44, 5 O. L. R. 92, 1 O. W. R. 364, 781, 2 O. W. R. 789.

Injury to passenger — *Contributory Negligence—Onus.*] — The plaintiff alighted from a car of the defendants in which he was a passenger, and attempted to cross the street, when he was, while the car from which he had alighted was standing still, struck by another car going in the opposite direction, and injured. A rule of the defendants required that a motorman when passing another car should slacken speed and ring his gong continuously until car passed: — *Held*, upon the evidence that the gong was not rung when the east-bound car was approaching and passing the standing car; that the car was running past the standing car at a rate of speed which was, under the circumstances, excessive and dangerous to the passengers alighting from the other car; and negligence was thus established. The onus of proving contributory negligence on the part of the plaintiff rested on the defendants in the first instance, and, in the absence of evidence tending to that conclusion, the plaintiff was not bound to prove the negative in order to entitle him to a verdict: *Wakelin* v. *London and South-Western Rw. Co.*, 12 App. Cas. 41. To prove contributory negligence it is necessary for the defendant to shew that the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence: *Dublin and Wicklow Rw. Co.* v. *Slattery*, 3 App. Cas. 1207. Upon the whole circumstances as detailed in the evidence, there was no proof of contributory negligence on the part of the plaintiff to disentitle him to recover. There was not a want of due care on the plaintiff's part as a proximate cause of the injury, which could alone constitute negligence sufficient to deprive him of his remedy against the defendants for their negligence. *Bell* v. *Winnipeg Electric Street Rw. Co.*, 24 C. L. T. 155.

Injury to passenger — Damages—Release of claim — Validity of — Mental incapacity of plaintiff — Knowledge of defendants — Absence of fraud — Failure to notify plaintiff's solicitor—Costs. *Begg* v. *Toronto Rw. Co.*, 3 O. W. R. 517.

Injury to passenger — *Dangerous condition of steps of car—Climatic conditions—Necessity for care.*]—The steps of an electric car, owned and operated by the defendants, were in a slippery condition in consequence of exposure, while in use, to snow followed by rain, sleet, and cold. The evidence shewed that the car had been thoroughly cleaned in the morning, before being sent out, and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed:—*Held*, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the defendants accountable for injuries sustained by the plaintiff, a passenger on one of their cars, who, in getting off the car, slipped and fell. *McCormack* v. *Sydney and Glace Bay Rw. Co.*, 37 N. S. R. 254.

Injury to passenger—Findings of jury —Proximate cause — Nonsuit — New trial. *Collins* v. *London Street Rw. Co.*, 3 O. W. R. 212, 553.

Injury to passenger — *Negligence — Contributory negligence—Passenger alighting from car run over by another.*]—The plaintiff, a passenger on a crowded car of the defendants going westwards, being near the front of the car when it stopped at the street where he wished to alight, made his way past a number of persons in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants (of whose approach he was not aware) proceeding eastwards on the other track, knocked down, and

very seriously injured. The distance between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches. It was the custom of the company to permit passengers to alight at the front entrance, and they had no rule against it. It was, however, a rule of the company that motormen, when approaching another car, should slacken speed and ring the gong continuously until the car had been passed, which, however, was not done in this case:—*Held*, that the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff, and that the plaintiff had not been guilty of contributory negligence. There is no binding authority for the proposition that from the moment a passenger's foot touches the ground, a street railway company's liability for injuries to him by their other cars ceases. *Bell* v. *Winnipeg Electric Street Rw. Co.*, 15 Man. L. R. 338, 1 W. L. R. 405.

Injury to passenger — New trial — Questions for jury. *Stitt* v. *Port Arthur*, 3 O. W. R. 126.

Injury to passenger — Scope of conductor's authority—Attempt to pull person on moving car. *Dawdy* v. *Hamilton, Grimsby, and Beamsville Electric Rw. Co.*, 1 O. W. R. 364, 781.

Injury to pedestrian — *Negligence — Excessive speed—Means of escape—Burden of proof.*]—The plaintiff, proceeding along the track of the defendants, on a public street in the city of Sydney, was overtaken, struck, and severely injured by an electric car, driven at an excessive and dangerous rate of speed. At the time of the accident the plaintiff was prevented from escaping by a car of another line, which was obstructing the crossing in front of him, and by banks of snow, which had been thrown up by the defendants' plough at the side of the track upon which he was standing:—*Held*, that the burden of shewing that the plaintiff had means of escape, was upon the defendants; and that the plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape. *Ricketts* v. *Sydney and Glace Bay Rw Co.*, 37 N. S. R. 270.

Injury to person — Collision with vehicle—Contributory negligence—Proximate cause—Jury. *Cohen* v. *Hamilton Street Rw. Co.*, 4 O. W. R. 19.

Injury to person — *Failure to give warning.*] — The plaintiff, travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and, after walking for some distance, the car by which he had travelled, backing up, struck and injured him. There was a light at both ends of the car, but the current was very weak at the time, and the light given very slight, and the motorman came within four or five feet of the plaintiff before seeing him. The car was going along at the rate of only three or four miles an hour. The motorman did not sound the gong nor give any other warning of his approach:—*Held*, that the case could not properly have been withdrawn from the jury; that the accident was fairly and properly attributable to the defendants' negligence; and that there had been no misdirection, but that the sum awarded by the jury as damages, $1,800, was largely in excess of what had been given in cases of much more serious injury, although it cannot be said that there is a standard of damages in such cases. New trial directed unless the plaintiff would consent to the reduction of his verdict to $900. *Ford* v. *Metropolitan Rw. Co.*, 22 C. L. T. 227, 4 O. L. R. 29, 1 O. W. R. 287.

Injury to person — Negligence — Car running backwards. *Balfour* v. *Toronto Rw. Co.*, 2 O. W. R. 671, 5 O. L. R. 735.

Injury to person — Non-repair of highway—Actionable breach of duty—Statute—Agreement with municipalities. *Stuart* v. *Metropolitan Rw. Co.*, 6 O. W. R. 255.

Injury to person bicycling on highway — Crossing behind car — Approach of car from opposite direction—Failure to sound gong—Negligence—Contributory negligence — Nonsuit—New trial. *Preston* v. *Toronto Rw. Co.*, 6 O. W. R. 786, 11 O. L. R. 56.

Injury to person crossing track — Collision — Negligence — Excessive speed—Warning—General verdict—Conflicting evidence—Excessive damages—New trial. *Furlong* v. *Hamilton Street Rw. Co.*, 2 O. W. R. 1007.

Injury to person crossing track — *Collision—Rate of speed—Negligence—Contributory negligence—Proximate cause—Appeal—New point.*] — The plaintiff's wagon was struck and plaintiff injured by an electric tram car of the defendants, while attempting to cross the defendants' track, at a place known as Grand Lake Crossing, near which there was a down grade for a distance of about 3,000 feet, and then an up grade for 1,000 feet, terminating at a siding near which the crossing was situated. On the down grade it was usual to run cars at a speed of from 20 to 25 miles an hour, but when half way down the power was shut off and the speed on reaching the siding was 10 miles an hour. When the plaintiff's team was first seen it was at a distance of from 35 to 40 feet from the crossing, and the car was distant from 50 to 75 feet. The motorman promptly applied the brakes and reversed the current, but was unable to avert the collision. The whistle had been blown when 300 yards distant from the crossing, and the car was provided with suitable appliances for stopping it within a reasonable time. The rate of speed at which the car was proceeding was reasonable considering the time and place. The plaintiff heard a whistle blown, which he supposed to be that of a Sydney and Louisburg train, but did not see the car until his horse's head was distant about 20 feet from the crossing. There was also evidence to shew that he failed to exercise proper care in approaching the crossing, as the reins were lying loose, and one witness called for the

plaintiff testified that, at the time, the horse was being whipped and was galloping: — *Held*, that the proximate cause of the accident was negligence on the part of the plaintiff. A point not raised by the statement of claim, or at the trial, where evidence might have been given to displace the contention, should not be raised on appeal. *Livingstone* v. *Sydney and Glace Bay Rw. Co.*, 37 N. S. R. 336.

Injury to person crossing track — Contributory negligence — Failure to look twice—Nonsuit. *Gosnell* v. *Toronto Rw. Co.*, 4 O. W. R. 213.

Injury to person crossing track — Contributory negligence — Nonsuit. *Gallinger* v. *Toronto Rw. Co.*, 4 O. W. R. 522.

Injury to person crossing track — *Negligence—Contributory negligence—Nonsuit.*]—The plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car of the defendants on the north track of a street in a city, and proceeded to cross the north and south tracks on the street, in front of an approaching east-bound car on the south track, then about one hundred feet awaw. He was struck by the car and injured. There was evidence that it was going at the rate of 8 to 10 miles an hour; that there was a bright electric light near by; that the plaintiff, if careful, could have seen the approaching car; but that the motorman did not apply the brakes or sound the gong before the plaintiff was struck:—*Held*, that a nonsuit was properly directed in an action brought against the defendants for negligence. *Gallinger* v. *Toronto Rw. Co.*, 25 C. L. T. 10, 8 O. L. R. 698, 4 O. W. R. 522.

Injury to person crossing track— Negligence — Evidence for jury—Neglect to give warning. *Daldry* v. *Toronto Rw. Co.*, 6 O. W. R. 62.

Injury to person crossing track — Negligence — Findings of jury—New trial. *Taylor* v. *Ottawa Electric Co.*, 5 O. W. R. 564.

Injury to person walking on track — Negligence—Cause of injury—Contributory negligence—Findings of jury—Neglect to give warning—Neglect to look for car. *Small* v. *Toronto Rw. Co.*, 6 O. W. R. 97.

Injury to vehicle by collision — *Negligence — Use of tracks—Nuisance — Piling snow at sides of tracks—Contributory negligence.*]—A car of the defendants, driven at an excessive rate of speed, ran into the plaintiffs' wagon, which was proceeding along the track, from which the defendants had removed the snow accumulated there during a heavy snow storm, and deposited it on the highway in such a way as to make it impossible for wagons, which, to the knowledge of the defendants, were forced, in consequence, to make use of the defendants' tracks. The driver of the wagon made repeated efforts to attract the attention of the motorman, but failed though there was sufficient light and an unobstructed view for 400 yards:—*Held*, in an action for damages for negligence, that the plaintiff was entitled to recover; that the blocking of the highway by the defendants constituted in fact as well as in law a nuisance, and, the common law having been infringed, there was no burden cast upon the plaintiff to shew a requirement by the local authorities to level the snow to a certain depth over a certain area, and that such requirement had not been complied with; that if contributory negligence was relied on, the case was one in which the defendants must not only prove such negligence, but also that it was of such a character that they could not by the exercise of ordinary care and diligence have averted the mischief which happened; and that the restrictions in the company's charter in relation to the levelling of snow placed upon the highway, amounted to a condition. *Bell* v. *Cape Breton Electric Co.*, 37 N. S. R. 298.

Man killed crossing street — *Negligence of motorman — Contributory negligence of deceased — Evidence properly submitted to jury — Verdict upheld — Order granting new trial set aside — Practice — Special leave to cross appeal.*] — David King, while driving a delivery wagon along Adelaide Street, was killed by a Yonge Street car, the property of the defendant company. The published rules of the company required their mortormen to reduce the speed and keep their cars carefully under control when crossing a street. The widow and daughter of the deceased brought action to recover damages, alleging negligence of defendant company. The jury found that the motorman was negligent in causing the accident, in failing to observe the published rules of the company, and that the deceased had a right to assume that these rules would be followed, and therefore was not guilty of contributory negligence. Judgment was entered for plaintiffs on the finding of the jury. The Court of Appeal for Ontario set aside this judgment and ordered a new trial:—*Held*, that the Court of Appeal, where the facts are not in dispute, should not set aside the findings of the jury, or order a new trial, but should enter judgment for one party or the other. Where the defendants had appealed, praying that this action should be dismissed, and the plaintiffs had not presented a cross-petition, special leave was granted at the hearing *nunc pro tunc* to cross appeal against the order for a new trial. Judgment of the Court of Appeal for Ontario, 8 O. W. R. 507, discharged; judgment of Sir Wm. R. Meredith, C.J.C.P., at trial, restored. *King* v. *Toronto Rw. Co.*, C. R. [1908] A. C. 326, 12 O. W. R. 40 [1908] A. C. 260.

Operation of car — Contributory negligence — Conflicting evidence—Findings of jury—Refusal of Court to interfere. *Rossi* v. *Ottawa Electric Rw. Co.*, 8 O. W. R. 98.

Operation of tramway — *Precautions for safety of passengers—Crossing cars — Sounding gong—Slackening speed at dangerous places—Neglect of rules—Passenger alighting from front of car — Contributory negligence.*] — Judgment of the Court of King's Bench for Manitoba, 15 Man. L. R. 338, affirmed. *Winnipeg Electric Street Rw. Co.* v. *Bell*, 37 S. C. R. 515.

Passenger — *Injury resulting from fault in construction of cars—Negligence—Con-*

tributory negligence — Passenger not on guard.]—A tramway company is responsible for accidents of collision which arise from the fact that its road has curves too sharp for the length of its cars. The passengers who use the tramway are not bound to be on the watch for accidents, and the fact of being absorbed in reading a newspaper at the time of the occurrence of one is not a contributory fault. *Jago* v. *Montreal Street Rw. Co.*, 35 Que. S. C. 109.

Passenger — Negligence — Findings of jury—Judge's charge—Direction not to go by numbering witnesses — Prejudice — Conflict of testimony — Comments of Judge — Damages — Increase by amendment — Excessive damages. *Tidy* v. *Toronto Rw. Co.*, 12 O. W. R. 994.

Passenger projecting body beyond car — *Negligence — Contributory negligence — Evidence — Injury from striking post.*]—The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—*Held*, (reversing the judgment of a Divisional Court, 10 O. W. R. 33), that the action should be dismissed, as there was no evidence of what caused the injury; Meredith, J.A., dissenting. *Per* Riddell, J. (in the Divisional Court): While it is impossible to lay down any specific rule for the guidance of railway or street railway companies generally, a railway company operating in a country in which tobacco chewing, or gum chewing, is not uncommon, must expect its patrons, or some of them, to be tobacco and gun chewers, and if it be the custom of such passengers to put their heads past the lines of the car to expectorate, the railway company should be held to know of such custom, and should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway company must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act. The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court. *Simpson* v. *Toronto and York Radial Rw. Co.*, 16 O. L. R. 31, 11 O. W. R. 297.

Passenger thrown from car — Negligence — Contributory negligence — Evidence for jury—Operation of car—Duty to passenger standing on platform. *Shea* v. *Toronto Rw. Co.*, 7 O. W. R. 724, 8 O. W. R. 404.

Person attempting to enter car — *Front vestibule — Closing—Requiring entrance of passengers by rear of car—Order of Railway and Municipal Board—Terms of order—Notice — Finding of negligence on one ground — Effect of—Negativing negligence on other alleged grounds.*] — In compliance with an order made by the Ontario Railway and Municipal Board, the front platform of the defendants' car was enclosed by a vestibule having a swing door, fastened by a spring lock on the inside, capable of being opened by the motorman to permit the exit of passengers. The plaintiff, not being aware of this order, attempted to get on a car so equipped at the front, and while so doing, the car started and she was thrown to the ground and injured. She asserted that the motorman saw her standing on the step, and not withstanding started the car. There was no notice on the door notifying the public of the non-admission by that door. On a charge to the jury that they might find on one or all of the following grounds of negligence, namely, (1) the omission of a non-admittance notice, (2) starting the car while the plaintiff was on the step, and (3) in not opening the door and letting the plaintiff in, they found that the defendants' negligence consisted in the omission to have a non-admittance notice on the door, and did not make any finding as to the other alleged grounds of negligence. A Divisional Court, while holding that the ground of negligence found by the jury was not tenable, in that the company were merely obeying the board's order, which did not require any such notice, directed a new trial on the other alleged grounds of negligence: 12 O. W. R. 587. The Court of Appeal, while affirming the judgment of the Divisional Court as to the ground on which the jury found not constituting negligence, reversed the judgment granting a new trial, holding that the finding of the jury was tantamount to a finding negativing negligence on the other alleged grounds. *McGraw* v. *Toronto Rw. Co.*, 18 O. L. R. 154, 13 O. W. R. 129.

Person attempting to get on car — Negligence—Findings of jury—Contributory negligence—Ultimate negligence—Dismissal of action. *Watkins* v. *Toronto Street Rw. Co.*, 9 O. W. R. 702, 10 O. W. R. 170.

Person crossing track — Negligence—Contributory negligence—Concurrent negligence of deceased and motorman—Findings of jury—Proper judgment thereon—Divided opinion in Court of Appeal. *O'Leary* v. *Ottawa Electric Rw. Co.*, 12 O. W. R. 469.

Person crossing track — *Negligence— — Contributory negligence — Findings of jury—Evidence.*]—The plaintiff was driving easterly in his carriage with a pair of horses, at a moderate pace along one of the streets of a city, and on arriving within thirty feet of a cross street, on which there

was a street car line, he saw a car coming from the north, where there was a down grade, approaching at a rapid rate, the car being then about 300 feet distant. The plaintiff admitted that he could easily have stopped his carriage and horses before reaching the track. He consulted with his coachman, and, both being of the opinion that the speed of the car was not so great as to prevent their crossing in safety, he attempted to do so, when the carriage was struck by the car and damaged, and he himself injured. No attempt was made by the motorman to slow down the car. On questions submitted to the jury, they found that the accident was caused through the defendants' negligence, such negligence consisting in the car not being under proper control, and that there was no contributory negligence on the plaintiff's part:—*Held*, that it could not be said, in all the circumstances, that the plaintiff acted so recklessly as to preclude the submission to the jury of the question whether or not he acted with reasonable care; and a finding by the jury in the plaintiff's favour was upheld.—Judgment at the trial and of a Divisional Court affirmed, Moss, C.J.O., and Meredith, J.A., dissenting. *Milligan* v. *Toronto Rw. Co.*, 17 O. L. R. 530, 11 O. W. R. 966, 12 O. W. R. 967, 8 Can. Ry. Cas. 434.

Person crossing track — Negligence—Contributory negligence—Findings of jury —Infant—Dismissal of action. *Hackett* v. *Toronto Rw. Co.*, 10 O. W. R. 25.

Person crossing track — Negligence—Contributory negligence—Nonsuit. *Tinsley* v. *Toronto Rw. Co.*, 10 O. W. R. 1077.

Person crossing track — *Negligence—Excessive speed—Findings of jury — No reasonable evidence to support.*] — Plaintiff was struck and injured by one of defendants' street cars while crossing the street. When she started to cross she saw the car which struck her standing some distance away. Going behind another car she did not look when she reached the devil strip: —*Held*, that accident arose from her imprudence, and that the car which struck her was not going at an excessive rate of speed, and there was not enough evidence to justify reasonable men in reaching the conclusion which they did. Appeal allowed and action dismissed. *Brill* v. *Toronto Rw. Co.*, 13 O. W. R. 114.

Person crossing track — Negligence—Excessive speed of car—Failure to shew that injury due to speed—Nonsuit. *Hill* v. *Toronto Rw. Co.*, 9 O. W. R. 988.

Person crossing track — *Omission to stop car at usual stopping place, when signalled — Negligence — Contributory negligence — Nonsuit.*]—The plaintiff, intending to take a street car going westerly, on arriving, shortly after midnight, at the southerly side of the street on which the particular car line was, saw a car coming westerly very rapidly, being then about 300 feet off. He saw two persons standing at the corner signal the car to stop, and, believing that it would do so, it being the usual and customary practice to stop at the corner, when persons wished to get on or off the car, he, without again looking to see where the car was, attempted to cross in front of it, so as to get on it, when, instead of stopping, it ran past the corner, knocked down the plaintiff and injured him:—*Held*, that it could not be said that there was inexcusable negligence on the plaintiff's part in attempting to cross the street in front of the car, for he might reasonably assume that the car would stop at the corner in pursuance of the signal to do so, and that the case, therefore, could not have been withdrawn from the jury; and was properly submitted to them. —Judgment of a Divisional Court, 15 O. L. R. 438, 10 O. W. R. 1077, 8 Can. Ry. Cas. 69. Reversed by Court of Appeal, *Tinsley* v. *Toronto Rw. Co.*, 17 O. L. R. 74, 12 O. W. R. 389, 8 Can. Ry. Cas. 90.

Person driving on highway — *Collision — Negligence — Evidence.*]—A plaintiff, alleging that he had to kill his horse which was injured by a street car, brought an action against the company owning the car to recover damages therefor: — *Held*, that the action failed, upon the grounds that it was established by the testimony and the circumstances of the case that at the moment of collision the plaintiff was driving his horse at too rapid a rate of speed in a dangerous spot, and that he had not proved any fault on the part of the company or of their employees. *Montreuil* v. *Quebec Rw., Light, and Power Co.*, 30 Que. S. C. 6.

Person driving on highway — Duty as to highways — Keeping rails flush with streets — Street Railway Act, R. S. O. 1897 c. 208, s. 23—Repeal by Railway Act, 6 Edw. VII., c. 30—Effect of—Interpretation Act, 7 Edw. VII., c. 2, s. 6, s. 7 (46) —Findings of jury—Appeal — Costs. *Fox* v. *Cornwall Street Rw. Co.*, 11 O. W. R. 222, 12 O. W. R. 942.

Person ejected from car — Refusal to pay fare—Responsibility of railway company for acts of servant—Scope of employment—Findings of jury—Evidence — Admissibility—Appeal. *Paget* v. *Toronto Rw. Co.*, 12 O. W. R. 330, 1102.

Person falling from car — Fare not demanded by conductor—Status of person as passenger—Duty of conductor — Misconduct — Proximate cause of fall—Avoidance of kick aimed by conductor at passenger— Scope of conductor's employment—Responsibility of owners of railway — Negligence —Contributory negligence. *Wells* v. *Port Arthur*, 12 O. W. R. 496.

Person walking on track — Excessive speed — Negligence. *Poisson* v. *Sherbrooke Street Rw. Co.*, 5 E. L. R. 388.

Person walking on track — Negligence of motorman — Trespass on tracks. *Montreal Park and Island Rw. Co.* v. *Labrosse*, 4 E. L. R. 357.

Projecting body beyond car — Injury from striking post — Negligence — Contributory negligence — Question for jury— Damages — Costs. *Simpson* v. *Toronto and York Radial Rw. Co.*, 10 O. W. R. 33.

Snow and ice piled on highway — *Negligence — Nuisance — Powers of city engineer — Directions.*] — The defendants,

operating a tramway line in H., were empowered by their Act of incorporation and the rules made thereunder to remove snow and ice from their tracks, to enable them to operate their cars, "provided" that, in case of such removal, it should be the duty of the company to level the snow and ice so removed to a uniform depth, to be determined by the city engineer, and to such distance on either side of the track as the engineer should direct, or to remove from the street all snow and ice disturbed, ploughed, or thrown out, etc., within 48 hours of the fall or disturbance, etc., if the city engineer should so direct. In exercise of the power conferred upon them, the defendants swept snow from their track and piled it up on either side of the road in such a way as to form a ridge or bank, which caused a sleigh driven by the plaintiff to slew, throwing him out and severely injuring him:—*Held*, that the removal by the defendants, under the powers conferred upon them, of snow and ice, and placing it upon other portions of the street, was not to be treated as a nuisance for which the company would be responsible in damages.—*Semble*, that, irrespective of any directions given by the engineer, it was the duty of the defendants in removing snow and ice from their track and throwing it upon adjacent parts of the street, to do so in a reasonably careful manner, and with a just regard to the rights and interests of the public, and that, if the question had been left to the jury in this way, a verdict for the plaintiff based upon sufficient evidence could not have been disturbed.—*Semble*, also, that the defendants would be responsible for the consequences of failure on their part to carry out the directions and determination of the city engineer, but, in the absence of such directions and determination, they were only bound to act in a reasonable careful manner, and the adequacy of their performance of the duty cast upon them was to be determined by the circumstances of the case. *Mader* v. *Halifax Electric Tramway Co.*, 37 N. S. R. 546. See *S. C.*, 26 C. L. T. 188, 37 S. C. R. 94.

Starting car before passenger alights — *Liability of company — Negligence of.*]—The conductor of a street car who, after the car has stopped to allow a passenger to alight, gives the signal for starting before being sure that the passenger has quite finished the act of alighting, commits an act of negligence which involves the liability of his employers for the accident resulting from it. *Dupuis* v. *Montreal Street Ry. Co.*, 16 Que. K. B. 286, 3 E. L. R. 30.

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3. Ontario Railway and Municipal Board.

Jurisdiction — *Control and management by commissioners — Agreement between municipalities — Enforcement—Possession of railway — Statutes.*]—Under an agreement made between two municipalities and confirmed by the statute 6 Edw. VII., c. 80 (O.), one of the municipalities was, on payment of the amount of an award, to become the owner of a part of an electric railway, which theretofore had been owned by the other, although operated in both municipalities, and the whole road was to be operated and managed by a board of commissioners constituted in the manner provided for in the statute and agreement. The amount awarded having been paid, and the appellants, a board of commissioners who had been operating the railway for the municipality which owned it, retaining control, management, and possession of the railway, and refusing to permit compliance with the provisions of the agreement and enactment in regard to its operation and management, the Ontario Railway and Municipal Board was applied to, and such compliance was enforced by its order:—*Held*, that the board did not thereby exceed the powers conferred upon it by the Ontario Railway and Municipal Board Act, 1906.—Construction and effect of s. 16 of that statute, and of 56 V. c. 78, the Ontario Railway Act, 1906, and 8 Edw. VII., c. 80. *Re Port Arthur Electric Street Railway*, 18 O. L. R. 376, 13 O. W. R. 811.

Jurisdiction—*No power to order double track—Where company has franchise for only single track—10 Edw. VII. c. 83, ss. 9, 10.*]—Ont. Rw. & Mun. Bd., *held*, that where a street railway company has a franchise for only a single track, the Board has no power, under 10 Edw. VII. c. 83, ss. 9, 10, to order the company to double track. To do so would be, in effect, to give the company a different franchise than that which had been granted by the municipality. *Waddington* v. *Toronto & York Radial Rw. Co.* (1911), 18 O. W. R. 621.

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4. Miscellaneous Cases

Construction of statute — *General Railway Act — Charter of company — Repugnancy — 6 Edw. VII., c. 30, ss. 5 and 116.*]—The Ontario Railway Act of 1906 (6 Edw. VII., c. 30) is by s. 5 made applicable to a street railway company incorporated by the legislature, but where there are inconsistent provisions those of the special shall override those of the general Act. By s. 116 of the said Railway Act a passenger on a railway train or car may be expelled for refusal to pay fare. By s. 17 of the special Act a passenger in such case is subjected to a fine:—*Held*, that these two provisions are not inconsistent and a conductor on a street railway car may lawfully eject a passenger who refuses to pay his fare. In this case the company was held liable for damages, the passenger having been ejected from a car with unnecessary violence. Appeal dismissed with costs. *Toronto Railway Co.* v. *Paget* (1909), 42 S. C. R. 488, 30 C. L. T. 174.

Contract — *Continuous passage—Damages.*]—The defendants had placed a number of special or extra cars on a portion of their line for the purpose of carrying a large number of persons who had assembled for the purpose of viewing a regatta. It was arranged that the cars in question should run from a point in the suburbs, near which the regatta was held, to a point in the centre of the city, and discharge their passengers there and return for others, those passengers who desired it being given transfers which entitled them to be carried on other cars to their destinations in other parts of the city.

The point at which the special cars were stationed was passed at stated intervals by other cars carrying on a regular service to and from Quinpool road. The plaintiff, who had been attending the regatta, entered a car known as a "trailer," attached to another car, which bore a sign at each end with the words "Quinpool road," expecting to be carried to a point on the line near his residence, but was informed on reaching the central point that the car in which he was went no further, and that he would have to transfer. There was evidence that an agent of the company stationed at the point of departure announced, as passengers entered, that the car in question was for the city, but this was not heard by the plaintiff: —*Held*, that, outside of the cars performing the regular service, there was no obligation on the part of the defendants to carry the plaintiff through to his destination in any one particular car; that the only contract was to carry passengers in accordance with the usual modes and methods of running the defendants' cars; and that, under the circumstances existing at the time, it was the plaintiff's duty to have protected himself by making inquiry as to the destination of the car he entered. *O'Connor* v. *Halifax Electric Tramway Co.*, 38 N. S. R. 212. Affirmed by the Supreme Court of Canada, 37 S. C. R. 523.

Contract for construction, etc. — *Necessity for sanction of contract by shareholders — Contract incomplete — Directors — Liability of — Electric Rw. Act. R. S. O. (1897), c. 209—Special Act.*]—Action for damages for breach of contract for construction of electric railway. Plaintiff proved execution of the contract under corporate seal signed by president and secretary. The contract was never carried out:—*Held*, that R. S. O. (1897), c. 209, s. 17, had enacted that no such contract should be of any force or validity until sanctioned by a resolution passed by the votes of the shareholders, in person or by proxy, representing two-thirds in value of the paid-up stock, at a general meeting specially called, and not having been complied with, action should be dismissed, but under the circumstances without costs. *Royal British Bank Co.* v. *Turquand*, 5 E. & B. 248, and *Selkirk* v. *Windsor, Essex & L. S. R. Rw. Co.*, 16 O. W. R. 1, 21 O. L. R. 109, distinguished. *Thomas* v. *Walker* (1910), 16 O. W. R. 751, 1 O. W. N. 1094.

Franchise — *Assumption by municipality — Valuation — Operation in two municipalities — Compulsory taking — R. S. O. (1897), c. 208, s. 41.*]—By s. 41 of R. S. O. (1897), c. 208, a municipal corporation which has given a franchise to a street railway company may, at the expiration thereof, on giving six months' previous notice, assume the ownership of the railway and all its real and personal property on payment of the value thereof to be determined by arbitration.—The town of Berlin assumed the ownership of the Berlin & Waterloo Street Railway Co., and the latter appealed from the award of arbitrators fixing the value of their railway:—*Held*, reversing the judgment of the Court of Appeal (19 O. L. R. 57), that the proper mode of determining the value of the "railway and all real and personal property in connection therewith," was not by capitalizing its net permanent revenue, but by estimating its value as a railway in use and capable of being operated, excluding compensation for loss of its franchise.—*Held*, also, that the company was not entitled to compensation for loss of its privilege of operating the railway in the municipality of Waterloo.—On the expiration of the franchise the company executed an agreement extending for two months, the time for assumption by the municipality, but did not relinquish possession until six months more had expired. Shortly before it was taken over by the municipality, an Act of the legislature was passed reciting all the circumstances, ratifying and confirming the agreement for extension of time, and authorizing the municipality to take possession on payment of the award subject to any variation in the amount by the Courts. —*Held*, that though this Act did not expressly provide for taking possession on the same footing as if it had been done immediately on the expiration of the franchise, its effect was not to confer upon the town of Berlin a new right of expropriation in respect of an extended franchise, but merely to extend the time for assumption of ownership under the original conditions.—*Quære*, did the Act just mentioned, by its terms, preclude the company from claiming compensation for loss of franchise?—The rights of the company to compensation are defined by statute, and there is no provision for an allowance of ten per cent. above the actual value of the property. *Berlin* v. *Berlin & Waterloo Street Rw. Co.* (1910), 30 C. L. T. 336.

Mortgage — *Future property—Fixtures —Rolling stock—Execution — Company.*]—An electric street railway company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1887, c. 157, and subject to the provisions of the Street Railway Act, R. S. O. 1887, c. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works, and fixtures, etc., and also all rolling stock and all other machinery, appliances, works, and fixtures, etc., to be thereafter used in connection with the said works. The by-laws of the directors and shareholders (who were the same persons, and only five in number) authorizing the giving of the mortgage, directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—*Held*, that s. 38 of R. S. O. 1887 c. 157, does not restrict the power of mortgaging to the existing property of the company, and that a company is invested with as large powers to mortgage its ordinary after-acquired property as belong to a natural person; that the mortgage in terms covered future property, and, even if not authorized in this respect upon a strict reading of the by-laws, had been acquiesced in and ratified, and was binding.—*Held*, also, that the rolling stock, poles, wires, etc., formed an essential part of the *corpus* of what must be regarded as an entire machine, and were, therefore, fixtures and not seizable under execution to the prejudice of the mortgagees. *Kirkpatrick* v. *Cornwall Electric Street Rw. Co., Bank of Montreal* v. *Kirkpatrick*, 21 C. L. T. 368, 2 O. L. R. 113.

Promotion of railway — *Power of provisional directors—Contract with promoters of rival railway—1 Edw. VII., c. 92, s. 9—R. S. O. c. 209, s. 44—Costs.*]—The Essex and Kent Rw. Co. was incorporated to build an electric railway. Plaintiffs were the two persons most active in promoting the railway and in opposing its rival the defendant company. The promoters of defendant company found themselves checked at many points by plaintiffs, and the provisional directors gave defendants, their president and secretary, power to bargain with the plaintiffs. They did so, and their agreement was ratified by their board. By the contract plaintiffs agreed to cease all operations in support of any other railway in operation to defendant railway and to assist latter in securing franchises, etc., for which they were to receive $1,000.—Riddell, J., *held* (15 O. W. R. 87, 20 O. L. R. 290, 1 O. W. N. 355), that there were no misrepresentations by plaintiffs, and they had acted for themselves and not for the Essex and Kent Rw. Co.; that they were not guilty of breach of trust in making the contract, and they had carried out their part thereof. That the defendant company had not been organized at the time of the contract, though Newman and Nelles believed that the company had power to make the contract, and they were not guilty of fraud in representing their power, as they believed that what had taken place justified them in making the contract. Action dismissed against the railway company and judgment entered against Newman and Nelles for $1,000 with costs.—Divisional Court (16 O. W. R. 1, 21 O. L. R. 109, 1 O. W. N. 731), set aside the judgment as against the two individual defendants and entered judgment against the company for amount of the bond, $1,000, and interest and costs, except costs thrown away in appeal by the failure to bring the company before the Divisional Court. Judgment of Riddell, J., reversed on the ground that 1 Edw. VII., c. 92, s. 9 (to which his attention was not directed), authorized the above contract.—Court of Appeal affirmed judgment of Divisional Court. *Selkirk* v. *Windsor, Essex & Lake Shore Rapid Rw. Co.* (1910), 17 O. W. R. 317; 2 O. W. N. 193, O. L. R.

Usufruct — *Tacit renunciation — Expropriation by a railway — Change from steam railway to an electric railway—Additional damages suffered by adjacent proprietors — Extent of their remedy.*]—The renunciation to a usufruct is not subjected to any particular form. It may be tacitly effected and may result from circumstances, such as the conduct of the usufructuary, his failure to exercise his right, etc., the appreciation of which is left to the Courts.—Expropriation for the purpose of an electric railway (Art. 5164 *et seq.* R. S. Q.), in no way affects the right of the expropriated proprietor to recover damages to the remainder of his land by the change made from an electric railway to a steam road. Hence, such right is independent of any increased value which might have been given to the remainder of his land by the construction of the railway, and the award of the arbitrators fixing the amount of indemnity to be paid for the part of his land which has been expropriated does not extinguish his right to recover any claim he may have arising therefrom.—In any event, such claim in no wise depends upon the special provisions above referred to, but is based upon the common law responsibility contained in Art. 1053 C. C. Consequently, it only applies to damages actually suffered, under reserve to recover future damages, if any there be, and cannot include in one and the same action both present and future damages. *Lapointe* v. *Chateauguay & Northern Rw. C.* (1910), 38 Que. S. C. 139. (An appeal is pending before the Court of King's Bench.)

STRIKE.

See CRIMINAL LAW—INJUNCTION — TRADE UNION.

STRIKING OUT PLEADINGS

See PLEADING.

STUMPAGE LIEN.

See LIEN.

STYLE OF CAUSE.

See WRIT OF SUMMONS.

SUBLEASE.

See LANDLORD AND TENANT.

SUBPOENA.

Absence of signature of prothonotary — *Nullity.*]—An original subpœna not signed by the prothonotary or his deputy is absolutely void. *Tapley* v. *Irving*, 4 Que. P. R. 319.

See CONTEMPT OF COURT—COSTS—DISCOVERY—PRACTICE—WITNESSES.

SUBROGATION.

Essentials of — *Creditor — Volunteer.*]—The doctrine of subrogation is part of the law of the province of Nova Scotia. 2. 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. 3. 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. 4. 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. 5. 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. *Semble,*

that a mere stranger or volunteer, who pays the debt of another, without an 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. *Regina* v. *O'Bryan*, 21 C. L. T. 278, 7 Ex. C. R. 19.

Hypothec — *Payment — Tiers-de-tenteur — Registration — Mistakes of Registrar.*]—F. on the 13th May, 1893, hypothecated to O. lots 87, 119, 130, and 132. Subsequently A. became *tiers-de-tenteur* of 87 and half of 132. Later J. became *tiers-de-tenteur* of 119 and 130 and other half of 132. Neither A. nor J. was bound to pay the claim of O. On 22nd April, 1899, and 12th February 1900, J. borrowed $500 from E. and hypothecated to him the lands of which he was *tiers-de-tenteur*. On the 9th November, 1901, in order to obtain legal subrogation, E. paid the claim of O., who gave him a quittance and granted him conventional subrogation. On 23rd November, 1901, A. sold the lands of which he was *tiers-de-tenteur* to M., and charged upon the purchase-price the payment of O.'s claim, to which E. was subrogated. On 26th November, 1901, to comply with this obligation, M. paid to E. the O. claim and obtained a quittance, which stated that the payment was made out of the purchase-money due to A., and in accordance with the terms of the sale, and that it was a general and final quittance and for radiation of the hypothec. The lands of which J. was the *tiers-detentuer* were sold by the sheriff, and the proceeds were to be distributed:—*Held*, that the right and interest of A. (or of M.) to obtain legal subrogation was superior to those of E., for A. was interested in paying off the debt to free his land from the hypothec. 2. That A., by this payment made by his purchaser out of the purchase-money to E., had obtained legal subrogation in the O. claim, in spite of the terms of the quittance signed by E. 3. But that the lands of A. (sold to M.), being equally affected by the claim of O., A. could claim out of the proceeds of the sale of J.'s lands only a deduction of that portion of the O. claim which these lands should bear in proportion to their value; and such was the extent of the legal subrogation obtained by A. 4. That E., not being an assignee nor a subsequent subrogate, could not complain of the want of registration of the legal subrogation obtained by A. 5. That the registrar's mistakes or irregularities or erroneous interpretation of documents regularly produced before him could not injuriously affect the rights of A. 6. That to obtain registration of the quittance granted by E., it was sufficient to produce a copy of it to the registrar, which had been done, and the quittance shewed the legal subrogation. *Bélanger* v. *Boissonnault*, 22 Que. S. C. 53.

See BANKS AND BANKING—CHOSE IN ACTION—ASSIGNMENT OF — COMPANY — GUARANTY — MUNICIPAL CORPORATIONS — PARTITION.

SUBSCRIPTION.

See COMPANY.

SUBSCRIPTION FOR SHARES.

See COMPANY.

SUBSEQUENT INCUMBRANCERS.

See MORTGAGE.

SUBSIDY.

See CROWN—RAILWAY.

SUBSTITUTED CONTRACT.

See SALE OF GOODS.

SUBSTITUTED PARTIES.

See PARTIES.

SUBSTITUTED SERVICE.

See PROCESS — SOLICITOR — WRIT OF SUMMONS.

SUBSTITUTION.

Action by curator against life tenant — *Security for estate — Contracts—Setting aside — Superior Court — Territorial jurisdiction — Joinder of causes of action — Election — Interim injunction — Dissipation of estate.*]—An action by the curator to a substitution against the life tenant who is dissipating the property of the substitution, to compel him to give security, or in default to give up possession to the remaindermen, and to set aside contracts made by him with the object of dissipating such property, his co-contractors being made defendants with him, in an action in a mixed matter within the jurisdiction of the Court for the district in which any one of the defendants resides.—The two claims are not incompatible, and the plaintiff may combine them in one action. The defendants, therefore, cannot by dilatory exception compel him to elect between them.—It is within the discretionary power of the Court or a Judge, at the time of the institution of such an action, to grant an interlocutory injunction against acts of such a nature as to damage the property of the substitution, but not against those which affect only the income or revenue derivable from the property; and when such income or revenue has been transferred by acts alleged to be void, to solvent transferees, they will be left in possession *pendente lite*. *Hébert* v. *Resther*, 14 Que. K. B. 375.

Charges on — *Specific legacies—Judgment for—Execution—Sale of land charged—Opening of substitution—Revendication.*]—When a succession is bequeathed with a substitution, specific legacies bequeathed by the testator are a charge upon the substitu-

tion; and therefore the alienation of land which is the subject of the substitution in execution of a judgment which orders the *grevé* to pay such a legacy is definitive, and the *appelés* cannot contend that they have rights therein.—The handing over of the property which is the subject of the substitution, made by anticipation on the part of the *grevé* to the *appelés* is equivalent as regards the latter to the opening of the substitution. It gives them the right to revendicate lands which are part of it and which have been alienated; and there is no ground for them to have recourse to simple conservatory measures. *Filion* v. *Filion*, 31 Que. S. C. 24.

Restraint on alienation — *Substituted property — Right to alienate — Creditors' rights.*]—A restraint upon alienation provided for in a substitution pure and simple, being confirmative of the substitution, does not hinder the alienation of the property substituted subject to the rights of those in remainder if the substitution is opened. Therefore, the creditors of the tenant for life may, in spite of the restraint upon alienation, procure a seizure and sale of the immovable substituted, subject to the openings of the substitution. *Turcot* v. *Charters*, 18 Que. S. C. 24.

Sale of land under execution — *Judgment — Universal legatee — Specific legatee — Payment of debts — Land discharged.*]—A sheriff's sale of an immovable devised by a specific title with substitution, the sale being made pursuant to a judgment recovered by a universal legatee against a specific legatee in respect of a sum which he was obliged by virtue of his legacy to contribute to the payment of the debts of the testator, which had been paid by the universal legatee, has the effect of freeing the land from the substitution. *Beaulieu* v. *Beaulieu*, 31 Que. S. C. 231.

Universal legacy — *Partition — Statute — Effect of.*]—A universal legacy to children, subject to a substitution in favour of grandchildren of the testator, having been followed, after the decease of the latter, by partition among the beneficiaries, a statute which declares such partition final and definite, and which decrees that the beneficiaries are and have always been sole proprietors of the share which the partition gives to each of them, subject to the charge of rendering it up to their children at their decease, has the effect of restricting the right of the grandchildren to the share of their father or mother, and leaves them without interest or status by virtue of the will as regards the share of each one of the other beneficiaries who may die without leaving children. *Prévost* v. *Prévost*, 28 Que. S. C. 257.

Will — *Devise of immovables — Partition among devisees — Alienation—Restraint upon — Right of intervention.*]—A devise, in terms universal, of immovables to the children of the testator born and to be born of his marriage, with restraint upon alienation, so that they may pass in the course of nature to the grandchildren, creates a substitution to which the provisions of 61 V. c. 44 (Q.), are applicable, and the alienation of the immovables may be permitted when it is of advantage to both classes.—Where the heirs have made a partition among them of the immovables as if each lot had been devised to each co-parcener, by virtue of the substitution, and this partition has been ratified by the legislature, the interest of each one is restricted to his own portion, and one has no status nor interest to intervene in respect of the alienation of the property falling by the partition to the others. *Prévost* v. *Prévost*, 14 Que. K. B. 309.

See ASSESSMENT AND TAXES — EXECUTION—PARTITION — SUCCESSION — WILL.

SUBSTITUTION OF DEBTOR.

See CONTRACT.

SUBWAY.

See RAILWAY.

SUCCESSION.

See DISTRIBUTION OF ESTATES.

SUCCESSION DUTY.

See REVENUE—REVISOR—WILL.

SUCCESSION DUTY ACT.

See CONSTITUTIONAL LAW—REVENUE.

SUMMARY APPLICATION.

See PARTITION—WILL.

SUMMARY CONVICTION.

See CERTIORARI — CRIMINAL LAW—HAWKERS AND PEDLARS — INTOXICATING LIQUORS — JUSTICE OF THE PEACE — POLICE MAGISTRATE — PROHIBITION — PUBLIC HEALTH — SHIP — STIPENDIARY MAGISTRATE.

SUMMARY EJECTMENT ACT, N.B.

See LANDLORD AND TENANT.

SUMMARY ENQUIRIES.

See EXECUTION.

SUMMARY JUDGMENT.

See JUDGMENT—WRIT OF SUMMONS.

SUMMARY PROCEDURE.

Action — *Amendment.*]—When an action is summary in its nature, the plaintiff will be allowed, on motion, to add to the fiat, writ, and declaration the words "summary procedure." *Sessenwein* v. *Schwartz*, 4 Que. P. R. 393.

Municipal by-law — Offence against —Defects on face of conviction—Keeping billiard room open in prohibited hours — Uncertainty. *Carman* v. *Fisher* (Man), 1 W. L. R. 276.

See AMENDMENT — ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY—CONCILIATION — MASTER AND SERVANT — MECHANICS' LIENS — TRUSTS AND TRUSTEES — WATER AND WATERCOURSES.

SUMMARY TRIAL.

See APPEAL—CONSTITUTIONAL LAW—CRIMINAL LAW.

SUMMONS.

Chambers summons — *Place of return —Place of issue.*]—The action was commenced in the Rossland registry, and the defendants issued a summons out of that registry, but returnable in Vancouver, asking that the writ of summons be set aside. Section 32 of the Supreme Court Act, as amended in 1901 (c. 14, s. 13), provides that in proceedings commenced in any registry other than Victoria, Vancouver, or New Westminster, any application may be made in Victoria, Vancouver, or New Westminster:—*Held*, that a summons under this section must be issued out of the registry at which it is returnable. *Centre Star Mining Co.* v. *Rossland and Great Western Mines, Ltd.*, 24 C. L. T. 46, 10 B. C. R. 136.

See PRACTICE—PROCESS—WRIT OF SUMMONS.

SUNDAY.

Exercising calling on — *Municipal By-law—Ultra vires—Closing of shops — Vancouver Incorporation Act, 1900.*] — The Vancouver Incorporation Act, 1900, empowered the city to pass a by-law to prohibit "the keeping open of barber shops on Sunday," and the city thereupon passed a by-law enacting that all barber shops should be closed on Sunday and that no person should exercise the trade of a barber on Sunday within the city. The appellant was charged with an offence under the by-law, and before the magistrate he admitted he had shaved customers on Sunday, and the magistrate thereupon convicted him of having "kept open:"—*Held*, that a barber by shaving customers on a Sunday does not necessarily "keep open."—*Held*, also, that the city has no power to pass a by-law prohibiting a barber from exercising his trade or calling on Sunday. *In re Lambert*, 7 B. C. R. 396.

Lord's Day Act — *Conviction—Farmer —Ejusdem generis rule.*]—The Ordinance to Prevent the Profanation of the Lord's Day, C. O. 1898 c. 91, provides:—(1) No merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, shall on the Lord's Day sell or publicly shew forth or expose or offer for sale or purchase any goods, chattels, or other personal property, or any real estate whatsoever, or do or exercise any worldly labour, business, or trade of his ordinary calling, travelling or conveying travellers or Her Majesty's mails, selling drugs and medicines and other works of necessity and works of charity, only excepted:—*Held*, that the words "or other persons whatsoever" are applicable only to persons who are *ejusdem generis* with those specially named, and do not include a farmer engaged in farm work. *Hamren* v. *Mott*, 5 Terr. L. R. 400.

Lord's Day Act — *Druggist — Selling "ice cream soda"—Medicines — Evidence—Finding—Certiorari.*] — The evidence before the magistrate shewed that on a Sunday two policemen bought "ice cream soda" at the defendant's drug shop and paid 20 cents therefor. One of the policemen swore that he was not ill, and did not get the stuff for medicine, but he also said that nothing was said at the time as to whether he or the other policeman was ill or not. Evidence was given by physicians to shew that both ice cream and soda water were used as medicines. The magistrate found upon the evidence that soda water and ice cream were sometimes sold as medicines, and stated that, in his opinion, the sale of these articles mentioned in the evidence was not made as a sale of medicines, although nothing was said by either party on the subject. Upon a motion to quash the conviction, based upon this evidence, for an offence against the Lord's Day Act, it was contended that there was no evidence that the articles were not sold as medicines:—*Held*, that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed upon *certiorari*, but the defendant's remedy, if any, was an appeal. *Regina* v. *Howarth*, 33 U. C. R. 537, not followed. *Regina* v. *Urquhart*, 20 C. L. T. 7.

Lord's Day Act — Restaurant-keeper —Supplying food—Candies and oranges not eaten on premises — Conviction—Appeal. *Rex* v. *Devins*, 10 O. W. R. 11.

Lord's Day Act — *Victualling house keeper—Supplying food—Ice cream.*]—*Held*, under the circumstances set out in the opinion, that supplying ice cream to the complainants on a Sunday was the supplying a refreshment in the nature of a light meal in the ordinary course of the defendant's business as a victualling house keeper, and was not an offence against the Lord's Day Act, R. S. O. c. 246. A person carrying on the business of a victualling house keeper cannot make any distinction as to whom he supplies, or what he supplies, provided it is food or victuals; and "ice cream" is a food. *Regina* v. *Albertie*, 20 C. L. T. 123.

See COURTS — CRIMINAL LAW—LORD'S DAY ACT—MUNICIPAL CORPORATIONS.

SUNDAY OBSERVANCE ACT.

See CONSTITUTIONAL LAW — LORD'S DAY.

SUPERANNUATED CIVIL SERVANT.

See ASSESSMENT AND TAXES.

SUPERIOR COURT, QUEBEC.

See APPEAL—COURTS.

SUPREME COURT OF ALBERTA.

See APPEAL — MECHANICS' LIENS.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL — DIVORCE.

SUPREME COURT OF CANADA.

Powers of Judge of as to habeas corpus — *Effect of judgment in Provincial Court.*] — An application for a writ of *habeas corpus* was referred by the Judge to the Supreme Court of the province, where it was refused. On application subsequently made for a *habeas corpus* to a Judge of the Supreme Court of Canada:—*Held*, that, under the circumstances, it would be improper to grant the writ. *In re Patrick White*, 31 S. C. R. 283.

See APPEAL — CONSTITUTIONAL LAW — COSTS—COURTS.

SUPREME COURT OF NEW BRUNSWICK.

See APPEAL—COURTS.

SUPREME COURT OF NORTH-WEST TERRITORIES.

See APPEAL.

SUPREME COURT OF NOVA SCOTIA.

See APPEAL—PARTITION.

SUPREME COURT OF PRINCE EDWARD ISLAND.

See APPEAL.

SUPREME COURT OF SASKATCHEWAN.

See APPEAL — COURTS — CRIMINAL LAW

SUPREME COURT OF YUKON TERRITORY.

See APPEAL.

SURETY.

See CONSTITUTION—ELECTIONS—GUARANTY — HUSBAND AND WIFE — PRINCIPAL AND SURETY.

SURGEON.

See DISCOVERY — MEDICINE AND SURGERY —PHYSICIANS AND SURGEONS.

SURGERY.

See MEDICINE AND SURGERY.

SURGICAL EXAMINATION.

See DISCOVERY.

SURPLUS.

See COMPANY.

SURPRISE.

See NEW TRIAL.

SURRENDER.

See ATTACHMENT OF DEBTS — CONSTITUTIONAL LAW — LANDLORD AND TENANT —WAY.

SURROGATE COURT JUDGE.

See COURTS.

SURROGATE COURTS.

Jurisdiction — *Accounting — Falsifying inventory of assets.*]—The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. For full enquiry and accounting resort must be had to the administrative powers of the High Court. Review of English authorities.

Where upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money not included in the executors' inventory of the assets of the estate, should have been included, and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime: — *Held*, Meredith, J., dissenting, that the Judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him. *In re Russell*, 24 C. L. T. 368, 8 O. L. R. 481, 3 O. W. R. 926.

See ADMINISTRATION — COURTS — EXECUTORS AND ADMINISTRATORS.

SURROGATE COURTS, MANITOBA.

See COURTS.

SURROGATE COURTS, ONTARIO.

See COURTS.

SURROGATE GUARDIAN.

See INFANT.

SURVEY.

Plan of block — *Excess — Distribution —Buildings and fences — Encroachment—Dispute as to division line — Remedy — Damages — Injunction — Mandamus — Compensation.*]—The plaintiff and defendant owned adjoining lands in block 21 in a city, and the plaintiff alleged that the defendant so constructed a certain building on his own land that the eaves and eavestroughs projected over the plaintiff's land, and so constructed a fence that it encroached upon the plaintiff's land beyond the dividing line. The issue was as to the proper location of the dividing line between the southerly 10 feet of lot 15, owned by the plaintiff, and the northerly 15 feet of the same lot, owned by the defendant. The plaintiff based his claim on an excess in length of 3.3 feet shewn on the plan of a survey of the block made in 1894. He contended that this excess should be distributed over the whole length of the block; and that, by doing this along the northern boundary of the block, one inch would be added to the width of each 25-foot lot, with the result that the line in dispute, instead of being just 360 feet from the southern boundary of the block, on the basis of allowing 25 feet for each lot, would be moved 1.4 feet to the north:—*Held*, that the main scheme, based on predetermined and fixed dimensions, was the staking out of the bulk of the block in 25-foot lots; and the rest of the block was treated as a remnant of yet undefined quantity, to be dealt with as further consideration would suggest; and the discrepancy should be thrown on the north end of the block, which would not affect lots 1 to 28.—*Held*, also, that the plaintiff would not, in any event, be entitled to damages, an injunction or a *mandamus*, but only to compensation for the land encroached upon. *Thordarson* v. *Akin* (1910), 15 W. L. R. 115.

Village lots —*Authorisation — Statutory requirements — Order in council — Resolutions of municipal council—By-law—Cost of survey — Assessment for — Proprietors interested.*]—After a resolution of the council of an incorporated village in favour of a survey of certain streets and lots, and correspondence with the Crown Lands Department, an order in council was passed, by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of $290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate:—*Held*, that the survey directed was not authorised and was illegal, the requirements of the statute (R. S. O. 1887 c. 152, s. 39) not having been complied with so far as to give the Lieutenant-Governor in council jurisdiction to authorise the survey. 2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it. 3. That if there was jurisdiction to authorise the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not. *In re Scott & Peterborough*, 26 U. C. R. 36, followed. *Regina* v. *McGregor*, 19 C. P. 69, distinguished. *Sutton* v. *Port Carling*, 22 C. L. T. 139, 3 O. L. R. 445, 1 O. W. R. 67.

See BUILDINGS — MINES AND MINERALS—WAY — WILL.

SURVEYOR.

Fees — *Taxation.*]—Where a surveyor has done work at the request of the parties themselves, he is not an officer of the Court; and his fees are not subject to taxation by the Court. *Roy* v. *Beaudry*, 9 Que. P. R. 244.

Services — *Rate of remuneration.*]—If a surveyor is appointed by the Court, as in this case, to do certain acts in his capacity of surveyor, he has a right, according to the tariff of surveyors to $6 a day of six hours of work, and $1 for every additional hour, and, besides, to his travelling expenses. *Jutras* v. *Mercure*, 5 Que. P. R. 6.

See BORNAGE — CONTRACT — MINES AND MINERALS.

SURVEYS ACT.

See WAY.

SURVIVAL OF ACTION.

See EXECUTORS AND ADMINISTRATORS — MASTER AND SERVANT—REVIVOR.

SURVIVORSHIP.

See CHURCH — DISTRIBUTION OF ESTATES —HUSBAND AND WIFE—WILL.

SUSPENDED SENTENCE.

See CRIMINAL LAW.

SWAMP LANDS.

See CROWN.

SYNDIC.

See CHURCH.

SYNDICATE.

See PARTNERSHIP.

TACKING.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

TALESMEN.

See TRIAL.

TARIFF.

See CHARTERED ACCOUNTANTS — COSTS—RAILWAY—SOLICITOR.

TAVERN LICENSES.

See MUNICIPAL CORPORATIONS — COURTS—LIQUOR LICENSES.

TAVERNS.

See MUNICIPAL CORPORATIONS.

TAX COLLECTOR.

See MUNICIPAL CORPORATIONS.

TAX SALE.

See ASSESSMENT AND TAXES.

TAXATION.

See MUNICIPAL CORPORATIONS.

TAXATION OF COSTS.

See COSTS — SOLICITOR.

TAXATION OF SURVEYOR'S FEES.

See SURVEYOR.

TAXES.

See ASSESSMENT AND TAXES.

TAXING OFFICERS.

See COSTS—SOLICITOR.

TEACHER.

See SCHOOLS.

TELEGRAPH AND TELEPHONE.

1. TELEGRAPH, 4156.
2. TELEPHONE, 4156.

1. TELEGRAPH.

Mistake of operator — *Agency—Responsibility of sender of message.*]—A telegraph company is the agent of the person sending a message, only for the purpose of delivering the specific message, and the person who delivers a message to be sent is not responsible for any mistake made by the operator in the transmission. *Ross* v. *Long*, 40 N. S. R. 174.

See CONTEMPT OF COURT — CONTRACT — ELECTIONS — RAILWAY.

2. TELEPHONE.

Contract with municipality — *Franchise — Obligations of holder — Rendering of services — Refusal to supply service unless application signed — Default — Provisions of contract — Interpretation — Forfeiture — Action by municipality — Rights of individuals — Mandamus—Amendment — Costs.*]—The legal relation between the holder of a franchise, whether exclusive or not, entitling the holder to use public

highways and other public places, and to exercise powers with regard to persons or property which the franchise-holder has not of common right, for the purpose of supplying commodities or rendering services in common use, and the inhabitants of the territory over which the franchise extends, is analogous to that between a common carrier of goods by land and the public and between an inn-keeper and the public. And there is an implied obligation upon the franchise-holder to render such services or supply such commodities, on request and without unfair discrimination, to every inhabitant who is ready and willing to pay in advance therefor, and whose place at which the obligation is required to be performed lies along the line of the franchise-holder's operations, and who accords to the franchise-holder all reasonable facilities to admit of the convenient performance of the obligation. — Review of the authorities.—And *held*, in this case, that the defendants were at fault in refusing a telephone service to the municipality (who were the sole plaintiffs) and the several individual ratepayers, unless they should execute a certain proposed form of application.—Paragraph 17 of the agreement between the plaintiffs and defendants, under which (validated by statute) the defendants held their franchise, provided that, if the defendants should fail to supply either public or private telephone service within the town according to the terms of the agreement, they should thereby forfeit all their powers and privileges under the agreement; with an exception as to default occasioned by unavoidable causes:—*Held*, that, as a matter of interpretation, this clause did not apply to any case of refusal to supply to individuals as such, however numerous, based upon a *bona fide* dispute as to the legal rights and obligations existing between the company and the individual, and therefore not an absolute and unconditional refusal.—*Semble*, that, if a forfeiture had arisen, relief against it would have been given upon terms.—*Semble*, also, that, if the plaintiffs had asked for a *mandamus* for the furnishing of telephone service in accordance with their own application, it would have been granted, though no relief would have been given (in this action) to individuals in the same position. — *Held*, however, that, as the only relief sought by the plaintiffs was forfeiture, and they did not ask leave to amend, the action must be dismissed, but without costs. *Red Deer* v. *Western General Electric Co.* (1910), 14 W. L. R. 657.

Rights over streets of city — Control of municipal corporation — Underground wires — Injunction — Declaration of right —Construction of statutes. *Vancouver* v. *British Columbia Telephone Co.* (B.C.), 1 W. L. R. 461.

See APPEAL — ASSESSMENT AND TAXES—COMPANY — CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS — RAILWAY — WAY.

TEMPERANCE ACT, 1864.

See INTOXICATING LIQUORS.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See LIMITATION OF ACTIONS — RAILWAY.

TENANT BY SUFFERANCE.

See RAILWAY—VENDOR AND PURCHASER.

TENANT BY THE CURTESY.

Mortgage by husband in lifetime of wife — *Effect on estate of husband—Life estate — Right of mortgagee to possession —Tenants in common.*]—T. was the owner of two undivided sixths parts of land, the remaining parts being owned by his wife. T. mortgaged the whole property, but his wife did not join in the mortgage. The equity of redemption was foreclosed after the death of the wife, and the lands sold to the plaintiff. In an action of ejectment the defendants, the sons of T., pleaded that they as heirs of their mother were tenants in common with the plaintiff:—*Held*, that at the time of making the mortgage T. was a "tenant by the curtesy initiate," and upon the death of the wife his estate for life became vested; that this life estate passed under the mortgage; and that plaintiff was entitled to possession. *McLellan* v. *Taylor*, 40 N. S. R. 275.

See ARREST — HUSBAND AND WIFE.

TENANT FOR LIFE.

Insurance of house by — *Right to insurance moneys.*]—S. C., the tenant for life of a house and lot of land, insured the house against loss or damage by fire, paying the insurance premiums out of her own funds, and taking the policy in her own name. S. C. was not in any way bound to repair, or rebuild, or insure. The house was totally destroyed by fire, and the amount of the insurance paid over to S. C., who placed it in the bank, on deposit receipt, to her own credit:—*Held*, that the amount received from the insurance company belonged exclusively to S. C., and that her executors were entitled to judgment for the amount of the deposit receipt, with interest from date, and costs, against the devisee of W. C., to whom the lot and house were devised subject to the life estate of S. C. *In re Curry Estate*, 33 N. S. R. 392.

Renewal of lease — *Carrying on business on premises — Profits — Account.*]—A widow was entitled under her husband's will to the use and enjoyment of all his

property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land: — *Held*, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of the husband's estate. An account against her executor was directed, and the scope of the enquiry defined. *Wakefield* v. *Wakefield*, 20 C. L. T. 255, 32 O. R. 36.

Waste — Cutting timber — Remainderman — Injunction — Mortgage — Subrogation. *Whitesell* v. *Reece*, 1 O. W. R. 516, 2 O. W. R. 160.

See CROWN — IMPROVEMENTS — MONEY IN COURT — RAILWAY — SETTLED ESTATES ACT — TRUSTS AND TRUSTEES—WILL.

TENANTS IN COMMON.

Account — *4 Anne c. 16 — Infant — Statute of Limitations.*]—Section 27 of the statute 4 Anne c. 16, providing for an action of account by one tenant in common against another, is in force in Nova Scotia, being a provision in amelioration of or auxiliary to the common law.—Where one receives the profits of an infant's estate, and more than six years after the infant comes of age he brings a suit for an accounting, the Statute of Limitations is a bar to such suit. This rule also applies to actions of account between tenants in common. *Crane* v. *Blackadar*, 40 N. S. R. 100.

Erection of wharf by one — *Ouster—Trespass — Burden of proof.*]—The defendants erected a wharf on a portion of a water lot in the town of L., of which they were tenants in common with the plaintiff:—*Held*, that the wharf was a permanent structure, and that the defendants by erecting it ousted the plaintiff, their co-tenant, from the portion of the lot which it covered; that a claim by the plaintiff for damages for cutting logs, and a counterclaim by the defendants for the erection of the logs so cut, must both be dismissed, neither party having satisfied the burden of proof by shewing ownership of the land upon which the trespasses complained of were committed. *Zwicker* v. *Morash*, 34 N. S. R. 535.

One tenant in possession — *Bona fides — Acquisition from reputed owner of whole property — Cessation of bona fides —Account — Rents and profits — Outlay.*]—The possessor of an immovable in virtue of a title the defects of which are unknown to him (*e.g.*, a sale from one who, though only a joint part-owner, is the reputed owner of the whole), is a possessor in good faith and acquires the fruits.—2. Such good faith does not cease merely upon his being informed of the claims of the co-owners, but only upon becoming aware of proceedings at law to enforce such claims.—3. An undivided joint owner, who is in possession of an immovable, has the right to credit himself with the cost of necessary outlay, in accounting to his co-owners for the fruits produced. *Burns* v. *Brown*, 34 Que. S. C. 272.

Possession of one — *Statute of Limitations — Fiduciary capacity—Acquiescence —Partition.*]—An action for partition of land was resisted by the heirs, etc., of D., on the ground that she had acquired title by exclusive possession against the other tenants in common. The trial Judge found, and the evidence supported such finding, that D. acted throughout in a fiduciary capacity, as administratrix for the benefit of her father's estate, and those interested in it:—*Held*, that it was not open to a person in the position of D. to avail herself of the Statute of Limitations. As the plaintiffs believed that D. was acting within her rights as administratrix, there was nothing in their conduct that would operate as a bar to the relief sought on the ground of acquiescence. The acts of D., leasing the property, collecting rents, etc., which were relied upon as giving her an exclusive title, were perfectly consistent with the rights of the plaintiffs as tenants in common. *Brown* v. *Dooley*, 36 N. S. R. 56.

Receipt of rents by one tenant — *Remedy of the other — Account — Form of action.*]—The juridical relation of creditor to debtor cannot arise between co-heirs of an undivided property, in respect of the immovable which is the subject of it, and in respect of its revenues. As long as the property is undivided, the remedy *en reddition de compte* in respect of revenues collected by the one, is not open in favour of the other; he has only an action *en compte et partage*. *Leggatt* v. *Ledoux*, 35 Que. S. C. 97.

See ASSESSMENT AND TAXES — LIMITATION OF ACTIONS — PARTITION — TENANT BY THE CURTESY — WILL.

TENDER.

Bank notes.]—A tender in bank notes is good, though the notes are not legal tender, if the tender is not objected to on that account. *Stewart* v. *Freeman*, 23 C. L. T. 157, 2 N. B. Eq. R. 451.

See ASSESSMENT AND TAXES — BANKS AND BANKING — BROKER — CARRIERS — CONTRACT—COSTS—DEBTOR — JUDGMENT—LANDLORD AND TENANT—MORTGAGE — SALE OF GOODS — VENDOR AND PURCHASER — WATER AND WATERCOURSES.

TERMINATING SHARES.

See COMPANY—MORTGAGE.

TERMINATION OF PROSECUTION.

See MALICIOUS PROSECUTION.

TERRITORIAL COURT OF DISTRICT OF YUKON.

See APPEAL.

TERRITORIAL JURISDICTION.

See COURTS — CRIMINAL LAW—PLEADING.

TERRITORIAL REAL PROPERTY ACT.

See REGISTRY LAWS.

TEST ACTION.

See CONSOLIDATION OF ACTIONS — PARTICULARS.

TESTAMENTARY CAPACITY.

See WILL.

THEATRE.

See NEGLIGENCE.

THEFT.

See BAILMENT — CONFLICT OF LAWS—CONTRACT — COSTS — CRIMINAL LAW — DEFAMATION — GUARANTY.

THIRD PARTIES.

See NEGLIGENCE — PARTIES.

THREATS.

See CONTRACT—INJUNCTION—TRADE UNION —VENDOR AND PURCHASER — WAY.

THRESHER'S LIEN.

See LIEN.

THRESHER'S LIEN ORDINANCE.

See WEIGHTS AND MEASURES.

THRESHING.

See CONTRACT.

TIMBER.

Advances by bank to lumbermen—*Insurance of lumber against fire — Loss payable to bank — Destruction of lumber by fire — Lien of sawyer — Possessory lien terminated by fire.*]—The defendants' bank advanced to C. & Co., lumbermen, money wherewith to carry on lumbering operations. With the bank's knowledge, the plaintiff contracted with C. & Co. to saw their logs into lumber, which he did. C. & Co. then insured this lumber, making the loss payable to the bank; and, while lying in the plaintiff's yard, the lumber was burnt. The plaintiff claimed to be entitled to payment out of the insurance moneys, in priority to the bank, of the contract price of the sawing:—*Held*, that the plaintiff had, at most, a mere possessory lien upon the lumber, for the price of the sawing, depending not upon contract, but wholly upon possession, and therefore brought to an end by the fire; while the bank had a lien upon the insurance moneys, which the plaintiff was not in a position to attack or displace. Judgment of Riddell, J., reversed. *Chew* v. *Traders Bank* (1909), 19 O. L. R. 74, 14 O. W. R. 415.

Agreement for sale — What passes under — Trespass — Injunction — Reference — Damages. *Kent* v. *Orr*, 2 O. W. R. 789.

Agreement for sale of standing timber — Construction — Quantity of timber —Measurements — Estimates — Conflicting evidence. *McAlister* v. *Brigham*, 7 O. W. R. 347.

Arbitration and award — *Condition precedent.*] — A contract for the sale of timber limits contained a guarantee by the vendor that the quantity of timber thereon at the time of the sale would prove equal to that shewn in a statement annexed and a covenant that he could re-pay to the purchaser the amount of any shortage found in proportion to the price at which the sale was made. In another clause, provision for arbitration was made in case of dispute as to the amount of any such shortage. — Supreme Court of Canada *held* that an award by arbitration had not been made a condition precedent to recovery for the amount of any deficiency in the quantity of timber guaranteed to be upon the limits. Judgment appealed from, 15 B. C. R. 70, 13 W. L. R. 368, affirmed. *David* v. *Swift* (1910), 44 S. C. R. 179.

Building road and hauling logs.—A contract to do a thing, as a means of doing something else, is fulfilled when the thing is done in such a way that the pur-

pose of the contracting parties is realised. Thus, a contract with a firm of lumber merchants for hauling saw-logs at so much per 1,000 feet, and to build a suitable and satisfactory road for that purpose, for a fixed price, does not oblige the contractor to build a road across four lots when there is already one across the first three. A road joining the one already built, in such a way as to afford adequate transportation facilities, is all that is required. The carter was justified in refusing to continue his contract to haul the saw-logs when the manufacturers failed to pay for the building of the road. *Dauphin* v. *Starks Cooperage Co.*, 37 Que. S. C. 51.

Contract — *Accounts — Condition precedent — Absence of common intention — Pleading.*]—The plaintiffs owned a lumber mill, situate on the Canadian side of the St. John river, about twenty miles below the mouth of Little Black river, and the defendants a mill about sixty miles below the Little Black river on the American side of the St. John. The logs of both parties became mixed in a jam at the mouth of Little Black river, and it was agreed that the jam should be broken and the logs allowed to float down the St. John to the booms of the plaintiffs and defendants, each party having the right to saw all the logs that came into their respective booms, irrespective of marks. An account was to be kept, and the excess of the cut of one party's logs over the other was to be paid for at the end of the season, at a rate per thousand agreed upon. It was further agreed that the defendants were to have a man at the plaintiffs' mill, to be paid by the plaintiffs, to check the count of the defendants' logs sawed, and the plaintiffs had the right to have a man at the defendants' mill, at the plaintiffs' expense, to check the count of their logs. The plaintiffs sawed a portion of the defendants' logs without notice to them and without affording an opportunity of having a man present to check the count. In a claim by the plaintiffs for the excess of their logs sawn by the defendants, the defendants contended that the checking of the count at the plaintiffs' mill by their representative was a condition precedent, and, as they were prevented from doing so by the default of the plaintiffs, there was no liability. At the trial, without a jury, the Judge found upon the evidence that the defendants' right to have a man at the plaintiffs' mill to check the count of the cut was not a condition precedent, and the plaintiffs were entitled to recover on the basis of an account kept by their own servants for the excess of their logs cut at the defendants' mill over the defendants' logs cut at their mill:—*Held*, that there was evidence upon which the Judge might find as he did. *Kennedy Island Mill Co.* v. *St. John Lumber Co.*, 38 N. B. R. 292, 4 E. L. R. 107.

Contract for sale of timber — *Estimates — Paid for by promissory notes — Raft broken up by storm — Much timber lost — Action on note for price.*]—Messrs. H. L. & Co., of Montreal, entered into a written contract with Messrs. L. & Co., for the sale of a quantity of red pine timber, then lying above the Rapids, Ottawa River, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June, then next, and to be paid for by the purchaser's promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off; if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by Messrs. L. & Co., according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L. & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L. & Co. against Messrs. H. L. & Co., to recover the amount paid on their promissory notes, and for a breach of their contract, and for the difference between the contract price of 9½d. per foot and 10½d. per foot, the market price when the timber was to have been delivered:—*Held*, by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada:—1. That the action was maintaintable. 2. That, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers. 3. That the taking possession of a part of the timber by Messrs. L. & Co., after the day mentioned for the delivery thereof, in the contract, and not at the place, could not be considered as an acceptance of the whole, nor could it be considered as an admission, that the property in the timber passed to them before the storm which broke up the raft. The old French law in force in Lower Canada, grounded on the civil law, is in substance the same as the law of England, upon this point. *Logan* v. *Le Mesurier* (1847), C. R. 1 A. C. 292.

Contract of sale — *Commercial sale—Delivery — Quality and dimensions—Price —Average.*]—When a written contract of sale of timber to be cut specifies an estimate of dimensions, thus, "the waney pine is estimated to average not less than," etc., and so on for other kinds, and the schedule of prices is settled upon that estimated average as a minimum, with a progressive increase for sizes above it, the contract is not carried out by the delivery of timber of dimensions falling in average below that estimate. Judgment in 15 Que. K. B. 481 reversed, *McArthur Export Co.* v. *Klock*, 17 Que. K. B. 556.

Contract of sale — Property in standing trees — Right to make roads over vendor's land — Servitude — "Superficies" — Subsequent sale of land — Rights of purchaser of timber against subsequent vendee of land. *Laurentide Paper Co.* v. *Baptist*, 6 E. L. R. 105.

Correspondence — *Warranty — Findings on facts by trial Judge—Refusal to set aside.*]—Findings on facts made by a trial Judge will not be set aside unless the Court is clearly of opinion that he was wrong. On April 19th, 1907, the defendants wrote to the plaintiffs asking the price of oak timber of certain specifications, stating, "we want this for heavy engine foundation work, and must be well seasoned, free from wane, shakes and dry rot." April 22nd, the plaintiffs replied, "the price is $60 per M., the purchaser paying for the full survey. Will saw it for you and charge for time it takes; if you have a rotary, think you would do better to cut it yourself." On the same day the defendants sent the plaintiffs specification for an additional lot and on April 24th, sent an order for one piece for a boat keel and order No. 1120 for 51 pieces, "to be well seasoned and free from wanes, shakes and dry rots, and to be well and evenly sawn," and also wrote a latter asking for a new quotation of price, including the sawing and stated, "presuming you will quote a price in this manner we are enclosing order for the first lot enquired for. . . . ." April 27th, the defendants sent another order, No. 1149, for 67 pieces, to be "well and evenly sawn, and free from shakes and wane, suitable for car repairs." April 29th, the plaintiffs wrote, "will cost you $60 per M., full survey of what is in the timber. Will saw it and charge for the time it takes. . . . The only way we will sell this oak is for the purchaser to take all risks of it turning out good or bad in sawing." April 30th, the defendants wrote plaintiffs to saw up two or three of the larger sticks into sizes on the first order and then advise what the cost was and the cost of re-sawing. The plaintiffs sawed two logs and shipped the pieces to the defendants, May 4th. The cost proved to be about $105 per M. On May 11th, a telephone conversation took place in which, according to evidence for the plaintiffs, it was stated that the oak sawn was good, and that the rest would run about the same, but no guarantee of quality was made, while, according to the evidence for the defendants, the plaintiffs stated that the logs sawn were of good quality and that they would be a fair average of all the oak, and the defendants told the plaintiffs to go ahead with the orders on that basis. On the same day the defendants wrote, "confirming our conversation of this morning, please go ahead with our orders Nos. 1120 and 1149. . . ." There was evidence that the plaintiffs requested the defendants to send a man over to inspect the oak timbers, and also that it is impossible by inspecting oak in the square to tell whether it is good or bad inside. The plaintiffs sawed the oak to the dimensions ordered and shipped it, but all excepting the piece for the boat keel was rejected by the defendants on the ground that it was unsuitable for the purposes that it was ordered for and not free from wane, shakes and dry rot. —*Held*, sustaining the judgment of the trial Judge, that the defendants bought the oak in the stick, agreeing to pay $60 per M. for it, and the cost of sawing; that there was no warranty of quality by the plaintiffs, and that the plaintiffs were entitled to recover the purchase price. *Sayre & Co.* v. *Rhodes, Curry & Co.* (1909), 39 N. B. R. 150.

Crown lands — Issue of patent — Consent of timber licensee — Agreement as to timber — Ownership of land — Estoppel. *McWilliams* v. *Dickson Co.*, 6 O. W. R. 702.

Crown lands — Licensees — Right to cut — Rights of locatees — Free Grants and Homesteads Act — Reservation — Pine trees — Windfalls — Building and fencing —Trespass — Injunction — Declaration of rights. *Martin* v. *Romleskie*, 12 O. W. R. 1165.

Crown lands *and Crown timber dues — Sale of cut of timber by occupant of lot under location ticket—Timber cut before issue of letters patent granting ownership—Payment of Crown dues and right to them.*]—The purchaser of a cut of timber on a lot occupied under a location ticket, who proceeds to cut before the occupant, his seller, has been granted ownership of the lot under letters-patent, does so at his own risk, and, if compelled to pay Crown timber dues, has no action to recover the amount from his seller. *Deschamps* v. *Giroux* (1911), 39 Que. S. C. 454.

Crown permit — *License to cut—Possession of limits — Trespass — Right of action.*]—The grantees under permits to cut timber upon lands which are part of the public domain, have a possession of the limits comprised in such permits, which gives rise in their favour to a remedy by action of trespass against those who disturb their possession. Compare a contrary decision in *Price* v. *Girard*, 28 Que. S. C. 244. *Breakley* v. *Bilodeau*, 30 Que. S. C. 142.

Cutting logs — *Survey—Qualification of surveyor.*]—A written contract, under which L. was to cut logs for P. at stated sum per M., contained a clause providing that logs were to be surveyed by any surveyor P. might have in his employ, said survey to be final: —*Held*, that a survey made by two surveyors employed by P., who surveyed about one-third the logs, counted the balance, and made an estimate of count on basis of survey, might be a good survey under contract.— It is not necessary that surveyor should be qualified under R. S., tit. xvii., c. 96, and amending Acts. *Patterson* v. *Larsen* (1906), 37 N. B. R. 28.

Delivery of timber—Correspondence—Evidence—Non-completion of contract. *McGibbon* v. *Charlton*, 1 O. W. R. 828.

Destruction by fire — Crown lands—Timber license — Renewal — Expiry of license — Timber vested in Crown—Action by licensees for damages for negligence in operation of railway. *Gillies Brothers Co., Limited* v. *Temiskaming & Northern Ontario Railway Commission* (No. 1), 10 O. W. R. 971.

Dimensions of lumber sold — *Waiver of objection — Condition not arising — Contract price — Right to recover.*]—The defendants contracted to purchase from the plaintiffs a cargo of lumber of specified dimensions at an agreed price per thousand, delivered f.o.b. at B., 90 per cent. of the price to be paid on delivery of the lumber on board ship, and the balance, 10 per cent., on

right delivery of cargo at the port of discharge. The defendants objected to pay the 90 per cent., on the ground that part of the lumber delivered was not of the dimensions called for by the contract, but waived the objections upon the defendants offering to take back the cargo, or the lengths objected to, if there was any trouble at the port of delivery:—*Held*, that the parties were then dealing upon the basis of the original contract, and as, owing to the loss of the vessel, the cargo never arrived at the port of delivery, the conditions upon which the defendants were to take over the portion complained of did not arise, and they were entitled to be paid for the whole cargo upon the basis fixed by the contract.—*Held*, also, that the trial Judge erred in treating the contract as at an end and dealing with the transaction on the principle of a *quantum meruit*, and adopting a different scale of prices for the lumber from that fixed by the contract. *Ham* v. *Smith Tyrer & Co.*, 42 N. S. R. 321.

Dispute as to ownership — Crown lands — Location — Cancellation — Timber licenses — Settlement — Purchase—Cheque —Acceptance on account — Accord and satisfaction — Injunction — Consent order in action afterwards dismissed for want of prosecution — Binding agreement — Title —Possession — *Jus tertii* — Assignment of location — Regulations of department — Settlement duties — Forfeiture — Ruling of department — Reference. *McWilliams* v. *Dickson Co. of Peterborough*, 8 O. W. R. 211.

Conversion — Value of logs cut — Cost of lumbering operations — Ascertainment—Reference — Evidence — Improper reception and rejection — Result not affected — Timber dues — Damages — Deductions — Master's report — Appeal — Form of report — Weight of evidence — Varying report — Costs — Interest. *McWilliams* v. *Dickson*, 11 O. W. R. 606.

Dispute as to ownership — Crown lands — Location — Cancellation — Timber licenses — Settlement — Purchase—Cheque —Acceptance on account—Accord and satisfaction — Injunction — Consent order in action afterwards dismissed for want of prosecution — Binding agreement — Title —Possession — *Jus tertii* — Assignment of location — Regulations of department — *Ultra vires* — Settlement duties—Forfeiture —Ruling of department — Reference. *McWilliams* v. *Dickson Co.* (No. 2), 6 O. W. R. 706.

Driving logs — *Injury to land—Damages — Misdirection — Employment of contractor — Vis major.*]—In an action for damages for injuries to the plaintiffs' land by logs which the defendant had neglected to confine within his boom, and which were suffered to be driven up and down stream by the tide, the trial Judge instructed the jury that in assessing damages they were not restricted to the actual damage referred to in the statute (R. S. N. S. c. 95, s. 17), but, at the same time, the amount allowed ought to be reasonable:—*Held*, that the jury should have been told, at the same time that the actual damage was, as a rule, the measure in common law actions of this kind; but, as the amount awarded by the jury was small, and as there was evidence to support it, the misdirection, if any, occasioned no substantial wrong or miscarriage, and was, therefore, within O. xxxvii., r. 6. *Quære*, whether the defendant could escape liability by employing a contractor to bring down his logs, when, in the ordinary course of things, they would necessarily come in contact with the plaintiffs' land. *Semble*, that he could not. In respect to a portion of the damage done, the defendant relied upon a plea of *vis major*:—*Held*, that this was not a defence unless the defendant could shew that the damage would equally have happened if he had done his duty.—*Held*, that, in this case, the excuse was insufficient, a larger quantity of logs having been brought down the stream in the expectation that, before the high tides came, a sufficient quantity could be sawed to enable the remainder to be confined within the boom, and the high tides having occurred two or three days earlier than the defendant expected, as the result of which the logs not confined in the boom were carried up the stream and stranded on the plaintiffs' land. *Campbell* v. *Dickie*, 36 N. S. R. 40.

Floating — *Tolls — Tariff — Retroactivity — Action.*]—One who erects works and buildings to facilitate the floating of timber on a river, for which a tariff of tolls is fixed by order of the Lieutenant-Governor in council, in accordance with s. 2972*f*, R. S. Q. (54 V. c. 25, s 1), has the remedy of an action to recover tolls upon the timber floated since the erection of the works, as well before as after the coming into force of the tariff. *Tanquay* v. *Royal Paper Mills Co.*, 31 Que. S. C. 397.

Fraud in reducing to writing — Foreigner—Void agreement—Sale of standing timber—Interest in land—Execution by wife—Construction of contract. *Lasjinski* v. *Campbell*, 1 O. W. R. 114.

Hauling tan bark—*Cord—Agreement as to cubic contents—Payments on estimate—Evidence of collateral agreement as to sale—Jury — Questions — Misdirection—Verdict.*]—A written contract, wherein A. agreed to haul certain bark belonging to B. for $1.87 per cord, contained a clause to the following effect: "The survey to be made by buyer or his agent and the owner or his agent, who, failing to agree, shall choose a man who shall choose a third whose scale shall be considered final reckoning, 128 feet per cord. Bark to be estimated by agent of owner as soon as finished hauling, and paid for accordingly; account to be balanced as soon as bark is sold." When the hauling was finished, B.'s agent estimated the number of cords hauled on the basis of 140 feet to the cord, and the hauling was paid for on that basis. The bark was not sold, and no final survey was made or account balanced as provided in the contract. In an action by A. against B. for a balance due on the contract, the Judge directed the jury that in construing the contract (as to that part which provided for a payment on an estimate), the words "the estimate to be based on basis of 128 cubic feet to the cord, and paid accordingly," should be read into the contract:—*Held*, on appeal (*per* Tuck, C.J., Hanington and Landry, JJ.), Barker and McLeod, JJ., taking

no part, and Gregory, J., dissenting, that the direction was right; that the sale of the bark and survey provided by the contract were not conditions precedent to payment; and the plaintiff might recover on the contract, and was not put to an action for a breach in not selling.—*Per* Gregory, J., that the construction of the clause of the contract which provided for payment on an estimate was an erroneous construction, and the appeal should be allowed and a new trial granted. —A Judge is not bound on the request of counsel to submit questions to the jury under C S. N. B. 1903, c. 111, s. 163, and c. 116, s. 78. He may refuse to do so and ask for a general verdict. *Shaw* v. *Stairs*, 2 E. L. R. 111, 37 N. B. R. 593.

Interest in lands — *Timber licenses.*] —An interest in a special timber license issued under the Land Act of B. C. is an interest in lands. *Vaughan-Rys.* v. *Clary* (1910), 15 B. C. R. 9.

Issue as to ownership — *Severance by stranger — Waiver of tort — Conveyance of land by husband to wife — Title to timber —Sale to bona fide purchaser — Amendment of issue — Parties — Damages.*]— F. conveyed land to his wife for valuable consideration. Shortly afterwards it was discovered that a trespasser had cut timber on the land and sold it to G., who bought in good faith and sold it to another *bona fide* purchaser. In an action by F.'s wife against the two purchasers, the money was paid into Court, and an interpleader issue ordered to decide which of the claimants, the plaintiff or G., was entitled to have it:—*Held*, affirming the judgment of the Court of Appeal, *Faulkner* v. *Greer*, 16 O. L. R. 123, 11 O. W. R. 198, which reversed the decision of a Divisional Court, 14 O. L. R. 360, 9 O. W. R. 241, 733, that the plaintiff was entitled to the whole sum.—Duff, J., expressed no opinion on the question.—*Held*, also, Idington, J., *dubitante*, and Duff, J., dissenting, that, if necessary, the writ and interpleader order could be amended by adding F. as a co-plaintiff with his wife. *Greer* v. *Faulkner*, 40 S. C. R. 399.

License to cut timber—*Description of land — Boundaries — Winding river — Ambiguity — Evidence — Deed.*]—A license to cut timber on lands traversed by a watercourse described the portion on which the timber was to be cut as "bounded on the south" by the river. The river crossed the width of the land almost entirely at a point about seven arpents from its northerly boundary, and again crossed it completely at another point about nineteen arpents further south:—*Held*, that there was no ambiguity in the description, but, even if any doubt existed, the language of the instrument must be construed literally, and the party bound thereby could not be allowed to give evidence of extraneous circumstances to shew a different intention. *Morel* v. *Lefrancois*, 27 C. L. T. 157, 38 S. C. R. 75.

License to cut timber — *1309 S. R. O. — Renewal of license — Effect, retroactive lots within the limits licensed alienated before the renewal.*] — A license to cut timber issued under s. 1309 S. R. O., even though it is a renewal of a former license, takes effect only at the date it bears and has no retroactive effect to the first of May precedent, and the lots in the limits alienated before the issuance are excepted from it. (*Price* v. *DeLisle*, 21 C. S. 41). Hence, the holder of a license to cut timber which expired on April 30th, and was renewed on the 10th of December, cannot claim that his rights date back to the 1st of May preceding, and he does not acquire the right to remove the timber from lots within the limits of his license granted by letters patent between those two dates. *Edwards Co.* v. *Halewyn*, 18 Que. K. B. 419.

Licenses—*Mining lands—Different Crown patents of same locations — Reservation in patents — Right to cut pine for buildings, working of mines, etc.—Right exceeded—Reference to ascertain damages—F. D. and costs reserved.*] — Plaintiffs were licensees with power to cut and remove all red and white pine upon certain locations. Defendants claimed same land under Crown patents as mining lands. Defendants' patents were subject to reservation to Crown of all pine, but patentees had right to cut such trees as were necessary for buildings, fencing, fuel, or for purposes essential to the working of the mines thereon. They could also dispose of all trees required to be removed in actually clearing the land for cultivation. Defendants exceeded their rights and plaintiffs brought action to recover.—Boyd, C., directed a reference to Master at Sudbury to ascertain what damages plaintiffs had sustained by defendants removing timber for purposes other than allowed in their patents. Further directions and costs reserved. *Gordon* v. *Moose Mountain Co.* (1910), 17 O. W. R. 661, 2 O. W. N. 333, 22 O. L. R. 373.

Logging—Moneys advanced—Scaling logs —Conditions of contract. *Lequime* v. *Brown* (B.C.), 1 W. L. R. 193.

Logs — *Course of manufacture — Lien for advances — Chose in action.*]—Under appellant's contract, he was given a lien for advances on logs from which deals, etc., were being manufactured wherever they might lie. He claimed a lien on logs on the Tobique River:—*Held*, that lien did not attach. The logs could not be identified, and any evidence as to the manufacture was very loose and vague. *McKean* v. *Randolph*, 6 E. L. R. 381.

Logs — *Quantity — Mill scale — Guarantee.*]—Action to recover price of logs. Verdict for plaintiff for $325. An appeal dismissed. Only questions of fact involved. *McLeod* v. *White*, 6 E. L. R. 251.

Logs cut at 10c each.] — When the plaintiff, by his action, claims the value of 11,050 logs, cut at 10c. a log, in virtue of a contract for an indeterminate quantity, he may recover for the quantity cut if the proof shews that he cut more than alleged in and prayed for in his declaration, and this even when plaintiff has not amended his declaration to make it agree with the proof. *Lemelin* v. *Adam* (1909), 17 R. de J. 50.

Logs to be cut into lumber.]—Defendants purchased from plaintiffs certain logs to be cut into lumber and paid for at

stated prices per M. feet. Defendants put forward many grounds as absolving them from performance of contract. Latchford, J., at trial, *held*, that defendants had failed to give shipping orders simply because they could not make sales and having refused to give shipping orders, the plaintiffs were justified in selling the lumber at a loss and defendants were liable for said loss, $2,577.59, with interest and costs. Divisional Court affirmed judgment, 15 O. W. R. 92, and dismissed the appeal with costs. *Wood v. Gall Lumber Co.* (1910), 15 O. W. R. 429, 1 O. W. N. 503.

Lumbering operations — Cleaning out stream—Allowance for—Proportion of cost—Driving timber—Breach of contract—Construction of contract—Impossibility of performance—Failure to get logs out—Measure of damages—Destruction of logs by fire—Negligence — Nominal damages — Interest —Costs — Claim and counterclaim. *Eddy Co. v. Rideau Lumber Co.* (1906), 8 O. W. R. 361, 939.

Lumbering operations — *Price payable according to measurement—Effect of clause providing for employment of government culler.*]—When, in an agreement respecting the cutting and manufacture of lumber, it is provided that the logs will be inspected, culled, measured and stamped every month by a government culler, his measurements and certificate thereof are not final and binding. In addition to the case of fraud, the parties may refuse to accept the measurements and certificate on the ground of error, and, for this purpose, parol evidence will be allowed. *Racicot v. Church* (1911), 39 Que. S. C. 532.

Oral contract—*Sale of interest in timber limit—Part performance — Statute of Frauds—Amendment — Partnership.*]—The plaintiff, who had an interest in a contract for driving logs, brought an action against the defendant, who had an interest in a timber limit, alleging that by an oral agreement the defendant had agreed to give him (the plaintiff) half his interest in the timber limit in consideration of an interest in the log driving contract. It was shewn that the defendant had received an equal share with the plaintiff ($2,330.27) of the profits of the driving contract. The defendant alleged that this was a return for his services in driving the logs, and denied any agreement to pay the plaintiff any share of the profits from the timber limit:—*Held*, that a contract for an interest in a timber limit is a contract for an interest in land within the Statute of Frauds. That the division of the profits of the driving contract was not a sufficient part performance to take the case out of the statute, as it, at the most, could only be regarded as payment of the purchase money. That there was no evidence that the timber limit was held as partnership property, and, even if it was so, that it did not follow that a transfer by one partner of his interest would not be within the statute. Had the evidence of the alleged agreement been clear and satisfactory, leave to amend and recover the consideration paid on the footing of the contract might have been given. But, as the verdict of the jury was so manifestly against the evidence, the action was dismissed, and leave given to the plaintiff, if so advised, to bring a new action to establish the oral agreement and recover the purchase money. Judgment of Teetzel, J., 2 O. W. R. 714, reversed. *Hoeffler v. Irwin*, 25 C. L. T. 32, 2 O. W. R. 714, 4 O. W. R. 172.

Owner not in possession — *Authority to sell — Secret agreement — Estoppel.*]—The owner of logs, by contract in writing, agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale, and was answered, "No, I have sold them to McK." E. then purchased a portion of them from McK., who did not pay the owner therefor, and he brought an action of trover against E.:—*Held*, affirming the judgment in 36 N. B. R. 169, Neshitt and Killam, JJ., dissenting, that the owner, having induced E. to believe that he could safely purchase from McK., could not afterwards deny the authority of the latter to sell. *People's Bank v. Estey*, 24 C. L. T. 170, 34 S. C. R. 429.

Payment for information as to timber limits—Condition precedent—Cancellation of previous contract—Defendant putting it out of plaintiff's power to perform condition — Right to payment — Reduction in amount—Deficiency in acreage—Evidence—Counsel in witness box. *Lett v. Lye* (B.C.), 6 W. L. R. 484.

Purchase of logs — *Common law lien of loggers excluded by terms of contract — Attempt to prove alteration of contract by conduct — Evidence — Onus — Possession —Seizure by sheriff — Bill of sale — Destruction of lien.*]—When parties who have bound themselves by a written agreement depart from it, and adopt some other line of conduct, it is incumbent on the party insisting on and endeavouring to enforce a substituted verbal agreement, to shew, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding; that both parties were proceeding on a new agreement, the terms of which they both understood. — In this case the written contract between the parties (for getting out logs) was inconsistent with the idea of the loggers having a common law lien on the logs for their work, but they alleged a new arrangement:—*Held*, in the circumstances set out below, and having regard in particular to the onus, which was upon the loggers, that it should not be found that there was any alteration of the written contract.—*Semble*, that, if there had been an alteration, the loggers would not lose their common law lien by reason of the logs being seized by the sheriff at a time when the loggers were not in actual physical possession of the logs. They could not be said to have lost their lien because they had tied up the logs in a boom, made it fast, and gone ashore. And the sheriff would not be entitled to seize without tendering to the loggers the amount for which they had a lien. But, *held*, that the loggers, by including the logs in a bill of a sale

to R., gave to him the right of possession against themselves, and thereby destroyed their lien, if they had it; and, as they did not comply with s. 23 of R. S. B. C. c. 132, they did not confer any title upon R. which he could maintain as against the owner of the logs. *Poper* v. *Roberts* (1910), 14 W. L. R. 445.

Purchaser of timber, felled by means of advances made by him on the purchase price thereof, who, by reason of the interest he has in having such timber delivered to him, causes it to be floated in face of a prohibition on the part of the seller thereof, acts in the capacity of manager for the seller and places upon him the obligation of paying the tolls exigible by virtue of Art. 7300 R. S. Que. (1909), by those persons who have improved the stream in which such timber is floated. *Adam* v. *River Quelle Lumber Co.* (1910), 38 Que. S. C. 92.

Purchase of timber limits — Agreement to share profits—Denial of signature—Action to perpetuate testimony and enforce agreement—Assignee of part of claim—Purchase for benefit of incorporated company —Parties—Amendment — Declaratory judgment. *Millar* v. *Beck* (1906), 8 O. W. R. 501.

Raft of ties floated down streams and towed on lake — *Timber Slide Co. Act, R. S. O. 1897 c. 19½ — Tolls for use of company's river improvements — Loss by allowing ties to pass into lake—"Raft" not a "ship" or "vessel."*]—In an action by three companies for work done for and services rendered and materials supplied to defendant in connection with the floating certain ties down streams and towing them on the lake, the evidence shewed that defendant had used the river improvements of the plaintiffs for the two previous years without objecting to the company's right to compensation for the use of them, and he had made arrangements for the use of them for the year 1908:—*Held*, that the defendant was liable. *International Boom Co.* v. *Rainy River Boom Co.* (1906), 97 Minn. 513 (1908), 104 Minn. 152, followed. Judgment of Britton, J., at trial (1909), 13 O. W. R. 190, affirmed. *Pigeon River* v. *Mooring* (1909), 14 O. W. R. 639.

Right to buy a thing.]—An absolute right to buy and a conditional right to be preferred to other bidders in case of a sale. The statute 4 Edw. VII. c. 13 (Que.) s. 21 (Art. 1343d.) as follows: "When a lot included in the limits of a license to cut timber is sold by a plan, the holder of the license has the right to buy the merchantable timber cut on the premises by the settler in preference to every other person at the current price paid by such holder of a license for wood of the same quality in the same locality," does not give the holder of the license an absolute right to buy the timber in question, but only a conditional right to be preferred to other buyers in case of a sale by the settler. Moreover, they cannot claim to be the owners of the timber and seize it. *Beauce Lumber Co.* v. *Fortier*, 35 Que. S. C. 492.

Rights of licensee — *Trespass on limits.*] — The holder of a license to cut timber on Crown lands, under s. 1309 *et seq.*, R. S. Que., has no possessory action against a trespasser on his limits. His proper remedy is in damages as for a tort. *Price* v. *Girard*, 28 Que. S. C. 244.

Saisie-conservatoire — *Petition of defendant for leave to remove for safety or to manufacture.*] — When timber lying in a river has been seized and put in the custody of a guardian, under a conservatory process, the Court or Judge has no power to allow the defendant, on the ground that it is exposed to be carried away and lost, to remove it to a place of safety by means of funds to be raised on the security of the timber, nor to allow the defendant to manufacture it, on giving security to the plaintiff, at a given rate per ton of the goods to be manufactured. Petitions for such purposes will be dismissed. *Larouche* v. *D'Ouiatchouan Pulp Co.*, 32 Que. S. C. 414.

Sale — *Contract — Time for removal.*] —In 1899 the plaintiff contracted with the defendant B., by an instrument under seal, to sell to the latter certain kinds of timber from the plaintiff's land, "now upon" the lots described, and so much thereof as the purchaser might see fit to cut and remove, with the right of entry "at all times" until removed, the timber removed to be paid for at certain specified prices:—*Held*, that the agreement being silent as to the duration of the right to cut and remove, it must be exercised within a reasonable time; and B. and his assigns, not having attempted to exercise the right until 1903, should be enjoined from doing so. *Dolan* v. *Baker*, 10 O. L. R. 259, 3 O. W. R. 833, 5 O. W. R. 229.

Sale — *Property passing — Measurement — Inspection — Marking—Completion of sale — Seizure by creditor of vendor — Claim by purchaser.*]—A contract by which D. engages to furnish to P. 200,000 feet of wood, plank measure, of white birch, sawn into slabs, etc., at the price of $21 per thousand feet, etc., is a sale by measurement, which is completed by the purchaser making inspection, measurement, and placing a mark on the wood, although no notice of these acts has been given to the vendor, and they have been done in his absence, and he has to verify them in order to ascertain and fix the price. The inspection, measurement, etc., make the purchaser the owner of the wood, and he may intervene to contest a seizure made by a creditor of the vendor. *Coté* v. *James Richardson Co.*, 15 Que. K. B. 359.

Sale of — Contract — Re-sale of treetops — Right of purchaser after time expired — Extension — Trespass — Costs. *Wilcox* v. *Johnson*, 4 O. W. R. 9.

Sale of — *Interest in land — Severance — Identification — Vendor's lien — Injunction.*]—St. G., the owner of land, by an agreement in writing sold all the timber on it to E., taking promissory notes in payment. E. assigned all his interest in the agreement to S., his principal, who made the notes; E. indorsed them to St. G. S.

cut and removed timber from the land, and cut and piled on the land a lot of cordwood, which he sold to the defendant, but did not pay the notes. St. G. sold the land and all her interest in the timber and the notes to the plaintiff. The defendant sought to remove the wood, but the plaintiff obtained an injunction restraining him, and claimed a vendor's lien:—*Held*, that the sale of the timber to be removed in three years by the purchaser was of an interest in land, in respect of which a vendor's lien arose by operation of law, which was not displaced by the cutting or sale of the timber, as long as it could be identified and remained on the land; and the remedy was by an injunction and enforcement of the lien. *Summers* v. *Cook*, 28 Gr. 179, followed. *Ford* v. *Hodgson*, 22 C. L. T. 177, 3 O. L. R. 526, 1 O. W. R. 121.

Sale of growing timber — *Time for removing—Subsequent growth.*]—Right, by virtue of agreement, to cut and remove a certain kind of wood from land, during a fixed period, extends to subsequent growths of same kind of wood as long as the period endures. *Belouin* v. *Hovey* (1906), 28 Que. S. C. 31.

Sale of interest — *Price payable by instalments — Property not to pass if payment in arrear — Bank — Advances to vendee of timber — Security under sec. 88 of Bank Act — Validity — Payment not in arrear at time of agreement for advances — Company — By-law — Authorising security — Necessity for proof of.*] — The plaintiffs, licensees of timber limits under the Dominion Lands Act, R. S. C. 1906, c. 55, s. 173, agreed to sell their interest to M. for a sum payable in instalments, the agreement of sale providing that all logs, etc., should be deemed to be the property of the plaintiffs unless and until M. should have paid all arrears due under the agreement. M. assigned his interest to the M. company, incorporated, and the company, as security for advances, executed, pursuant to a previous agreement, in favour of the defendants, a chartered banking corporation, an instrument in the form of a security under s. 88 of the Bank Act, R. S. C. 1906 c. 29, pledging all the logs upon their premises, including those cut from the limits of which the plaintiffs were licensees. The plaintiffs alleged that the property in the logs never passed to the company.—*Held*, that as, at the time of the agreement for the advances by the defendants, there were no arrears due to the plaintiffs, and the fact was as stated in the instrument of security, that the logs were owned by and in the possession of the company, and were free from any mortgage, lien, or charge, the security given to the defendants was a valid one, and prevailed against the claim of the plaintiffs.—No evidence was offered to shew that a by-law had been passed by the company authorising the execution of the instrument referred to, as required by the Manitoba Joint Stock Companies Act, s. 69, as amended by c. 13 of 1906, s. 4:—*Held*, that the defendants had not upon them the onus of shewing a by-law; the security being in the usual form, regularly executed and under the seal of the company, this was *prima facie* evidence of all preliminary formalities having been complied with. *Mutchenbacker* v. *Dominion Bank* (1910), 13 W. L. R. 282.

Sale of logs — *Cut under Government license — Shipped to defendants' mill — Question as to measurement and culls — Evidence as to — Reference — Costs.*]—Plaintiff brought action to recover for a certain quantity of logs alleged to have been cut by plaintiff on an island in Georgian Bay under license from the Ontario Government for the defendants, and shipped to the defendants at their mill. Defendants claimed that a large number of these logs were culls. — Latchford, J., *held*, that the measurements made by Government cullers were independent and impartial as to the quality and quantity of timber cut and should be accepted, and as plaintiff's claim was based upon their measurements, judgment should be entered for plaintiff for amount of the contract price. If parties cannot agree to amount a reference was directed to ascertain it at defendants' expense. Costs to plaintiff. *Martin* v. *Beck Mfg. Co.* (1910) 17 O. W. R. 291, 2 O. W. N. 219.

Sale of logs — *Offer and acceptance — Account — Price—Debtor and creditor—Security — Evidence. —Held*, on the evidence that there was a sale of certain logs, and that defendant was to pay $5 per M. therefor. *Royal Bank* v. *Schaffner*, 7 E. L. R. 506, affirmed, 515.

Sale of lumber — Rejection of part — Action for value—Finding of Master—Interference by Court. *Potter* v. *Orillia Export Lumber Co.*, 8 O. W. R. 804.

Sale of lumber mill and timber limit—Price to be paid in cash and work—Breach—Rescission—Damages—Specific performance—Improvements—Occupation rent—Counterclaim—Loss of profits. *Crowston* v. *Tait* (N.W.T.), 6 W. L. R. 70.

Sale of lumber to be manufactured —*Advances made by purchaser — Lien on logs — Identification of logs.*] — It was agreed that E. should sell and M. should buy three million superficial feet of deals to be manufactured at E.'s mill, M. to have a lien for advances on the deals and also on "the logs from which the said deals are being manufactured." Afterwards E., by representing to M. that he had cut a number of logs on the T. river for the purpose of this contract, and required advances to cut more, and that the logs would be a sufficient security for all advances he might make, obtained advances from M. from time to time. E. had in fact some seven million feet of logs cut on the T. river, but none were marked for M., and part were got out for another. E. then assigned for the benefit of his creditors: — *Held*, that the logs intended for M. were not sufficiently identified, and no lien would attach for his advances. *McKean* v. *Randolph*, 39 N. B. R. 37, 6 E. L. R. 381.

Sale of right to cut — Time for cutting — Trespass — License — Deed — Construction. *Columbus Fish and Game Co.* v. *W. C. Edwards Co.*, 5 E. L. R. 247.

Sale of right to cut — *Time limit unprovided for — Jurisdiction of Court to impose — Sale of right to cut growing trees —Timber or fuel — Period for cutting — Chattels — Action petitoire.*]—The Courts are without jurisdiction to impose a limit to the duration of a contractual obligation, when there has been no stipulation therefor between the parties to the contract. To act otherwise would be to substitute judicial action for the rights or the wishes of the parties, and such an intervention would be an arbitrary proceeding, a danger which Courts ought scrupulously to avoid. —2. Nevertheless, Courts have the right to intervene and fix a period when it is a question of the obligation of doing some act, as in the case of a debtor who is by law or agreement obliged to perform an obligation.—3. The right of cutting wood for construction purposes (timber) regarded as being acquired for commercial purposes, cannot be viewed in the same way as a right of cutting firewood (fuel), acquired, as in the present case, for the personal use of the purchaser.—4. The sale of a right to cut wood is a sale of movables, because the purchaser proposes to make into chattels the subject-matter of the contract. Therefore, there is no ground for an *action petitoire* against the owner of such a right, on the ground that he assumes to exercise it for a longer time than his deed authorises. *Bégin* v. *Carrier*, 33 Que. S. C. 1.

Sale of right to cut and remove — *Effect of — Subsequent purchaser of land —Irregularity.*]—The sale, by a deed in the English language, of the right during 20 years from the 25th January, 1887, of cutting all soft wood which is to be found on lots, etc., is not a sale of a superficial right, nor of a real right or dismemberment of the property, but of a personal right, which may create obligations between the contracting parties without affecting the immovables described. Therefore a third person subsequently purchasing the immovables becomes owner of the wood which is upon the property and may dispose of it without being in any way responsible to the holder of the right of cutting.—The latter is not in a position to invoke against the former the irregularity or the nullity of one of the successive sales which have led up to his purchase, if those interested in this sale have ratified it by their subsequent acts. *Baptist* v. *Laurentides Paper Co.*, 16 Que. K. B. 471.

Sale of standing timber — Contract —Construction — Quantity of timber — Measurements — Estimates — Conflicting evidence. *McAlister* v. *Brigham*, 6 O. W. R. 812.

Sale of standing timber — *Deed — Construction — Time for removal — Blank in deed — Reasonable time — Acquiescence —Trespass — Damages.*]—The plaintiff, by a deed purporting to be made under the Act respecting Short Forms of Conveyances in 1881, for a valuable consideration, granted, bargained, sold, and assigned to B. all the timber then standing, growing, or being upon land owned by the plaintiff, together with full power for B., his servants, workmen, and agents, from time to time and at all reasonable times thereafter during the term of —— years, to fell the timber, enter upon the lands, etc. There was no evidence to explain the blank left in the deed for the number of years, and nothing to shew what the true agreement was, whereby the deed might be rectified. There were occasional acts of ownership of the timber on the part of B. up till his death in 1898, and after his death by his executors, apparently acquiesced in by the plaintiff. In 1903 persons claiming under authority from the executors cut and removed timber from the land, and this action was brought for a declaration of the plaintiff's rights and an injunction and damages in respect of the trespasses:—*Held*, upon the language of the deed, that the right granted was intended to be acted upon within a reasonable time, and that such reasonable time had elapsed before the trespasses complained of, and had not been extended by the conduct or acquiescence of the plaintiff; Meredith, J.A., dissenting.—Judgment of Magee, J., awarding the plaintiff $565.92 damages, affirmed. *Mathewson* v. *Beatty*, 15 O. L. R. 557, 11 O. W. R. 79:—*Held*, by the Supreme Court of Canada, affirming the above decision, Davies and Duff, JJ., dissenting, that the instrument executed in 1881 did not convey to B. the fee simple in the standing timber, but only gave him the right to cut and remove it within a reasonable time, and that such time had elapsed before the entry to cut in 1903; and the plaintiff was entitled to damages. *Beatty* v. *Mathewson*, 40 S. C. R. 557.

Sale of standing timber with liberty to purchaser to remove within limited time — Sale of lot without reservation of timber — Actual notice of previous agreement — Registration of conveyance— Right of vendee of timber to recover value from vendor. *Barnes* v. *Golding*, 11 O. W. R. 261.

Sale of standing timber — *Registered deed — Sale of same by vendor to third person — Remedy of first vendee.*] — The purchaser of a cut of wood, with a registered deed, cannot recover from a third party, acting in good faith, to whom the vendor has sold and delivered the same wood after having cut it, the price or the value. *Champoux Co.* v. *Reid*, 35 Que. S. C. 156.

Sale of standing timber — *Registration of real rights — Ownership — Distinction of things — Movables and immovables — Priority of title.*]—A deed of sale of the right, during twenty years, to cut and remove standing timber, with permission to make and construct such roads and buildings as might be necessary for that purpose, does not affect the title to the lands on which the trees are growing, but merely conveys the personal right to the timber as and when cut under the license. The registration of such a deed, in conformity with the provisions of the Civil Code of Lower Canada respecting the registration of real rights, is unnecessary, and, if effected, cannot operate to secure to the vendee any right, privilege, or priority of title in or to the timber as against a subsequent purchaser of the lands. *Watson* v. *Perkins*, 18 L. C. Jur. 261, distinguished. Judgment in *Baptist* v.

Laurentides Paper Co., 16 Que. K. B. 471, affirmed *Laurentide Paper Co.* v. *Baptist*, 41 S. C. R. 105, 6 E. L. R. 105.

Sale of timber—No provision as to time of performance—Reasonable time—Time for commencement and completion of work—Notice—Trespass — Damages — Injunction. *Johnson* v. *Dunn* (B.C.), 2 W. L. R. 317.

Sale of timber — *Personal contract of loggers — Action by assignees — Validity of assignment — Construction of contract — Absence of word "assigns" — Intention—Novation — Evidence — Breach of contract — Right to repudiate — Damages.*]— W. I. P. and T. F. P., carrying on business as a firm, entered into an agreement with the defendants to supply certain logs from certain timber limits at a specified price and of specific dimensions. The term of the agreement was for one year from the 15th February, 1907, and the quantity to be supplied was from 20,000,000 to 25,000,000 feet. On the 8th June, 1907, the firm sold and assigned all their property, including all contracts and orders with the full benefit thereof, to an incorporated company, taking in payment shares of the company, and continuing to manage the business for the company. The company agreed to assume and carry out all the contracts of the firm and indemnify the firm from all losses and damages on account of such contracts. The company kept delivering logs to the defendants who accepted and paid for the same until some time in October, 1907, when they refused to accept or pay for any more logs, asserting that the contract was one which could not be assigned; that there had not been a novation; and that, if the contract was assignable, the plaintiffs had committed breaches thereof which entitled the defendants to repudiate. The company then sold the remainder of the logs which the firm had agreed to deliver under their contract, and brought this action for the difference between the selling price and the price they would have been entitled to receive from the defendants. W. I. P. and T. F. P. were joined as plaintiffs with the company:—*Held*, that the words of the contract—"the parties hereto, for themselves, their executors and administrators and successors respectively, mutually covenant"—must be interpreted as meaning that W. I. P. and T. F. P covenanted for themselves and their executors and administrators only, for the defendants an incorporated company, for their successors. W. I. P. and T. F. P., therefore, did not covenant for their assigns; but the omission of the word "assigns" did not necessarily make the contract unassignable; and that the nature of the contract, coupled with the absence of the word "assigns," did not, having regard to the subsequent conduct of the parties and all the circumstances, shew an intention that the contract should be performed by W. I. P. and T. F. P. only, and not by any other person or company; and the contract was, therefore, assignable: Irving, J.A., dissenting.—*Held*, also, upon the evidence, that there had not been a novation.—*Held*, also, upon the evidence, that the plaintiffs had not committed such a breach of the contract as would entitle the defendants to repudiate: Irving, J.A., dissenting.—*Held*, also, upon the evidence, that the damages awarded at the trial should not be increased or reduced. *Paterson* v. *Can. Pac. Timber Co.* (1910), 14 W. L. R. 598.

Sale of timber—*Property in standing trees—Right to make roads over vendor's land — Servitude.*] — Plaintiffs, appellants, through their agent F., bought from R. "the right to cut all soft wood on certain lots to make the necessary roads and buildings for such purpose, the cutting to be done within 20 years. R. sold to L., through whom defendant claims. What title did F. get? Was it a title in the land or a license to cut the trees of soft wood and remove them in 20 years? The Supreme Court of Canada held it is the latter. If the trees remained standing at the end of 20 years the right ceased. *Laurentide* v. *Baptist*, 6 E. L. R. 105.

Sale of timber—*Terms of payment.*]—The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should "settle" a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings:—*Held*, affirming the judgment in 10 B. C. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land:—*Held*, also, Davies, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant. *O'Brien* v. *Mackintosh*, 24 C. L. T. 115, 34 S. C. R 169.

Sale of timber limits—*Ascertainment of price—Survey—Boundaries.*]—A stipulation in sale of timber limits, estimated to contain 5,550 acres, that seller will cause the acreage to be verified by a sworn provincial land surveyor within a reasonable time, and upon a sworn statement by such surveyor, purchaser will pay for the acres in excess of 5,550, at rate of $2 per acre, does not contemplate a survey that will settle boundaries of limits as against third parties, neighbours, or squatters, but simply a verification of area of property sold, in order to arrive at an equitable settlement of price. *Nadeau* v. *Price* (1906), 14 Que. K. B. 439.

Sale of timber to be cut — *Estimates of dimensions — Price to be fixed upon the estimates taken as a minimum — Timber delivered below the average estimates — Obligations of vendor.*] — Defendants contracted to purchase all the white pine timber, waney and square, and all red pine timber made by plaintiffs during the ensuing winter on limits named. The timber was estimated to be of certain average sizes speci-

fied and the quality and form was to be the same as a portion already cut and examined by Mr. Joseph Boulet, an employee of the defendants. The contract also contained a clause that "the waney pine is estimated to average not less than 23 feet lineal, or 17½ inches girth; the square white pine 37 feet cube, and the red pine 40 feet cube"; also another clause that "the timber not to be inferior in make and quality to that seen by Mr. Joseph Boulet. Sellers will endeavour not to exceed 20 per cent. second class in waney." The schedule of prices was settled upon the estimated average as a minimum, with a progressive increase for sizes above the average. The defendants admitted the contract but refused to accept delivery of the timber tendered and they refused to pay, claiming that what was tendered was disconform to contract both in sizes and in quality:—*Held*, that the contract was not carried out by the delivery of timber of dimensions falling below the average estimates. Judgments of the Court of King's Bench for Quebec, and of the Superior Court of Quebec, *per* Mr. Chief Justice Routhier, at trial, discharged. *Klock* v. *McArthur Export Co., C. R.* [1908] A. C. 257.

Supply of bark—Dispute as to quantity —Measurements—Action — Counterclaim — Costs. *Hamill* v. *Muskoka Leather Co.* (1906), 7 O. W. R. 751.

Supply of logs—Action for price—Subsequent agreement—Finding of trial Judge —Appeal—Costs—Discretion—Payment into Court. *Payne* v. *Murphy* (1906), 8 O. W. R. 972.

Supply of logs—Condition—Driving and towing—Season for towing. *Playfair* v. *Turner Lumber Co.* (1906), 8 O. W. R. 614.

Supply of logs — Moneys advanced—Scaling logs—Conditions of contract—Duty to measure—Implied contract — Ascertainment of quantity—Impossibility of performance. *Lequime* v. *Brown* (B.C.) (1906), 3 W. L. R. 480.

Supply of logs—Permission to use roads —Failure to furnish good road—Oral representations—Evidence of—Admissibility—Conflict. *Charest and Brunet* v. *Chew* (1906), 7 O. W. R. 241.

Supply of lumber—*Survey—Statute.*]—Act relating to survey and exportation of lumber, C. S. N. B. c. 96, does not apply to contracts for small lumber such as is used for pulpwood. *Rose* v. *St. George Pulp and Paper Co.*, 37 N. B. R. 247.
Affirmed, 37 S. C. R. 687.

Timber — Declaration — Injunction— Costs. *Sweeney* v. *Sissons* (1910), 1 O. W. N. 500, 895.

Tolls — *Application to fix — Rivers and Streams Act — Improvements.*] — Proper sum fixed by a County Court Judge as a toll to be paid by one lumber company to another for the use of the constructions and improvements made by the latter upon a creek so as to make it floatable, upon an application by one of the companies under R. S. O. c. 142, taking into account the original cost of the constructions and improvements, the amount required to maintain the same, the interest upon the original cost, and other matters. Fire-ranging was not considered part of the original cost nor a proper charge for maintenance. A sum of $100 was allowed for book-keeper's time. The Judge refused to divide the constructions and improvements into sections and assign different tolls to the different sections according to the amount of saw logs and timber floated over each of such sectins. He also refused to take into consideration the sum expended in increasing the efficiency of the improvements for the convenience of the respondents. *In re South Creek*, 21 C. L. T. 344.

Towing — *Delivery of logs—Lost logs—Payment for.*]—Under a contract to tow logs, the owner of the tug is entitled to be paid only for the logs delivered; and where the special term that he is to be paid for logs "lost or not lost" is relied on, it must be proved specifically. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

Transfer of timber—*Right of property in manufactured article — Revendication — Creditors.*]—An agreement by which a lumber manufacturer transfers "all the logs which he shall cut in the winter following" to one who advances him money necessary for the purposes of his lumbering operations, does not confer upon the creditor any right of property which permits him to revendicate the lumber manufactured as against the creditors of the manufacturer, who has become insolvent. *Tremblay* v. *Lefaivre*, 31 Que. S. C. 72.

Vesting of property — *Intention of parties — Timber in raft — Raft broken by storm — Loss must be borne by purchaser.*]—By the law of England, under a contract for sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties. If the seller is to do something to the goods sold, the property will not be changed until he has done it, or waived his right to do it. There is no distinction between the law of England and the law in force in Upper Canada in this respect. The respondent entered into a contract in writing, for the sale to the appellant of "a raft of timber now at Carouge, containing white and red pine, the quantity, about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole 7¾d. per foot. Payment, one-third cash, one-third sixty and ninety days after date." Shortly before the contract was signed the raft had been measured by a public officer, called the Supervisor of Cullers, appointed under the Canadian Act, 8 and 9 V. c. 49, and the number of pieces of timber and the contents of each piece was set down in a specification thereof, which made a total of 71,445 feet, and this specification was delivered by the respondent, before the execution of the contract, to the appellant, and sent by him to the place where the raft was to be delivered. The raft was towed to the Indian Cove

booms, the appointed place for delivery, where it arrived in the afternoon, and notice of its arrival given to the servants of the appellant, who assisted in fastening the raft outside the booms. This was done at the instance of the appellant's servant, as, from the state of the tide, the raft could not be placed inside the booms. During the night a storm arose, by which the raft was carried away, broken to pieces, and dispersed, and a great portion of it lost. The appellant employed his servants in collecting as much of the wood as was saved, and that was put into the appellant's booms:—*Held*, that as the respondent had ascertained the price of the raft by the measurement previously made, the specification of which was in the appellant's possession, and as the contract did not shew that any future measurement of the raft was necessary, no act then remained to be done by the respondent or by the appellant, and that the raft, upon delivery at the Indian Cove booms, had wholly passed to the appellant, and the loss incurred must be borne by him. *Gilmour* v. *Supple* (1858), C. R. 2 A. C. 368.

Woodmen's liens—Undertaking to pay amounts of, if established—Construction — New trial. *Mechefeske* v. *Robert Stewart Limited*, 9 O. W. R. 182.

See ASSESSMENT AND TAXES — BOUNDARIES — CONSTITUTIONAL LAW—CONTRACT —CROWN — CROWN LANDS — DAMAGES—EVIDENCE — MINES AND MINERALS—RAILWAY — RECEIVER — REVENDICATION — VENDOR AND PURCHASER — WATER AND WATERCOURSES.

TIME.

Exchequer Court — *Standards of time —Service of process — Sittings of Court.*] —In the service of its process, as well as in its sittings and in the public hours of its registry, the Exchequer Court of Canada will be guided by the civic time in use in the town where the Court sits, unless it is made to appear that such time is in fact incorrect. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 470, 10 B. C. R. 381.

See APPEAL — ARREST — ASSESSMENT AND TAXES—BANKRUPTCY AND INSOLVENCY —BOND — CERTIORARI — COMPANY—CONTRACT — COSTS — CRIMINAL LAW—DISCOVERY — DISMISSAL OF ACTION — ELECTIONS — EXECUTION — HUSBAND AND WIFE—INSURANCE—INTOXICATING LIQUORS —JUDGMENT — LIEN — MASTER AND SERVANT — MECHANICS' LIENS — MINES AND MINERALS — MUNICIPAL CORPORATIONS — OPPOSITION — PARTICULARS — PEREMPTION —PLEADING — RAILWAY — RULE NISI — SALE OF GOODS — SHIP — TIMBER—TRIAL —WILL.

TITLE BY POSSESSION.

See LIMITATION OF ACTIONS.

TITLE OF LAND.

Quebec Law — *Possessory action — Nature and period of possession.*]—The possession necessary to entitle a plaintiff to maintain a possessory action must be continuous and uninterrupted, peaceable, public, and as proprietor, for the whole period of a year and a day immediately preceding the disturbance complained of. *Conture* v. *Conture*, 34 S. C. R. 716.

Registered title — Appurtenances. *Greisman* v. *Fine*, 1 O. W. R. 479.

Registered title — Real Property Limitation Act. *Central Canada L. & S. Co.* v. *Porter*, 1 O. W. R. 482, 2 O. W. R. 137.

Sheriff's sale — *Effect of annulment—Possession in good faith—Rents and profits —Compensation for improvements—Liability for deterioration.*]—One who is in possession of land by virtue of a title acquired at a sheriff's sale is the possessor in good faith up to the moment at which his title is declared void by the Court, and such title is valid although its subsequent annulment deprives it retrospectively of its effect. 2. A contract set aside as absolutely void is considered as never having had a legal existence and as incapable of producing any juridical effect, past or future; but a contract or a title in virtue of which action has been taken and which has been declared void later is, notwithstanding Art. 412, C. C., a sufficient basis to establish the good faith of the possessor. 3. Such a possessor has a right to retain the profits which he has received and to be compensated for the improvements which he has made, as he will be responsible for any deterioration which he has caused to the property. *Savoie* v. *Gastonguay*, 10 Que. K. B. 459.

Statute of Limitations — Declaration —Pleading — Possession — Tenancy by the curtesy — Devolution of Estates Act—Improvements. *Chevalier* v. *Trepannier*, 1 O. W. R. 847.

Trespass — *Overhanging roof — Right of view — Evidence — Boundary line — Waiver.*]—In 1844 the defendants constructed a toll-house close to or on the boundary of their land, with windows overlooking the adjoining lot and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the adjoining lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable of his house, and the defendants paid the cost of the necessary alteration. In 1900 the plaintiff instituted the present action against the defendants to have the remainder of the projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties, and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty: — *Held*, Strong, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of

proving title to the strip of land in dispute, consequently that his action could not be maintained.—*Held*, further, *per* Girouard, J., following *Delorme* v. *Cusson*, 28 S. C. R. 66, that, as the plaintiff and his auteurs had waived objection to the manner in which the toll-house had been constructed, and permitted the roof and windows to remain there, the demolition could not be required, at least so long as the building continued to exist in the condition in which it had been so constructed. *Parent* v. *Quebec North Shore Turnpike Trustees*, 22 C. L. T. 46, 31 S. C. R. 556.

See CHURCH — CONTRACT — COURTS — EJECTMENT — LIMITATION OF ACTIONS — TRESPASS TO LAND — WATER AND WATERCOURSES.

TOLL BRIDGE.

See ASSESSMENT AND TAXES.

TOLL ROADS.

See MUNICIPAL CORPORATIONS — RAILWAY AND RAILWAY COMPANIES — WAY.

TOLLS.

See CONTRACT — MANDAMUS—MUNICIPAL CORPORATIONS — RAILWAY—TIMBER — WATER AND WATERCOURSES.

TORT.

See ATTACHMENT OF DEBTS—ATTACHMENT OF GOODS — CORPSE — CROWN—EASEMENT—MINES AND MINERALS—PARTIES —SERVICE OUT OF THE JURISDICTION—SET-OFF—TIMBER—WAY.

TOWAGE.

See SHIP.

TOWING.

See SHIP.

TOWN SITE.

See VENDOR AND PURCHASER.

TOWNS INCORPORATION ACT.

See MALICIOUS PROSECUTION AND ARREST—STIPENDIARY MAGISTRATE.

TRACTION ENGINE.

See WAY.

TRADE.

See RESTRAINT OF TRADE.

TRADE AGREEMENT.

See CONTRACT.

TRADE AND COMMERCE

See CONSTITUTIONAL LAW.

TRADE COMBINATION

See CONSPIRACY — CRIMINAL LAW — DISCOVERY — INJUNCTION.

TRADE COMPETITION.

See CONSPIRACY.

TRADE CUSTOM.

See CONFLICT OF LAWS — PRINCIPAL AND AGENT—SALE OF GOODS.

TRADE MARK AND TRADE NAME.

Absence of registration—*Trade Mark and Design Act, s. 20—Labels on beer bottles—Similarity of design—Passing-off—Injunction.*]—Upon an application by the plaintiffs for an interim injunction to restrain the defendants from the use of labels on their beer bottles whereby they were enabled to pass it off as beer manufactured by the plaintiffs, it was not alleged that the labels were registered, and no benefit was claimed from the Trade Mark and Design Act, R. S. C. 1906 c. 71:—*Held*, that s. 20 of that Act was not a bar to the relief claimed, the plaintiffs' case not relating to the infringement of a trade mark, but being based upon the passing off of the defendants' goods for those of the plaintiffs.—*De Kuyper* v. *Van Dulken*, 4 Ex. C. R. 71, distinguished. *Kirstein* v. *Cohen*, 39 S. C. R. 286, followed.—And *held*, upon the evidence, that, although the prominent words upon the labels, "Budweiser" on the plaintiffs', and "Capitol" on the defendants', were not the same, there was a similarity in the labels as to general design and appearance which might deceive intending purchasers.—The Judge is, from inspection of the exhibits and from the other evidence, to form his own independent judgment as to the likelihood of deception.—*Payton* v. *Snelling*, [1901] A. C. 308, and *Hennessey* v. *Keating*, [1908] 1 I. R. 43, 24 T. L. R. 534, specially referred to. Injunction till the trial. *Anheuser Busch Brewery* v. *Edmonton Brewing & Malting Co.* (1910), 15 W. L. R. 421, Alta. L. R. .

Acquiescence, by owner of trade-mark "Listerine," in the use by another of the word "listerated," in the United States, for a number of years, is a ground of estoppel to proceedings taken, subsequently, in Canada, for infringement. *Lambert Pharmacal Co.* v. *Palmer* (1910), 39 Que. S. C 64.

Action to compel defendant to assign a trade mark to company as he had covenanted so to do when company purchased his business. Judgment for company with costs. *Tilley* v. *De Forest* (N. B. 1910), 9 E. L. R. 28.

Advertisement — *Imitation — Defendant using his own name—Injunction—Delay in moving for—Discretion—Appeal.*] — Action for injunction to prevent defendant from advertising shoes for sale in such a manner as to infringe upon the plaintiffs' trade mark, "The Slater Shoe." The defendant was the agent in Winnipeg for the sale of goods manufactured by George A. Slater of Montreal, who was not connected with the plaintiffs. George A. Slater advertised and sold his goods extensively in Canada under the names "The George A. Slater Shoe" and the "Invictus Shoe." The defendant's advertising agent, in an advertisement published in a Winnipeg newspaper, described the shoes the defendant was selling as "the celebrated George A. Slater Invictus Shoes for men." The words "George A." and "Invictus" were in considerably smaller type than the words "Slater" and "Shoes," but still were quite prominent and easily seen. The defendant discontinued the advertisement as soon as the form of it came to his notice, and before the plaintiffs took exception to it:—*Held*, that the advertisement objected to, in the form in which it appeared, would, if persisted in, have constituted an infringement of the plaintiffs' trade name; but that the discretion exercised in refusing an injunction should not be interfered with, and that an appeal therefrom should be dismissed without costs, for the following reasons:—(a) The defendant was not personally responsible for the form in which the advertisement had appeared, and had voluntarily withdrawn it as soon as it came to his knowledge and before any complaint was made. (b) The action had not been commenced until after the lapse of 16 days from the withdrawal of the advertisement. *Semble*, that it is not necessary in such an action for the plaintiff to prove fraud or an intention to deceive on the defendant's part. It would be sufficient if the advertisement were likely to deceive. *Slater* v. *Ryan*, 6 W. L. R. 741, 17 Man. L. R. 89.

Assignment — *Execution — Right of property.*]—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 it has been used. *Gegg* v. *Bassett*, 22 C. L. T. 114, 3 O. L. R. 263.

"Buster Brown"—*Validity of registration.*]—In 1902 the New York Herald began the issue of a comic section of that paper under the titles of "Buster Brown" and "Buster Brown and Tige," and have since continued to sell the same and licensed other newspapers to do so. In 1907 the Herald registered said titles as trade marks, and brought action against the Ottawa Citizen Co. for infringement, and an injunction against the use of them:—*Held*, that the terms "Buster Brown," and "Buster Brown and Tige" were not susceptible of registration under the Act respecting trade marks. Appeal from 12 Ex. C. R. 1, 5 E. L. R. 265, dismissed with costs. *New York Herald* v. *Ottawa Citizen*, 41 S. C. R. 229, 6 E. L. R. 312.

Corporate name — *Conflict — Fraud —Intent to deceive.*] — In the absence of fraud or bad faith, a body corporate may use its own name on goods of its own manufacture, although such use may tend to confuse its goods with goods of the same kind bearing the trade-mark of another manufacturer. 2. Where the defendants, a corporate body, had obtained their name before a trade-mark with which such name was said to conflict had been registered in Canada by the plaintiffs, a foreign corporation, it was not shewn that the defendants had adopted such name with intent to deceive the public, nor to sell their goods as those of the plaintiffs, the Court refused to restrain the defendants from using their corporate name upon goods manufactured by them. *Boston Rubber Shoe Co.* v. *Boston Rubber Shoe Co. of Montreal*, 21 C. L. T. 517, 7 Ex. C. R. 187.

"Cream yeast" — *Validity — Trade Name—"Passing-off."*] — *Held*, that the plaintiff's trade-mark for a certain kind of yeast, consisting of a label bearing the representation of the head and bust of a woman, with the words "Day" and "Hop" on either side, and the words "Cream Yeast" below was properly registerable and valid. *Provident Chemical Works* v. *Canada Chemical Co.*, 1 O. W. R. 488, 4 O. L. R. 545, followed.—2. That the defendants by selling yeast in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark. *Cochrane* v. *MacNish*, 13 R. P. C. 100, distinguished. —3. That the defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff. Judgment of a Divisional Court, 6 O. L. R. 66, 2 O. W. R. 497, 23 C. L. T. 259, affirmed. *Gillett* v. *Lumsden*, 24 C. L. T. 345, 8 O. L. R. 168, 3 O. W. R. 851.

Criminal law — *Forging or falsely applying trade-mark—Prosecution for—Defence—Invalidity of registration—Title to exclusive use of registered words—Descriptive words.*]—The defendant was convicted by a magistrate of the offence of forging a trade-mark, to wit, the registered trade-mark "Glyco-Thymoline," and falsely applying to certain goods a trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive, contrary to s. 447 of the Criminal Code. The trade mark "Glyco-Thymoline" consisted solely of these words, applied to a medical compound sold by a company, in the form of a solution in bottles. The defendant made and sold a solution, of which the chief ingredients were thymol and glycerine, which

he named "Glyco-Thymol." The company and the defendant labelled their respective bottles in much the same way. Before the magistrate the case was virtually dealt with as a case of passing off the defendant's goods for those of the company, but this, the Court of Appeal pointed out, was not the offence charged, and could only be the subject of a civil action for an injunction and damages. The words registered as the company's trade-mark were merely descriptive and incapable of registration, and that was a defence open to the defendant. The conviction was therefore quashed. *Rex* v. *Cruttenden*, 25 C. L. T. 455, 6 O. W. R. 249, 10 O. L. R. 80.

Descriptive words.] — A trade-mark bearing the words "asbestic wall plaster" was registered by the plaintiffs on the 3rd February, 1896. The particular words were applied to a compound of asbestic and the ordinary wall-paper. The defendants alleged that they had been selling this compound before the registration of the trade-mark by the plaintiffs; that the words were merely descriptive of the articles of which the compound consisted; and that they could not be compelled to invent a new name:—*Held*, that the words were merely descriptive, and that the appellants could not acquire an exclusive right to their use. *Asbestos and Asbestic Co.* v. *William Sclater Co.*, 21 C. L. T. 130, 10 Que. Q. B. 165.

Descriptive words — *Pleading—Prior user.*]—In an action for infringement of the plaintiffs' trade-mark for "asbestic wall plaster," the defendants were entitled to allege in their plea, without having taken steps to have the plaintiffs' mark annulled, that they had sold asbestic wall plaster long prior to and since the registration of plaintiffs' trade-mark, and that by law they had the right to make use of the words "asbestic wall plaster," the word "asbestic" being merely an indication and description of the article sold by the defendants and referring to the character and quality of the article. *Asbestos and Asbestic Co.* v. *William Sclater Co.*, 18 Que. S. C. 324.

Descriptive words.]—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 persons of plaster under that name is not an infringement of a registered trade-mark for "asbestic wall plaster." *Asbestos and Asbestic Co.* v. *William Sclater Co.*, 18 Que. S. C. 360.

Family name — *Injunction.*]—Where there is no allegation of any attempted imitation of a trade-mark and the complaint of unfair and illegal dealing is wholly limited to the use of the word "Slater," a family name, in connection with a trade and industry, and the defendant has used that name publicly, without objection or protest from any person for more than six years, the complainant is too late, even if a right in such respect ever existed, to secure an interim injunction. *The Slater Shoe Co. Ltd.* v. *The Eagle Shoe Co.* (1910), 16 R. L. n. s. 474.

Fancy name — *Descriptive letters — Forum — Exchequer Court.*]—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." Judgment of Meredith, C.J., 2 O. L. R. 182, 21 C. L. T. 467, reversed. The amendments to the Exchequer Court Act since the decision in *Partlo* v. *Todd*, 14 A. R. 444, 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 shewn. *Provident Chemical Works* v. *Canada Chemical Mfg. Co.*, 22 C. L. T. 381, 4 O. L. R. 545, 1 O. W. R. 618.

Geographical description — *Alien — Competition.*]—An alien has an action in the province of Quebec to prevent unfair competition in trade. 2. An unregistered trade-mark is only entitled to protection where there is unfair or fraudulent competition, and damage is caused to the proprietor of such mark. 3. Unfair competition does not exist where confusion of marks is not possible. So, in the present case, the adoption by the defendants of the name "Milwaukee" to describe their lager beer, made in Montreal, having preceded by ten years the introduction of the plaintiffs' lager beer in the Canadian market, and there being no proof of deception or damage, the defendants using a different label containing the word "Montreal," the plaintiffs were not entitled to an injunction to restrain the use of the word "Milwaukee" in connection with the sale, etc., of the Canadian article. Judgment in 20 Que. S. C. 20 reversed. *Pabst Brewing Co.* v. *Ekers*, 22 Que. S. C. 545.

Geographical designation — "*Caledonia water*" — "*Caledonia mineral water.*"]—The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, respecting the waters of which they had caused to be registered certain trade-marks, and the names "Caledonia water" and "Caledonia mineral water." The water, which was used medicinally and as a beverage, had through the plaintiffs' exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs, and near the springs a village, laid out on the ground many years before, had actually come into existence, where the plaintiffs had erected an hotel, and had procured a railway station and post office to be erected under the name "Caledonia Springs." In 1898 L. & Co., who had purchased a lot about a quarter of a mile distant from the plaintiffs' place, had, by sinking an artesian well, tapped springs, from which water flowed, similar in some respects to the plaintiffs', which they supplied in barrels to their agents, as "water from the new springs at

Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned: — *Held*, reversing the judgment in 21 C. L. T. 524, 2 O. L. R. 322, 1 O. W. R. 785, that the defendants could not be restrained from using the word "Caledonia" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co., and as against them the plaintiffs should only be allowed the costs of entering judgment by default. *Grand Hotel Co. of Caledonia Springs* v. *Wilson, Grand Hotel Co. of Caledonia Springs* v. *Tune*, 23 C. L. T. 82, 5 O. L. R. 141. Affirmed, 1904, A. C. 103.

"**Hall mark**" — *Right to register.*]—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. The fact that such marks were not trade-marks, but marks used to comply with the statutes of the country of origin would not in that respect in any way alter the case.—*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. 2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to the goods manufactured by them from sterling silver which, it was thought, so resembled a "British 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 a "British hall mark" were also upon the market:—*Held*, that the plaintiffs could not, under the circumstances, exercise the exclusive right to the use of such mark as a trade-mark. *Gorham Manufacturing Co.* v. *Ellis*, 24 C. L. T. 119, 8 Ex. C. R. 401.

Incorporated company — Infringement —Passing off goods — Injunction—Scope of. *Sovereen Mitt, Glove, and Robe Co.* v. *Simcoe Mitt, Glove and Robe Co.*, 3 O. W. R. 681.

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 Favourite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of such stoves, caused a model to be made from 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 the defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs:—*Held*, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of the defendants' design should be expunged from the register. *Findlay* v. *Ottawa Furnace and Foundry Co.*, 22 C. L. T. 200, 7 Ex. C. R. 338.

Infringement — *Action.*] — "Buster Brown" and "Buster Brown and Tige" as applied to sale of comic sections of newspapers were not registered as trade-marks in Canada until 1907, although from 1902 onwards they had been selling in this country comic sections of a newspaper published in New York, with words "Buster Brown" and "Buster Brown and Tige" applied to same without having obtained protection of copyright therefor under Can. Copyright Act:—*Held*, that even if said words, or titles, were subject of valid trade-marks (*quoad hoc dubitante*), the plaintiffs had abandoned to the Canadian public any exclusive right they may originally have had to use the same as trade-marks. *New York Herald* v. *Ottawa Citizen* (1908), 12 Ex. C. R. 1; affirmed, 41 S. C. R. 229.

Infringement — *Coined word — Similarity — Colourable imitation — Costs.*]— The coined word "Sta-Zon," adopted by the defendants as a trade-mark or name for their eye-glasses, is not so similar to the coined word "Shur-On," adopted by the plaintiffs and registered as a trade-mark to distinguish their eye-glasses of very similar appearance, as to mislead ordinary persons, exercising ordinary caution, into purchasing the defendants' goods by mistake for those of the plaintiffs.—There can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception.—Where there is no reliable evidence of persons having been actually misled, it is for the Court to determine the question by consideration of the words themselves.—The plaintiffs in advertising their goods used in connection with the word "Shur-On" such words as "On to stay on," "An eye-glass that stays on," etc.:—*Held*, that, although the defendants had adopted the trade-mark "Sta-Zon" because of the plaintiffs having so described their goods, and with the object of acquiring the benefit of the market which the plaintiffs had developed, the plaintiffs had acquired no exclusive right in the words used in their advertisements other than "Shur-On" but, on account of the defendants' conduct the dismissal of the plaintiffs' action for infringement should be without costs. *Kerstein* v. *Cohen*, 11 O. L. R. 450, 7 O. W. R. 247, 8 O. W. R. 934.

Infringement — *Defence — Non-registration — Invalidity.*] — The defendant in an action for infringement of a trade-mark

may plead that there was no registration of the trade-mark, and also that the alleged trade-mark was invalid. *Grand Hotel Co.* v. *Carlin*, 2 Que. P. R. 489.

Infringement — Injunction — Use of defendant's own name — Absence of fraud —Passing-off. *Slater* v. *Ryan* (Man.), 5 W. L. R. 142.

Infringement — *Inventive term — Coined word — Exclusive use—Colourable imitation — Common idea — Description of goods — Deceit and fraud.*]—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 in 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 calculated to deceive purchasers, as the terms are neither phonetically nor visually alike. — The judgment appealed from, 13 O. L. R. 144, 8 O. W. R. 934, was affirmed. *Kerstein* v. *Cohen*, 27 C. L. T. 653, 39 S. C. R. 286.

Infringement — *Name not registered in Canada — Passing off goods — Injunction.*] — Plaintiffs, manufacturers in the United States of liquid glue and other adhesives which sold largely in Canada, United States and Europe, had adopted the trade name "LePage," which was registered in England and United States, but not in Canada. Defendants restrained from using the name "LePage." *Russia* v. *LePage*, 11 W. L. R. 506.

Infringement — Similarity — Distinction — Advertisements — Absence of fraud or deception — Passing off goods. *National Casket Co.* v. *Eckhardt*, 9 O. W. R. 313, 10 O. W. R. 74.

Infringement — Validity — Comic section of newspaper — Sale in Canada without copyright — Effect of a subsequently registered trade-mark consisting of title of comic supplement. *New York Herald Co.* v. *Ottawa Citizen Co.*, 5 E. L. R. 265.

Infringement — *Visual resemblance—Idem sonans.*]—In deciding whether a trade-mark so resembles another as to be calculated to deceive, visual resemblance is not necessarily the only thing to be considered; the possibility of confusion to the ear may also be an element. — The letter "B" stamped on buttons of braces manufactured by the defendants in the same manner as the plaintiffs' trade-mark—the letter "D" —was stamped on the buttons of braces manufactured by them was held to be an infringement. *Doran* v. *Hogadore*, 11 O. L. R. 321, 7 O. W. R. 349.

Injunction — *Security.*] — The owner of a trade-mark, who complains that his orders for sales of an article covered by the trade-mark are filled by the sending of an article covered by the defendant's trade-mark, and that the resemblance between the two marks is such that it may induce error in purchasing, has the right to an interlocutory injunction upon furnishing security. *Lefebvre* v. *Landry*, 5 Que. P. R. 341.

Injunction will lie at the instance of a party who has, for many years, used a non-descriptive word, such as "Standard," as a trade-mark stamped on his enamelled and porcelain ware with the result that, so stamped, it has become generally known as his, to restrain another from using the same word, in the same manner, on like ware, thereby representing it to be the same as that hitherto procured under that name from the plaintiff, so that persons ordering "standard ware," who knew the plaintiff to be the manufacturer, would expect to get his ware, and persons who did not know the manufacturer's name would expect to get what they previously had, and thus be, in either case, exposed to deception. The exclusive right to use a trade-mark registered under the Trade-Mark and Design Act (R. S. C. 1906, c. 71) carries with it the right to have others enjoined from using it and that the latter cannot set up, against a demand for injunction, reasons that might avail against the granting of the registration. The remedy, in case of the improper or wrongful registration of a trade-mark, would seem to be a direct action to have it cancelled. *Standard Sanitary Mfg. Co.* v. *Standard Ideal Co.*, 37 Que. S. C. 33.

Labels on beer bottles — *Possibility of deception — Misrepresentation in plaintiffs' labels as to registration.*]—In an action to restrain the defendants from using certain labels upon bottles containing beer manufactured and sold by the defendants, upon the ground that the use of the labels in this way constituted a passing of the defendants' goods as those of the plaintiffs and a fraud upon the public:—*Held*, that the proper interpretation of s. 20 of the Trade Mark and Design Act, R. S. C. 1906 c. 71, which provides that no person shall institute any proceedings to prevent the infringement of any trade mark, unless it is registered, involves a limitation of its provisions to an action for infringement strictly so-called.—*Held*, also, that the label or design in question here came within the definition of a trade mark given in s. 5 of the Act and was capable of registration; but the disability to sue without registration applies only to an innocent infringement; an actual intention to deceive, that is, an actual fraud or attempt at fraud, must be proven; otherwise the action remains merely an infringement action. *Goodfellow* v. *Prince*, 35 Ch. D. 9, followed. And *held*, upon the evidence that the defendants could not be heard to say that they did not intentionally produce a colourable imitation of the plaintiffs' trade mark, or that they did not intentionally pass off or attempt to pass off their goods as being the goods of the plaintiffs. The possibility of deceiving an unwary purchaser is sufficient; the character of the goods must be considered, and each case must stand on its own footing; the nature of the goods here involved was such as to suggest unwariness in the majority of cases; and the presence of the defendants' name upon the labels was not sufficient to

prevent the probability of deception.—*Held*, also, that, although the plaintiffs' label contained a misrepresentation, inasmuch as it spoke of registration, when none had been made, that was not a misstatement about the goods themselves, and was, therefore, not one which deceived the public; and *quære*, whether that was a defence open to the defendants, as it had not been pleaded.—*Held*, also, as to the form of the judgment, as the use of the defendants' label was not suggested by any real quality in the goods or by the place of manufacture, but was a straight and arbitrary adoption or imitation of the plaintiffs' label, for which the defendants had no manner of excuse or justification, there should be an injunction, as in *Edelsten* v. *Edelsten*, 1 DeG. J. & S. 185, restraining the defendants from using their present body label or any other colourable imitation of the plaintiffs' body label.—*Held*, further, that the plaintiffs were entitled to an account of the profits made by the defendants upon the sale of all beer sold by them bearing the label complained of. *Anheuser Busch* v. *Edmonton Brewing Co.* (1911), 16 W. L. R. 547, Alta. L. R. .

License — Option — Agreement — Declaration of rights — Specific performance —Injunction — Misconduct — Equitable relief — Counterclaim — Reservation of rights — *Res judicata*. *McAvity* v. *James Morrison Brass Mfg. Co.*, 2 O. W. R. 156, 1018.

Petition for registration — *Specific mark — Name of firm as applied to sale of electro-plated ware and cutlery — English and Canadian statutes.*] — *Held*, that the wording of the Trade Mark and Design Act, R. S. C. c. 71, s. 5, is wider than the Imperial Patents, Designs, and Trade Marks Act, 1883 (46 & 47 V. c. 57, s. 64), and that, under the word "names" as used in the Canadian Act, the name of an individual or firm, without anything more and without being accompanied by any particular distinctive feature, may be considered and known as a trade mark, and is entitled to registration as such. The facts disclosed in the material filed in support of the petition established that the name "Elkington & Co." (as applied to the sale of electro-plate and goods of precious metals, table knives, carving knives, cake knives, and other articles of cutlery), without any distinctive mark or form, was registered in England as a trade mark in 1876 by the petitioner's predecessor in title, and that the name had been in use as a trade mark by them for some thirty-five years before, and had acquired distinctiveness and become well-known throughout the world owing to such long continuous use. *In re Elkington & Co.'s Trade Mark*, 11 Ex. C. R. 293.

Pleading — *Registration — Prior user —Superiority of product — False representations — Scire facias.*]—In an action for infringement of a trade-mark, the defendant may, in answer to an allegation that the trade-mark was obtained by the plaintiff's firm, deny such allegation and state that the plaintiff was, at that time, doing business under another name. 2. It is immaterial whether the interdict or the curator who sues *ex-equalité* upon a trade-mark, obtained the registration of the trade-mark. 3. In such an action it is a valid defence to say that the label constituting the trade-mark in question had been used by the defendant and others prior to the registration of the trade-mark by the plaintiff. 4. Although it matters not which of the two products is superior, the defendant may meet an allegation of the plaintiff's declaration stating that his trade-mark product is superior, by denying the statement and affirming the superiority of his own product. 5. False representations regarding the ownership of a trade-mark constitute no ground for the voiding of it. 6. A defendant may plead in answer to conclusions demanding that he be ordered to cease to use a trade-mark, that he had ceased to use it before the institution of the action. 7. That the nullity of a trade-mark can be pleaded against an action based upon such trade-mark, without the issuing of a *scire facias* by the Crown. *Fafard* v. *Ferland*, 6 Que. P. R. 119.

Pleading — *Statement of claim—Sufficiency of.*]—In an action for infringement of a trade-mark, it is a sufficient allegation that the trade-mark used by the defendants is the registered trade-mark of the plaintiffs, to allege in the statement of claim that the registered trade-mark of the plaintiffs and the mark used by the plaintiffs and the mark used by the defendants are in their essential features the same. 2. It is not necessary in such statement of claim to allege that the imitation by the defendants of the plaintiffs' trade-mark is a fraudulent imitation. 3. It is not necessary 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 plaintiffs. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 21 C. L. T. 278, 7 Ex. C. R. 9.

Prior use — *Application to rectify register — Counterclaim — Title.*]—A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to 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 with the likeness of their kings. *Spilling* v. *Ryall*, 8 Ex. C. R. 195, 23 C. L. T. 102, explained. 2. An application to rectify the register of trade-marks cannot be made by counterclaim. (*Secus* now, under General Order of the 7th March, 1904.) 3. In an action for the infringement of a trade-mark the defendant may attack the legal title of the plaintiff to the exclusive use of the trade-mark he has registered. *Partlo* v. *Todd*, 17 S. C. R. 196, referred to. *Provident Chemical Works* v. *Canadian Chemical Manufacturing Co.*, 4 O. L. R. 548, approved. *Spilling* v. *O'Kelly*, 24 C. L. T. 119, 8 Ex. C. R. 426.

Registration — *Petition to cancel — Similarity to established name — Company.*] —The firm name of persons doing business as "The Laing Canning and Preserving Company" is not so nearly similar to that of "The Laing Packing and Provision Com-

pany, Ltd.," as to come within the prohibition of R. S. Q. c. 4697, paragraph 1, and entitle the latter company to have the registration of the former set aside, and the further use of such name prohibited, particularly in the absence of proof of damage caused by such similarity. *Laing Packing and Provision Co.* v. *Laing*, 25 Que. S. C. 344.

Registration — *Words* — *Device* — *Resemblance* — *First user* — *Declaration*— *Truth of* — *Expunging mark.*]—Registration of a trade-mark to be applied to the sale of whisky was refused, on the ground that it too closely resembled trade-marks previously registered. The earlier ones consisted in the representation of a maple leaf and such words as "Old Red Wheat," "Early Dew." The later one consisted 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 Rye Whisky," etc. 2. A declaration made by the respondents that they believed a certain trade-mark was theirs on account of their having been the first to use it, being true when made, and they having afterwards, when they learned of one J. C.'s registered trade-mark, purchased it from him, the petitioners were not entitled to have the respondents' trade-mark expunged, on the ground that their declaration was untrue. 3. In 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 whisky, which consisted of the words "Maple Leaf" and the representation of a maple leaf:—*Held*, that the registration should be expunged. *Meagher* v. *Hamilton Distilling Co.*, 8 Ex. C. R. 311.

Representations of the King and the Royal Arms — *User before registration* — *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." 2. The English rule prohibiting the use of the royal arms, representations of His Majesty, or of any member of the royal family, or 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. 3. 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. 4. The declaration required from the proprietor of a trade-mark by s. 8 of the Trade-Marks and Design Act, R. S. C. c. 63, may be signed by his duly authorised attorney or agent. *Spilling* v. *Ryall*, 23 C. L. T. 102, 8 Ex. C. R. 195.

Sale of business — *Right to use name.*]—The proprietor of a firm name of no pecuniary value *per se*, and not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period, cannot, after the expiry of the time, prevent the user of such name, when he himself does not carry on or intend to carry on business under it. *Love* v. *Latimer*, 20 C. L. T. 456, 32 O. R. 231.

"Standard."] — The word "Standard" cannot properly be registered as a trade-mark under the Canadian Trade-mark and Design Act, 1870.—Judgments appealed from, 37 Que. S. C. 33, 20 Que. K. B. 109, set aside. *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (1910), 31 C. L. T. 43, 27 T. L. R. 63.

Statement of claim — Particulars — Infringement. *Morrison* v. *Mitchell*, 1 O. W. R. 838.

Trade union — User by non-members. *Robinson* v. *McLeod*, 1 O. W. R. 83.

Use of corporate name — *Fraud and deceit* — *Evidence.*]—Since 1885 the plaintiffs, incorporated in Massachusetts, had done business in the United States of America and Canada as manufacturers and dealers 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, registered as their trade-mark known as "Bostons," which had acquired a favourable reputation. 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, on one grade of which was impressed their 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 "Boston Rubber Company." In an action to restrain the defendants from continuing to use such impressed trade-mark or any other similar mark, on such goods as an infringement of the plaintiffs' registered trade-mark: — *Held*, reversing the judgment in 7 Ex. C. R. 187, 21 C. L. T. 517, that, under the circumstances, the use by the defendants of their corporate name in the manner described on goods of their own manufacture similar to those manufactured by the plaintiffs, was a fraudulent infringement of the plaintiffs' registered trade mark and calculated to deceive the public, and so, in bad faith, to obtain sales of their own goods as if they were the plaintiffs' manufactures, and consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark upon such goods manufactured by them in Canada. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 22 C. L. T. 275, 32 S. C. R. 315.

Use of similar name — *Registration*— *Misrepresentations* — *Injunction*—*Evidence.*]—The fact that the word "Simpson" had been, previously to the plaintiff's registration, used and registered as a trade-mark for pills as a cure for one complaint, did

not disentitle the plaintiff to obtain registration of the name as a trade-mark for pills to cure another ailment, and the registration was therefore good. The fact that the name "Simpson" was entirely fictitious and was not the name of the real manufacturer, did not constitute any such misrepresentation as would disentitle the plaintiff to an injunction. Only misrepresentations contained in the trade-mark itself will disentitle the plaintiff to an injunction, and therefore fictitious testimonials published by the plaintiff were not such misrepresentations as would defeat his right. *Ford* v. *Foster*, L. R. 7 Ch. 611, followed. *Semble*, that the prior user outside of Canada of the word "Simpson" in connection with Kidney Pills was not sufficient to disentitle the plaintiff to its exclusive use within Canada: — *Held*, also, upon the evidence, that the defendant had adopted the word "Simpson" wilfully, and solely to induce the public to believe that the pills he sold were those advertised by the plaintiff, and that therefore the plaintiff was entitled to an injunction, with costs. One of the defendant's witnesses stated that he had in the year 1891 seen the name "Simpson's Kidney Pills" inscribed upon a wire door mat in London, England. This evidence was objected to on the ground that it was secondary evidence and that the door mat itself should be produced.—*Held*, that the evidence should be admitted because the production of the door mat would be highly inconvenient. *Templeton* v. *Wallace*, 4 Terr. L. R. 340.

Use of word — *Pleading.*]—In an action for selling, in violation of plaintiff's right, what purports to be asbestic wall plaster, stamped and labelled as such, it is pertinent for the defendant to plead that he has, before and since the registration of plaintiff's trade-marks, sold asbestic wall plaster, and he has a right to describe it as such. *Asbestic & Asbestos Co.* v. *Sclater*, 2 Que. P. R. 467.

Words of same derivation.]—The use of the word "listerated," on a label to qualify or describe a tooth powder, is not an infringement of a trade-mark consisting of the word "listerine," registered and known as the name of an antiseptic preparation. *Lambert Pharmacal Co.* v. *Palmer* (1910), 39 Que. S. C. 64.

See CONTRACT — COVENANT — EVIDENCE —PLEADING.

TRADE UNION.

Action against — *Actionable conspiracy — Misdirection — Resolutions of union calling a strike — New trial.*]—In an action against the appellants alleging that they had conspired to injure the plaintiffs in the conduct of their business, and that in pursuance of the conspiracy of the Union whom they represented caused the plaintiffs' men to go out on strike, the trial Judge, in effect, directed the jury that if the resolutions of the Union calling out the plaintiffs' men were the cause of the strike, they were an actionable wrong, without regard to the motive and without regard to the conspiracy alleged:—*Held*, that this direction could not be supported, and that there must be a new trial.—Judgment of the Court of Appeal in *Metallic Roofing Co. of Canada* v. *Jose*, 9 O. W. R. 786, 14 O. L. R. 156, reversed. *Jose* v. *Metallic Roofing Co. of Canada*, [1908] A. C. 514.

Action against — *Conspiracy — Strike —Calling men out — Misdirection — New trial.*]—In an action against the members of a trade union for conspiring to injure the plaintiffs in their business, the trial Judge told the jury that the calling out of the members of the union on a strike, by a resolution of the union, unless within a certain time a particular agreement was entered into, was an actionable wrong, if that resolution was the cause of the strike, without regard to the motive or the conspiracy alleged:—*Held*, that this direction was a misdirection to the jury and a new trial should be held. When the Privy Council has awarded costs they are not subject to the rules of practice of the Courts below. There is no right of set-off, and stay of execution, with a view to a set-off of other costs to be recovered upon a new trial ordered by the Privy Council, will be refused. *Russell* v. *Russell*, [1898] A. C. 307, followed. Judgments of the Court of Appeal for Ontario, the Divisional Court for Ontario and Mr. Justice MacMahon, at trial, set aside. *Metallic Roofing Co.* v. *Jose*, C. R., [1909] A. C. 1.

Combination of workmen to injure business of employer — *Interim injunction. Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, 2 O. W. R. 183, 266, 819, 844.

Employers' association — Conspiracy to injure workmen—Black list—Findings of jury. *Mitchell* v. *Woods* (B.C.), 4 W. L. R. 371.

Exclusion of member — Interim injunction — Illegal organisation. *Cresswell* v. *Hyttenrauch*, 2 O. W. R. 447, 655, 662.

Expulsion of member — *Articles of association — By-law in restraint of trade —Illegality — Militia Act.*]—The plaintiff, a musician and a member of the active militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was to unite the instrumental portion of the musical profession for protection of its interests, the regulation of prices, the enforcement of good faith among its members and to assist members in sickness, etc. After the plaintiff joined, the defendants adopted a new article providing that no member should play in any engagement with any person playing an instrument who was not a member. The plaintiff was fined, and expelled for default of payment of the fine for playing in his regimental band at a concert, in uniform, under the direction of the bandmaster, and with the permission of the colonel commanding—some of the band not being members:—*Held*, that, at the time the plaintiff joined

the association, it was a perfectly legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's explusion was invalid, and he was entitled to an injunction and damages. *Rigby* v. *Connol*, 14 Ch. D. 482, *Mineral Water Bottle, &c., Society* v. *Booth*, 36 Ch. D. 465, *Swaine* v. *Wilson*, 24 Que. B. D. 252, and *Chamberlain's Wharf, Limited* v. *Smith*, [1900] 2 Ch. 605, considered. *Parker* v. *Toronto Musical Protective Association*, 21 C. L. T. 31, 32 O. R. 305.

Fees of members — *Arrears — By-laws — Penalty for infraction.*]—By their charter the plaintiff association have power to impose by by-law the payment of an annual fee by each of their members, and also, a penalty for every infraction of their by-laws. The association, in pursuance thereof, passed a by-law fixing the membership fee at $2 a year and imposing a penalty of $10 for every infraction of the by-laws. The defendant took out his license, and paid his fee for one year, and afterwards exercised his trade for three years without paying his fee:—*Held*, that, in the circumstances, the plaintiff association could claim from the defendant only the penalty which he had incurred for the infraction of the by-laws and not the arrears of his fees. *Barbers' Association of the Province of Quebec* v. *Charlebois*, 23 Que. S. C. 287.

Inducing breach of contract — *Interference with business — Foreign officer—Incorporation — Pleading.*] — Damages are recoverable against a trade union and the members thereof in an action by employers of workmen who, by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers, and other workmen are prevented from entering into the employment in their stead. And a foreign officer of an organised body of which the local trade union was a part, who came to this province and aided, encouraged, and directed the members in their unlawful acts, was held liable with them for the consequences. It is too late at the trial, after a trade union has appeared and pleaded in an apparently corporate capacity, to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded. *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers*, 23 C. L. T. 170, 5 O. L. R. 463, 2 O. W. R. 282.

Industrial Disputes Investigation Act, 1907—Aiding striker — Intent—Criminal Code—Summary conviction—Jurisdiction of magistrate — Prosecution for violation of the Industrial Disputes Investigation Act in furnishing supplies to strikers. *R.* v. *Nelson* (N.S. 1910), 9 E. L. R. 210.

Interference between master and servant — Interim injunction — Balance of convenience. *Small* v. *American Federation of Musicians*, 2 O. W. R. 26, 33, 99, 278, 310.

Interference between master and servant — Procuring discharge of servant —Actionable wrong — Damages — Injunction. *Graham* v. *Bricklayers and Masons' Union*, 8 W. L. R. 281, 9 W. L. R. 475.

Interference with employers' business — Injunction — Action against members of union — Parties — Representation —Local bodies — General council. *Gurney Foundry Co.* v. *Emmett*, 2 O. W. R. 938, 959, 1038.

Interference with servants of plaintiff — Interim injunction. *Small* v. *Hyttenrauch*, 2 O. W. R. 447, 656, 658.

Labour dispute — *Master and servant —Strike — Lock-out — Illegal acts of strikers — Picketting — Conspiracy—Preventing men from working for master — Criminal Code, s. 523 — Watching and besetting — Intimidation — Threats of violence — Nuisance — Liability of lodges and individuals — Principal and agent — Injunction — Damages.*]—Action arising out of a labour dispute between plaintiffs and their workmen and for an injunction and damages against five local lodges, one international union and a number of individual defendants sued individually and as representatives of all other persons constituting the lodges. The men were not employed under contract. There was a conspiracy to picket the plaintiffs' works and to prevent others taking employment with the plaintiffs. Picketting, as conducted here, amounted to a common law nuisance, and the individual defendants who took part in it, as well as those acting in combination with them, are liable in damages to the plaintiffs:—*Held*, that the unions are liable—the law of principal and agent being applicable to trade unions. The lodges approved, supported and participated in the strike, and are jointly liable with the individual defendants for the damage caused by the wrongful acts of the strikers. Strikers receiving strike pay from a grand lodge does not make a lodge liable for past illegal acts committed by its employees without its authority. The union has no right to penalise for a refusal to obey its mandate. The lodge does not violate any person's rights in insisting on obedience to its rules and meting out to its employees who violate its rules the punishment the constitution calls for. Plaintiffs sustained damages by being deprived of the services of their men, but for that damage they have no remedy against any persons unless it arises from some illegal act performed by the defendants or some of them. Damages assessed against certain lodges, held liable. *Vulcan Iron Works Co.* v. *Winnipeg Lodge No. 174 Ironmoulders Union* (Man.) 10 W. L. R. 421.

Local unions — *Liability for illegal acts of members during strike.*]—An appeal by the defendants Local Unions Nos. 189 and 174 of an international trade union from the judgment of Mathers, J., 10 W. L. R. 421, finding them liable for certain unlawful acts in a strike of workmen, and a cross-appeal of the plaintiffs from the same judgment, in so far as it absolved the defendants Local Unions Nos. 147 and 335 from the like liability, were both dismissed; the Court being of

opinion, upon the evidence, that the findings of fact could not be disturbed.—*Per* Perdue, J.A.:—Lodges 147 and 335 may have aided the men by distributing strike-pay and giving other monetary assistance, but that is not alone sufficient to render them liable as authorising or ratifying the unlawful acts as strikers; to create such liability, it must also be shewn that the illegal acts were performed by the individuals while acting under the orders or authority of the Lodge, or that the Lodge ratified illegal acts of its members committed while they were assuming to act for it or under its authority. *Vulcan Iron Works* v. *Ironmoulders* (1911), 16 W. L. R. 647, Man. L. R.

Longshoremen's wages — Arbitration —Award—Agreement entered into in virtue of Industrial Disputes Investigation Act—Enforcement of agreement—Jurisdiction of Court. *Martin* v. *Shipping Federation, Re Industrial Disputes Investigation Act* (1907), 4 E. L. R. 341.

Member — *Interference with employment — Threatening employer — Refusal by union men to work with non-union man—Coercion of employer — Contractual relationship between employer and employee.*] —The plaintiff, a stonemason, applied for membership in the union of which defendants were officers. He made a payment on account of his application fee, but, not being vouched for by two members of the union, the executive returned the fee and requested him to submit to a test of workmanship preliminary to his being enrolled. Considering the test an unfair one, he declined to submit to it, whereupon the union refused him membership. The test proposed was what is known as "boulder work," but the plaintiff stated that he had been accustomed to "sandstone work." After some delay, the plaintiff was told he could submit to a test in any kind of stone he chose, but he did not accept the offer. Subsequently, while he was at work on a building, the union at a meeting passed a resolution instructing the secretary to notify the employer that unless the plaintiff was discharged the union men would be called out. The plaintiff, having been discharged, brought this action for an injunction and damages: —*Held*, on appeal, reversing the judgment of Lampman, Co.C.J., 8 W. L. R. 281, that the plaintiff had not shewn that the purpose of the defendants was to molest him in pursuing his calling, and prevent him, except on conditions of their own making, from earning his living thereby. *Graham* v. *Knott*, 14 B. C. R. 97; *S. C., sub nom. Graham* v. *Bricklayers' and Masons' Union*, 9 W. L. R. 475.

Mine workers—Motion for attachment for contempt — Disobedience of order of Court restraining interference with business —Attachment. *Cumberland Rw. & Coal Co.* v. *McDougall* (N.S. 1911), 9 E. L. R. 289.

Resolution — Distribution of moneys contributed — Exclusion of certain members — Illegality. *Boiteau* v. *Ethier*, 5 E. L. R. 449.

Strike—Appeal from order of Judge continuing an interlocutory injunction until trial of action—Balance of convenience—Discretion—Criminal Code, s. 501—Parties to action—Trade union—Point raised for first time on appeal. *Cumberland Coal & Rw. Co.* v. *McDougall* (N.S. 1911), 9 E. L. R. 204.

Strikes — *Combined action—Conspiracy to injure plaintiff—Picketting and besetting.*] —Whilst workmen, members of a trade union, have a right to strike and to combine for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet they have no right to induce other workmen, who are not members of the union and who desire to continue working, to leave their employment, or to endeavour to prevent the employers from getting other men to work for them and for that purpose to watch and beset the places where the men happen to be, or to induce the employers' workmen to break their contracts, as these are actionable wrongs and picketting and besetting are expressly made unlawful by section 501 of the Criminal Code. *Quinn* v. *Leatham*, [1901] A. C. 511; *Read* v. *The Friendly Society, &c.* [1902] K. B. 732; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; *Lyons* v. *Wilkins*, [1899] 1 Ch. 255, and *Charnock* v. *Court*, [1899] 2 Ch. 35, followed:—*Held*, also, that all the defendants who had participated in, or counselled, or procured the acts condemned were each individually liable for the whole amount of the damages suffered by the several plaintiffs in consequence of those acts, but not for any damage caused by themselves quitting work. *Krug Furniture Co.* v. *Berlin Union* (1903), 5 O. L. R. at p. 469, followed. Damages were assessed against all the defendants found guilty at $2,000 divided amongst the several plaintiffs in proportions fixed by the judgment.—*Held*, also, that the property and assets of the Union were liable for the amount of the judgment and costs, and that an interim injunction granted should be made perpetual restraining the defendants from persuading, procuring or inducing workmen to leave the employ of the plaintiffs and from conspiring or combining to injure workmen not to enter the plaintiffs' employ, also from besetting or watching places where the plaintiffs or any of their workmen or those seeking to enter their employ reside or carry on business or happen to be with a view to compel the plaintiffs or said workmen to abstain from doing anything they or any of them have a lawful right to do, and from persistently following them or any of them. Defences enuring, under an order of the Court, for the benefit of absent interested persons, represented for the purpose of the action by one or more of the actual defendants, should not be struck out by reason of a contempt or default committed by such defendants in refusing to produce documents, and any interlocutory judgment entered in consequence of such defences being struck out is a nullity. The destruction during the progress of this suit of a book kept by an officer of the Union at its headquarters in which were recorded minutes relating to the strike and the non-production of a strike register kept and of the reports handed in from day to day by members of the Union actively engaged in picketting and officially appointed for that purpose were circumstances that justified the Court in presuming that they contained entries unfavourable or damaging to the defence and in being

satisfied with less convincing evidence, than might otherwise be required, that the wrongful acts of certain members were the authorized acts of the Union. *Taylor on Evidence*, 10th ed. 117. Privy Council refused leave to appeal. *Cotter* v. *Osborne*, C. R. [1911] A. C. 137, 18 Man. L. R. 471, 8 W. L. R. 451, 10 W. L. R. 354.

Unincorporated and unregistered association — Action by — Status as plaintiff — Individual members — Breaches of contracts — Joinder of causes of action —Parties — Individual rights — Master and servant — Agreements to mine coal — Terms and conditions — Stipulations as to timber, water, and track — Reasonable interpretation — Industrial Disputes Act, 1907 —Conciliation boards — Agency. *United Mine Workers of America District No. 18* v. *Strathcona Coal Co.* (Alta.), 8 W. L. R. 649.

Watching and besetting — *Conspiracy — Injunction.*]—Injunction granted in the terms of the order, in *Taff Vale Rw. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426. *Le Roi Mining Co.* v. *Rossland Miners' Union, No. 38, Western Federation of Mines*, 8 B. C. R. 370.

Workmen's association — *Action by members against council — Election of council — Delegates to grand council.*]—Action for a declaration that a certain meeting of grand council, at which officers were elected, was illegal, and all business done, void: *Held*, that in all such organisations, unless something is done in violation of express law, or fraudulently, and with improper motive, the Court will not undertake to review the proceedings. Under one of the articles of the association, any lodge, three months in arrears for a certain tax, might be suspended. One lodge was twelve months in arrears.—*Held*, that the grand council had acted properly in refusing delegates from that lodge admittance.—*Held*, that the meeting was legal. *Sutherland* v. *Grand Council of P. W. A.*, 7 E. L. R. 70.

See CONTRACT — DISCOVERY — MASTER AND SERVANT — PLEADING — WRIT OF SUMMONS.

TRADE USAGE.

See CONTRACT.

TRADES LICENSES.

See MUNICIPAL CORPORATIONS.

TRADING COMPANY.

See BILLS OF SALE AND CHATTEL MORTGAGES —COMPANY.

TRADING CORPORATION.

See CHOSE IN ACTION — ASSIGNMENT OF —COMPANY.

TRADING STAMPS.

See CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS.

TRAFFIC ACCOMMODATION.

See RAILWAY.

TRAFFIC AGREEMENT.

See RAILWAY.

TRAMWAYS.

See STREET RAILWAYS.

TRANSCRIPT.

See COURTS — EXECUTION.

TRANSFER.

See BANKRUPTCY AND INSOLVENCY — BILLS OF SALE AND CHATTEL MORTGAGES — MINES AND MINERALS.

TRANSFER OF ACTIONS.

See COURTS — PROHIBITION — STATUTES.

TRANSFER OF LAND.

See DEED—FRAUD AND MISREPRESENTATION —LAND TITLES ACT—MORTGAGE—MUNICIPAL CORPORATIONS — PRINCIPAL AND AGENT — REGISTRY LAWS.

TRANSFER OF PROPERTY.

See JUDGMENT DEBTOR—LAND TITLES ACT.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS.

TRANSPORT.

See SHIP.

TRAVELLING EXPENSES.

See VENDOR AND PURCHASER.

TREASON.

See CRIMINAL LAW.

TREASURER OF MUNICIPALITY.

See ESTOPPEL.

TREATING.

See MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS — TRIAL.

TREATY.

See CONSTITUTIONAL LAW — COPYRIGHT — EXTRADITION.

TREES.

Fall of branch — *Injury to passer-by on highway — Negligence — Liability.*]— The owner of property on which trees grow close to a public thoroughfare is liable for damages caused by the fall through decay of a branch on a passer-by. Owners of such trees, who fail to have them properly inspected and pruned, are at fault and liable for accidents that happen in consequence. *Lamarche* v. *Les Révérends Pères Oblats*, 29 Que. S. C. 138.

Growing trees — Highway — "Left standing" — Municipal corporation—Statutes. *Wolff* v. *Kehoe*, 1 O. W. R. 78.

Ornamental trees — *Destruction by railway company under statute — Rights of owners — Injunction — Construction of statutes.*]—The right of property in shade trees on highways and to fence them in, conferred upon the owners of the lands adjacent to the highways by s. 688 of the Municipal Act, R. S. M. 1902 c. 116, is not taken away by an Act incorporating a railway company with power to construct a line of railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved. The defendants' Act of incorporation provided that the several clauses of the Manitoba Railway Act, R. S. M. 1902 c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of the Manitoba Expropriation Act, R. S. M. 1902 c. 61, with respect to the expropriation of land and the compensation to be paid therefor, shall be deemed to be incorporated *mutatis mutandis* with the Railway Act:—*Held*, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiffs' land, although such action was necessary in carrying out the approved plans, without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damages suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under s. 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation to be awarded; and that the *interim* injunction secured by the plaintiffs should be continued until the trial unless the defendants should furnish security that they would proceed forthwith to settle the amount of such compensation. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 C. L. T. 380, 15 Man. L. R. 7.

Property in trees planted in highway — *Destruction — Recovery.*]—Trees planted upon the public highway in the city of Montreal, with the consent of the municipal authority and in conformity with its regulations, become an accessory to the property in the land in front of which and for the advantage of which they have been planted, and the owner of such land may maintain an action for damages against a neighbour, when by reason of the industry carried on by the neighbour, the trees have been destroyed. *Beauchamp* v. *Montreal*, M. L. R. 7 S. C. 382, followed. *L'Huissier* v. *Brosseau*, 20 Que. S. C. 170.

See CRIMINAL LAW — DAMAGES—MUNICIPAL CORPORATIONS — RAILWAY—TIMBER.

TRESPASS TO GOODS.

Conversion — *Hay stored in defendant's barn by another person with defendant's consent—Intention to convert — Wrong inference drawn by trial Judge.*]—Action for unlawful conversion of hay tried before a Judge without a jury. Judgment for plaintiff. On appeal, action dismissed, there not appearing any motive on defendant's part nor any intention of converting it to his own use. *Donald* v. *Fulton*, 6 E. L. R. 397.

Conversion of ties — *Damages.*]—Action for trespass to land and conversion of ties. On appeal plaintiff sought to increase the amount allowed him as damages. Appeal dismissed. *Bruno* v. *Warren*, 11 W. L. R. 228.

Destruction of animal — Proof of identity — Evidence. *Bremner* v. *Walker* (N.W.T.), 2 W. L. R. 347.

Distress as for rent — *No rent agreed upon—Arbitrary fixing by letter of owner—No assent for agreement or implication — Sale of goods seized — Irregular proceedings.*]—Action for trespass to goods. *Held*, that plaintiff never agreed to pay rent nor consented to hold property on terms set forth in defendant's letter, therefore defendant had no right to distrain. A landlord cannot, by writing a letter, arbitrarily fix the rent which he is to receive unless the amount is assented to by agreement or by implication. Defendant's proceedings were altogether irregular and plaintiff is entitled to recover the whole value of the goods seized together with damages for injury to business. *White* v. *Cusak*, 10 W. L. R. 553; 2 Sask. L. R. 106.

Hire of chattels — *Contract for — Payment in satisfaction for breach of—Effect of—New trial—Notice of motion.*]—In an action upon a contract for the hire of chattels, the plaintiff is entitled to recover damages for the improper use of or injury to the chattels or for a conversion of them. Therefore, where a plaintiff sued in assumpsit for the hire of blocks and gear for hoisting, and also added a count in trespass for the improper use and injury to the same and a count in trover for a conversion of a part thereof, and the trial Judge found that a sum of money paid by the defendant to the plaintiff before action was an ample compensation for the plaintiff's claim on the count of hiring:—*Held*, that this amounted to a finding in favour of the defendant on the pleas of "not guilty," pleaded to the counts in tort. A copy of the notice of the motion for a new trial must be served upon the Judge who tried the cause. The mere filing of the same with the clerk is not sufficient. *Lang* v. *Brown*, 34 N. B. R. 492.

School rate — Distress — Second distress—Abandonment after abortive sale — Arrest under individual warrant—Estoppel —Amendment—Costs. *Matheson* v. *Reid*, 2 E. L. R. 340.

See CONVERSION — DISTRESS—ILLEGAL DISTRESS—TRIAL.

TRESPASS TO LANDS.

Absence of injury — *No damages — Landlord and tenant—License by tenant to strangers to cross land—Costs.*]—Action for trespass and injury to land. The defendant tenant gave people permission to cross the land for a few days:—*Held*, no breach of covenant not to assign or sublet, there being no substantial parting with a substantial portion of the demised premises. *Kinnear* v. *Shannon*, 13 O. W. R. 502.

Action — *Possession — Effect of enclosure by another.*]—The mere enclosure of the land of another, by the adjoining proprietor, by a fence put up with the consent of and by arrangements with the owner, for the purpose of protecting the lands of both against cattle, does not dispossess the owner, nor prevent him from maintaining trespass against anyone intruding therein, or using his land for purposes other than that for which it was enclosed. *Brookman* v. *Conway*, 35 N. S. R. 462, affirmed, *Conway* v. *Brookman*, 35 S. C. R. 185.

Action for damages — *Question of boundaries affected the rights and liabilities of the parties—Construction of description in title deed — Rights and incidents of easements.*]—Action between pulp manufacturers carrying on business in the village of Thorold on adjoining properties in reference to their respective water rights. The metes and bounds of the property conveyed were designated by the general terms; the particular description was relative as to other properties.—Divisional Court, *held*, that effect should be given to the particular description, the more so as there was no repugnancy. *Attrill* v. *Platt*, 10 S. C. R. 425, followed. —*Held*, further, that an easement had been acquired over a tail-race within the metes and bounds, but outside of the particular description. Judgment of Britton, J., at trial, 19 O. W. R. 195, 2 O. W. N. 1028, reversed as to damages. *Davey* v. *Foley* (1911), 19 O. W. R. 531, 2 O. W. N. 1284.

Action for damages—*Water percolating into plaintiffs' cellar—Cause of injury—Evidence contradictory—Onus—Undertaking to repair wall—Action dismissed—No effect on future rights of action.*]—Plaintiff brought action to recover damages for injury to plaintiff's premises by water brought thereon by reason, as alleged, of defendants using a large quantity in their livery business upon their premises adjoining the plaintiff's premises and not providing proper means of escape. — Falconbridge, C.J.K.B., *held*, that the onus was on the plaintiff to shew that he had appreciably suffered from defendants' wrongful acts and that onus had not been satisfied. Action dismissed without costs, on defendants undertaking to forthwith repair the defect in their wall. Dismissal not to prejudice future rights of action. *Pinder* v. *Sanderson, Newman & Hough* (1911), 18 O. W. R. 240, 2 O. W. N. 726.

Action for damage for — *Injunction —Possession sufficient in absence of proof of title—Fouling stream — Nuisance — Reference—Costs.*] — Plaintiffs brought action to recover damages for material dumped on plaintiffs' land by defendants, for a declaration that plaintiffs were owners of the land and for a mandatory order compelling the removal of materials dumped over the brow of plaintiffs' land as charged. Britton, J., *held*, that plaintiffs' possession, in the absence of proof of title by defendants, was sufficient to entitle plaintiffs to maintain the action for the trespasses complained of; that plaintiffs were entitled to the injunction restraining defendants from like trespasses; that plaintiffs had suffered no injury, to any extent, from discolouration of the water of the stream, but that a continuance, for any considerable time, would result in a ground for action as to fouling the water; that the only damage so far was the amount required to either buttress the dumps by a wall, or to remove them. Damage for the expense of so doing awarded at $200. Plaintiffs to have a reference at their own risk, if desired, instead of accepting the award. Plaintiffs to elect within 30 days. Costs reserved. *Fisher* v. *Doolittle* (1910), 17 O. W. R. 441, 2 O. W. N. 259.

Action for damages for trespass—*Title—Deed—Description—Locus in quo — Possession—Evidence. Millet* v. *Beazanson* (N.S. 1910), 9 E. L. R. 16.

Action for possession — *Title in dispute—Lease from Indians — Agreement for sale—Statute of Limitations.*] — Plaintiff claimed title as assignee of a lease for 999 years granted by an Indian tribe. Defendant claimed under an agreement for sale and under Statute of Limitations. Trial Judge held in favour of plaintiff, declaring him entitled to the land and ordered defendant to deliver possession, enjoining him from entering or trespassing thereon; and gave plaintiff $5 damages and costs. Appeal to the Court of Appeal dismissed with costs. *Tait* v. *Snetzinger* (1909), 14 O. W. R. 1029, 1 O. W. N. 193.

Action to determine boundary—*Survey — Injunction — Counterclaim for damages occasioned by—Reference to ascertain —F. D. and costs reserved — Appeal dismissed.*[—Plaintiff brought action for a declaration that plaintiff was owner of certain lands and premises claimed by defendants, for a return of the timber said to have been wrongfully taken, for an injunction, and for a declaration of the boundary line between plaintiff's and defendants' lands. In 1887, one Wheelock, a surveyor, ran a line between the two properties.—Riddell, J., *held* (17 O. W. R. 376, 2 O. W. N. 224), upon the evidence, that he could not say that Wheelock did not strike the true line, and the plaintiff failed. Action dismissed with costs. Defendants counterclaimed for damages occasioned by the injunction order allowed with costs, with a reference to the Master to assess damages. Further directions and costs reserved until after report.—Divisional Court dismissed plaintiffs' appeal with costs. *Horan* v. *McMahon* (1911), 18 O. W. R. 674, 2 O. W. N. 897.

Action to determine boundary between two farms — *Injunction to restrain further trespass — Sufficient possession to satisfy rule as to trespass—Ont. Jud. Act, s. 58* (4).]—Plaintiff, a farmer of the township of Alfred, brought action to recover $200 damages for an alleged trespass upon his lands by defendant, another farmer of said township, and cutting of timber thereon, and for an injunction to restrain any further trespass. At the trial judgment was given plaintiff for $25 damages and for the injunction asked. Divisional Court *held*, that there was sufficient possession in the plaintiff to satisfy the rule as to trespass. The fact that he is a mere mortgagor is rendered immaterial by the Ont. Jud. Act, s. 58 (4). The defendant complained that he had been saddled with costs, although he paid money into Court, and no further or greater amount of damages had been assessed against him.—*Held*, that as defendant did not admit the plaintiff's title, which was the main matter in dispute, it was necessary for plaintiff to proceed to trial to obtain his desired relief, that he had acted most reasonably throughout as one who did not desire unduly to press his own rights or at all encroach upon those of others, and there was no reason to deprive plaintiff of costs. *Charbonneau* v. *McCusker* (1910), 17 O. W. R. 18, 2 O. W. N. 83, 22 O. L. R. 46.

Adverse possession — *Statute of Limitations — Escheat proceedings—Grant by Crown of escheated property.*] — The evidence shewed continuous open and notorious possession by plaintiff and predecessors in title. The Crown had escheated this property. Defendant did not live on the property and was not served with escheat proceedings. He became aware of them, however, but took no action. The judgment escheating the lot revested both title and possession in the Crown. The defendant remained in possession after the Crown grant as an intruder. Judgment for plaintiff. *McFetridge* v. *McCabe*, 6 E. L. R. 494.

Agreement for sale of standing timber — *License to enter and cut — Extension by parol of period for cutting—Reasonable time—Interest in land.*] — Action claiming damages for trespass to land. Judgment for defendant with costs. *Drew* v. *Armstrong* (1911), 9 E. L. R. 491, N. S. R.

Animals — *Fences — Agreement — Municipal by-law.*]—The plaintiff and defendant, adjoining land-owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height and which they agreed to keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on the plaintiff's land and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, whence, by breaking down the plaintiff's fences, they got on the plaintiff's land and further damaged it. A township by-law provided that no fence should be less than five feet high, and prohibited the running at large of all breachy cattle:—*Held*, that the defendant was liable for the damages sustained by the plaintiff, and that such liability was not affected by the by-law. *Barber* v. *Cleave*, 2 O. L. R. 213.

Assault.] — Defendant purchased farm at sheriff's sale and obtained sheriff's deed, plaintiff's mother being in possession and plaintiff residing with her. Defendant entered with his team to plough. Plaintiff struck defendant, who resisted. Plaintiff brought action of trespass for assault. On the trial the Judge told the jury that defendant had no right to enter, plaintiff and her mother being in possession. Verdict for plaintiff:—*Held*, on motion to set aside, that defendant had a right to enter. *McSwain* v. *Chappell* (1880), 2 P. E. I. R. 317.

Bailiff — *Recourse against — Pleading —Amends.*]—A creditor whose bailiff has by error made a seizure of goods on the premises of a person other than the defendant will be relieved from liability upon paying an indemnity and giving up the effects seized, and will have recourse against the bailiff for reimbursement. The bailiff, if he has promised to pay the amount, will not be allowed later, in a suit for the recovery thereof, to plead that the creditor should have waited until sued by the person whose goods were thus wrongfully seized and then brought in the bailiff *en garantie;* his acknowledgment of the debt deprives him of the right so to plead. *Bédard* v. *Trudeau*, 3 Que. P. R. 75, 17 Que. S. C. 336.

Boundaries — Ambiguous descriptions —Natural boundaries—Conventional line — Admissions. *Dimock* v. *Stonehouse*, 2 E. L. R. 406.

Boundaries — *Encroachment — Passageway—Gates — Nuisance — Obstruction of light—Removal of wall — Injunction — Damages—Costs.*]—Action to restrain defendant from trespassing and from obstructing of plaintiff's light. A question of fact. Judgment for plaintiff. *Phoenix* v. *Quaglotti*, 11 W. L. R. 659.

Boundaries — Middle of stream. *Wason* v. *Douglas*, 1 O. W. R. 552.

Boundaries — Possession — Conventional line—Estoppel. *Gallant* v. *Dunn*, 2 E. L. R. 322.

Boundaries—Survey—Conventional line—Agreement — Possessory title—Real Property Limitation Act — Acts shewing possession. *Clark* v. *Fisher*, 3 O. W. R. 358.

Boundaries — Water lot — Road allowance—Encroachment—Right of user — Navigable water — Injunction—Damages — Reference—Costs — Parties—Indemnity — Guarantee. *Herriman* v. *Pulling & Co.*, 8 O. W. R. 149.

Boundary Lines Act — *Obligation to fence—Joint owner—Parties—Possession — Right of action.*]—The provision in s. 4 of the Boundary Lines Act, R. S. M. c. 12, viz., "Each of the parties occupying adjoining tracts of land shall make, keep up, and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," does not supersede the common law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and such owner will be liable for the trespasses committed by his cattle, unless it is shewn that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered. The common law rule is not displaced by a joint liability to keep up fences. The injured crops were raised by plaintiff who was in possession, but another person had a half interest in the crop:—*Held*, that sole possession by the plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party or to obtain any release from him. *Star* v. *Rookesby*, 1 Sask. 335, and *Graham* v. *Peat*, 1 East. 246, followed. *Garrioch* v. *McKay*, 21 C. L. T. 421, 13 Man. L. R. 404.

Cancellation of agreement for sale of land — *Plaintiff not in possession — Amendment of pleadings.*]—An action for trespass cannot be maintained unless the plaintiff has been in actual possession of the land. An application to amend the pleadings by adding a claim for recovery of possession of the land was refused on the ground that to do so would give the plaintiff an entirely new action. *Leadley* v. *Gaetz* (1904), 6 Terr. L. R. 98.

Cattle straying from highway — Defective fence. *Smith* v. *Boutilier*, 2 E. L. R. 212.

Contract to improve property—*Contractors' foreman removed loam from plaintiff's property — Liability of contractors—Damages.*]—Chambers, a foreman for Stone & Wellington, contractors, entered upon plaintiffs' land and removed a quantity of sod and black loam, which was used to improve the property of one Magann, held by The Toronto General Trusts Corporation. Plaintiff brought action against all four defendants for trespass and removal of loam, and for a redeposit of said loam, and that plaintiff might enter on land of defendant Magann and take indiscriminately and remove said loam, and for an injunction restraining further interference with plaintiffs' property.—Britton, J., *held* (15 O. W. R. 811, 1 O. W. N. 686), that the action against Magann and the Toronto General Trusts Co. should be dismissed without costs as there was no personal interference with plaintiff's property by them. Judgment given plaintiff for $250 and costs on proper scale, with no set-off of costs against Stone and Wellington and Chambers. *Gregory* v. *Piper*, 9 B. & C. 591, and *Murray* v. *Cronan*, L. R. 6 C. P. 24, 27, specially referred to. *Bolingbrake* v. *Local Board of Swindon*, L. R. 9 C. P. 575, distinguished. Divisional Court dismissed defendants' appeal with costs. *Saunders* v. *Toronto*, 26 A. R. 265, considered. *Power* v. *Magann* (1910), 17 O. W. R. 784, 2 O. W. N. 425.

Cutting and removing timber — *Measure of damages—Wrongful and wilful Acts.*]—In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed. Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only: — *Held*, that the damages should be measured by: (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc. *Martin* v. *Porter*, 5 M. & W. 351, and *Bulli Coal Co.* v. *Osborne*, [1899] A. C. 351, applied and followed. Decision of Lount, J., 22 C. L. T. 114, 3 O. L. R. 269, affirmed. *Union Bank of Canada* v. *Rideau Lumber Co.*, 23 C. L. T. 11, 4 O. L. R. 721, 1 O. W. R. 764.

Cutting and removing timber — *Rights reserved by Crown—Acquisition of by plaintiffs — Title to pine trees.*]—Plaintiffs brought action to recover damages for alleged trespass by defendants in entering on plaintiffs' lands and cutting and removing timber, etc.—Clute, J., gave plaintiffs judgment for $3,157 damages and costs, and dismissed the claim of Miller and Dickson by third party notice, against the Eastern Construction Co., and gave judgment for plaintiffs in the action in *Schmidt* v. *Miller* for $1,033 damages and costs, and dismissed claim of Miller and Dickson on third party notice against the Eastern Construction Co. Court of Appeal allowed defendants' appeal as to the claim for value of the pine timber, and as to the other claims of the plaintiffs; if the parties are unable to agree as to amounts there will be a reference to ascertain them. Further directions and the question of costs throughout, except of the appeals, to be reserved. The cross-appeal dismissed with costs to the Eastern Construction Co. The costs of the appeal to be allowed to the defendants on the final taxation. *National Trust Co.* v. *Miller* (1911), 19 O. W. R. 38, 2 O. W. N. 993.

Cutting down tree on boundary line —*Action for damages—Ownership of tree—Evidence.*]—Motion to set aside the verdict for plaintiff and for a new trial in an action claiming damages for cutting down a line tree. *Peters* v. *Dodge* (N. S. 1910), 9 E. L. R. 237.

Cutting logs on land — *Trespass not wilful—Extra-judicial affidavits taken before trial — Witnesses in vinculis.*]—Action for trespass and damages for cutting logs on plaintiff's property: — *Held*, that trespass was not wilful but was done by one of the defendant's servants in the belief that they were executing his instructions. Measure of damages will not be actual commercial value under special circumstances in this case. Defendant's conduct in procuring extra-judicial affidavits to fetter conscience of witnesses at trial held to be highly reprehensible. *Law* v. *Madden*, 11 W. L. R. 6.

Cutting timber — Joint tort-feasors —Independent contractor—Damages—Gross negligence. *Phillips* v. *Parry Sound Lumber Co.*, 8 O. W. R. 282.

Cutting timber — *Logs — Pulp wood— Action for re-possession of — Declaration that timber, etc., belonged to plaintiffs — Account for damages — Injunction—Alleged contract of sale by plaintiffs—No evidence of —Counterclaim dismissed — Declaration as asked granted—Costs.*] — Plaintiffs brought action, alleging trespass on their lands and cutting of pulpwood, claimed a declaration that the timber logs and pulpwood now in Jarvis river were cut off their lands and were property of plaintiffs; for an account for damages, return of timber, and an injunction: — Sutherland, J., *held*, that the plaintiffs were entitled to declaration asked; that no sale of said timber, logs and pulpwood was ever made by plaintiff to Smith, and that consequently Smith could not and did not make any valid sale to defendant company. That the property in question was still in existence and available, and the plaintiffs were entitled to the possession thereof; that defendant company should look to the Smiths for a return of $6,372.40 paid to the Smiths on account of their contract; that as plaintiffs were recovering their property under circumstances of greater value, they were not entitled to any substantial amount in respect of trespass. As for Smith's counterclaim, it should be set off against the damages claimed by plaintiff; that defendants' improvements were of no substantial benefit to plaintiffs for possession of logs in question, with costs of action against both defendants. No order as to costs of Smith's counterclaim. *Br. N. Am. Mining Co. Ltd.* v. *Pigeon River Lumber Co. & Smith* (1910), 17 O. W. R. 575, 2 O. W. N. 303.

Damages for exclusion and profits —*Form of action—Mesne profits.*]—A verdict in an action for trespass to land recovered against a defendant in possession, for the expulsion and exclusion of the plaintiff and for profits, will not be disturbed on the ground that the count on which it was obtained was in the form of an action for *mesne* profits. *Smith* v. *Smith*, 37 N. B. R. 7.

Defence — *Expropriation — Plan — Description—Boundary line — Damages.*]—The defence in an action for trespass to land was that the land in question has been expropriated by the town of S. under the provisions of the Act of the province of 1889, c. 84, and conveyed by the town to the defendant company. The Act contained a provision that, upon the filing of a plan in the office of the registrar of deeds for the county, immediately after the town council should have by resolution provided for such expropriation, all rights, etc., in said lands should forthwith absolutely vest in that town: — *Held*, that the filing of the plan would be ineffectual in the absence of a resolution of the town council providing for the acquisition or expropriation of the land; and that a description written on the face of the plan was made part of and must be taken in connection with it. The defence to the action depended in part upon the position of the line between McD. and McL.—*Held*, that the mode adopted by the defendant to fix the starting point of this line could not be adopted to the exclusion of all others, and to control the line as established by the vendors and purchasers at the times the conveyances were made, and not since disputed, especially as the effect would be to deprive the plaintiff of his land without proper notice, and without remuneration. — *Held*, with respect to damages, that though they were not such as the Court would have given, the matter was one in the discretion of the trial Judge, and there was no reason for interfering. *McLennan* v. *Dominion Iron and Steel Co.*, 36 N. S. R. 28.

Destruction of liquors — Order of magistrate — Liquor License Act—Proprietary medicines — Intoxicating liquors — Declaration of forfeiture and order for destruction—Verbal direction acted on before reduction to writing—Delay—Police officers —*Bona fides* — Jurisdiction—Reasonable and probable cause—Malice—Notice of action—Estoppel—Nominal damages — Costs. *Ing Kong* v. *Archibald*, 12 O. W. R. 592.

Distress.]—Bailiff may use force necessary to ascertain if door is fastened. *McKinnon* v. *McKinley* (1856), 1 P. E. I. R. 113.

Disturbance of possession — *Encroachment — Remedy—Damages.*] — The disturbance of possession which affords ground for an action of trespass is such as is adverse or in defiance of the right of a person who is in possession *animo domini*. A simple encroachment is only ground for an action for damages. *Bertrand* v. *Levesque*, 28 Que. S. C. 46.

Disturbance of possession — *Intention—Damages.*]—An action for trespass is based upon the disturbance caused to possession, without reference to the intention of the supposed trespasser. It is not necessary that the act complained of should be of an aggressive character, nor that there should be proof of actual damage, in order to sustain the action. *Latourelle* v. *Darby*, 14 Que. K. B. 553.

Disturbance of possession — *Right of action—Entry—Damages—Right of possession.*]—A disturbance of possession which affords ground for an action of trespass must be a material fact or a judicial act which, directly by itself or indirectly by its consequences, constitutes or implies a claim adverse to the possession of another person. The simple fact of entering upon lands for a temporary purpose (in this case for the purpose of projecting into a river over a

steep bank timber for a drive), when that is done without any idea or claim of having a right as against the owner, may give rise to an action for damages, but cannot be the occasion of a judicial pronouncement upon a right of possession which is not attacked. *Latourelle* v. *Darby*, 28 Que. S. C. 97.

Division fence — *Dispute as to boundaries—Finding of County Court Judge — Appeal—Consent of parties to Court disposing of appeal as arbitrators — Costs.*]— On appeal a Divisional Court acting as arbitrators directed that a certain survey line be the boundary between the parties defendant to build a fence within six months. *Graham* v. *Riddell*, 13 O. W. R. 518.

Ejectment — Boundaries — Survey — Encroachment — Damages — Possession — Form of judgment — Variation — Scale of costs—Appeal as to. *Gilmore* v. *Luckhurst*, 3 O. W. R. 383, 676.

Entry on land by servant of municipality — *Construction of road diversion —Unauthorised entry — Damages, general and special — Responsibility of municipality for act of servant—Scope of authority.*] —The defendant M., acting or road-boss under instructions from the reeve and one of the councilmen of the defendant municipality, entered upon the plaintiff's land for the purpose of making a road diversion around a slough on the road allowance. The plaintiff forbade the construction of the road diversion on his land, but M. proceeded to make it. The preliminary steps necessary to give the municipality the right to enter and appropriate the plaintiff's land had not been taken:—*Held*, that the defendants were guilty of trespass and liable for the damage resulting therefrom.—*Held*, that the plaintiff was entitled to general damages for the trespass and deprivation of the use of the portion of his land taken, assessed at $75; but not to damages for having 9 acres separated from the rest of his farm by the road diversion—whatever loss he sustained in this connection was a matter for consideration in awarding compensation in the expropriation proceedings since taken. — *Held*, also, that the plaintiff was entitled to special damages, assessed at $99, for the loss of flax and wheat destroyed by water backed on the land by reason of the construction of the road diversion without proper culverts.—*Held*, also, that the defendant M. was the servant of the defendant municipality, and in constructing the road diversion was acting within the apparent scope of his authority, and, therefore, the municipality were liable for his acts. *Citizens Life Assurance Co.* v. *Brown*, [1904] A. C. 423, followed. *Foley* v. *Municipality of South Qu'Appelle* (1910), 15 W. L. R. 264.

Equitable title — *Adverse possession.*] —Action for trespass for cutting timber:— *Held*, that although plaintiff had not acquired a deed, he was entitled to same and was the equitable owner of the lot. There was no actual or constructive possession by the defendant such as would bar the plaintiff's claim. Appeal dismissed. Judgment for plaintiff confirmed. *Grue* v. *Davidson*, 6 E. L. R. 409; 43 N. S. R. 242.

Escheat proceedings under R. S. (1900), c. 175 — *Effect as regards title and possession.*] — Where proceedings are taken under the provisions of R. S. 1900, s. 175, of escheating lands forfeited to the Crown, the fact that a small portion of the land, the subject of the escheat proceedings, has been trespassed upon by a person not having his place of abode on the land sought to be escheated, does not entitle such person to personal service. All that is required in such case is that the notice referred to in the Act shall have been duly posted, and where this has been done and the person trespassing has failed to intervene within the period of three years, as provided by s. 16 of the Act, he is estopped from afterwards attacking the proceedings in escheat, by which the lands are revested in the Crown, not only the title to the land but the possession; and continuance in possession by a person trespassing upon a portion of the land can have no effect as against the validity of a subsequent grant, and is not within the mischief aimed at by Statute of Maintenance, 32 Henry VIII., c. 9, and will not affect subsequent grantees without some new entry or acts amounting to *dissesin* as against subsequent owners. Where plaintiff claiming under a conveyance to her of the land the subject of the escheat proceedings, by virtue of such proceedings, entered into possession and exercised acts of ownership over the whole, and asserted title to the whole, to the knowledge of defendant:—*Held*, that the effect of such entry was to give her *seisin* of the whole, notwithstanding the continuance of the acts of trespass. A party holding possession without title of a portion of land must establish a strong case to make out *disseisin*, as against a party occupying the remainder of the whole. *McFetridge* v. *McCabe*, 43 N. S. R. 293.

Evidence of possession.]—The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass. Judgment in 1 E. L. R. 524 reversed. *Temiscouata Rw. Co.* v. *Clair*, 38 S. C. R. 230.

Fire — *Origin of — Action for damages— Counterclaim.*]—Plaintiff brought action to recover damages for entering on plaintiff's land, cutting trees and brush thereon, and setting fire to same, whereby plaintiff's property was injured:—*Held*, that plaintiff had proved his case as to the origin of the fire, and was entitled to recover. Judgment for plaintiff for $500 and costs. Counterclaim dismissed with costs. *Johnston* v. *McKibbon* (1910), 16 O. W. R. 902, 1 O. W. N. 1146.

Forcible entry of premises by public officer — *Gambling house — By-law — Justification — Absence of warrants—Criminal Code, s. 575 — Gambling instruments destroyed by justice's order.*]—While plaintiff was absent from his store and boarding-house, left in charge of an employee, the defendant, a police officer, broke in and arrested the assistant and took him to gaol. The defendant's assistants then returned, broke open a door in plaintiff's shop, removed certain goods, and tried to take money from the till, but could not, then returned to the police

station, leaving the door open, when some one entered and robbed the till:—*Held*, on appeal, that plaintiff entitled to damages for money stolen and goods removed. The character of the house will not affect the damages. Judgment in 7 W. L. R. 637, 1 Sask. L. R. 81, reversed. *Win Gat* v. *Johnson*, 1 Sask. L. R. 476, 9 W. L. R. 293.

Highway — *Gate — Fences — Title—Easement — Adverse possession — User.*]— The first action is one for destroying a gate and trespassing on plaintiff's land. Nominal damages given, as it was rough pasture land, and defendant's cattle had only occasionally strayed thereon. The second action was for breaking and entering and committing trespass on plaintiff's land:—*Held*, that as defendant was equitable owner action must be dismissed. *Reynolds* v. *Laffin*, 7 E. L. R. 100.

Hire of chattel — *Contract — Provision for removal on default—Entry by owner on lessee's premises — Damages.*]—An agreement, that the lessor of a movable article may at any time, in case of violation by the lessee of the condition of the lease, enter upon the latter's premises and remove the article leased, is contrary to public order, and therefore void. Therefore, a person who, assuming to act under such agreement, trespasses upon the dwelling house of another, is responsible in damages. *Cardinal* v. *Fiset*, 29 Que. S. C. 424.

Hunting with guns — *Conviction — 7 Edw. VII. O., c. 49, s. 55 — Conviction quashed.*]—Defendant was convicted for unlawfully trespassing "with guns and sporting implements" in pursuit of game upon lands of one Colton, under 7 Edw. VII. O., c. 49, s. 25. The conviction did not mention any date of the commission of alleged offence. The prosecutor's land was not, in fact, enclosed by fences. The sign boards were not shewn to be such as the statute required to establish notice. The defendant was in a boat upon navigable water and did not, in fact, go upon any land unless it can be said that being upon the water he was over submerged land and so upon the land. Upon these facts the conviction was quashed. *Rex* v. *Russell Lansing* (1909), 14 O. W. R. 1007, 1 O. W. N. 186.

Injunction — *Expropriation — Statute —Acquiescence — Compensation.*]—Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injuncton should be withheld in order to enable the necessary proceedings to be taken and compensation made. *Goodson* v. *Richardson*, L. R. 9 Ch. 221, and *Cowper* v. *Laidler*, [1903] 2 Ch. 337, applied. But where there has been acquiescence equivalent to a fraud upon the defendant, the injunction ought not to be granted, even where the legal right of the plaintiff has been proved. *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414, *Wilmot* v. *Barber*, 15 Ch. D. 96, *Johnson* v. *Wyatt*, 2 DeG. J. & S. 17, and *Smith* v. *Smith*, L. R. 20 Eq. 500, referred to. By the defendants' charter, 59 V. c. 62, ss. 9, 25 (B.C.), it was provided that the powers to enter, survey, ascertain, set out, and take, hold, appropriate, and acquire lands, should be subject to the making of compensation, and that the powers, other than the powers "to enter, survey, set out, and ascertain," should not be exercised or proceeded with until approval of the plans and sites by the Lieutenant-Governor in council. The defendants entered upon lands of the plaintiffs, made surveys, and constructed works thereon, without making compensation or obtaining such approval. Some time after entry the defendants obtained the necessary order in council approving of the plans and sites of the land to be expropriated:—*Held*, that making of compensation was not a condition precedent to making the survey and taking possession of the land, and, as the order in council was not dealt with at the trial, the rights of the parties could not properly be determined on the material presented; the injunction should, therefore, be refused, and the parties left to take proceedings as they should respectively see fit. Judgment in *Byron N. White Co.* v. *Sandon Waterworks & Light Co.*, 10 B. C. R. 361, varied. *Sandon Waterworks & Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

Injury — *Trespass — Pleading—Negligence — Scienter.*]—In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration was held bad, on demurrer, for not alleging negligence or knowledge of vice. *Elliott* v. *Doak*, 36 N. B. R. 328.

Injury to building — *Damages — Injunction.*]—Action for damages for injury to plaintiff's house by raising an adjoining building. It appearing that the injury was caused by joint action of defendant's contractor and plaintiff's excavation under his own building, action was dismissed. *Ayerhart* v. *Weinstein*, 13 O. W. R. 377.

Injury to fence.] — Plaintiff owned some vacant land next to defendant company's apartment house. Portions of this house projected and some windows looked over plaintiff's land, yet the defendants did not seem desirous of purchasing it. The plaintiff then erected a board fence sufficiently high to shut out the view from the windows, and in order to limit the borrowed light as far as possible, he covered the side of the fence next the apartment with tar paper. Some one not appreciating either the artistic effect or the altruistic motives of the plaintiff, proceeded to batter down the fence. In an action for damages plaintiff recovered $1 and costs. *McKeague* v. *Great West* (1909), 12 W. L. R. 355.

Injury to land — *Damages.*]—Defendant went on plaintiff's field to cut hay without latter's permission. The field was laid out in lots. Defendant removed a number of survey posts, necessitating a re-survey:—*Held*, that defendant liable in damages. *Oliphant* v. *Fisher* (1909), 12 W. L. R. 636.

Line fence — Occupation not in accord with paper title. *Martin* v. *Martin*, 2 E. L. R. 70.

Maintenance of action for — *Year's possession—Agreement to purchase.*] — The

appellant being a mortgage creditor of one L. for about $475, the latter proposed by letter to sell him the land for $425. In answer the appellant offered $400, which L. accepted, on condition that the appellant, before taking possession, should satisfy himself that the respondent would not take the land at this price. The appellant communicated the offer to the respondent, and, upon the refusal of the latter to buy, took possession of the land. No money was paid:—*Held*, that, under the circumstances, the consensus having made the sale complete, the appellant could join his possession to that of L. to make up his year's possession, if that were necessary in trespass as well as ejectment (and *quære* as to this), the action being against the respondent, who had disturbed the appellant's possession. *Beauchemin* v. *Latraverse*, 9 Que. Q. B. 56.

Mining claim — *Contradictory evidence —Wilful trespass — Rule in assessing damages — Practice — Adding party—Reversal on appeal.*]—In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial Judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the Court to assess the damages. The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court *en banc* reversed the trial Judge in his findings of fact upon the evidence: — *Held*, reversing the judgment appealed from, that the trial Judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error. *Semble*, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff:—*Held*, *per* Taschereau, C.J.C., dissenting, that, although not convinced that there was error in the judgment of the trial Judge which the Court *en banc* reversed, while at the same time it did not appear that there was error in the judgment *en banc*, yet the latter judgment should stand, as the Court *en banc* should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong. *Kirkpatrick* v. *McNamee*, 25 C. L. T. 125, 36 S. C. R. 152.

Motion to set aside verdict and for entry of nonsuit — *New trial — Leave to move for non-suit not reserved at trial — Construction of agreement — Whether it amounted to a grant of the land or merely a right of way.*]—Action for trespass to land. At trial verdict for plaintiff. Rule *nisi* for non-suit or new trial. Former cannot be granted as leave not asked at trial. As a construction of the document shews that all plaintiff's predecessor in title obtained was a right of way, no trespass maintainable. New trial ordered. Plaintiff to amend by pleading a right of way if so advised. *McKinnon* v. *Clark*, 7 E. L. R. 211.

Not personal action — *Costs.*]—Actions for damages for trespass to lands are not personal actions, and Division Courts in Ontario have no jurisdiction to try them. Costs of such an action allowed on County Court scale. *Neely* v. *Parry Sound River Imp. Co.*, 8 O. L. R. 128, followed. *Bishop* v. *Mullen* (1910), 16 O. W. R. 863.

Occupancy — Payment into Court — Costs. *Forbes* v. *Dixon*, 1 E. L. R. 498.

Occupation of premises under agreement to purchase — Breach of contract —Possession—An action claiming damages for trespass and for assault. *Shand* v. *Power* (1911), 9 E. L. R. 342, N. S. R. .

Possession of land for a year—*Nature of — Prescriptive right — Possession solo animo—Joint possession—Right of action.*] —The possession for a year which affords a ground, in favour of the person disturbed in his possession, for the remedy by action of trespass, is a useful, continuous, and public possession, not equivocal, and in the capacity of owner, by means of which a prescriptive right is acquired. An acquired possession cannot be preserved *solo animo* as against a rival right openly manifested; and even material acts well marked do not shew, in such conditions, anything more than a joint or promiscuous possession. In neither case can there be a right of action. *Raymond* v. *Conway*, 32 Que. S. C. 310.

Possession of plaintiff — Writ of possession against previous occupant. *Whitford* v. *Armstrong*, 2 E. L. R. 54.

Possessory action — *Disturbed possession — Prescription — Title — Intervention.*]—The plaintiff, by possessory action, complained of being troubled in his possession, by the defendants, of the rear portion of lots 2195 and 2196 of the cadastral plan of Three Rivers, extending from "*la cime de la côte*" to the river St. Lawrence. The defendants pleaded ownership and possession under arrangements with the Crown. The Canada Iron Furnace Company intervened, claiming ownership of the entire lot No. 2196 under a deed of sale of the 30th October, 1890, accompanied by constant possession for over ten years. The plaintiff contested the intervention, alleging that the intervenants could only claim the extent of ground conveyed to their auteur, by sheriff's sale of the 15th February, 1862, and which extended only to the "*cime de la côte*," none of which is claimed by the action, the portion so claimed starting from the "*cime de la côte*" and going to the river. The intervenants' title expressly covered all the land to the river, which is given both by the title and by the cadastral plan as the boundary thereof. The intervenants were never troubled in their possession judicially, the only disturbance being a notarial protest by the plaintiff, more than a year and a day prior to the institution of this action, notifying the intervenants that he claimed the land now claimed by his action, and requiring them to join in making a line fence along the "*cime de la côte*." This protest was not followed by any attempt to obtain possession of the land from the intervenants:—*Held*, that there was no trouble *de droit* of the intervenants' possession within

ten years. 2. A notarial protest is not a trouble *de droit* of possession of land, and does not interrupt prescription. 3. The intervenants' title and constant possession gave them ownership of the land, notwithstanding the title of conveyance to their auteur. 4. The intervenants had a sufficient interest to intervene, having shewn a possession which was troubled by the plaintiff's action. 5. Possession which affects a whole lot of land renders it unnecessary to prove particular acts of possession, within a year and a day, of any special part of the lot. *Dupré* v. *Harbour Commissioners of Three Rivers*, 23 Que. S. C. 439.

Possessory action — *Public authority — Colonisation roads — Land taken for — Liability of agents of the Crown — Expropriation — Formalities — Value of land —Indemnity.*]—1. A possessory action may be brought against those who shelter themselves behind the orders of public authority, *e.g.*, contractors and superintendents of works, authorised by the Minister of Colonisation to open a colonisation road by virtue of s. 1715 *et seq.*, R. S. Q.—2. The provisions of s. 1718, R. S. Q., that "the lands on which colonisation roads are laid out and constructed become the property of the Crown, and when these works are situated in a county, no indemnity is due for the land taken," is subject to Art. 407, C. C., and does not exempt the Minister of Colonisation and his representatives from making the expropriation in the forms prescribed by law. The owner should not be deprived, unless by an express and formal contract, of the guaranty against illegalities which the formalities of expropriation afford, and the indemnity to which he has a right may extend to things other than the value of the land. *Gagnon* v. *Marquis*, 35 Que. R. S. C. 406.

Prescription — *Lost grant.*] — Where the defendant had been using a way by permission and paying compensation during the twenty year prescription it cannot have been used as of right. The doctrine of lost grant applied only where the enjoyment cannot be otherwise accounted for. Where a previous action regarding the same right of way had been compromised out of Court between the parties themselves there is no estoppel, and not being in writing did not create an easement. *Smith* v. *McGillivray*, 5 E. L. R. 561.

Quare clausum fregit — *Effect of deed from Commissioner of Public Lands — Occupier.*]—Plaintiff held an agreement for a lease from the original proprietor who subsequently sold to the government under Land Purchase Act. After sale to the government plaintiff agreed to purchase and paid deposit but obtained no deed. Defendant subsequently applied to Commissioner of Public Lands to purchase locus and obtained a deed and entered and cut wood on the land. Plaintiff brought action of trespass and obtained verdict:—*Held*, (Peters, J.) that defendant's deed was void and verdict was right. *McMicken* v. *McCarthy* (1881), 2 P. E. I. R. 389.

Quare clausum fregit — *Parol demise by corporation void.*]—This was an action of trespass. The plaintiffs had demised by parol for one year, the land to F. and put him in possession. Shortly afterwards defendants entered, turned him out and retained possession. On the trial it was contended that F. being tenant in possession the action should have been brought in his name and not in that of the plaintiffs, and the plaintiffs were non-suited. In support of a rule to set this non-suit aside it was contended that the corporation could only demise under seal and the parol demise to F. was therefore void and the corporation properly made plaintiffs:—*Held*, Peters, J., that the demise was void and the non-suit must be set aside. *St. Andrew's College* v. *Griffin* (1852), 1 P. E. I. R. 80.

Real Property Limitation Act—*Limitation of actions — Adverse possession — Isolated acts of ownership — Service of trespass.*]—Action for trespass and to recover possession of some uncleared land. The legal estate has always been in plaintiff. The fence he put up to separate this from the rest of his farm was for convenience and is not a boundary fence. The occasional and intermittent acts of defendants were really a series of trespasses, for plaintiff was not excluded, and also used the property in dispute. The plaintiff must succeed. To constitute adverse possession, it must be adequate in continuity, in publicity and extent, and is displaced by evidence of partial possession by owner of legal estate. *Shunk* v. *Downey*, 13 O. W. R. 398.

Removal of buildings — Action to recover value — Title to land—Proof of — Ownership of buildings—Annexation to freehold—Equitable interest—Repairs. *Mills* v. *Bryce*, 7 W. L. R. 738.

Removal of coal — Measure of damages. *Bartlett* v. *Nova Scotia Steel Co.*, 1 E. L. R. 226.

Removing fences—Crown lands—Title of occupant as against wrong-doers — Evidence. *Carr* v. *Ferguson* (N.S. 1910), 9 E. L. R. 218.

Rescission of agreement for sale of land — *Plaintiff not in possession—Amendment of pleadings.*]—An action for trespass cannot be maintained unless the plaintiff has been in actual possession of the land. An application to amend the pleadings by adding a claim for recovery of possession of the land was refused, on the ground that to do so would give the plaintiff an entirely new action. *Leadley* v. *Gaetz*, 6 Terr L. R. 98.

Right of reversioner to maintain—*Injury to possession—Action in case.*] — A tenant for years, not in possession, cannot maintain trespass against a defendant who enters upon the land without objection on the part of those actually in possession; nor can he recover in case, unless there is evidence of an act necessarily injurious to the reversion or in denial of his right. Where the declaration is in trespass, and the plaintiff on the trial relies upon and directs all his evidence to proving injury to his possession, the attention of the trial Judge not being in any way called to the fact that he

was proceeding for injury to the reversion, he cannot afterwards, upon a motion to set aside a non-suit and enter a verdict for himself, claim the right under 60 V. c. 24, s. 95, to have a verdict entered for him in case as if he had declared for and proved damages to his reversionary interest. *McDougall* v. *Campbellton Water Supply Co.*, 31 N. B. R. 467.

Searching for liquor without warrant — *Private dwelling house — Liquor License Act — County constable — Notice of action — Bona fide conduct — Leave and license — Jury.*]—The defendant, a county constable appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority. In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and, there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a nonsuit:—*Held*, on appeal, that the question as to whether the defendant was acting *bona fide* in the discharge of his duty as a constable, in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury; and that leave and license which was argued on the appeal but not pleaded on the record, should also, if pleaded, be submitted to the jury; and the judgment dismissing the action was set aside and a new trial ordered, with liberty to the defendant to amend by adding a plea of leave and license. *Bell* v. *Lott*, 25 C. L. T. 34, 9 O. L. R. 114, 4 O. W. R. 430.

Searching private dwelling house without warrant — Liquor License Act — House of public entertainment — Honest belief — Leave and license — Questions for jury — Pleading. *Bell* v. *Lott*, 4 O. W. R. 430.

Timber — Conversion — Assignment of claim for wrongful act — Dispute of title —License — Estoppel — Admissions—Husband and wife. *McDermott* v. *Travers*, 5 O. W. R. 313.

Timber — Conversion — Joinder of defendants and causes of action — Purchasers from trespassers. *Rogers* v. *Frechette*, (B. C.), 1 W. L. R. 190.

Title — Adverse possession — Evidence. *Bochner* v. *Hirtle* (N.S. 1910), 9 E. L. R. 258.

Title — Joint occupancy — Deed by one occupant with other's concurrence. *Jennings* v. *Chandler*, 2 E. L. R. 57.

Title — Pleadings — Jurisdiction of County Court — Damages — Boundary — Declaration — Claim of tenant — Amendment — Costs. *Miller* v. *Smith*, 6 O. W. R. 784.

Title by possession — Vague and indefinite evidence. *Young* v. *Greenough*, 1 E. L. R. 174.

Usufructuary of undivided half.]—The unsufructuary of an undivided half of an immovable has a right of action in trespass. *Martin* v. *Campbell*, 23 Que. S. C. 522.

Water percolating into lands, buildings and cellar — *Damage to building by vibration caused by cars on railway siding —No damage proved.*] — Plaintiff brought action to recover $2,000 damages, for water alleged to have percolated from a ditch along defendants' railway siding to their planing mill, into the lands, buildings and cellar of plaintiff, and for $1,700 damages to her building by vibration caused by cars on said siding.—Britton, J., *held*, that no damage by water or vibration was proved and no negligence was shewn against defendants; that defendants were not trespassers, and dismissed the action with costs. *Gattie* v. *Eaton & Son* (1910), 17 O. W. R. 203, 2 O. W. N. 167.

Woodland—*Title — Constructive possession under color of—Sufficiency of acts—Pretended sale to avoid liability.*]—In an action for trespass to woodland by cutting, it appeared that both plaintiff and defendant claimed under deeds of the locus from the same original grantor, but that plaintiff's title was prior in point of time.—Defendant detailed isolated acts of cutting in various years, many of them matters of small moment, which may have been unknown to the real owner, and also gave evidence to shew that he had at times turned his cattle out to roam and feed in the woods:—*Held*, that the acts shewn were insufficient to establish such actual or constructive possession as to bar plaintiff's claim.—*Bentley* v. *Peppard*, 33 S. C. R. at p. 446, and *Wood* v. *LeBlanc*, 34 S. C. C. 627, as to constructive possession under colour of title followed.—*Held*, also, that defendant could not escape liability for the cutting by an alleged sale of the land to a third person, it appearing that such sale was not a *bona fide* transaction, but a scheme to avoid liability, and that the real transaction was an authority from defendant to do the cutting. *Grue* v. *Davidson*, 43 N. S. R. 242, 6 E. L. R. 409.

Wrongful and wilful — *Damages — Mode of assessment.*]—Where in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or *bona fide*. *Union Bank of Canada* v. *Rideau Lumber Co.*, 22 C. L. T. 114, 3 O. L. R. 269.

TRESPASS TO PERSON.

Arrest and search — *Reasonable and probable cause—Post office — Decoy letter.*] —The appellant, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters, for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of them bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter should have been returned by the

carrier to the post office. There being no entry of this letter in the post office book, after the usual time for making such entry had elapsed, the appellant was detained and searched by the respondent, a detective, acting under the instructions of the post office department. The letter not being found on the appellant, he was released. On the following day the letter was returned to the post office:—*Held*, (affirming the *dispositif* of the judgment in 20 Que. S. C. 549, with a modification of the considérants) that the appellant having violated the rules of the post office department, by failing to enter the letter bearing a non-existent address in the book provided for that purpose, there was reasonable and probable cause for detaining and searching him, and that his action for damages against the respondent, in the absence of evidence that the respondent had made an improper and illegal use of his authority in the manner in which he effected such detention and search, and subsequent release, could not be maintained. 2. A letter is a post letter although directed to a fictitious or non-existent address. *Mayer* v. *Vaughan*, 11 Que. K. B. 340.

Assault — Personal injuries—Damages. *Harris* v. *Burt*, *King* v. *Burt*, 474, 2 O. W. R. 474, 3 O. W. R. 490.

Pleading — *Allegations as to character.*] —In an action for damages for trespass or aggravated assault, allegations concerning the respective characters of the plaintiff and defendant will be struck out of the record, upon inscription in law, as being useless and not pertinent to the issue. *Chénier* v. *Martin*, 25 Que. S. C. 324.

See ASSAULT—JUSTICE OF THE PEACE—PLEADING.

TRIAL.

1. CAUSE LIST, 4227.
2. COPY OF PLEADINGS FOR JUDGE, 4228.
3. EXCLUSION OF WITNESSES, 4228.
4. JUDGE—DEATH OF, 4228.
5. JURY TRIAL, 4228.
6. NEW TRIAL, 4262.
7. NOTICE OF TRIAL, 4272.
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9. SEPARATION OF ISSUES, 4277.
10. SETTING DOWN, 4278.
11. SPEEDY TRIAL, 4280.
12. MISCELLANEOUS CASES, 4281.

1. CAUSE LIST.

Case tried out of its turn in absence of party — *New trial.*]—See *Milligan* v. *Crocket*, 36 N. B. R. 351.

Priority — *Action for pension.*] — An action for an alimentary pension will not be given priority upon the list for trial. *Brodeur* v. *Morcau*, 6 Q. P. R. 437.

2. COPY OF PLEADINGS FOR JUDGE.

Dispensing with — *Setting down.*]— The copy of pleadings required by art. 295, C. P., is for the use of the Judge alone; and where the Judge of the district had informed the advocates and prothonotary of that district that he did not require this copy, an inscription made without was held valid. *Menier* v. *Whiting*, 18 Que. S. C. 113.

Necessity for.] — The record for the Judge fulfils the requirements of the law if it contains sufficient of the pleadings and proceedings for the information of the Judge, and it is not necessary to give him a copy of a reply or of a rejoinder which contains only a denial of the facts alleged. *County of Nicolet* v. *Toussignant*, 9 Que. Q. B. 356.

Setting down without.] — Notwithstanding Art. 295, C. P., which provides that no cause may be placed upon the list until a copy of the pleadings has been produced at the record office for the use of the Judge presiding at the trial, the inscription of a case upon the list without such production will not be set aside upon motion, such copy not being imperatively required by the enactment, and the Judge in like cases being able to exercise his discretion in the application of Art. 295. *Menier* v. *Divers*, 2 Que. P. R. 389.

3. EXCLUSION OF WITNESSES.

Evidence — *Parties to action.*] — The mere fact that a party intends to give evidence does not entitle the other party to call for his exclusion as in the case of an ordinary witness. If a party has been wrongfully excluded, it is not necessary for him to shew that he was substantially prejudiced thereby in order to get a new trial. *Quære*, in case of harmless exclusion. *Bird* v. *Vieth*, 7 Brit. Col. L. R. 31.

4. JUDGE—DEATH OF.

Reservation of judgment—*New trial.*] —The evidence was taken and the argument heard before Rose, J., who died without having given judgment:—*Held*, that the ordinary course would be to have the action set down for argument before a Divisional Court on the evidence already taken, but that there was no power to make such an order, either in Court or Chambers, except on consent. *Wellbanks* v. *Conger*, 12 P. R. 354, distinguished. The defendant not consenting, no order could be made, and the cause must go down to trial again. *Clarke* v. *Trask*, 21 C. L. T. 166, 1 O. L. R. 207.

5. JURY TRIAL.

Act of commerce — *Hire of machines —Action for breach of contract—Damages —Injunction.*]—The leasing of machines to a manufacturer for the purposes of his industry is an act of commerce, and the lessee

in an action against him by the lessor for damages for breach of the covenants in the lease has a right to a trial by jury, according to the terms of article 421 *et seq.*, C. P. C.—A claim for an injunction in addition to damages does not change the nature of the action, and is no obstacle to its being tried by a jury. *Brunet* v. *United Shoe Machinery Co.*, 15 Que. K. B. 295.

Action against municipal corporation — *Non-repair of street — Judicature Act, s. 104—Delay in moving—Costs.*]—Injuries caused by the negligent use of a steam roller belonging to a municipal corporation and operated by a contracting company on a street of the former, are not caused through non-repair of the street; and a motion by the defendants, under s. 104 of the Judicature Act, to strike out a jury notice in an action to recover damages for injuries so caused, was refused. Because of the long delay in moving the costs were made costs to the plaintiff in any event. *Kirk* v. *City of Toronto*, 24 C. L. T. 62, 7 O. L. R. 36, 2 O. W. R. 1138.

Action against municipal corporation — *Non-repair of street — Jury notice —Striking out.*]—By s. 104 of the Judicature Act, an action against a municipal corporation for an injury "sustained through non-repair" of a highway, is to be tried without a jury. It was alleged that an accident to the plaintiff was caused by the negligent construction of a certain pavement, which was built on an incline, and made with an exceedingly smooth granite finish, at all time dangerous to pedestrians, and when moist rendered even more dangerous than when dry through the faulty, improper, and negligent construction thereof. The Master in Chambers decided that, *secundum allegata*, the action was for non-repair, which he defined as meaning any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be non-repair, within the words of the statute, as interpreted by the costs. The jury notice was therefore struck out. *Armour* v. *Town of Peterborough*, 25 C. L. T. 283, 5 O. W. R. 630, 10 O. L. R. 306.

Action against municipal corporation — *Non-repair of streets — Obstruction.*]—An action for damages for injuries caused by runaway horses which were frightened by a steam roller, left standing on a highway, is an action based on an act of misfeasance by the defendants, and not on the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury. Order of the Master in Chambers, 2 O. W. R. 1115, reversed. *Clemens* v. *Town of Berlin*, 24 C. L. T. 92, 7 O. L. R. 33, 3 O. W. R. 73.

Action against municipal corporation — Non-repair of streets — Obstruction—Amendment. *Read* v. *City of Toronto*, 4 O. W. R. 310.

Action for damages—*Amount claimed —Interest.*]—An order for trial by jury will not be made in an action to recover $400 damages, even when there is an additional claim for interest upon the amount of damages sought to be recovered for such interest is altogether casual, and depends upon the judgment which may be granted or refused, and only runs from the date of the judgment. *D'Hellencourt* v. *La Patrie Publishing Co.*, 9 Que. P. R. 14.

Action for damages for closing streets — *Injury to business — Shutting off access to factory.*]—Damages caused to a manufacturer by the closing of streets bounding his factory and giving access to it, although his works and business are affected by it and it affords ground for a personal action, are not damages resulting from personal wrongs or torts or quasi-torts to personal property, within the meaning of Art. 421, C. P. C.; and therefore a person suing for such damages has no right to a trial by jury. *Montreal Brewing Co.* v. *City of Montreal*, 15 Que. K. B. 297.

Action for damages for illegal seizure — *Trespass—King's Bench Act, s. 59.*] —Under s. 59 of the King's Bench Act, a party complaining of an illegal seizure of his goods has a right to have his action tried by a jury unless he expressly waives such right.—That the act complained of might have been properly characterised as a trespass will not affect the right to a trial by jury, for every illegal seizure is a trespass, although there may be a trespass without a seizure. *Bartlett* v. *House Furnishing Co.*, 4 W. L. R. 567, 16 Man. L. R. 350.

Action for damages for negligence —*King's Bench Act, R. S. M. 1902, c. 40, s. 59—Discretion.*] — The plaintiff's claim was for damages for the loss of an arm in consequence of being run over by a car of the defendants, which he alleged was going at excessive speed, without a fender, and without the gong being rung to warn him. On his application, under s. 59 of the King's Bench Act, R. S. M. 1902, c. 40, a Judge ordered that the action should be tried by a jury, on the grounds that the principal issues to be tried were issues of fact, and that a jury would be more likely to assess the proper damages in case of a verdict for the plaintiff than a Judge:—*Held*, that the judicial discretion exercised by the Judge in this case should not be interfered with. *Morrison* v. *Robinson*, 8 Man. L. R. 218, *Case* v. *Laird*, 8 Man. L. R. 461. *Harvie* v. *Snowden*, 9 Man. L. R. 313, *Woolacott* v. *Winnipeg Electric Street Ry. Co.*, 10 Man. L. R. 482, and *Bergman* v. *Smith*, 11 Man. L. R. 364, discussed and distinguished. *Griffiths* v. *Winnipeg Electric Ry. Co.*, 5 W. L. R. 149, 371, 16 Man. L. R. 512.

Action for damages for personal injuries — *Non-repair of highway.*]—A plaintiff who complains that he injured himself by falling on a defective sidewalk, that he was beaten by a drunken man while placed in a patrol waggon, and that he was unable to attend to business, can ask for a jury trial, all these causes of action being triable by jury. *Larrasey* v. *City of Montreal*, 8 Que. P. R. 429.

Action for damages for wrongful and illegal seizure of goods — Trespass

—King's Bench Act, s. 59. *Bartlett* v. *House Furnishing Co.* (Man.), 4 W. L. R. 567.

Action for deceit — Claim for rescission of term of contract—Abandonment by plaintiff — Amendment—Plaintiff's jury notice allowed to stand. *McCloy* v. *Holliday*, 13 O. W. R. 928.

Agreement of a commercial nature —*Agreement for removal of snow between a city municipality and a tramcar company in a contract pursuant to a by-law.*] — A covenant or agreement in a contract between a city municipality and a tramcar company, pursuant to a by-law granting the privilege to operate tramcars on certain conditions, that the company shall pay the city one-half the cost of the removal of snow from the entire street surface, in the streets where tramcars pass, is not an agreement of a commercial nature, within the meaning of Art. 421 C. P. Hence, a trial by jury cannot be had in an action brought under the agreement by the city against the company, to recover the cost of removal of snow. *Montreal Railway Co. & Montreal* (1909), 19 Que. K. B. 216.

Answer by majority to question submitted — *Failure to take objection at time—Recording verdict as unanimous.*] — In an action for damages for placing a car laden with lumber on the plaintiffs' track, whereby a collision occurred and the plaintiffs suffered injury, questions were submitted to the jury, who, without having remained out for four hours, returned the answer of a majority to certain of the questions. The prothonotary read over the answers to the jury, without making reference to whether the answers were unanimous or not, and asked the question, "as you say one so say you all," and, no one objecting, the verdict was entered accordingly: — *Held*, that this had the effect of making the verdict a unanimous one.—*Per* Longley, J., that if counsel for the defendants wished to object to the validity of the finding, he should have done so on the spot, when the jury could have been sent back, and having been silent and allowed the verdict to be recorded, he could not afterwards raise the objection. *Midland Rw. Co.* v. *McDougall*, 30 N. S. R. 280.

Answer to questions. *Balfour* v. *Toronto Rw. Co.*, 5 O. L. R. 735, 2 O. W. R. 671.

Answers to questions — Inconsistent findings—Mistrial. *Nettleton* v. *Town of Prescott*, 10 O. W. R. 944.

Application for — *Action for money lent—Joinder of claim — Exception.*] — A claim arising from a loan of money by an advocate to a broker is not a debt of a commercial nature, and consequently is not susceptible, under Art. 421, C. C. P., of trial by jury. And where such claim is joined to a demand of a commercial nature the defendant is entitled, under Art. 177, C. C. P., to stay the suit by dilatory exception. *Gilman* v. *Fenwick*, 20 Que. S. C. 513.

Application for — *Change of venue — Time for — Amendment.*]—An application for change of venue and trial by jury after an order made giving leave to amend defence, but before delivery thereof, is premature. *Bank of British Columbia* v. *Oppenheimer*, 7 B. C. R. 446.

Application for — *Delay in proceeding —Bar.*]—A party who has applied for a trial by jury is deprived of the right of proceeding by the expiration of the delay of 30 days from issue joined, if the application has been made by pleading, or from the judgment granting a special application for a trial by jury, if there has been such an application. *Copland* v. *Canadian Pacific Rw. Co.*, 4 Que. P. R. 163.

Application for — *Equitable relief — Questions of fact.*] — Action by a former shareholder in a company against T. and the company, the latter being joined as defendant because T. and his brother and partner had a controlling interest in the company, and the consent of the company to be joined as plaintiff could not be obtained. It was alleged that T. while a director of the company had discovered a valuable bed of gold in areas as to which the company held an option to purchase; that the discovery was concealed; and that T. procured a conveyance of the property to himself, and also purchased the shares of the other shareholders, including those of the plaintiff, without disclosing the discovery. These facts were put in issue by T. The relief sought to be obtained was, among other things, a declaration that T. held the areas as trustee for the company, and that the company was entitled to a transfer thereof; also, that the transfer of the shares by the plaintiff to T. should be set aside. The defendant applied for an order to have the issues tried by a jury: O. 342:—*Held*, that the admitted relation of T. with these properties and to his co-owners and co-partners in the transaction was such as to entitle all others interested in the property to the fullest explanation of the dealings of T. with the officers of the company, and the circumstances under which he and his partner became proprietors of the mine. The inquiry could be more effectively made in a trial before a Judge, as in other equitable proceedings, than before a jury. The application was dismissed. *Rood* v. *Thompson*, 22 C. L. T. 36.

Application for — *Fraud — Time.*]— There cannot be a trial by jury except in the cases enumerated in Art. 421. C. P. 2. An action for damages, founded upon fraud and false representations, does not come within any of the classes of actions mentioned in that article. 3. After a motion is made to settle the facts, it is not too late to plead that the action is not one proper to be tried by a jury. *Bell* v. *Royal Bank of Canada*, 4 Q. P. R. 309, 31 Que. S. C. 321.

Application for — *Time.*]—A special application to a Judge for leave to exercise the option of having a case tried by a jury, when that option has not been exercised by the declaration or the defence, must be presented to the Judge within the three days which Art. 423 fixes for this purpose, and it will not suffice to give to the opposite party notice of this application within this time,

even when one of three days is a non-juridical day. *Canadian Pacific Rw. Co.* v. *Foster*, 12 Que. K. B. 139.

Application for — *Time.*]—An application for a trial by jury will be received if it is made within three days after issue joined, although the notice thereof was not given a clear day before the return of the motion. *Richer* v. *Shawinigan Water and Power Co.*, 7 Que. P. R. 71.

Application for — *Time — Justice's Court — Adjournment — Continuation of trial before another justice — Security for costs.*]—An application for a jury under C. S. c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late. A bond for security for costs under 49 V. c. 53, approved of by a justice who has been called upon to continue a trial commenced before the justice who issued the first process, and who was unable by reason of illness to conclude the trial, is sufficient. *Temperance and General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. R. 558.

Application for — *Time — Non-juridical day.*] — Where the third and fourth days following that upon which issue is joined are non-juridical days, a motion for leave to elect to have a case tried by a jury may be presented on the following juridical day. *Morlock* v. *Webster*, 5 Que. P. R. 484.

Application for — *Time — Pleading.*] —A plaintiff who is in default for a reply to a plea, may obtain leave to file his reply, but such filing will not have the effect of extending the time to elect for trial by jury, the time therefor having expired on the fourth day after issue joined. *Deniger* v. *Grand Trunk Rw. Co.*, 5 Que. P. R. 136.

Application for — *Trespass.*] — To make a case for an order for trial of an action by a jury, all the causes of action must be susceptible of being tried in this exceptional way. 2. An action in which damages are claimed against the defendants for having executed an illegal *mandat de perquisition* and having entered without warrant the domicil of the plaintiff and having threatened her with criminal prosecution, may be tried before a jury; but if the plaintiff claims, besides, damages on account of being deprived of the use of certain personal property, that cause of action takes away the right to trial by jury. *Roy* v. *Dickson*, 4 Que. P. R. 357.

Application for trial by jury—*Action for negligence causing personal injuries — Grounds for directing jury trial—Decision of referee — Discretion — Appeal to Judge in Chambers—Apeal to Court of Appeal—Rule 682 (a)—Practice.*]—Rule 682 provides for an order or decision of the Referee in Chambers to a Judge, and clause (*a*) says that such appeal may be made notwithstanding that the Referee exercised his discretion in making the order or giving the decision. The Referee in Chambers dismissed an application by the plaintiff for an order directing that the action be tried by a jury. The plaintiff appealed from the Referee's decision, and a Judge in Chambers dismissed the appeal, on the ground that the discretion exercised by the Referee should not be interfered with. The plaintiff appealed to the Court of Appeal from the order of the Judge in Chambers:—*Held*, that the Court of Appeal was in the same position as the Judge in Chambers, and was at liberty to review the discretion exercised by the Referee, and decide whether the action should or should not be tried by a jury. The 4 members of the Court were divided in opinion as to whether the case was or was not a proper one for trial by jury. The action was to recover damages for personal injuries sustained by the plaintiff by falling on a slippery floor in the defendants' store, where she was employed as a clerk owing to the negligence of the defendants, as she alleged:—*Held*, *per* Howell, C.J.A., that it was a doubtful point whether or not the case came within the Workmen's Compensation for Injuries Act (though it had been ruled by a Judge, whose decision was not appealed from, that it did not); if it did come within the Act, the case must be tried by a jury; if it did not, there was a discretion to order a jury. It must appear that there would be conflicting testimony, and that the question of assessing the damages would be a complicated one. The facts raised an issue akin to those which the legislature had declared should be tried by a jury, thereby establishing a policy as to the trial by a jury.—*Per* Richards, J.A., that a Judge could deal with the testimony and the damages as well as a jury, and in this particular case no sufficient reason was shewn for having a jury trial. *Per* Perdue, J.A., that, while an appeal may be made to a Judge from a discretionary order made by the Referee, on the hearing of such an appeal the Judge should follow the same rule that is observed by the Court when dealing with an appeal from an order made by a Judge in regard to a matter within his discretion, viz., not to interfere unless the order appealed from is clearly wrong; and, as no attempt had been made to shew that the Referee had acted upon a wrong principle, or upon a wrong ground, in refusing the order, and no special reason had been shewn by the plaintiff why the case should be tried by a jury, the Referee's decision should not be interfered with. —*Per* Cameron, J.A., agreeing with Howell, C.J.A., that the case was one properly triable by a jury. *Hewitt* v. *Hudson's Bay Co.* (1911), 17 W. L. R. 61, Man. L. R.

Challenge to array — *Disqualification —Interest of sheriff—Ratepayer—Notice — Venire.*]—It is no ground for a challenge to the array that the jury was summoned by a coroner who was the deputy sheriff of the county who was disqualified by reason of being a ratepayer in the town the corporation whereof were the defendants in the action, or that the coroner summoned the jury under a notice by the clerk of the circuits, pursuant to s. 18 of c. 126, C. S. N. B. 1903, and no *venire* was issued. *Milmore* v. *Town of Woodstock*, 3 E. L. R. 204, 38 N. B. R. 133.

Claim and counterclaim.]—Where the claim is such that it cannot by reason of R. 170 of the Judicature Ordinance (C. O. 1898 c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have

been entitled to have tried by a jury:—*Held*, that if the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed. *Friel* v. *Stinton*, 5 Terr. L. R. 252.

Composition of — *Jury de medietate linguæ.*] — A jury composed exclusively of persons speaking the French or English language can only be had upon the application of either party and if the opposite party does not object; otherwise it will be refused, even if both parties speak the same language and are of the same origin. *Martin* v. *Frères de la Charité de St. Vincent de Paul*, 9 Que. P. R. 381.

Composition of — *Jury de medietate linguæ.*]—Where the parties to an action are of the same race and speak the same language, a Judge will grant the request of one of them that the jury shall be exclusively composed of persons speaking the same language, whether French or English.—*Semble*, that a procedure statute (in this case a statute modifying the right to trial by jury) is applicable to causes pending at the time assent is given to it. Judgment in *Martin* v. *Frères de la Charité de St. Vincent de Paul*, 9 Que. P. R. 381, reversed. *Frères de la Charité de St. Vincent de Paul* v. *Martin*, 10 Que. P. R. 194.

Consent of parties to filing of the plea long after the usual delay has the result of prolonging for 30 days from the date it was filed the delay within which the defendant could proceed upon his option for a jury trial. *St. Paul Electric Light & Power Co.* v. *Quesnel* (1910), 12 Que. P. R. 158, 17 R. L. n.s. 122.

De medietate linguae.]—If one of the parties is a corporation and objects to a jury of the same language, the Court must order a jury *de medietate linguæ*. *Beaulieu* v. *Montreal St. Rw. Co.* (1911), 12 Que. P. R. 263.

Default of proceeding on — *Certificate—Filing—Time.*] — A certificate of the prothonotary attesting that a party who has demanded a trial by jury has made default in proceeding upon his demand will be struck out of the record if it is filed before the expiry of thirty days from the joining of the issue. *Mathers* v. *City of Montreal*, 3 Que. P. R. 382.

Delay in proceeding — *Terms—Jury—Postponement—Practice — Dismissal for want of prosecution.*]—In the Yukon Territory the rules and practice as to the trial of actions which would prevail in a more settled community cannot be enforced, the conditions being entirely different. It is the endeavour of the Court to suit its rulings to the conditions prevailing, and, so far as possible, to accommodate suitors and witnesses. Cases are often heard in part at one time and adjourned to suit the convenience of witnesses and suitors.—An action to establish a partnership in a mining venture may be tried by a jury, if either party desires it, and the Court has no power to dispense with the jury.—The plaintiff being in default under Rule 170 (2) for not serving notice of trial within 6 weeks after the close of the pleadings, the defendant moved to dismiss the action for want of prosecution, and the plaintiff moved to postpone the trial, on account of the absence of G., a material witness, whose attendance, it was sworn in May, could not be obtained until July. The plaintiff intended to ask for a jury:—*Held*, that, if the plaintiff desired the evidence of G., she must be put upon terms to proceed without a jury, and the trial must go on within 10 days, and a postponement would be allowed till July to take the evidence of G.; but, if these terms were not accepted, the trial must proceed at once, with or without a jury as the plaintiff might elect, and no postponement would be granted; in default of the plaintiff proceeding to trial, in any case, within 10 days, the action to be dismissed. *Morgan* v. *Knorr* (1910), 14 W. L. R. 230.

Delays to bring the case to trial—*C. P. 442.*]—A party, by allowing a delay of more than 30 days to elapse, from date at which a case stands ready for trial without proceeding to bring on the trial, is, by the sole operation of law, deprived of his right to a jury trial. *Czifurska* v. *MacDonell* (1910), 12 Que. P. R. 29.

Depositions under commission—*Use of by jury—New trial.*]—On the trial of an action on a promissory note, the evidence of a witness taken under a commission was, subject to the objection of counsel, given to the jury, and by them taken to the jury room when they retired to consider as to their verdict:—*Held*, that the practice was not usual, and was not to be commended, but, as the incident could not have had a prejudicial effect, it was not a ground for a new trial. *Royal Bank of Canada* v. *Hale*, 37 N. B. R. 47.

Different causes of action—*Damages and settlement—C. P. 421.*]—No right to a jury trial can be had unless the whole of the plaintiff's action is susceptible of being tried in that manner, and there cannot be two trials of the same case. So if plaintiff's action is based on damages said to have been suffered while in the employ of the company, and on an agreement between the parties and under which settlement of plaintiff's claim was arrived at, there can be no jury trial, the first ground alone being triable by jury. *McKinstry* v. *Irvin* (1910), 12 Que. P. R. 195.

Diligence required to avoid the loss of the right to a trial of this nature.] —In order to avoid being deprived of the right to a trial by jury, the party who has obtained it must, within the thirty days following the joinder of the issues, not only take one of the steps required for the trial but every other proceeding necessary for the commencement of the trial. *Huard* v. *Landrieux* (1910), 37 S. C. (Que.) 478.

Direction to — *Submission of questions—Scientific investigation — New trial—Exceptions to charge—Exclusion of jury.*]—In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the

jury the bearing of the facts in evidence upon the questions to be determined:—*Held*, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial. The Judge is bound to submit questions to the jury if requested to do so. Per Hunter, C.J.: (1) A jury is not suited to try a dispute involving questions as to what were the proper nautical manœuvres to be performed under peculiar conditions, and the new trial should be held before a Judge without a jury. (2) The Court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.—Per Martin, J.: (1) It is the duty of the Judge under s. 86 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence. (2) The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the Judge. (3) The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right. *Alaska Packers' Association* v. *Spencer*, 24 C. L. T. 361, 10 B. C. R. 473.

Disagreement — Motion for nonsuit—Negligence of master—Death of servant — Action for damages. *Rogers* v. *Empire Limestone Co.*, 3 O. W. R. 788.

Disagreement — *Fraud — Judgment by Court.*]—On the second trial of an action on a promissory note, where the defence alleged fraud on the part of the plaintiffs in obtaining the indorsement, the jury disagreed. Plaintiffs then moved for judgment on the ground that there was no evidence of fraud, and the motion was refused:—*Held*, that no jury could properly find fraud, and it was desirable, especially in view of the first abortive trial, that the judgment should now be entered which should have been entered at the trial. *Yorkshire Guarantee and Securities Corporation* v. *Fulbrook*, 9 B. C. R. 270.

Disqualification of juror — *Setting aside verdict.*]—If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not *per se* a ground for setting aside the verdict on the latter. *Dunsmuir* v. *Lowenberg, Harris & Co.*, 24 C. L. T. 117, 34 S. C. R. 228.

Disqualification of jurors — *Grounds for new trial—Misdirection—Rejection of evidence.*]—The fact that a juror was related to the plaintiff's wife, which was not known to either party or their attorneys at the time of the trial, and that two other jurymen were open to challenge on the ground that they had not the necessary property qualification, are not grounds for a new trial.—Telling the jury in an action of replevin that if there is any question about the defendant's possession of the property replevied it was settled by the record of the return at the time of replevying, is misdirection and a ground for a new trial, though there is other evidence amply justifying the finding of possession.—A statement of a person, through whom a plaintiff claims, made to a stranger, not in the presence of the plaintiff, and before the transfer to the plaintiff, that he, the predecessor in title, was not the owner of the property in question, is evidence as a declaration against interest, and its rejection is ground for a new trial. *Lloyd* v. *Adams*, 37 N. B. R. 590.

Effect on future trial.]—A jury notice is not a notice of trial, but one changing the mode of trial. If given in sufficient time it assigns the case to the jury list of trials, and when once given makes the case a jury case, at any time or times when the trial comes on, unless the case be an equitable one, or the parties agree to a trial without a jury. *Hackett* v. *Rorke*, 37 N. S. R. 435.

Equitable action — *Discretion — Review.*]—Where the action is of an equitable nature, the Judge ought not to grant an application for a jury without substantial reasons, and where he exercises his discretion and grants a jury, his discretion is reviewable. *Colonial Investment Co.* v. *Ledbetter*, 40 N. S. R. 504.

Exclusive jurisdiction of Chancery —*Legal and equitable issues.*] — The plaintiffs' claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge:—*Held*, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery, within s. 103 of the Judicature Act, R. S. O. c. 51. There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings. *Sawyer* v. *Robertson*, 20 C. L. T. 254, 19 P. R. 172.

Exhausting panel — *Talesmen—Juror treated by agent of party — New trial.*] — Where the jury panel has been exhausted by reason of some of the jurors being out in another case, the presiding Judge may direct talesmen to be summoned.—Treating one of the jurors during the progress of the trial by the attorney of one of the parties is ground for a new trial. *Nadeau* v. *Thériault*, 2 E. L. R. 135, 37 N. B. R. 408.

Extension of delay — *Joinder of issue —C. P. 442.*]—A case, in which option has been made for a jury, stands ready for trial, within the meaning of 442 C. P., as soon as the issues are joined, whether within the delays fixed by law or outside such delays when by consent of the parties. *St. Paul Light & Power Co.* v. *Quesnel* (1911), 17 R. L. n. s. 122, 12 Q. P. R. 158.

Facts assigned — *Inscription on ordinary roll.*]—After the facts to be submitted to the jury have been assigned, a party cannot, even if thirty days elapse after such assignment, inscribe the case on the ordinary roll. *Kermode* v. *University of Queen's College*, 7 Que. P. R. 368.

Facts assigned — *Motion to settle — Peremption.*]—Where a party has caused to be served, within the time allowed therefor, notice of a motion to settle the facts to be submitted to the jury, he cannot be deprived of his right to a trial by jury except by the

ordinary peremption. *Furness, Withy, & Co., Limited*, v. *Great Northern Rw. Co. of Canada*, 7 Que. P. R. 361.

Failure to agree—*Dismissal of action.*] —When in an action tried with a jury the presiding Judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence. Judgment in 30 O. R. 635, 19 C. L. T. 194, affirmed. *Floer* v. *Michigan Central Rw. Co.*, 20 C. L. T. 204, 27 A. R. 122.

Failure to answer material question —*Power of Court to supply—New trial.*]—Where the jury, in answering questions submitted to them, fail to answer a material question, upon which their answers to other questions depend, their findings will be set aside and a new trial ordered.—Assuming that the Court has power to supply a finding, on a point not answered by the jury, it will not do so in a case where the evidence is not clear or where it is conflicting. *Blois* v. *Midland Rw. Co.*, 39 N. S. R. 242.

Failure to set down in time — Power to give leave to set down—Jurors Act, s. 97 —Amending Act, 2 Edw. VII. c. 14, s. 3. *Fleming* v. *Canadian Pacific Rw. Co.*, 5 O. W. R. 588.

Failure to submit question — *New trial.*]—In the trial with a jury of a replevin action, the fact in issue was whether an annual rent, the amount whereof was fixed by an award, was agreed prior to the submission to arbitration to be paid in advance, or whether both the amount of the rent and the time of payment were included in the submission. The ascertainment of this fact was not left to the jury, and pursuant to a general verdict judgment was entered for the defendant:—*Held*, on appeal, that, in consequence of the non-submission of this question of fact to the jury, there must be a new trial. *MacAdam* v. *Kickbush*, 10 B. C. R. 358.

Findings — Meaning of negligence — Contributory negligence—Injury at railway crossing — Signals — Evidence — Nonsuit. *Moore* v. *Grand Trunk Rw. Co.*, 6 O. W. R. 1031.

Findings — Negligence — Failure to agree as to contributory negligence. *White* v. *Canada Atlantic Rw. Co.*, 3 O. W. R. 840.

Findings as to negligence — *Questions as to special grounds—Judge's charge —Nondirection—Misdirection—New trial.*]—Upon a trial by jury, the Judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying. And, where the form of the charge was defective in this respect, and, consequently, left the jury in a confused state of mind as to the questions in issue, a new trial was directed. Judgment in *Alaska Packers' Association* v. *Spencer*, 10 B. C. R. 473, affirmed; Davies, J., dissenting:—*Held, per* Nesbitt, J., that in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence. *Spencer* v. *Alaska Packers' Association*, 35 S. C. R. 362.

Findings of jury — *Effect of—Finding of negligence on one ground—Inference that negligence negatived on other grounds.*] — See *McGraw* v. *Toronto Rw. Co.*, 18 O. L. R. 154, 13 O. W. R. 129.

Findings of jury — *Interpretation — Negligence — Contributory negligence—Ultimate negligence—Damages—Scale of costs.*] —Action for damages for personal injuries and for injury to plaintiff's property, defendants' street car having collided with plaintiff's team and cornbinder:—*Held*, that the proper interpretation of the jury's answers is that plaintiff could by reasonable care have avoided the collision, but that defendants' servants negligent in not stopping the car sooner, whereby plaintiff and his team were dragged a considerable distance, when they received their injuries. It is a case of liability for ultimate negligence. *Keown* v. *Windsor, Essex and Lake Shore Rapid Rw. Co.*, 13 O. W. R. 950.

Findings of jury — Questions and answers—Injury caused by defendants' negligence—Question whether plaintiff could have avoided injury by exercising reasonable care —Answer, "he might have"—Construction — Contributory negligence. *Badgeley* v. *Grand Trunk Rw. Co.*, 13 O. W. R. 683.

Fixing facts — *Special verdict—Judgment after verdict—Motion for judgment—Responsibility—Fault causing death — Victim's voluntary act.*] — In a jury trial in which the facts have been fixed, and wherein the question is as to the liability of a contractor for death resulting from the victim grasping the handle of a crane which, in swinging round, had come into contact with electric wires heavily charged with a high voltage, an answer in the verdict that the fault chargeable to the defendant was "that he had not taken the necessary precautions to prevent the arm of the derrick from coming into contact with the electric wires," is, as to detail, in sufficient compliance with the requirements of Art. 483 C. P., although it does not state what the precautions were which the contractor should have taken.—The Judge presiding at the trial is bound, after the verdict has been received, to render judgment at once, or after taking the case without there being any necessity to move him by motion or otherwise.—The spontaneous and voluntary act of a passer-by who rushes to the aid of a workman whom he believes to be in danger and who is instantly killed by electricity, as above related, cannot be pleaded as the cause of his death by the party responsible for the accident. *Martineau & Dumphy* (1909), 19 K. B. (Que.) 339.—Reversed by the Supreme Court.

Formation and challenging of the jury — *Supplementary number of jurors called without the consent of the parties—C. P. 448, 449, 460.*]—(Reversing Guerin, J.)—The Judge cannot, without the consent of the parties, order the calling of other jurors than those summoned, and if such order is issued at the request of one of the

parties without notice to the other party, it will be set aside. *Archibald & Cullen* (1910), 11 Que. P. R. 363.

General verdict.]—If either party asks that the jury return a general verdict, the jury must do so, unless they are unable to agree. *Macleod* v. *McLaughlin*, 13 B. C. R. 16.

General verdict — *Questions submitted —Oral contract—Credibility of parties.*] — The terms of an oral contract were in question. The plaintiff and defendant, being the only witnesses on the point, each swore positively to his version of the contract. Counsel for each of the parties at the trial proposed certain questions, asking that they be submitted to the jury and objecting to the submission of the questions proposed by the other side. The Judge submitted both sets of questions, but directed the jury that they were at liberty either to answer the questions and thus give a special verdict, or to give a general verdict. The jury gave a general verdict for the plaintiff. On a motion by the defendant to set aside the verdict:—*Held*, that the question of there being a mistake or no *consensus ad idem* did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that, therefore, the verdict should not be disturbed. *Newson* v. *McLean*, 2 Terr. L. R. 4.

Grounds for demanding — *Damages —Injunction.*]—It is not necessary, to authorize a trial by jury, that all the claims made by the plaintiff in a commercial action should be for payment of money. Neither a claim for an injunction accompanying a demand for damages, nor the fact that an interlocutory injunction has been granted, can take away the right to a jury. *Brunet* v. *United Shoe Machinery Co. of Canada*, 8 Que. P. R. 9.

Illegal issue of panel of jurors may be quashed on verbal objection and demand. *Archibald* v. *Cullen* (1910), 16 R. L. n. s. 382.

Incompetency of jurors.] — A new trial was ordered, upon payment of costs, where it was shewn that one of the jurors was not selected to be of the panel, that another was so deaf that he was not able to hear some of the most important evidence, and that a third was in such friendly relation with the defendants, an incorporated company, as should have induced him to decline to sit on the trial. *Cameron* v. *Ottawa Electric Rw. Co.*, 20 C. L. T. 304, 32 O. R. 24.

Inconclusive findings — *New trial — Negligence.*]—The plaintiff's intestate had a contract with the defendant company to repair a bridge, and in an action to recover damages for his death by the defendants' negligence, the jury found, *inter alia*, that he went on such business on a coal train without any ticket, but with the consent of the officer in charge, and that the latter had no authority, unless by custom, to allow the deceased to travel on the train:—*Held*, that the findings were inconclusive and that there should be a new trial. *Nightingale* v. *Union Colliery Co.*, 8 B. C. R. 134.

Inconsistent and unsatisfactory findings — Re-trial. *Moore* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 211.

Inconsistent findings — *Contract — New trial.*]—In an action for damages for breach of a contract the jury found, in answer to questions submitted by the Judge, that the racks furnished under the contract by the plaintiffs, and rejected by the defendants' inspector, were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished by the defendants on acceptance of the plaintiffs' tender; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs:—*Held*, on a motion to set aside the verdict and enter a verdict for the defendants, that, in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial. *Lawton Co.* v. *Maritime Combination Rack Co.*, 36 N. B. R. 604.

Interpleader issue.]—Neither a Judge nor the Court, in the North-West Territories, has power to direct the trial by jury of an interpleader issue. *McIntosh* v. *Shaw*, 4 Terr. L. R. 97.

Irregular verdict — *Powers of trial Judge—Direction to reconsider.*]—In a cause tried with a jury, if the jury brings in an informal, contradictory, or inconsequent verdict, the Judge has the power and it is his duty to point out to the jury the defects in it, to give the necessary explanations, and to order the jury to reconsider and correct it. *Jolicoeur* v. *Grand Trunk Rw. Co.*, 34 Que. S. C. 457.

Irregularity — Cause removed from Surrogate Court into High Court—Terms of order removing—Time for filing jury notice. *McKenzie* v. *Shosbotham*, 10 O. W. R. 1055.

Irregularity — Claim under Mechanics' Lien Act—Exclusive jurisdiction of Court of Chancery—Claim for immediate payment —Discretion—Striking out. *Trussed Concrete Steel Co.* v. *Wilson*, 9 O. W. R. 238.

Irregularity — *Ontario Judicature Act, s. 103—Exclusive jurisdiction of Court of Chancery before 1873—Action to set aside contracts for fraud.*]—In an action to set aside contracts for fraud and for a return of money paid, the plaintiff filed a jury notice: —*Held*, that s. 103 above applies and jury notice struck out. *Hall* v. *McPherson*, 13 O. W. R. 939.

Irregularity — Specific performance— Counterclaim for deceit—Legal and equitable issues—Striking out jury notice—Discretion. *Huron and Bruce Loan Co.* v. *Evans*, 3 O. W. R. 701, 756, 801.

Irregularity — *Striking out — Action against municipal corporation—Non-repair of highway.*]—The plaintiff by her statement of claim in an action to recover damages for injuries sustained by falling into an open sewer dug in the street by the defendants,

alleged that such injuries were caused by the negligence of the defendants in not securely guarding said sewer and making the same safe for passengers using the said street:—*Held*, that the failure of the defendants to guard the excavation was non-repair within the meaning of s. 104 of the Judicature Act, and the plaintiff's jury notice was struck out. *Burns* v. *Toronto*, 8 O. W. R. 867, 13 O. L. R. 109.

Inscription for enquete and merits —*Motion to reject—Jury trial—Delays; are they suspended by the death of one party?—Notice of such death—C. P. 268, 293, 423.*]—The death of one of the defendants does not interrupt the delays as regards proceedings to trial, or interfere with the right of the plaintiff to take the necessary proceedings for trial in the absence of any suggestion or notice of such death. *Chartrand* v. *Paquette* (1910), 11 Que. P. R. 351, 1910.

Issue — *Finding — New trial.*]—Where the issue submitted to and found by the jury involves, and as a necessary consequence determines, the issue raised by the pleading, a new trial will not be granted, though the precise point was not submitted. *Porter* v. *Tibbits*, 37 N. B. R. 25.

Judge's charge — *Misdirection—Error in law.*]—The Judge's charge to the jury can be attacked only for errors in law. *City of Montreal* v. *Ryan*, 17 Que. K. B. 143.

Judge's charge — *Misdirection—View of facts — Assignment of facts dispensed with—General verdict—Additions—Evidence—Damages — Excess.*]—Misdirection by the trial Judge on matters of fact affords no ground for a new trial, more particularly when the Judge expressly instructs the jury that they are not bound by his view of the facts.—2. When, in a trial by jury, the assignment of facts is dispensed with by consent of the parties, and the jury bring in a general verdict, to which they append a recommendation and an expression of opinion, the Court will not infer that the verdict rests exclusively on these additions, and will therefore not disturb it if it is one which, in view of all the evidence, could reasonably have been found.—3. In the absence of an assignment of facts, the Court cannot apply special rules of law (*e.g.*, respecting employer's liability) to any one or more of the facts proved, to say that a general verdict is wrong. In such a case, the verdict must stand, if there is enough in the whole evidence to support it.—4. When it does not appear that the jury was actuated by improper motives, or was misled, a verdict of $2,000 damages to a father for the death of his son is not excessive. *Montreal* v. *Enright*, 16 Que. K. B. 353.

Judge's charge—*Objection by counsel—Correction by Judge—Subsequent objection to corrected charge — Misdirection.*]—See *Can. Pac. Rw. Co.* v. *Hansen*, C. R. [1907], A. C. 523.

Judge's charge — *Practical withdrawal of case — Evidence — New trial.*]—On the trial of an action against a surety the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial Judge directed the jury that the facts proved in no way operated to discharge him, and that while, if they could find any evidence to satisfy them that he was relieved from liability, they could find for the defendant, he knew of no such evidence, and it was not to be found in the case:—*Held*, that the disputed facts were practically withdrawn from the jury, and, as there was evidence proper to be submitted and on which they might reasonably find for the defendant, there should be a new trial. *Wood* v. *Rockwell*, 27 C. L. T. 236, 38 S. C. R. 165.

Judge's charge — *Time for objecting—Statement in writing—Misdirection—Affidavit.*]—A party who desires to object to the direction given to the jury by the trial Judge must formulate his objection at the trial, and indicate in writing the portion of the charge to which he objects, and he will not be permitted to make the objection at a later stage, establishing by affidavit the direction given to the jury which he alleges to be contrary to law. *Bélanger* v. *Larocque*, 25 Que. S. C. 463.

Judge's charge to the jury — *Mixed questions of law and fact—Quoting judicial opinions.*]—In an action (tried by a jury) directed by a carter against the party to whom the goods were delivered, for an action which happened to the carter at the moment of delivery, the question to ascertain whether, at that moment, delivery has been made in such a way that the defendant and its employees had been put in charge of the goods delivered, is one of law and of fact which was properly left with the jury. In any event, the Judge's opinion on a question of law, in the course of his charge to the jury, is irregular only in so far as the opinion is wrong. There is no irregularity in the fact that the Judge in his charge to the jury, quoted a judicial opinion which was expressed in an analogous, although not an identical case, with the one in which it was cited from the moment that the point emphasised is applicable. As a consequence, an opinion upon the duties of employers towards their workmen may be cited to shew the precautions to be taken by those who receive delivery of goods which, when being handled, are a source of danger for those engaged in the work. *Canada Car Co.* v. *Poirier*, 19 Que. K. B. 140.

Juror — *Affinity — New trial.*]—On the trial of this cause a verdict was found for defendant. The foreman of the jury was married to a sister of defendant's wife, and plaintiff moved to set aside the verdict and for a new trial, on the ground that this affinity disqualified the foreman: — *Held*, (Hensley, J., Hodgson, C.J., and Peters, J., concurring), that the foreman was disqualified, and there must be a new trial. *Bevan* v. *McLeod* (1870), 1 P. E. I. R. 297.

Juror treated by defendant's attorney. *Nadeau* v. *Theriault*, 2 E. L. R. 135.

Jurors — *Same juror sitting on former trial — Challenge — New trial.*]—The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at a new trial, but the fact that such a juror served without challenge is not *per se* a ground for granting a new trial.

At the first trial, with a special jury, the plaintiff got a verdict in his favour, and on appeal a new trial was ordered. At the second trial a nonsuit was entered, and on appeal a new trial was ordered. At the third trial, also with a special jury, the plaintiff got a verdict in his favour. Between the second and third trials the defendant changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. J. M. was a juror, on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of the fact until after the conclusion of the trials—*Held*, refusing a new trial on this ground, that in selecting a special jury it was the duty of the solicitor to ascertain any grounds of challenge, an opportunity to do which is provided by s.-s. 5 of s. 59 of the Jurors Act. *Harris* v. *Dunsmuir*, 22 C. L. T. 341, 9 B. C. R. 303.

Jury not qualified to assess value of lands expropriated without expert evidence. *Beaudry* v. *Montreal* (1858), C. R. 2 A. C. 342.

Leave to file — Delay — Short notice of trial — Interpleader issue — Equitable issue — Court of Chancery. *O'Connor* v. *O'Connor*, 2 O. W. R. 737, 794.

Libel — *Necessity for.*]—The effect of s. 102 of the Judicature Act, R. S. O. 1897 c. 51, which provides for actions of libel, etc., being tried by a jury, is to dispense with a jury notice being given in such actions, so that a notice of trial is properly given without such notice having been first served; s. 106 not applying to actions of libel. *Putterbaugh* v. *Gold Medal Mfg. Co.*, 22 C. L. T. 122, 3 O. L. R. 259.

Loss of right by valid inscription by adverse party for proof and hearing — *C. C. 442.*]—A party having made option for a trial by jury, proceeded to have the facts defined, but thereafter allowed a delay of over thirty days to elapse without further proceeding. The adverse party moved that he be ordered to make the deposit required by Art. 434, but the motion was dismissed. The adverse party having afterwards inscribed the case for proof and hearing in the ordinary manner, the party desiring the jury trial moved to reject the inscription, there having been no judgment declaring lapse of the right to a jury trial. The Superior Court dismissed the last mentioned motion:—*Held*, refusing leave to appeal, that the case could be validly inscribed for proof and hearing under the last clause of Art. 442 C. P., even though there had been no judgment declaring the right to a trial by jury to have lapsed.—*Landrieux & Huard* (1910), 16 R. de J., 374.

Loss of right to — *Within what delay proceedings thereto should be taken—C. P. 442.*]—The party who has demanded a jury trial must take proceedings to that end within thirty days from the judgment fixing the facts to be submitted to the jury, otherwise his right to such a trial will be forfeited; in default of the party who demanded a jury trial doing so, the opposite party may inscribe the case for proof and hearing in the ordinary way. *Landrieux* v. *Huard* (1910), 12 Que. P. R. 198.

Meaning of the words "personal tort" — *Contract of hire — Municipal corporation and employee — Damages — C. P. 421.*]—(Reversing Lafontaine, J.)—1. The words "personal tort or wrong" used in the sense intended by [illegible] 421 C. P. mean a personal tort or wrong independent of any contract.—The hire of his services by an employee to a municipal corporation is a civil contract; an action for damages based on failure of the corporation to perform its obligations upon this contract is not triable by a jury. *Montreal* v. *de Montigny* (1910), 11 Que. P. R. 273.

Misdirection — *Judge's opinion of evidence.*]—It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by the defendants, but he also told them that the matter was entirely for them to decide:—*Held*, not misdirection. *Harry* v. *Packers S. S. Co.*, 10 B. C. R. 258.

Misdirection — *Non-production—Inference — New trial.*]—In an action involving disputed accounts, it is not a ground for a new trial that the Judge told the jury they might draw inferences, favourable or unfavourable to the plaintiff's case, from the fact that he refused to produce, under notice, documentary evidence in his possession, which, it was admitted, contained some account of the transaction in dispute. *Hale* v. *Leighton*, 36 N. B. R. 256.

Motion for directions — *Preservation of right to trial by jury.*]—A demand by way of motion to settle the facts to be placed before the jury, as provided in Art. 424, C. P. C., even when it is not followed by an adjudication thereon, is a proceeding within the meaning of Art. 442, which has the effect of relieving the party who makes it within the time prescribed from the forfeiture of the right of trial by jury provided by that article. *Furness, Withy & Co., Limited* v. *Great North. Rw. Co.*, 29 Que. S. C. 11.

Motion for striking of panel of jurors served and entered into Court within the 30 days following that on which the case was ready for trial is not too late, because it was argued after the expiration of said delay. *Beaulieu* v. *Montreal St. Rw. Co.* (1911), 12 Que. P. R. 263.

Motion to reject option for a jury trial — *C. P. 198, 214, 423, 442.*]—A motion to define the facts for a jury trial duly served, but which was never presented, cannot be considered a proceeding to bring on the trial. The filing of a reply to an answer, which reply contains no affirmative allegation of a new fact, does not interrupt the delays within which a motion to define the facts for a jury trial must be presented; the issues were joined by the filing of the answer. *Simard* v. *Taschereau*, 11 Que. P. R. 200.

Motion to strike out — *Discretion.*] —Striking out a jury notice is a matter of discretion, and should be confined strictly to cases where no Judge would try the issues on the record with a jury. Referred to the trial Judge. *Dyment* v. *Dyment*, 13 O. W. R. 461.

Motion to strike out — *Discretion exercised before trial — Equitable issue — Judicature Act, s. 103 — Con. Rule 551.*]— Since the Rules providing for the holding of separate jury and non-jury sittings, it is desirable, at any rate where the venue is laid in Toronto, to have it settled at as early a stage of the action as possible, whether the case is to be tried with a jury or without a jury.—*Montgomery* v. *Ryan*, 13 O. L. R. 297, approved.—In this action the plaintiff sought to set aside a certain agreement as fraudulent and void as against the plaintiffs and to have the plaintiffs declared entitled to a one-eighth share in the property in question; and, in the alternative, a declaration that the plaintiffs were entitled to a one-eighth share in certain stock; or damages and other relief:—*Held*, that this was an action which it was proper to try without a jury. *Sawyer* v. *Robinson*, 19 P. R. 172, distinguished. *Clisdell* v. *Lovell*, 10 O. W. R. 609, 925, 15 O. L. R. 379.

Motion to strike out — *Discretion exercised before trial — Place of trial outside of Toronto — Equitable defence.*] — The discretion of a Judge in Chambers in striking out a jury notice, in an action to be tried outside of Toronto, was held to have been properly exercised where the action was brought by the executors of a deceased mortgagee upon the covenant contained in the mortgage deed, and the defence was that the written documents, the mortgage deed and the deed of conveyance to the mortgagors, did not express the true agreement between the parties. — *Semble, per* Meredith, C.J.C.P., that the rule laid down in *Montgomery* v. *Ryan*, 13 O. L. R. 297, might well be extended to all cases, whether to be tried in Toronto or elsewhere.—*Semble*, also, that the facts alleged in the defence would not have been admissible under the plea of *non est factum;* that the defence was really an equitable one, involving rectification of the instrument sued upon; and in that case the jury notice would be irregular. *Bryans* v. *Moffatt*, 10 O. W. R. 1027, 15 O. L. R. 220.

Motion to strike out — *Discretion exercised before trial — Separate sittings for jury and non-jury cases.*]—The practice where the venue in an action is laid out of Toronto is, except in rare cases, to leave the matter to be dealt with by the trial Judge; but in Toronto, where there are separate sittings for jury and non-jury cases, the latter being practically a continuous sitting throughout the year, the practice has been adopted, in order to prevent the jury list from being unduly incumbered, to strike out before the trial the jury notice in cases which properly ought to be tried without a jury.—In an action on a promissory note, which involved an investigation of accounts, and therefore was properly triable without a jury, an order was made in Chambers directing such notice to be struck out. *Montgomery* v. *Ryan*, 8 O. W. R. 855, 13 O. L. R. 297.

Motion to strike out — Equitable issues. *Ontario Bank* v. *Stewart*, 2 O. W. R. 811, 819.

Motion to strike out — Judge in Chambers — Common law action — Practice — Separate sittings for trial of jury and non-jury cases — Avoidance of delay. *Hurdman* v. *Gall Lumber Co.*, 14 O. W. R. 143.

Motion to strike out — *Judge in Chambers — Judge at trial — Practice — Convenience.*]—*Held*, reversing an order of Riddell, J., in Chambers, striking out a jury notice, that in an action of merely common law character the determination as to the method of trial should not be taken out of the hands of the trial Judge; and that, if he determines that an action on the jury list should be tried without a jury, he should himself try it, because the litigants are entitled to have their cause tried in its order upon the list. The reasons for letting the determination rest with the trial Judge prevail over those of convenience and expedience applied peculiarly to actions tried at Toronto.—Review of the previous decisions. *Stavert* v. *McNaught*, 18 O. L. R. 370, 13 O. W. R. 1105.

Mutual insurance — *Policy at a fixed premium — Commercial matter — C. P. 421, C. C. 2471.*]—A mutual insurance company which underwrites policies at a fixed premium and for a fixed period, does a commercial act by issuing such policies and such policies may form the basis for a jury trial. *Hunt* v. *La Provinciale Assce. Co.*, 11 Que. P. R. 222.

New panel of jurors will not be granted *ex parte*, when a panel has become exhausted. This can only be done by motion in writing and with consent of other party. *Archibald* v. *Cullen* (1910), 16 R. L. n. s. 382.

Non-direction — *Onus — Substantial miscarriage — New trial.*]—Where a verdict is attacked for non-direction, the onus is upon the attacking party to shew that the proper instructions were asked for and refused. And where the charge of the trial Judge has placed the case as a whole correctly before the jury, and no injustice has been done by the verdict, and no substantial miscarriage of justice has resulted, a new trial will not be allowed for non-direction which has not materially affected the result. *Burrill* v. *Sanford*, 37 N. S. R. 535.

Notice — *Action for deceit — Claim for rescission of term of contract — Abandonment by plaintiff — Amendment.*]—Plaintiff filed a jury notice. On motion to strike out same he proposed to abandon claim for equitable relief. This was permitted, jury notice to stand, all necessary amendments to be made. *McClay* v. *Halliday*, 13 O. W. R. 928.

Notice — *King's Bench Act, sec. 59— Action under Workmen's Compensation for*

Injuries Act and at common law.] — The plaintiff sued for damages for personal injuries sustained by him while in the employment of the defendants, owing to the negligence of the defendants, claiming both under the Workmen's Compensation for Injuries Act and at common law. By s. 59 of the King's Bench Act, in an action under the Act a party may have a jury trial upon giving notice without an order, but in an action at common law an order for a jury is required. The plaintiff gave a notice for trial by jury: —*Held*, that, as the common law claim arose out of the same state of facts and the same circumstances as the claim under the Act, the notice for a jury trial should stand; and an application to set it aside was dismissed, with leave to the defendants to apply to the trial Judge to limit the hearing to the issues raised under the Act. *Schultz* v. *Lyall-Mitchell Co.* (1911), 17 W. L. R. 103, Man. L. R.

Notice — Motion for leave to file—Delay — Judicature Act, sec. 203. *Gillies* v. *McCamus* (1910), 1 O. W. N. 1020.

Notice—Motion to strike out—Discretion of Judge in Chambers — Order granted — Costs in cause to plaintiff only. *Miller* v. *Park* (1910), 17 O. W. R. 283, 2 O. W. N. 186.

Notice — Motion to strike out before trial — Duty of Judge in Chambers — Common law action — Practice — Separate sittings for trial of jury and non-jury cases —Avoidance of delay. *Hurdman* v. *Gall Lumber Co.* (1909), 14 O. W. R. 143.

Notice — *Striking out — Irregularity — Action against municipal corporation—Non-repair of sidewalk.*]—Plaintiff by his statement of claim in an action for damages for injuries alleged to have been sustained "by reason of a hole or depression in a boulevard caused by the negligence of defendants taking up the old sidewalk and not filling in," served a jury notice and defendants moved to have it set aside under O. J. A. s. 104. The Master in Chambers struck out the jury notice but the Chancellor restored the notice preferring to suspend matters until the stage of trial was reached.—Divisional Court *held*, that they could not say that the legislature in s. 104 of the Judicature Act intended to restrict its application to non-feasance. Appeal allowed and the jury notice struck out. Costs in the cause.—Judgment of Boyd, C., reversed and order of Master in Chambers, 15 O. W. R. 544, 1 O. W. N. 544, restored. *Brown* v. *Toronto* (1910), 16 O. W. R. 118, 21 O. L. R. 230. Followed in *Jackson* v. *Toronto* (1910), 16 O. W. R. 931, 2 O. W. N. 24.

Notice — Striking out — Order of Judge at jury sittings — Transfer to non-jury list. *Bilsky* v. *Peterson Lake Silver Cobalt Mining Co.* (1910), 1 O. W. N. 615.

Notice of—Motion by defendants to set aside—Ground, omission to name place of trial in statement of claim—Order allowing plaintiff to amend by naming North Bay as place of trial and striking out jury notice if plaintiff consents, if not amended to be allowed, and jury notice to stand, but defendants to be at liberty to move to postpone trial if unprepared—Costs to defendants in any event. *Turcotte* v. *Finkelstein* (1911), 18 O. W. R. 912, 2 O. W. N. 952.

Notice of trial—*Jury sittings—Workmen's Compensation for Injuries Act, s. 2 (c)*—"*Workmen*"—*Clerk in store — Pleading—Right to jury—King's Bench Act, s. 2 (c).*]—The plaintiff alleged that she was a clerk in the service of the defendants in their store, and was injured while serving customers, by reason of the negligence of the defendants or of some one in their service in authority. The plaintiff sought to recover damages from the defendants for her alleged injuries, but did not directly seek them under the Workmen's Compensation for Injuries Act, though she alleged in the statement of claim that she was conforming to the orders of the defendants' manager, etc. Assuming that the action was for the recovery of damages under the Workmen's Compensation for Injuries Act, the plaintiff, relying on the King's Bench Act, s. 59, s.-s. 1, gave notice of trial for a jury sittings, without obtaining an order for a jury:—*Held*, that the plaintiff was not to be regarded as a "workman," within the meaning of s. 2 (c) of the Act, not having alleged any facts from which it could be inferred that she was engaged in manual labour at the time the injuries were sustained; and she was not, therefore, entitled as a matter of right to a jury. *Bound* v. *Lawrence*, [1892] 1 Q. B. 226, followed. Order of the Referee setting aside the notice of trial, affirmed. *Hewitt* v. *Hudson's Bay Co.* (1910), 15 W. L. R. 372, 20 Man. L. R. 126.

Option for — *Failure to bring on trial —Subsequent reply — Motion for act of option.*]—When, after making the option for a jury trial in his declaration, the plaintiff allows more than 30 days to elapse from the date on which he should have filed his answer to a plea, without proceeding to bring on the trial, he is deprived of his right to a jury trial, and subsequent production of an answer, whether by consent or otherwise, has not the effect of reviving the lapsed right to a jury trial. A motion praying act of an option already made is not a proceeding to bring on the trial. *Asselin* v. *Montreal Light, Heat and Power Co.*, 7 Que. P. R. 218.

Option for — *Time — Pleading—Vacation.*]—If a plea is filed during the long vacation, the plaintiff may reply on the 7th September, from which date the delay for making option for trial by jury will run if the plea is not answered. *Belanger* v. *Montreal Street Ry. Co.*, 7 Que. P. R. 272.

Order for special jury — *New trial.*] —Pursuant to an order therefor, a trial was had with a special jury; on appeal a new trial was ordered:—*Held*, that the order for a special jury was not exhausted, and a summons for a special jury on the new trial was unnecessary. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 138, 1 W. L. R. 103, 188, 567.

Order for special jury — *New trial— Change of circumstances.*]—Pursuant to an order therefor a trial was had with a special

jury; on appeal a new trial was ordered:—*Held, per* Irving and Morton, JJ., Hunter, C.J., dissenting, that the order for a special jury was not exhausted by the abortive trial, and that, as there had been no amendment of the pleadings or change in the circumstances, the order was not provisional in its nature. *Per* Hunter, C.J., dissenting.—Any purely procedure order which does not touch the merits of the case, or the rights of the parties, can be disregarded or vacated if the circumstances have changed or the ends of justice require it, although it has not been appealed against; and, as there were issues involving scientific investigation, the trial should be had without a jury. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 280, 1 W. L. R. 103, 188, 567.

Order for trial by jury — *Jurisdiction of Referee in Chambers*—Under Rules 27 and 29 of the King's Bench Act, R. S. M. 1902 c. 40, the Referee in Chambers may exercise the power of ordering the trial of an action by a jury, given to a Judge by s.-s. (*b*) of s. 59 of the Act. *Cameron* v. *Winnipeg Electric Rw. Co.*, 7 W. L. R. 698, 17 Man. L. R. 475.

Order for trial by jury — *King's Bench Act, s. 59 (b).*]—Action brought for damages by widow and children of deceased, who had been killed in an accident on defendants' railway. The referee decided that the trial should be by a Judge without a jury, and this was affirmed by a Judge and the Court of Appeal. *McCormick* v. *Can. Pac. Rw. Co.* (1909), 12 W. L. R. 363.

Order for trial by jury — *Manitoba King's Bench Act, s. 59 — Discretion — Negligence — Personal injuries—Damages.*]—Plaintiff while rescuing a child of tender years who had wandered on defendant's street railway tracks, was himself struck and injured. He brought this action for damages. Order made for trial by jury. *Seymour* v. *Winnipeg*, 11 W. L. R. 679.

Order striking out — Powers of a Judge in chambers — Leave to appeal. See *People's Building & Loan Assn.* v. *Stanley*, 22 C. L. T. 254, 4 O. L. R. 90.

Ordinance respecting juries—*N. W. T. Act — Damages — Personal injuries.*]—The effect of c. 44 of 6 Edw. VII. (Ca.), was to annul the repeal of the North-West Territories Act, so far as Alberta and Saskatchewan were concerned, and the Ordinance respecting Juries is in consequence not in force. *Hansen* v. *Can. Pac. Rw. Co.* (1907), 6 Terr. L. R. 420.

Postponement of trial — *Same jury.*]—Where there is a postponement of a trial by jury after the jury has been selected, the Court will order that the jury already chosen shall serve upon the postponed date, unless there are serious reasons to the contrary. *Milonas* v. *Grand Trunk Rw. Co.*, 7 Que. P. R. 427.

Power to deprive party of right to jury — Judicature Act, s. 110 — *Intra vires. People's Building & Loan Assn.* v. *Stanley*, 2 O. W. R. 122.

Private regulations of a company—*C. P. 398, para. 2.*]—(Reversing Fortin, J.)—It is illegal to admit and allow to be placed before the jury the private regulations and instructions of a company for the guidance of its employees. *Klienbrod* v. *Montreal St. Rw. Co.* (1908), 11 Que. P. R. 301.

Proceeding to trial — *Time — Extension.*]—The time which Art. 442, C. P. C., allows for proceeding upon a demand for trial by jury is not extended by the fact that the party who elects for such trial has obtained the issue of a foreign commission returned for less than 30 days, nor by the fact that such party has been allowed to amend one of his pleadings, after the expiration of 30 days from the time that the cause is ripe for trial, that is to say, after issue joined. *Foley* v. *Foley*, 17 Que. S. C. 480, 3 Que. P. R. 53.

Qualification of jurors — *Age limit.*]—The age limit provided for by s. 1 of the Act respecting Juries, C. S. N. B. 1903 c. 126, operates as a disqualification, and not merely as an exemption. *Morgan* v. *O'Regan*, 38 N. B. R. 399, 4 E. L. R. 573.

Question for jury — *Master and servant — Injury to servant — Negligence — Findings of jury — Casual connection — New trial — Costs.*]—Plaintiff received injuries through carelessness of a fellow workman, and the jury found negligence, and stated in what the negligence consisted, but because they did not state that such negligence was the cause of plaintiff's injuries a new trial was ordered. The jury when asked whether the defendants through their foreman were guilty of negligence, and if so in what such negligence consisted, were not explicitly directed to confine their findings to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff. *Hillyer* v. *Wilkinson Plough Co.*, 5 O. W. R. 748, 9 O. L. R. 711.

Questions submitted — *Answers by jury — Determination of issue — Verdict — New trial — Questions by counsel — Duty of jury to answer.*]—T. & Co., under an arrangement made with B. in 1900, agreed to supply S. with materials to be used in building and repairing houses owned or managed by B. The materials were charged direct to B., and supplied upon his credit. This arrangement continued down to the 8th November, 1902, without any dispute between the parties. T. & Co. alleged that about that time B. requested them for his convenience to change the account and charge all materials got under the arrangement between them to S., to prevent the amount from getting mixed up with his private account with T. & Co., with which S. had nothing to do, and the account was changed in the books accordingly, but without any intention on the part of T. & Co. to alter the liability of B. This arrangement and request was denied by B., and he said, on the other hand, that about the 8th November, 1902, he gave T. & Co. a written notice that he would be no longer liable for goods supplied to S., and that the arrangement between them to that effect

was terminated. On the trial of an action by T. & Co. against B. for goods sold and delivered after the 8th November, 1902, the jury were asked: "After the 8th November, 1902, to whom was credit given by T. & Co., to B. or S.?" and they found, to B. They were also asked whether the goods were sold upon the credit of B. or S., and they found, upon the credit of B. They also found, in answer to a question, that B. agreed to become liable for the goods supplied subsequent to the 8th November, 1902, and charged in T. & Co.'s books to S. On these findings a verdict was entered for the plaintiff for the amount claimed:—*Held, per* Tuck, C.J., Hanington and Landry, JJ., that these findings were in effect findings that the change in the account was made in the circumstances alleged by T. & Co. at the request of B., and that the notice alleged to have been given by B. terminating his liability was not given; and it was no ground for a new trial, that no distinct questions were left or findings asked on these issues. — *Held, per* Barker, McLeod, and Gregory, JJ., that, as the questions submitted did not necessarily involve findings upon the issues between the parties, and upon which the defendant's liability must depend, there should be a new trial; that under s. 163 of c. 111 of C. S. N. B. 1903, counsel have the right to require the Judge to submit questions to the jury, and if they are pertinent to the issue it is the duty of the Judge to instruct the jury that they must answer them if they can.—The Court being equally divided, the rule dropped, and the verdict for the plaintiffs stood. *W. H. Thorne & Co. Limited* v. *Bustin*, 37 N. B. R. 163. *See* 37 S. C. R. 533.

Regularity — Action for damages — Amount under $500 — Statutes — Construction — Application — Repeal.— *Ledieu* v. *Roediger* (Y.T.), 1 W. L. R. 515.

Retirement of — *Evidence for Court alone.*]—Trial by jury. The securities, the subject-matter of the action, having been lost after action brought, the plaintiffs were proceeding to prove the loss, when the Judge proposed to allow the jury to retire pending the giving of the evidence. Counsel for the plaintiffs objected:—*Held*, that on a trial by jury after the plaintiffs' case has commenced the Judge may permit the jury to retire in his discretion while proof is being given of facts with which the Judge alone is concerned. *Bank of British Columbia* v. *Oppenheimer*, 20 C. L. T. 370, 7 B. C. R. 448.

Right to a jury — *Contract based on a municipal by-law—Infringement of.*]—A case is not triable by a jury when it is taken on an infringement of a contract based on a municipal by-law. A municipal by-law is purely an act of administration, excluding all idea of commerce, and the signing of a contract based on said municipal by-law in no way changes the nature of the municipal act. *Montreal Terminal Rw. Co.* v. *Montreal*, 11 Que. P. R. 1.

Right to elect for jury — *Damages for personal injuries — Incidental damages.*]

—The damages claimed in an action were principally for personal injuries suffered by the plaintiff by reason of a fall upon a sidewalk attributed to the negligence of servants of the defendants, whereby the plaintiff's leg was broken, but incidental damages were also claimed:—*Held*, that the plaintiff had the right to elect a trial by jury. *Armstrong* v. *Westmount*, 8 Que. P. R. 29.

Right to jury — *Action in warranty—Art. 421, C. P.*]—Where the corporation of the city of Montreal, being sued in damages for defective sidewalks, bring an action in warranty against a third party, the demand is based on a special right conferred by the city charter, and the plaintiffs in warranty do not sue for personal wrongs. Article 421, C. P., being a restrictive one, there can be no jury trial in such an action in warranty. *Churchwardens of the Parish of St. Agnès de Montréal* v. *Montreal*, 10 Que. P. R. 157.

Right to jury — *Action to set aside will—Issues.*]—In an action to set aside a will on the ground that it was obtained by fraud and undue influence, the plaintiff asked for a jury:—*Held*, that the action was one of those referred to in Rule 81, and as such, according to Rule 330, must be tried without a jury. Per Drake, J., that the character of an action is determined by the issues raised in the pleadings rather than by the prayer for relief. *Stewart* v. *Warner*, 4 B. C. R. 208, and *Corbin* v. *Lookout Mining Co.*, 5 B. C. R. 281, approved. *Hopper* v. *Dunsmuir*, 10 B. C. R. 17.

Right to jury — *Amount claimed for damages — Interest.*] — There cannot be a trial by jury in an action for damages to the amount of $1,000, with interest from the day of the commencement of the action. The claim for interest is an accessory demand, like that for costs, and cannot be a factor in determining whether there may be a trial by jury. *Bélair* v. *Dominion Textile Co.*, 10 Que. P. R. 237.

Right to jury — *Contestation under Winding-up Act.*]—The right to trial by jury is exceptional and exists only in cases specially provided for by law. Where a contestation is governed by the Winding-up Act, it is not susceptible of trial by jury. *Tetrault Shoe Co.* v. *Kent*, 10 Que. P. R. 244.

Right to jury — *Duty of Judge.*]—The power which a Judge has to take a case away from the jury should be exercised only when it is clear that the plaintiff could not hold a verdict in his favour; if the matter is reasonably open to doubt, the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported. *Nightingale* v. *Union Colliery Co. of British Columbia*, 23 C. L. T. 206, 9 B. C. R. 453.

Right to jury — *Insurance — Powers of jury—Motion—Costs.*]—An action to recover the amount of a policy of insurance issued by a mutual insurance company is not of such a nature that it can be submitted to a jury. 2. The question of the

want of jurisdiction of the jury may be raised at any stage of the cause, but if it is raised for the first time in answer to a motion to "*fixer les faits*," such motion will be dismissed with costs. *Montreal Coal and Towing Co.* v. *British Empire Mutual Assurance Co.*, 5 Que. P. R. 283.

Right to jury — *Joinder of issue — Expiration of time—Waiver—Pleading.*] — Joinder of issue takes place by sole operation of law, on the expiration of delays to file answers or replications. So, when the delay for answering an affirmative plea, or answer to a plea, has expired, issue is joined and the case stands ready for trial by jury, within the meaning of Art. 442, C. P.; and the subsequent filing of a replication by consent will not operate as a waiver of the delay within which proceedings must be taken to bring on the trial. *Anderson* v. *Norwich Fire Insurance Co.*, 17 Que. K. B. 361.

Right to jury — *Joinder of issue — Subsequent leave to reply—Revival of right to ask for jury.*]—Issue is joined by reason of default in replying to a plea; and the right to trial by jury, lost by neglect to demand an act of option within the 30 days following that upon which the plaintiff has been foreclosed of his right to reply to the plea, is not revived by the plaintiff subsequently obtaining leave to file his reply. *Vincent* v. *Montreal Urban Rw. Co.*, 6 Que. P. R. 289.

Right to jury — *Joinder of issue—Time —Waiver.*]—A case is ready for trial on the day when issue is joined, either by the filing of a pleading or the foreclosure from filing same. 2. After the right to a jury trial has been forfeited by the expiry of 30 days after a foreclosure, the consent to the filing of a pleading does not constitute a waiver of such forfeiture. *Matthews* v. *Town of Westmount*, 6 Que. P. R. 52.

Right to jury — *Lapse of time for demanding—Leave to file amended pleading—New right.*]—Where a party is permitted to file an amended pleading, he does not thereby acquire again the right to have the cause tried by a jury, if that right has already been forfeited by the expiry of thirty days since issue joined. *Montreal Light, Heat and Power Co.* v. *Dupras*, 10 Que. P. R. 114.

Right to jury — *Option — Inscription for proof and hearing—Delay.*]—The delay of 30 days, within which a party must proceed to bring on a trial by jury, runs from the day of the granting of a motion praying *acte* of his option for jury trial. 2. A motion for fixing the facts for the jury is a proceeding to bring on the trial, and an inscription for proof and hearing filed by the adverse party, notwithstanding such motion, will be rejected. *Morlock* v. *Webster*, 6 Que. P. R. 49.

Right to jury — *Option forfeited by lapse of time—Leave to amend pleading — Revival of right.*] — Leave granted to a plaintiff to amend his answer to the defendant's plea does not revive his right of option to a trial by jury, which he had declared, but had forfeited by allowing a delay of thirty days to elapse from the date at which the case stood ready for trial. Cf. *Anderson* v. *Norwich Union Insurance Co.*, 17 Que. K. B. 361. *Montreal Light Heat and Power Co.* v. *Dupras*, 18 Que. K. B. 174.

Right to jury — *Practice — Demand in pleadings—Time — "Ready for trial"— Amendment.*]—A cause stands "ready for trial," under the provisions of Art. 442, C. C. P., upon issue being regularly joined between the parties; and if a party who has made a demand in the pleadings for a jury trial, allows more than 30 days to elapse after the cause so stands ready for trial, without proceeding to bring on the trial, or obtaining an extension of the delay on application to the Court, he is deprived of his right to a jury trial by the sole operation of law. This rule is not affected by the fact that the adverse party, during the 30 days, with the formal consent of the party who demanded a jury trial, withdrew an allegation of one of his pleas. *Standard Life Assurance Co.* v. *Montreal Coal and Towing Co.*, 13 Que. K. B. 183.

Right to jury — *Time for exercising option.*]—A motion to compel a party to exercise his option for or against a trial by jury, will be granted even after the expiry of the time fixed by Art. 423, C. P., if it appears that the delay has been for the purpose of accommodating the opposite party. *Varin* v. *St. Lawrence Sugar Refining Co.*, 6 Que. P. R. 295.

Selection of jury must be so done as to place both parties on an equal footing. Nothing can be done without both parties being notified or consenting. *Archibald* v. *Cullen* (1910), 16 R. L. n. s. 382.

Settlement of facts for jury — *Subsequent proceedings — Time.*] — Where a party has caused the facts as to which the jury must inquire to be settled within 30 days of issue joined, he is not in default even when he takes no other proceedings for more than 30 days afterwards. *Brosseau* v. *Montreal Light, Heat and Power Co.*, 9 Que. P. R. 227.

Settlement of facts for jury — *Time—Commencement—Inscription in law.*] —The delay of 30 days allowed by Art. 442, C. P., for having the facts fixed for the jury, does not run until an inscription in law filed by the defendant with his plea has been determined. *Canada Industrial Co.* v. *Kensington Land Co.*, 8 Rev. de Jur. 187, distinguished. *Clough* v. *Fabre*, 9 Que. P. R. 231.

Severing issues — Rule 170. *Turner* v. *Van Meter* (N.W.T.), 2 W. L. R. 345.

Special direction to sheriff.]—Where an action is to be tried at the Victoria or Vancouver civil sittings held pursuant to s. 5 of the Supreme Court Act Amendment Act, 1901, a special direction (under s. 69 of the Jurors Act) to the sheriff to summon a jury is necessary. *Tanaka* v. *Russell*, 9 B. C. R. 336.

Special jury — *Application to quash panel—Court will set aside panel for partiality of officer returning it — Affidavit of*

party in support of application to set aside must be certain.]—Plaintiff applied to quash the special jury panel for alleged partiality of the under sheriff by whom it was returned. The grounds of the application were set out in an affidavit made by plaintiff, and were to the effect that plaintiff and defendant were respectively editors of the Islander and Examiner, the organs of the opposing political parties in P. E. Island, that the action was for libel on the plaintiff published by the defendant in his paper, that the under sheriff was a violent partizan of the defendant's political party, and had returned forty-three or forty-four out of the forty-eight jurors on the panel from the strong political partizans of the party opposed to the plaintiff. The plaintiff's affidavit was not supported by others, nor was there any affidavit of defendant contradicting it. The defendant's counsel took the objection that there could be no challenge to the array in a special jury case, and, therefore, the panel could not be quashed:—*Held*, Peters, J., that though there could be no technical challenge to the array, yet the panel could be set aside on application to the Court, and the application was, therefore, the proper mode of proceeding. 2. That as the grounds on which the plaintiff based his application were stated with sufficient certainty in his affidavit, and there was no rebutting affidavit, the application must be granted and the panel set aside, and a new panel returned by the coroner in the manner directed by the Court. *McLean* v. *Whelan* (1856), 1 P. E. I. R. 135.

Special jury — *Certificate for — B. C. Jurors Act, s. 63.*]—As the difficulty in this case lies in the law and not in the facts, a certificate for a special jury was not granted. *Cross* v. *Esquimalt*, 11 W. L. R. 257.

Special jury — *Fees of jurors — Mileage.*]—A special juror is entitled to $2 for each day's attendance at Court, whether he serves or not, and whether in order to attend Court he travels from his place of residence or not; if he so travels he is in addition entitled to mileage. *Taylor* v. *Drake*, 22 C. L. T. 220, 9 B. C. R. 54.

Special jury — Notice of striking — Time—Holiday. *Holman* v. *Times Printing Co.*, 1 O. W. R. 7, 338, 756.

Special jury — *Striking — Parties — Defendant to counterclaim — Challenge.*]—The defendants in the original action counterclaimed against the plaintiff and one R. On the defendant's application an order for a special jury was made, the plaintiff and R. acquiescing. On the striking of the jury the sheriff refused to allow R. to take any part, and the plaintiff then applied under Rule 157 to strike out the counterclaim because of the impossibility of properly striking a special jury where there are more than two parties:—*Held*, that the plaintiff had no right to make the application. As R. acquiesced in the order for a special jury when it was made and had not appealed, a challenge to the array by his counsel at the trial was overruled. *Bank of British North America* v. *Robert Ward & Co. (Ltd.)*, 9 B. C. R. 49.

Settling issues of fact — Order XXXII., Rule 1. *Purcell* v. *Smith*, 40 N. S. R. 611.

Striking out — *Discretion — Issues of fact and law.*]—A jury notice was struck out, the case being one which, in the opinion of the Judge before whom the motion is made, would be tried without a jury. *Stavert* v. *McNaught*, 13 O. W. R. 921.

Striking out — *Judge in Chambers — Common law action—Nuisance—Injunction —Damages.*]—Motion to strike out a jury notice in an action for an injunction to restrain a nuisance in the shape of a sewage farm, and for damages:—*Held*, this not being an action which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, that the jury notice could not be set aside as irregular by the Common Law Procedure Act. Long prior to the Administration of Justice Act, 1873, the common law Courts had power to grant an injunction in a case such as this. While, no doubt, a Judge sitting in Chambers has power, in the exercise of his discretion, to strike out a jury notice in an action such as this, although the party requiring a jury may *primâ facie* be entitled to it, the practice is not to exercise that power, but to leave it to be dealt with by the trial Judge. *Shantz* v. *Berlin*, 23 C. L. T. 15, 4 O. L. R. 730, 2 O. W. R. 1115.

Striking out — Mortgage action — Venue—Speedy trial—Consolidation of actions—Conduct of. *Lemon* v. *Lemon*, 2 O. W. R. 445, 473.

Striking out — Separate sittings for jury and non-jury cases—Practice. *Montgomery* v. *Ryan*, 8 O. W. R. 855.

Summoning of — *Procedure — Juror's Act—Directory or imperative.*]—If on the trial of an action in the Supreme Court twenty persons do not appear from which a jury may be selected the panel may be quashed. The provisions of the Jurors Act relating to the procedure to be followed by the sheriff in summoning a jury are not imperative but directory, and an irregularity in respect thereto is not *ipso facto* a ground for setting aside the panel. *Ross* v. *British Columbia Electric Rw. Co.*, 7 B. C. R. 394.

Time — *Acquiescence.*]—Option for trial by jury by special application must be made within 3 days after issue joined; the subsequent acquiescence or the filing of necessary pleadings does not re-open the right to ask for a jury trial. *La Banque Nationale* v. *Atlantic and Lake Superior Rw. Co.*, 8 Que. P. R. 309.

Time — *Default in proceeding.*]—Where a party has demanded a trial by jury, and has proceeded upon such demand within the 30 days following that on which the cause was ripe for trial, he is not deprived of such right by delaying more than 30 days his application to fix a day for the summoning of a jury panel, the penalty indicated in Art. 442, C. P., applying only to the commencement of the proceeding, and not having reference to any subsequent default. *Enright* v. *Montreal*, 9 Que. P. R. 27.

Time — *Joinder of issue — Default of reply.*]—Issue is joined by the default of the plaintiff to reply to a plea within 6 days after it is filed; a motion for leave to elect for trial by jury made after the 3 days which follow the joinder of issue will be dismissed as too late. *Cox* v. *Phœnix Assurance Co.*, 9 Que. P. R. 117.

Time — Leave. *Castle* v. *Chaput*, 2 O. W. R. 499.

Time — *Non-juridical day.*]—A motion for leave to elect to have a trial by jury may be made on the fourth day after issue joined, when the third day is a non-juridical day. *Langevin* v. *Allan Line Steamship Co.*, 8 Que. P. R. 149.

Time — Rule 168 — Discretion. *Brindamour* v. *Robert*, *Robert* v. *Brindamour* (Y.T.), 6 W. L. R. 148.

Time for applying — *Notice of motion.*]—A simple notice of motion is not a valid proceeding to bring on a trial by jury, the only valid proceeding being the motion itself, and if that is not made within the time allowed, the party applying loses the right to a jury. *Bray* v. *Montreal Street Ry. Co.*, 8 Que. P. R. 122.

Time for demanding — *Lapse — Revival.*]—The filing, with or without consent, of a reply by the defendants after default, has not the effect of reviving in favour of the plaintiff a lapsed right to demand a jury. *Leclair* v. *Montreal Street Ry. Co.*, 7 Que. P. R. 453.

Title to land — *New trial.*]—Cases involving the title to land should be tried without a jury, so that the necessity for a second trial may be avoided. *Wason* v. *Douglas*, 21 C. L. T. 521.

Venue — *Change — Right to special jury—Statutes.*]—The plaintiffs named Nelson as the place of trial, the action having been commenced in the Vancouver registry. The defendants applied to have the venue changed to Vancouver and for an order that the action be tried by a special jury if the plaintiffs desired a jury. No affidavit was filed alleging any ground for supposing that a fair trial could not be had at Nelson, but it was urged that there was no provision by which a special jury could be had:—*Held*, by the full Court, that the defendants could obtain a special jury at Nelson, and that in any event the application was rightly dismissed, as no ground had been shewn for supposing that a fair trial could not be had. *Fernie Lumber Co.* v. *Crow's Nest Southern Ry. Co.*, 12 B. C. R. 148, 3 W. L. R. 472.

Verdict — *Ambiguity and precision — C. P. 487, 489.*]—Where in an action in damages for tort, the jury brings in a verdict of common fault, but supported by obscure and ambiguous reasons, the Judge may, at the suggestion of the plaintiff's attorney, send the jury back for further consideration of their verdict and make their verdict more accurate by giving clearer and more precise reasons. *Ethier* v. *Broder* (1910), 17 R. L. n. s. 136.

Verdict — *Indefiniteness — Circumstances of case—Discharge of jury—Recalling and amending verdict—Effect of—New trial — Non-direction.*]—In an action for damages caused by water being backed up on to the plaintiff's premises, the jury did not answer the questions put, but answered: "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary creek caused the plaintiff damage in the sum of $3,000;" without stating that the grading was done by the defendants. It appeared that the dispute at the trial narrowed down to whether it was the grading of the street by the defendants or the grading of an alley by one Fletcher that caused the damage. On the verdict judgment was entered for the plaintiff:—*Held*, on appeal, that from the circumstances of the case the verdict would support the judgment. Where counsel at the trial abstains from asking the Judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point. After judgment was pronounced and the jury was discharged, at the direction of the Court the jury was recalled and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly: — *Held*, that whatever was done after the discharge of the jury was a nullity. *Waterland* v. *City of Greenwood*, 22 C. L. T. 245, 8 B. C. R. 396.

Verdict — *Misapprehension — Assignments and preferences—Fraudulent assignment.*]—In an action brought by plaintiff as assignee of M., against defendant, the sheriff of the county of Queens, who levied under execution on a portion of the goods covered by the assignment, the defence relied upon was that the deed of assignment was made fraudulently, with intent to hinder and delay creditors. It appearing that the jury had no difficulty in determining the only question upon which they had to pass, and their verdict being in accordance with that finding:—*Held*, that it could not be disturbed upon any reason based upon the circumstances under which it was rendered. Townshend, J., dissented, on the ground that there was no evidence to justify the verdict, and that it was given in disregard or misapprehension of the instructions of the Judge. *Fraser* v. *Drew*, 32 N. S. R. 385.

Verdict — *Motion to set aside—Negligence—Duty of Court—Reasonable verdict.*]—In an action for damages for personal injuries caused by the alleged negligence of the defendants, in which the question of their liability is tried by a jury, the appreciation of what constitutes the fault or neglect is for the jury. The Court, upon motion to set aside the verdict, is not called upon to decide whether the verdict rests upon an erroneous appreciation of the evidence, but whether it is or is not unreasonable. *Quebec and Levis Ferry Co.* v. *Jess*, 14 Que. K. B. 473.

Verdict — *Special verdict — Setting aside—Weight of evidence.*]—The Court will not set aside a verdict rendered by a special jury, merely because the Court would have come to a different conclusion on the evidence; the verdict is not considered against the weight of evidence unless, in the opinion of the Court, it is one which the jury, viewing the whole of the evidence, could not rea-

sonably find. (Article 501, C. C. P.). *McLeod* v. *Montreal Street Ry. Co.*, 20 Que. S. C. 8.

Verdict — *Weight of evidence — Negligence—Railway — Sparks from engine.*] — Fire was discovered on J.'s farm a short time after the passing of a train of the Grand Trunk Railway, drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a longer smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine, and they believed it was from that with the short smoke box; and that the use of said box constituted negligence in the company, which had not taken the proper means to prevent the emission of sparks:—*Held*, affirming the judgment of the Court of Appeal, 2 O. L. R. 689, 22 C. L. T. 12, that the latter finding was not justified by the evidence, and the verdict for plaintiff at the trial was properly set aside. *Jackson* v. *Grand Trunk Ry. Co.*, 22 C. L. T. 249, 32 S. C. R. 245.

Verdict which the jury, viewing the whole of the evidence, could not reasonably find — *Art. 501 C. P.*] — A verdict is clearly not against the weight of evidence when it is one which the jury, "viewing the whole of the evidence, could not reasonably find," Art. 498 No. 4, and Art. 501 C. P. This text of the law means: "a verdict which twelve reasonable men should not have found." *Montreal St. Ry.* v. *Henderson*, 19 Que. K. B. 135.

When does a case stand ready for trial?—*Registration of a judgment of the Supreme Court —Quære, when motion for a trial by jury is continued?—Right to a mixed jury—Corporation party to suit—C. P. 436, 442—R. S. C. c. 139, s. 58, 8 Edw. VII. c. 77.*]—*Held* (confirming Davidson, J).—A party to a suit who has been granted a trial by jury preserves his right by proceeding with it within the thirty days following the date upon which the case stands ready for trial of that nature. When a new trial has been ordered by the Supreme Court, the case stands ready for such trial only from the date of the registration of the judgment of the Supreme Court in the office of the Superior Court of the district in which suit was taken. The fact that more than thirty days have elapsed from the date of the discharge of the *délibere* of a motion for a new trial by jury and the service upon the opposite party of a notice that the same motion will be again presented cannot entail the loss to a party of his absolute and acquired right to a trial by jury.—(Reversing Davidson, J.). When one of the parties to a suit speaks neither French nor English and the other party is a corporation, the latter alone has the absolute right to ask for a jury *de medietate linguæ*. *Can. Rubber Co.* v. *Karavokiris* (1910), 12 Que. P. R. 122.

Wrongful dismissal—*Action by servant to recover damages for.*]—An action to recover damages for an act which amounts to a breach of a contract of services, and which could not be maintained in the absence of such a contract, is not an action "resulting from a personal wrong," within the meaning of Art. 421 C. P., and is therefore not triable by jury. *Montreal* v. *de Montigny* (1910), 20 Que. K. B. 49.

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6. NEW TRIAL.

Absence of material witness—Taking chances at trial. *McLellan* v. *Hovey*, 1 O. W. R. 215, 707.

Action for damages for negligence —*Best evidence available should have been adduced.*] — Plaintiff, a brakesman in the employ of defendants, brought action to recover damages for injuries caused as alleged by negligence of defendants placing a switch stand where it was placed. At trial, Teetzel, J., granted a non-suit, with costs, but subject to provision that if Divisional Court was of opinion that there was any evidence on charge of negligence which should have been submitted to a jury the judgment to be entered for plaintiff for $2,520. Divisional Court entered judgment for plaintiff for $2,520. Court of Appeal ordered a new trial on ground that the best evidence available had not been adduced at the trial. No costs of former trial to either party. *Leitch* v. *Pere Marquette Rw. Co.* (1910), 15 O. W. R. 699.

Action tried without a jury—Mistrial —Costs. *Wade* v. *Livingston*, 12 O. W. R. 1211.

Affinity of one of several J. P.'s trying cause to party, ground for setting aside judgment — *J. P.'s affinity to principal, ground for setting aside judgment against servant.*]—On appeal, in several cases of assault arising out of the same matter, from convictions by four J.P.'s, it appeared that one of the J.P.'s was married to a first cousin of the principal respondent, and the other respondents at the time of the alleged assaults, though not of affinity to any of the J.P.'s, were servants of the principal respondent:—*Held*, that the convictions must be set aside, and that no distinction could be made between the case of the principal respondent and the cases of his servants, but that all must be set aside. *Campbell* v. *McIntosh* (1872), 1 P. E. I. R. 423.

Appeal — *Subsequent discovery of new evidence—Obscure facts—Costs.*]—Divisional Court granted an order for a new trial upon grounds of discovery of new evidence, the trial Judge having had difficulty in finding the facts, and the new evidence not being in the knowledge of the defendant at the trial. Costs of former trial to be in the discretion of Court at new trial. Costs of appeal to the plaintiff in any event. *Hall* v. *Schiell* (1911), 19 O. W. R. 315, 2 O. W. N. 1186.

Charge to jury — *Misdirection—Bias.*] —In an action upon a guarantee, judgment was entered for the plaintiffs at the trial upon the answers of the jury to questions submitted, and the defendants moved for a new trial on numerous grounds of impro-

per reception and rejection of evidence, misdirection, improper direction, and remarks by the trial Judge. The Supreme Court of New Brunswick (37 N. B. R. 163) was equally divided, and the defendants appealed to the Supreme Court of Canada, where judgment was given (Davies, J., diss.) ordering a new trial, on the ground that the charge of the trial Judge to the jury shewed passion and bias and was improper. *Bustin* v. *Thorne & Co.*, 37 S. C. R. 533.

Counsel reading judgments to jury—*Substantial wrong — C. S. 1903, c. 111, s. 376.*]—At the trial the plaintiff's counsel was allowed, subject to objection, to read as a part of his closing address a judgment on a former motion for a new trial in this cause delivered in this Court, and also a judgment delivered on appeal in the Supreme Court of Canada. These were both dissenting judgments; they dealt with the same facts and expressed opinions on the facts, but covered a wider range of questions than those on which this jury was asked to find; the trial Judge expressed his opinion that the jury could not have been biased by the reading of these judgments; this was the third trial of the cause and at each trial the plaintiff had a verdict, and the weight of evidence was in favour of the findings of the jury:—*Held*, that while it was improper to allow the judgments to be read, yet under the special circumstances this was not a ground for a new trial.—*Held*, also, that the objection was cured by s. 376 of Supreme Court Act, C. S. 1903, c. 111, as no substantial wrong or miscarriage of justice had been thereby occasioned. *Harris* v. *Jamieson* (1909), 39 N. B. R. 177.

County Court action — *Verdict for insufficient damages — Weight of evidence — Powers of Judge.*]—In an action for trespass and trover, brought in a County Court, the jury found for the plaintiff for part of his claim, on evidence which, while contradictory as to part of the claim, was strongly in favour of the plaintiff's whole claim. The Judge of the County Court made an order setting aside the verdict and directing a new trial, on the ground that the damages were insufficient and the verdict against the weight of evidence:—*Held*, on appeal, that the Judge had power to make the order, and the appeal was dismissed. *Gallant* v. *O'Leary*, 38 N. B. R. 395, 4 E. L. R. 516.

Decree of Appellate Court—*Reasons for judgment.*]—B., a passenger on a railway train, was thrice assaulted by a fellow-passenger during the passage. The conductor was informed of the first assault immediately after it occurred, and also of the second, but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally, for the injuries complained of. The verdict was maintained by the Court of Appeal, but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 S. C. R. 75.) In the reasons given for the last mentioned judgment it was held that damages could be recovered for the third assault only, but the judgment as entered by the Registrar stated that the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused, a new trial was had, on which B. again obtained a verdict, the damages being apportioned between the second and third assault. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict:—*Held*, Taschereau, C.J.C., and Davies, J., dissenting, that, as the decree was in accordance with the judgment pronounced by the Court when the decision was given, and as it left the whole case open on the second trial, the jury were free to give damages for the second assault, and their verdict should not be disturbed. *Blain* v. *Can. Pac. Rw. Co.*, 25 C. L. T. 107; *Can. Pac. Rw. Co.* v. *Blain*, 36 S. C. R. 159.

Discovery of fresh evidence.] — The circumstances under which a new trial will be granted or refused on the ground of the discovery of fresh evidence, discussed. *Sexsmith* v. *Murphy*, 1 Terr. L. R. 311.

Discretion of Court below—Refusal of Court of Appeal to interfere—Affidavit of merits—Costs. *Clarke* v. *Union Stock Underwriting Co.*, 9 O. W. R. 486.

Divisional Court setting aside nonsuit and directing new trial—Appeal—Evidence for jury—Negligent setting out fire. *Parcau* v. *Can. Pac. Rw. Co.*, 2 O. W. R. 872.

Evidence — *Findings — New trial.*]—In an action to recover damages for injuries sustained, the plaintiff must make affirmative proof of the particular acts of negligence charged in the declaration as constituting the cause of such damages. The province of the jury is to find on such facts, and when the findings of the jury rest on grounds of negligence, other than those so charged, and are not given upon all the issues submitted, the Court of Review will grant motion for a new trial. *MacDonald* v. *MacDonald* (1910), 16 R. de J. 408.

Findings of Judge on conflicting evidence — *Promissory notes — Denial of signature—Comparison of handwritings —Absence of expert evidence — Refusal of majority of Court to order new trial.*]—The plaintiff sued the defendant for $2,000 said to have been lent, and produced two promissory notes for $1,000 each, said to have been written by the plaintiff and signed by the defendant. The notes were signed "Alec. Keiser," but the defendant's name was "John Keiser." The defendant denied the signatures, and swore that he never saw the plaintiff till the plaintiff endeavoured to collect the money. The trial Judge — there was no jury—believed the plaintiff's evidence, which was corroborated to some slight extent, and was of opinion, from a comparison made by himself of the signatures to the notes with a signature made by the defendant in the witness-box, that the former were written by the defendant. He therefore gave judgment for the plaintiff:—*Held*, Beck, J., dissenting, that the Court could not, in these circumstances, reverse the judgment of the trial Judge, nor grant a new trial.—*Per* Beck, J., that, in the absence of any expert evidence as to handwrit-

ing, the trial Judge was wrong in his finding of the fact of the defendant's signature to the notes, and that, in any case, in the circumstances disclosed by the evidence, the trial was unsatisfactory because no such expert evidence was given; and there should be a new trial. *Kalmet* v. *Keiser* (1910), 13 W. L. R. 94.

Findings of jury—*Contrary to evidence—Costs.*]—On the trial of an action for the delivery up and cancellation of an order given by the plaintiff in favour of the defendant D. upon the defendant S., as a means of avoiding a threatened arrest upon a charge of having been a participant in the blowing up of the defendants' dam, the jury, in answer to several questions submitted to them, negatived the fact of plaintiff's complicity in the offence charged, and upon their finding a verdict was entered for the plaintiff. There being strong evidence to shew that the plaintiff, although not an actual participator in the offence charged, was conspiring with, and aiding and abetting, those by whom the dam was blown up; that he received sums of money from people in the neighbourhood which was used for the purchase of dynamite, to be used in blowing up the dam; and that, although not actually present at the time, he was in the vicinity, and knew all about the intentions of those by whom the act was committed:—*Held*, that the findings must be set aside, with costs to be paid by the plaintiff, and a new trial ordered. *Moore* v. *Dickie*, 33 N. S. R. 375.

Findings of jury — *Court to draw inference that negligence had or had not been established.*]—Though allowance is to be made for the technical difference of the proceedings in the Courts of Canada and those of England, yet where trial by jury prevails, a special verdict ought to be the finding of facts, by the jury, from which the Court is to pronounce its judgment on the law, and the verdict ought not to leave facts to the Courts to draw an inference; such as, whether negligence has or has not been established; negligence being a question of fact and not of law. The negligence of a bailee in disobeying the instruction of a bailor, given more than a year prior to the cause of action, and not specifically declared upon:—*Held*, not sufficient, though proved in the cause, to entitle the plaintiff to recover damages thereon. A *venire de novo* awarded, with liberty to amend the pleadings. *Tobin* v. *Murison* (1845), C. R. 1 A. C. 256.

Findings of jury — Negligence — Contributory negligence—Judge's charge—Misdirection—Excessive damages. *Street* v. *Can. Pac. Rw. Co.*, 9 W. L. R. 558.

General verdict — *Answers to questions—Doubt as to meaning of jury—New trial—Misdirection — Negligence — Contributory negligence — Ultimate negligence — Street railways—Appeal — Costs.*]—In an action for damages for injury to a child who was run over by a car of the defendants, in which negligence was alleged, several questions were submitted to the jury by the trial Judge, but he also told them that they might, if they chose, find a general verdict. When the jury returned into Court, the foreman announced, "We award the plaintiff $300 damages." On being asked by the trial Judge whether they had answered the questions, they said they had answered 3, as follows: "(1) Q. Was the company guilty of negligence? A. Yes. (2) Q. If so, in what did such negligence consist? A. Overspeed. (3) Q. Was the plaintiff guilty of contributory negligence? A. Yes." On this the trial Judge dismissed the action:—*Held*, that there should be a new trial; it was probable that the verdict was intended to be a general one, but the matter was not free from doubt; and the jury should have been asked to make the matter plain before being discharged.—Among the questions that were not answered by the jury, was the following: "Could the motorman, after it became apparent to him that the boy was going to cross the track, by the exercise of reasonable care and skill have prevented the accident, *if he had been running at a reasonable rate of speed?*" In leaving this question, the trial Judge said: "I want you to consider that last question, because it is not 'Could he have prevented the accident if running at an *unreasonable* rate of speed?'"—*Held*, that this question was not properly framed, and the jury were not properly directed. The unreasonable rate of speed was the original negligence, and the question which the jury had to consider, after finding such negligence, was whether, notwithstanding that unreasonable rate of speed, the motorman, after seeing the child committing or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it:—*Held*, that the defendants should pay the costs of the plaintiff's appeal from the judgment dismissing the action (Martin, J.A., dissenting as to this): and that the costs below should abide the result of the new trial. *Rayfield* v. *B. C. Electric Rw. Co.* (1910), 14 W. L. R. 414.

Granted on appeal — Ground of mistrial—Question of malice not submitted to the jury—Jury found reasonable and probable cause—Duty of the Judge—No comment on facts which might prejudice the trial—Discussion of rule of law—Costs. *Harris* v. *Bickerton* (1911), 19 O. W. R. 383, 2 O. W. N. 1197.

Ground for—*Defence not availed of.*]—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence. *Kennedy Island Mill Co.* v. *McInerney*, 36 N. B. R. 612.

Judgment directing new trial—*No substantial difference in evidence—Nonsuit.*]—The judgment of the Supreme Court of Nova Scotia (34 S. C. R. 366) in an action by the executrix of M. to recover an amount alleged to be due under a contract of hiring with the defendants, was reversed on appeal to the Supreme Court of Canada, on the ground that the illness of deceased, by which he was permanently incapacitated, would of itself terminate the contract, and a finding of the jury that the deceased did not continue in his employment after notice of a rule that an employee was only to be paid for time that he was actually on duty, was

held to be against evidence and was set aside.—A new trial having been ordered and had, the presiding Judge, on the conclusion of the plaintiff's case, stated that, in his opinion, the additional evidence made no material change in the case from what it was before, and withdrew the case from the jury:—*Held*, that the facts being substantially the same as before, no useful purpose could be served as submitting the case to a jury, and that the Judge was right in withdrawing the case from the jury and in dismissing the action. *Marks* v. *Dartmouth Ferry Commission*, 38 N. S. R. 386.

Jurisdiction — *Objection not taken at trial.*]—Effect was given to an objection to the Judge's charge not taken at the trial, and a new trial ordered, but without costs. *Wason* v. *Douglas*, 21 C. L. T. 521, 1 O. W. R. 552.

Jury—*Verdict—Setting aside—Powers of Court en banc — Nonsuit.*] — Where the Court *en banc* set aside the verdict of the jury in favour of the plaintiffs:—*Held*, that the Court could not, under any of the Rules in the King's Bench Act, 58 & 59 V. c. 6, dismiss the action or enter a nonsuit or verdict for defendants in the face of the verdict of the jury. Rules 639, 640, and 642 discussed. *Connecticut Mutual, etc., Co.* v. *Moore, 6 App. Cas. 644, and British Columbia Towing, etc., Co.* v. *Sewell*, 9 S. C. R. 527, followed. New trial ordered without costs of former trial. Costs of the application to be costs in the cause to the defendants in any event. *Davidson* v. *Stuart*, 14 Man. L. R. 74.

Misdirection.]—Judge, in charging the jury, told them that if they thought the scars on the plaintiff's face, caused by the bite, were likely to be permanent, and that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages:—*Held*, misdirection, as such damages were too speculative and remote. The jury were further directed that in assessing the damages they might take into consideration the financial position of defendant and the condition in life of plaintiff:—*Held*, misdirection. *Price* v. *Wright*, 35 N. B. R. 26.

Misdirection — *Questions for jury — Verdict on issues — Damages.*]—An order for a new trial should not be granted merely on account of error in the form of the questions submitted to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the Judge at the trial, and the jury has passed upon the questions of substance. Judgment of the Court of Appeal for Manitoba in *Wald* v. *Winnipeg Electric Rw. Co.*, 18 Man. L. R. 134, affirmed, Fitzpatrick, C.J.C., dissenting, and Davies, J., *hæsitante*, as to the quantum of the damages awarded. *Winnipeg Electric Rw. Co.* v. *Wald*, 41 S. C. R. 431.

Misdirection — *Substantial miscarriage — Court equally divided—Negligence.*] — In an action for damages for the negligent operation of an elevator by the defendant's servant, causing the death of the plaintiff's son, a new trial was moved for on behalf of plaintiff, on the ground of misdirection. The Court was equally divided:—*Held, per* Graham, E.J., and Russell, J., that, as the effect of the misdirection complained of was to withdraw from the jury questions which were proper for their consideration, and upon which they should have been asked to pass, there should be a new trial.—*Per* Townshend, J., that, although the trial Judge in his instructions to the jury used inaccuracies of expression in regard to the law of negligence, these expressions were not of such a character as to mislead the jury on the main subject of inquiry, and, no substantial wrong or miscarriage having been occasioned, the provisions of O. 37, r. 6, applied, and a new trial should not be granted.—*Per* Longley, J.—The findings of the jury were warranted by the evidence, and, the questions submitted being proper, there was no reason for a new trial, and the application should be dismissed. *Hawley* v. *Wright*, 39 N. S. R. 1, 1 E. L. R. 26.

Motion for—*Misconduct of jurors—Contradictory affidavits — Oral examination before Court.*]—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined *viva voce* touching the matters in question. *Wood* v. *Le Blanc*, 36 N. B. R. 47.

Motion for—*Notice of — Amendment—Appeal — Improper admission of evidence — Absence of objection at trial — Perverse verdict.*]—An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal. An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission was refused, as it did not appear from the Judge's notes that objection was made at the trial, though the commissioner had noted the objection. A new trial on the ground that the verdict was perverse was refused. *Edmonton* v. *Thompson*, 1 Terr. L. R. 342.

Motion for—*Practice—Service of notice on Judge.*]—*See Lang* v. *Brown*, 34 N. B. R. 492.

Negligence—*Dismissed without costs — On undertaking not to appeal—New evidence forthcoming—Appeal to Divisional Court—New trial allowed.*]—Plaintiff brought action to recover damages for injuries received when a passenger upon a car of the defendants by being thrown down by a sudden jerk of the car, as alleged by plaintiff, when she was moving towards the door in order to leave the car. At the trial the action was dismissed, without costs, on plaintiff's junior counsel giving a consent that no appeal would be made. Plaintiff finding new evidence forthcoming desired a new trial. She alleged that the consent was given under mistake and without authority.—Divisional Court allowed

plaintiff a new trial, costs of the former trial and of this appeal, including the examination of the plaintiff on her affidavit, to be costs in the cause. Mulock C.J.ExD., *dissenting*, holding that the motion and appeal should be dismissed with costs. *Caswell* v. *Toronto Rw. Co.* (1911), 18 O. W. R. 464, 2 O. W. N. 655.

See 18 O. W. R. 473, 1 O. W. N. 856.

Negligence—*Findings of jury—Not satisfactory—New trial granted on terms.*]—In an action for negligence the jury gave these answers to the following questions: (1) Was there any negligence on the part of the railway causing the accident to the plaintiff? A. Yes. (2) If so, what was the negligence? A. If the conductor had been on rear end of car the accident may not have happened. (3) Was the plaintiff guilty of any negligence which caused or contributed to his own injury? A. Yes. (4) Damages? A. $200. Middleton, J., dismissed the action with costs. Divisional Court *held*, that a new trial should be ordered on terms of plaintiff paying costs of former trial and of appeal within 30 days after taxation, on the ground that the above answers of the jury were not satisfactory and that the jury should have been asked to find what the negligence of the plaintiff was. *Smith* v. *Hamilton St. Rw. Co.* (1911), 18 O. W. R. 729, 2 O. W. N. 801.

Notes of evidence not before Court —*Amendment — Costs.*]—In a case tried at circuit a verdict was entered for the defendants on a declaration amended at the trial, subject to the defendants' objection, by substituting, for counts therein set forth, causes of action at common law and causes of action under the Workmen's Compensation for Injuries Act; the plaintiff entered the cause on the special paper to move for a new trial, and the defendant to move for a nonsuit pursuant to leave, in case the Court should be of the opinion that the verdict should not stand; and the motions could not be argued owing to the stenographer not filing any record of the trial; the Court ordered a new trial without costs, and that the case be brought down for a second trial on the original record as if no order to amend had been made. *Bourque* v. *Record Foundry & Machine Co.*, 3 E. L. R. 481, 38 N. B. R. 239.

Order directing—Appeal from — New trial pending appeal—No application to stay —Judgment. *Webb* v. *Can. Gen. Electric Co.*, 2 O. W. R. 322, 865, 1113.

Order directing a new trial refused under Arts. 502, 503 C. P. Q., where it did not appear that the amount of damages awarded was so grossly excessive as to make it evident that the jury had been led into error or were influenced by improper motives. *Lachance* v. *Can. Pac. Rw. Co.* (1909), 35 Que. S. C. 494, affirmed 42 S. C. R. 205.

Restricting to particular issues — *Jury.*]—The jury brought in findings upon which the trial Judge was unable to enter judgment for either party. The plaintiff asked for a new trial on some of the issues not disposed of by the jury; the defendant on all the issues:—*Held*, that there must be a new trial on all the issues. This was not a proper case for limiting the new trial, as the jury might give answers on the issues not disposed of which might be inconsistent with the findings of the former jury. *Irvine* v. *Parker*, 24 C. L. T. 138.

Staying proceedings — *Appeal to Supreme Court of Canada — Special circumstances.*]—The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant. No special circumstances being shewn, the decisions of the Master in Chambers, 7 O. L. R. 186, 24 C. L. T. 134, 3 O. W. R. 312, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed. *Hockley* v. *Grand Trunk Rw. Co.*, *Davis* v. *Grand Trunk Rw. Co.*, 24 C. L. T. 311, 7 O. L. R. 658, 3 O. W. R. 963.

Surprise — *Loss of cattle — Bailment —Cause of disease not assigned in pleading or examination.*]—The defendant agreed to "feed and winter" 47 young cattle for the plaintiff and to be responsible for the loss of any of the cattle in any other way than by death from ordinary disease. A large number of the cattle died, and the plaintiff sued for damages. At the trial, the plaintiff had a verdict on the strength of evidence proving that the stable in which the defendant had kept the cattle was too small for so many cattle. There was nothing in the statement of claim to inform the defendant upon what grounds he was held liable, and he filed affidavits to shew that he had been unable to ascertain such grounds on the examination of the plaintiff for discovery, also, that the stable, which had been taken down and removed before the trial, had been of quite sufficient size to accommodate the cattle:—*Held*, that there should be a new trial, on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable. Costs to abide the result of the new trial. *McLenaghan* v. *Hood*, 15 Man. L. R. 510, 1 W. L. R. 422, 25 C. L. T. 19.

Verdict—*Finding of jury.*] — Where a case has been properly submitted to the jury, and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial Judge was dissatisfied with the verdict. *Fraser* v. *Drew*, 20 C. L. T. 111, 30 S. C. R. 241.

Verdict against weight of evidence —*Jury — Contract — Sale of logs.*] — A new trial will not be granted on the ground that the verdict was against the weight of evidence if the verdict was one which the jury, acting as reasonable men, could have found.—The Court refused to disturb a verdict for the plaintiff for $325 in an action to recover the balance due on a sale of a quantity of logs. *McLeod* v. *White*, 39 N. B. R. 32, 6 E. L. R. 249.

Verdict for defendants — County Court action — View by Judge and jury—

Judge ordering new trial — Refusal of Court of Appeal to interfere — Municipal corporations — Diversion of water — Injury to property. *Glazan* v. *Rossland*, 9 W. L. R. 468.

Verdict of jury — *Judgment.*] — In an action for negligence against a municipality the Judge gave judgment for the defendants, holding that the findings of the jury in favour of the plaintiff amounted to a verdict of non-feasance only. Other actions by other plaintiffs arising out of the same occurrence had been decided against the defendants by the Privy Council:—*Held*, that it was useless to send the case to another jury, and that the plaintiff was entitled to judgment for the amount of the verdict. *Gordon* v. *Victoria*, 7 Brit. Col. L. R. 342.

Weight of evidence — *Compromise of cause of action—Pleading—Abandonment at trial — Reference in Judge's charge — New trial.*]—The defendant, the father of a young girl, about whom the plaintiff, a boy of 18, had used some equivocal words, gave the plaintiff a severe thrashing. This action was brought to recover damages for the assault. The defendant also made a statement about the occurrence to a newspaper reporter, and the statement was printed in certain newspapers. At the trial the jury found a verdict for the defendant, and added, "Each party to pay their costs." The jury made no finding as to damages:—*Held*, that there must be a new trial.—*Per* Macdonald, C.J.A.:—There was misdirection in the trial Judge telling the jury to consider whether the defendant had provocation, and whether it excused what he did as to relieve him from damages. The case was not analogous to an action for libel. The defendant had no right to take the law into his own hands, and could not escape liability for the assault on the plea of provocation, either fancied or real, little or great, in circumstances such as were disclosed in this case. Circumstances of provocation may be given in evidence, and the jury can and ought to consider them in arriving at the measure of damages. But where, as here, there is a clear case of assault, of an aggravated character, the jury should be directed that such assault is a legal wrong, and that, as a matter of law, the plaintiff is entitled to redress. The jury should be directed to consider, in mitigation of damages, all the circumstances—for example, such as might tend to shew that the defendant did not act as he did out of mere wanton cruelty. Conversely, they should be directed to consider all matters in aggravation of damages, such, for instance, as the newspaper publication, and all acts of the defendant which they might consider ought to be visited with punitive damages.—*Per* Macdonald, C.J.A., also:—The verdict was against not only the weight of evidence, but against all the evidence; and from this and what took place after the verdict was rendered, it was apparent that the verdict was a compromise, and that the jury had not fulfilled their function of deciding upon the merits of the case.—*Per* Irving, J.A.:—If the verdict could be upheld on the ground that the defendant was justified in doing as he did, there was plenty of evidence to enable the jury to reach the conclusion they did, that is, if their verdict was grounded on the plaintiff's behaviour towards the defendant's daughter.—*Per* Irving, J.A., also:—The defendant pleaded a compromise of the cause of action, and the plaintiff set up a waiver of the alleged compromise; and the trial Judge erred in putting it before the jury; the jury may have based their finding for the defendant on this; and that alone would entitle the plaintiff to a new trial. *Slater* v. *Watts* (1911), 16 W. L. R. 234, B. C. R.

Witness remaining in Court — *In discretion of Judge to allow him to be examined.*] — At the trial all the witnesses were ordered to withdraw. The defendant, however, remained and was tendered as a witness but refused by the Court, and a verdict found for the plaintiff: — *Held*, Peters, J., in discharging a rule for a new trial, that the rejection or admission of the witnesses' testimony was entirely in the discretion of the Judge, that the witness was rightly rejected. *Young* v. *Young* (1854), 1 P. E. I. R. 98.

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7. Notice of Trial.

Close of pleadings.]—A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim:—*Held*, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular. *Gibson* v. *Nelson*, 20 C. L. T. 426, 19 P. R. 265.

Close of pleadings — *Several defendants — Irregularity—Waiver—Delay.*] — A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it. A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice. *Long* v. *Long*, 24 C. L. T. 297, 7 O. L. R. 596, 3 O. W. R. 428.

Distant sittings — *Dismissal of action.*]—In January, the plaintiff's solicitors gave notice of trial at the civic sittings to be held in July in Victoria, where, according to statute, civil sittings are also held in February, March, and May:—*Held*, on a summons to dismiss for want of prosecution, that the plaintiff must give notice of trial for the March sittings, otherwise the action will stand dismissed. *Wiles* v. *Times Printing and Publishing Co.*, 10 B. C. R. 226.

Equitable action — *Default judgment —Appearance in spite of—Time—Entry for trial—Motion to set aside—Non-appearance at trial—Dismissal of action—Conditions of order—Appeal—Amendment—Costs.*] — An action for partition or sale of lands and for a declaration that a Crown grant to the de-

fendants was inoperative and void. Judgment for default of appearance was entered against three of the four defendants in June, 1899. In February, 1900, an appearance was entered on behalf of all the defendants and a defence delivered. Notice of trial was given and the action entered by the defendants. The plaintiffs moved before the trial Judge to set aside the notice. This motion was dismissed; and, the plaintiffs not proceeding with the trial, an order was made dismissing the action for want of prosecution unless plaintiffs paid costs and gave security:—*Held*, that the action was of an equitable nature, and the plaintiffs were not entitled under any practice prevailing immediately prior to the 1st October, 1884 (when the Judicature Act came into force), to obtain a judgment by default against the defendants as at common law; the suit must be governed by the same practice as any other equitable action not provided for in Order XIII., Rules 11, 13; the defendants could appear at any time before judgment, although the time limited for appearance had elapsed; a defendant could appear at any time, though not served. 2. The appearance and defence being regular, the notice of trial and entry were regular; and *semble*, that, if the appearance and defence were irregular the motion should have been to set them aside, and not the subsequent proceedings. 3. The notice of trial was regularly given under Order XXXIV., Rule 11, and, the defendants having appeared when the cause was called for trial, and the plaintiffs having failed to appear, the action was properly dismissed under Rule 23 of that Order. 4. The conditions of the order made by the trial Judge, though unusual, were within his province. 5. The order made at the trial should be amended by adding recitals shewing what actually took place at the trial, and the appeal from it should be dismissed without costs, the difficulty having been created by want of care in drawing up the order, and the action should be dismissed with costs in case the conditions imposed were not complied with. *Duyon* v. *LeBlanc*, 34 N. S. Reps. 215.

Failure to proceed pursuant to notice — *Motion for nonsuit — Affidavit in answer — Service — Leave to proceed — Terms.*]—An application for judgment as of nonsuit for not proceeding to trial pursuant to notice, was refused, upon the plaintiff giving a peremptory undertaking to go to trial at the next sitting, and on payment of the costs of the motion, notwithstanding that the plaintiff's affidavit in answer to the motion, excusing the default, had not been served, as required by the Rule of Hilary term, 1894. *Frederick* v. *Gibson*, 36 N. B. R. 364.

Irregularity — Pleadings not closed—Leave to serve joinder *nunc pro tunc*. *McKenzie* v. *Budd*, 40 N. S. R. 626.

Late service of — Motion to set aside —Failure of applicant to negative service of proper notice. *Johnston* v. *Tapp*, 10 O. W. R. 23.

Motion to set aside — Irregularity — No place of trial named in statement of claim—Place of trial named in writ of summons not specially indorsed—Waiver of irregularity—Costs. *Barrett* v. *Perth Mutual Fire Insurance Co.*, 10 O. W. R. 464.

Necessity for — *Order to proceed at next sitting — Adjournment.*] — An order made on the defendants' application to dismiss for want of prosecution, directing that the plaintiff set down his action for the next sitting at Nelson and proceed with the trial, otherwise the action to stand dismissed without further order, dispenses with a notice of trial; and if, before the date fixed for the sitting at the time the order was made, the sitting is adjourned, it is a compliance with the order by the plaintiff if he enters the action for the later date, and is ready for trial when the case is called. *McLeod* v. *Waterman*, 9 B. C. R. 370.

Regularity — Close of pleadings — Action to establish will—Defence setting up agreement with testator—Joinder. *Russell* v. *Russell*, 10 O. W. R. 873.

Regularity — *Close of pleadings — Counterclaim—Joinder of issue—Rules 262, 263—Jury notice.*] — On the 19th October, 1906, the defendants delivered a statement of defence and counterclaim. No further pleadings were delivered until the 11th February, 1907, when the plaintiff delivered a joinder of issue, and served a jury notice and notice of trial, which were moved against as too late, it being contended that the cause was at issue not later than the middle of November, 1906:—*Held*, that the defendants (plaintiffs by counterclaim) not having noted the pleadings closed for default, it was open to the plaintiff to join issue when he did, and the pleadings were not closed until the 11th February, 1907, and therefore the notices were regular. — Con. Rules 262 and 263 considered. *Nixon* v. *Mundett*, 9 O. W. R. 400, 14 O. L. R. 343.

Service of — *Letter wrongly addressed — Ratification.*]—On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in St. Thomas, prepared a notice of trial and copies thereof, in three actions, which he directed to be forwarded to his Toronto agents, with instructions to serve a return with admissions of service; but, by a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning; but did not come to the notice of the member of the firm who had charge of the defences therein until after four o'clock, when, on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitor, which was done:—*Held*, reversing the decision of the Master in Chambers, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor did the defendants' solicitors do anything to ratify such service. *Newsome* v. *Mutual Reserve Fund Life Association*, 22 C. L. T. 115, 3 O. L. R. 253.

Setting down for trial — *Motion to set aside and strike off list—Invalidated by subsequent proceedings—Amendment — New defendant—Fresh grounds of action.*]—Master in Chambers granted plaintiff an order setting aside notice of trial as having become irregular, owing to case not being yet at

issue, through amendments made subsequent to setting down and notice of trial. Costs to plaintiff in any event. *Brennen* v. *Bank of Hamilton* (1910), 17 O. W. R. 8, 2 O. W. N. 91.

Time — *Judgment granting new trial—Settlement of.*]—By the judgment of the Supreme Court of Canada an appeal in this action was allowed and a new trial granted. The judgment was read in open Court on the 27th May. The plaintiff's solicitor thereupon gave the usual ten days' notice of trial for the 10th June, 1902. The minutes of the judgment were not settled until the 3rd June, and when settled bore date the 27th May, 1902. The notice of trial was set aside as premature. *Grant* v. *Acadia Coal Co.*, 22 C. L. T. 261.

Time for — *Power to abridge—County Courts.*] — A County Court Judge has no jurisdiction to abridge the six clear days' notice of trial required by s. 92 of the County Courts Act. *Hickingbottom* v. *Jordan*, 21 C. L. T. 490, and B. C. R. 126.

Waiver — *Entry for trial — Motion to strike off — Non-appearance — Action dismissed for—Appeal—Costs.*] — Defendants after giving notice of trial accepted service of a replication pleaded by plaintiff, without making any objection thereto:—*Held*, that they thereby waived the notice and admitted that the cause was not at issue when it was given. Where defendants subsequently gave another notice, which was admittedly defective, and entered the cause on the docket of causes for trial:—*Held*, that the cause was improperly entered and that a motion to set aside the notice, and to strike the cause off the docket, should have prevailed. Plaintiff did not appear at the time at which the cause was entered for trial, and an order was obtained by defendants under O. 34, R. 33, dismissing the action for non-appearance:—*Held*, that there was an appeal from the order so made, and that plaintiff was not limited to an application, under the order, to have the judgment set aside. *Per* Meagher, J. (dissenting), that there should be no costs, as the difficulty appeared to have arisen from a misunderstanding between solicitors. *Cummings* v. *Pickles*, 32 N. S. R. 489.

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8. Postponement of Trial.

Absence of witness — *Onerous terms.*] —Where a party to a suit is entitled to a postponement of the trial, on the ground of the absence of a material witness, it is improper to impose as a term of granting the order a condition that the party consent to a change of venue. *Royal Bank of Canada* v. *Hale*, 36 N. B. R. 471.

Absence of witness — Terms—Venue —Costs. *Gooch* v. *Anderson*, 2 O. W. R. 426.

Action to recover possession of mining lands — Act of provincial legislature passed *pendente lite* validating title of defendants — Petition for disallowance — Grounds for postponement. *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 10 O. W. R. 38, 225.

Adding parties — Amendment — Trial proceeding without adjournment — Witness for defendant not present — Refusal to adjourn — New trial. *Arthur* v. *Fawcett*, 5 O. W. R. 334.

Application for — *Illness of plaintiff —Inability to undergo examination for discovery — Evidence — Physicians — Detectives.*]—Order made postponing trial owing to illness of plaintiff. Some interesting comments will be found on the virility of opposing affidavits of medical men and the use of detectives as witnesses on interlocutory motions in civil proceedings. *Stowe* v. *Currie*, 13 O. W. R. 591.

Consent — *Disbursements — Attorney fees—C. P. 201.*]—When all the parties agree to a joint hearing of a case, such consent applies only to the service of subpœnas, the taxation of the witnesses and the cost of the depositions; it cannot affect the fees of the attorneys appearing for the parties to the suit. *Lavergne* v. *Lariviere* (1910), 17 R. L. n. s. 133, 12 Que. P. R. 206.

Costs — *Inspection of mining land.*] — The defendants got an order at the trial for the inspection of a vein in the plaintiffs' claim, which they alleged was the continuation of a vein the apex of which was within the limits of their own claim, and the plaintiffs, alleging that such order necessitated inspection by them of other similar places on their property, with a view of furnishing evidence to rebut that which might be adduced by reason of the defendants' inspection, and asked for an adjournment for that purpose, were allowed the adjournment, but only on the terms that all costs occasioned thereby should be borne by them in any event:—*Held*, on appeal, that such costs should abide the result of the issues to which the inspection related. *Iron Mask* v. *Centre Star*, 7 Brit. Col. L. R. 66.

Determination of questions arising in another pending action — Causes of action — Identity. *Toronto* v. *Toronto Ry. Co.*, 4 O. W. R. 221, 345, 5 O. W. R. 14.

Discretion — *Review — New trial.*]—If a trial Judge refuses, except upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness, the Court will review the exercise of his discretion, and grant a new trial. *Hale* v. *Tobique Manufacturing Co.*, 36 N. B. R. 360.

Extension of time for delivery of defence — Illness of defendants' manager — Terms — Costs. *Cliff* v. *New Ontario S. S. Co.*, 6 O. W. R. 519; *Grandin* v. *New Ontario S. S. Co. & Can. North. Ry. Co.*, 6 O. W. R. 521.

Grounds—*Action for libel — Costs.*]—Where it was understood that one action for libel in a newspaper should be made a test case, and that action was settled, Master in Chambers granted order postponing two other similar actions against other newspapers until March sittings. *Wilkinson* v. *Mail Printing Co.*, *Wilkinson* v. *Hamilton Spectator Co.* (1911), 18 O. W. R. 277, 2 O. W. N. 644. See 17 O. W. R. 935, 2 O. W. N. 471.

Grounds—*Illness of necessary and material witness.*]—Master in Chambers granted order postponing trial on grounds of illness of a necessary and material witness. Costs in the cause. *Smith* v. *Lennox* (1911), 18 O. W. R. 385, 2 O. W. N. 831.

Grounds for — Mistake of plaintiff — Proposed amendment — Award. *Paradis* v. *National Trust Co.*, 7 O. W. R. 323.

Grounds for — View of *locus in quo* necessary for defence — Impossibility of view at date of proposed trial. *Williamson* v. *Parry Sound Lumber Co.*, 7 O. W. R. 532, 562.

Motion by defendant to postpone — Difficulty in securing attendance of witnesses —Plaintiff's delay in proceeding—Terms of postponement. *Palangio* v. *Macdonnell*, 12 O. W. R. 721.

Necessary witnesses—Members of Parliament — Refusal to attend during session. *Lefurgey* v. *Great West Land Co.*, 7 O. W. R. 868.

Party and necessary witness a member of the Legislative Assembly in session — Convenience — Trial at Toronto — Privilege. *Todd* v. *Labrosse*, 11 O. W. R. 525.

Peremptory order for trial.] — An order that the plaintiff set his action down for trial for a certain sitting, and in default that his action be dismissed without further order, is not a peremptory order for trial; and where the plaintiff has complied with the order, and moves at the trial for a postponement, it will be postponed if a proper case is made out. *Thurston* v. *Weyl*, 9 B. C. R. 452.

Proposed absence of witness — Servant of Crown. *Pinkerton* v. *Greenock*, 7 O. W. R. 737.

Statutory sittings — *Fresh notice of trial — British Columbia Rule 440.*]—This case was set down for trial at the December sittings, but by telegram from the Chief Justice all cases were adjourned until the February sittings: — *Held*, unnecessary for plaintiff to give fresh notice of trial. *Atwood* v. *Kettle River Valley Rw. Co.* (B.C.), 10 W. L. R. 374.

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9. Separation of Issues.

Preliminary question of law — Application for separate hearing before trial — Rule 66, Exchequer Court. *Berliner Gramophone Co.* v. *Columbia Phonograph Co.*, 13 O. W. R. 53.

Preliminary trial of one issue — Rule 531. *Bank of Montreal* v. *Morrison*, 3 O. W. R. 303.

Preliminary trial of question of fact —Life insurance—Contract — Validity — Suicide of assured — Issue as to sanity — Separate trial — New trial of whole case. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 421.

Preliminary trial of question of law —*Demurrer.*]—The action was founded upon an agreement, under which the defendants were to transfer to the plaintiff a quantity of stock in certain telephone companies and property and assets connected therewith, in consideration of which the plaintiff agreed to make certain payments in money, deliver certain stock, and transfer to the defendants certain lands, including the portion of parish lot 3, Kildonan, lying west of the main highway. The plaintiff conveyed the land to the defendants, but charged that he had been induced to enter into the agreement by the misrepresentations of the defendants and that the stock transferred to him was of no value. He claimed $210,000 damages and also claimed a lien on lot 3, Kildonan, for $150,000. In the statement of defence the defendants raised the question of the plaintiff's legal right to a lien:—*Held*, that a Judge should make an order for the trial of such a question before the trial of the issues of fact, only where the points of law involved are such as affect the whole case, the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining. If there are issues of fact which must be tried in any event, however the point of law be decided, the order should be refused and the point left to be argued before the Judge at the trial. If the question of the plaintiff's right to a lien were argued and decided, the main issues raised in the action would still remain undisposed of. A question like the present one, not being the principal issue involved, but arising as an incident to the main relief sought, should not be set down to be argued and decided before the trial of the action. *Gardner* v. *Bickley*, 24 C. L. T. 382, 15 Man. L. R. 354.

Preliminary trial of question of law —Disposing of whole action — Reasonable probability of establishing propositions of law — Rule 259 — Jurisdiction of Master in Chambers. *Smith* v. *Smith*, 5 O. W. R. 518, 673.

Preliminary trial of question of law —*Pleading.*]—Under Rule 453 of the King's Bench Act, Man., it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers, under Rule 326, to strike them out, is the proper remedy. *Makarsky* v. *Can. Pac. Rw. Co.*, 15 Man. L. R. 53.

Separate trial of preliminary issue —Settlement of action — Rule 531—Consent. *Thomas* v. *Imperial Export Co.*, 7 O. W. R. 745, 807.

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10. Setting Down.

Application for leave to set down —Irregularity — Pleadings not closed — Counterclaim — Defence — Reply. *Brookfield* v. *Sutcliffe*, 40 N. S. R. 628.

Close of pleadings — Rights of defendant — Injunction motion — Terms of order. *Saunderson* v. *Johnston*, 4 O. W. R. 459, 487.

Delay — *Motion to strike out inscription.*]—A motion by the plaintiff to strike out an inscription on the merits made by the defendant on the 2nd June for the 11th September following will be refused, where it does not appear that such inscription has been made for the purpose of unjustly delaying the proceedings. *Bélanger* v. *Montmorency Cotton Mills Co.*, 7 Que. P. R. 202.

Desistment — *Re-entry* — *Costs* — *Copies of pleadings* — *Discretion* — *Dismissal of action.*]—A party who desists from any proceeding may proceed anew when no costs have been incurred.—Where a party has desisted from a setting down of an action for trial before the lapse of the proper time, he can set it down again without having to pay costs as a condition precedent.—The Court of first instance, being seised of a cause, has discretion to determine whether the copies of the proceedings produced are sufficient, according to the requirements of the law, for understanding the case. — *Semble*, that the Superior Court may dismiss an action in default of proof, reserving to the plaintiff the right to apply, although the plaintiff has set down an appeal from an order upon a motion to strike the case out of the list of cases for examination and hearing. *Nicolet* v. *Toussignant*, 3 Que. P. R. 239.

Inscription ex parte — *Copy of account not served.*]—An inscription for trial by the plaintiff *ex parte* will be set aside on motion, if a copy of the account sued for has not been served upon the party defendant. *Laurie Engine and Machine Co.* v. *Dumont*, 9 Que. P. R. 40.

Inscription ex parte — *Default of plea.*]—Where a defendant has appeared and raised a preliminary exception, which has been dismissed, but has not pleaded to the merits, the plaintiff may inscribe for trial *ex parte*, but not as upon default. *Lefebvre-Descoteaux* v. *Lefebvre-Descoteaux*, 8 Que. P. R. 348.

Inscription for trial — *Ex parte inscription* — *Notice* — *Irregularity.*]—An *ex parte* inscription should not be accompanied by a notice for a fixed day, saving the completion of it later, and if it is accompanied by an irregular notice, but followed by a regular notice, it will not be set aside on motion. *Boucher* v. *Mondor*, 9 Que. P. R. 258.

Irregularity — *Re-entry* — *Costs.*] — Where an action has been improperly entered for trial, the entry may be withdrawn and another substituted for it, the first being without effect; and the only costs to which the attorney is entitled are the costs of the motion to strike out the first entry, if such motion has been made. *Nicolet* v. *Toussignant*, 9 Que. Q. B. 356.

Irregularity — *Time* — *Joinder of issue.*]—An inscription for hearing upon the merits filed less than three days before issue joined is illegal and will not be set aside on motion. *Brisson* v. *International Harvester Co.*, 6 Que. P. R. 42.

Peremption of suit — *Is the striking of a cause from the hearing roll a useful proceeding* — *C. P. 279.*]—The mere striking by the Court of a cause from the hearing roll is not a proceeding interrupting peremption, where no notice was given by either party of the date on which such a case was set down for hearing. *Comp. Glasson*, 798, *Carre & Chauveau*, Art. 399, Q. 1437; *Coke* v. *Millar*, 4 R. L. 240. *Delle J. Proulx* v. *Les Commissaires D'Ecotes de Dorval* (1910), 11 Que. P. R. 395.

Proceeding taken in name of deceased party — *Amendment* — *Discretionary order* — *Interference with discretion on appeal.*]—During the time between the hearing of a case and the rendering of the judgment in the trial Court, the defendant died. His solicitor, by inadvertence, inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend and to be allowed to make a regular *reprise d'instance*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and *reprise d'instance* applied for, and reversed the trial Court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of review, on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgments given were nullities:—*Held*, reversing the judgment appealed from, Strong, C.J., and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and *reprise d'instance*, and that, as there was no abuse of discretion, the Court of King's Bench should not have interfered. *Price* v. *Fraser*, 22 C. L. T. 46, 31 S. C. R. 556.

Reinstatement of case struck out—*Notice.*]—Where a case, inscribed on the roll for trial, has been struck out in the absence of the attorneys, it may be reinstated, on the roll on the application of either of the parties, after notice to the other party. *Carter* v. *Walker*, 23 Que. S. C. 123.

Time — *Premature filing.*]—A proceeding in an action has no efficacy except as of the day upon which it is filed at the record office and made part of the record. 2. An inscription for examination and hearing, made before the expiration of the three days which follow issue joined, will be set aside upon the application of the opposite party. *Lachancè* v. *Casault*, 4 Que. P. R. 223.

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11. SPEEDY TRIAL.

Motion to expedite trial — Delay in pleading — Parties — Collusion — Motion

to strike out pleading — *Res judicata* — Practice — Costs. *Armstrong* v. *Crawford*, 12 O. W. R. 1155.

Prejudice.]—When the sum in litigation (in this case an alimentary allowance) is the only resource of the party seeking it, to whom serious prejudice will arise if the cause is not heard until it is reached in its place on the list, the Judge may order that the cause shall be called on as soon as possible. *Jones* v. *Moodie*, 3 Que. P. R. 163.

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12. MISCELLANEOUS CASES.

Affinity of one of several J. P.'s *trying cause to party is ground for setting aside their judgment.*]—These were appeals from judgments of four J. P.'s fining appellants in assault cases. One of the magistrates was married to a first cousin of D. McIntosh, the respondent in one of the cases. The respondents in the other cases at the time of the alleged assault, were not themselves of affinity to any of the magistrates but were acting as servants of D. McIntosh. Objection was taken to the convictions on the ground of D. McIntosh's affinity to one of the magistrates:—*Held*, Hensley, J., that this objection was fatal, and the convictions must be set aside, and that no distinction could be made between the case of D. McIntosh and those of his servants, but that the convictions in their cases must be set aside on the same ground. *Campbell* v. *McIntosh* (1872), 1 P. E. I. R. 423.

Agent not summoned may defend *first trial without waiving principal's right to rehearing — New trial.*]—An absent debtor attachment under 20 Geo. III., c. 9, was issued against W., but no summons was served on his agent. The 8th section of the statute gives the absent debtor the right to a rehearing within three years after judgment. At trial of this cause, the defendant's agent, by his counsel, wished to cross-examine the witnesses and address the jury. It was objected that he could not do so without waiving defendant's right to a rehearing and that as no appearance had been entered by the agent for the defendant, the agent could not be heard to defend. The Court at the trial refused to allow the agent's counsel to proceed, but reserved the point:—*Held*, (Peters, J.) that the agent had the right to defend without waiving his principal's right to a rehearing. *Cormack* v. *Worrel* (1850), 1 P. E. I. R. 1.

Application for special day for trial and special jury — Order LVIII., Rule 19 — Jurisdiction. *Genessee Oil Works* v. *Shatford*, 40 N. S. R. 618.

Application to re-open trial — Refusal — Discretion — Appeal — Admissibility of evidence to contradict witnesses on collateral issue — Notice of motion — Amendment — Title — Negligence — Street railways. *Rossiter* v. *Toronto Rw. Co.*, 11 O. W. R. 202, 1045.

Continuance of trial — Motion for—Grounds — Vagueness — Possibility of settlement. *Dominion Iron and Steel Co.* v. *Dominion Coal Co.*, 3 E. L. R. 415.

Direction for trial of action by Mining Commissioner — Mines Act, ss. 9, 20 — Jurisdiction of Master in Chambers. *Harrison* v. *Mobbs*, 9 O. W. R. 545.

Joinder of actions for trial — *Test —Fairness to all parties — Practice.*]—In considering whether or not a joinder for trial should be ordered under Art. 291, C. P., of actions for damages for quasi-offences, the test is not whether the issues are similar or identical but whether the facts to be proved are the same in each, so that they may be tried and decided on the same evidence, and due regard must be had to fair and equal treatment to all the parties concerned. Hence, when litigation grew out of the collapse of a structure as follows: (*a*) a suit for damages by the owner against the builder; (*b*) a suit in warranty by the builder against a sub-contractor; (*c*) a suit in sub-warranty by the sub-contractor against a special contractor for the steel work; (*d*) a suit by the builder against the owner for the balance of the contract price; (*e*) an incidental cross-demand by the owner for the damages caused by the collapse:—*Held*, that the enquiry into the cause of collapse must be the chief object of trial in each case, and they therefore may be joined, but the joinder of two or more, by an order which excludes one of them, to the detriment of a party thereto, is wrong and will be reversed on appeal. *Gardiner* v. *Wilson*, 17 Que. K. B. 498.

Judge interested in another action *against defendant on similar facts, disqualified to try cause — Query.*] — Objection was taken to the Judge trying this cause, on the ground that he was a shareholder in the Bank of P. E. I., which had a case against the same defendant, in which the same questions would arise, and the same evidence be given as in this case, and, as such shareholder, was interested in the result of the present action, and, therefore, disqualified to try it.—Peters, J., was of opinion that the objection did not disqualify him, but the Chief Justice being of a contrary opinion, he declined to try the case. *Hodgson* v. *Dawson* (1868), 1 P. E. I. R. 282.

Must be brought to trial at third term — *Discontinuance.*]—An attachment under 20 Geo. III., c. 9, and all subsequent proceedings, are dissolved if the plaintiff neglect to bring the cause to trial at the third term without having obtained leave to continue it to another. A motion to set aside such proceedings may be made by a subsequent attacher who tried and obtained judgment at the third term. *Wood* v. *Gay* (1862), 1 P. E. I. R. 200.

Stay of trial — *Action for arrest — Appeal pending from judgment of acquittal.*] —It is convenient to suspend the hearing of an action for damages resulting from an arrest, when there is an appeal pending from the order dismissing the complaint upon which the arrest was made, and this appeal has not yet been decided by the

Court of Queen's Bench, criminal side. *Papineau* v. *Nesbitt*, 3 Que. P. R. 88.

Test action — *Substitution of another action as test action.*]—After one of a number of actions brought by different plaintiffs against the same defendants in respect to causes of action which were identical has been ordered to be tried as a test action, the Court has power to substitute another action as a test action. Twenty-nine actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on the plaintiffs' application an order for a test action was made, the order providing that the defendants, if dissatisfied with the result of the test action, might apply to have the other action proceeded with, and that they might apply to have any of the actions forthwith proceeded with, if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, the plaintiffs' solicitor discovered that, on account of the particular place in the mine in which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action:—*Held*, that the object of the order, which was provisional in its nature, was to have a fair test action, and, as the one chosen would not be a fair one, another should be chosen. *McLeod* v. *Crow's Nest Pass Coal Co.*, 23 C. L. T. 341, 10 B. C. R. 103.

Undertaking as to trial — *Judgment.*] —An undertaking, embodied in an order, that the plaintiff should not proceed further, until the trial of the action, with his application for a certificate of improvements, is substantially complied with if no proceedings are taken until after judgment pronounced, though something be done before the judgment is drawn up and entered. *Dunlop* v. *Haney*, 7 Brit. Col. L. R. 300.

TROVER AND DETINUE.

Animal — Evidence of identity — Misdescription — Amendment. *Pearce* v. *Hart* (N.W.T.), 1 W. L. R. 476.

Contract for keep of animals — Dispute as to terms — Detention — Tender before action — Counterclaim — Costs. *McKinnon* v. *Minatty* (Y.T.), 1 W. L. R. 272.

Conversion — Hay cut from farm — Deed — Consideration — Failure of—Maintenance of grantor — Evidence. *Donald* v. *Fulton*, 5 E. L. R. 54.

Demand — *Evidence — Onus.*] — The plaintiff sold to the defendant two horses and took a lien-note for the price, which was not paid at maturity. The defendant re-took the horses under his lien-note, but that was after this action had been brought for unlawful detention of the horses: — *Held*, that, to succeed in the action of detinue, the plaintiff must shew that the defendant detained the horses after the plaintiff made a demand; the onus was on the plaintiff; the evidence did not shew a demand; and the action was dismissed with costs. *Macleod* v. *Scramlen* (1910), 14 W. L. R. 262, 3 Sask. L. R. 155.

Demand and refusal.]—In an action of detinue, as distinguished from an action of conversion, a proof of demand and refusal is essential, if the detention is denied. *Gray* v. *Guernsey*, 5 Terr. L. R. 439.

Negligence — *Parent and child.*] — A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should return it later. On his father attempting to untie the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it:—*Held*, that the father was not liable in detinue or trover, or in an action for negligence. *Kirkland* v. *Rendernecht*, 4 Terr. L. R. 195.

Permission to store goods, with knowledge of dispute as to title — *Intent to convert necessary — Evidence of intent — Setting aside finding of trial Judge.*]—Mere permission by the defendant to store goods in the defendant's barn, with knowledge of a dispute as to the title to the goods, but without intent to exercise dominion over the same, does not constitute conversion.—Where a cause is tried by a Judge without a jury, and the facts in evidence are not disputed, the Court may reconsider the evidence in the case and overrule the judgment of the trial Judge, if they think it wrong.—Here, in the opinion of the majority of the Court, the evidence did not prove any intent on the part of the defendant to convert the goods in dispute, and the finding of the trial Judge that there had been a conversion was reversed: *per* Barker, C.J., McLeod, Gregory and White, JJ.; Landry, J., dissenting. *Donald* v. *Fulton*, 39 N. B. R. 9, 5 E. L. R. 54, 6 E. L. R. 397.

See COMPANY — CONTRACT — COSTS — GIFT — SALE OF GOODS — VENDOR AND PURCHASER.

TRUST COMPANY.

See COSTS.

TRUSTEE ACT.

See EXECUTORS AND ADMINISTRATORS — TRUSTS AND TRUSTEES.

TRUSTEE INVESTMENT ACT.

See EXECUTORS AND ADMINISTRATORS.

TRUSTEE LIMITATION ACT.

See EXECUTORS AND ADMINISTRATORS — TRUSTS AND TRUSTEES.

TRUSTEE RELIEF ACT.

See EXECUTORS AND ADMINISTRATORS — PAYMENT INTO COURT.

TRUSTS AND TRUSTEES.

Absolute conveyance — Action to establish trust — Evidence — Character of trust — Statute of Frauds. *Hill* v. *Bible* (N.W.T.), 4 W. L. R. 276.

Absolute conveyance — Evidence — Possession — Limitation of Actions. *Morrison* v. *McLeod*, 1 E. L. R. 112.

Accidental mixture of goods — *Sale by trustee — Tenants in common — Following proceeds — Equitable claim — Jurisdiction of County Court — Demand.*] — The defendant shipped wheat in a car from a place in Manitoba to Duluth with instructions that the wheat was to be unloaded at Roland and cleaned and dried at the plaintiff's elevator there. This was done, and the wheat was thereby reduced in bulk to about 573 bushels. The plaintiff's employees, in reloading it into the car, supposing it to be the plaintiff's wheat, added about 200 bushels of the plaintiff's own wheat to make up a car load, and forwarded the car to its destination. The defendant had obtained an advance of money from B., the repayment of which he secured by transferring to B. the bill of lading for the wheat with the agreement that B. should sell it, and, after deducting the amount of the loan, pay the balance to the defendant. B. sold all the wheat, paid himself, and accounted to the defendant for the balance, neither of them knowing what part of the wheat was the plaintiff's:—*Held*, that there was a mixture of goods by accident, and the owners became tenants in common of the whole in the proportions which they severally contributed to it; (2) that B., as regards the wheat in question, stood in a fiduciary relation towards both the plaintiff and defendant; that the proceeds of property sold by a trustee without the consent of the owner can in equity, when traceable, be followed as fully as the property itself, if unconverted, could have been; that, so long as such money can be definitely traced it makes no difference that it has been mixed with other money; and that this rule applies, not only in the case of a trustee in the narrow and technical sense, but to any person in any kind of a fiduciary relation to others; (3) that an equitable claim like the plaintiff's in this action can now be entertained by a County Court; (4) that no demand and refusal were necessary before action. *Roblin* v. *Jackson*, 21 C. L. T. 217, 13 Man. L. R. 328.

Account — Contract — Parties. *Livingston* v. *Counsell*, 2 O. W. R. 517.

Accounting — *Interdiction — Obligations of the curator.*]—When the interdiction comes to an end, the curator of an interdict should render an account of his whole administration. The account should cover the entire period of the curatorship, and when a judgment has ordered the curator to render such an account he disobeys the order of the Court by making out an account covering only the latter part of his administration, and by alleging, with the filing of certain documents, that he has already accounted for the first period. *Caisse* v. *Caisse* (1909), 19 Que. K. B. 220.

Action against executors to establish trust — Purchase by second mortgagee of mortgaged premises from first mortgagee — Alleged trust for mortgagors —Failure of evidence to establish — Unexecuted agreement — Corroboration — Statute of Frauds — Purchase of chattels —Account. *Bowman* v. *Silver*, 10 O. W. R. 811.

Action by trustees — *Executors of deceased trustee — Joinder.*]—By a marriage contract a trust as to $10,000 was created by the wife for the benefit of herself and husband as to income and as to capital for the benefit of the children of the marriage, and five trustees were appointed, the husband being one of them. The marriage took place in 1862, and in 1866 the wife died. Afterwards one of the trustees died and others resigned and were replaced. In January, 1899, the husband died, leaving two children. By his will he appointed one child and two other persons his trustees and executors:—*Held*, that an action with respect to part of the trust estate instituted by the four surviving trustees and the executors and trustees of the fifth (deceased) was regular as regards form, inasmuch as their administration was joint, like that of the members of a syndicate. *Kennedy* v. *Houseman*, 17 Que. S. C. 311.

Action for declaration of plaintiff's interest in certain land and to compel a conveyance thereof. Order made directing a conveyance to plaintiff of an undivided half interest in the lands. *Gibson* v. *Van Dyke* (1910), 1 O. W. N. 396.

Action to enforce trust — Conveyance of land — Death of alleged trustee—Action against heirs-at-law — Evidence—Failure to prove trust. *Birks* v. *Haiens*, 6 O. W. R. 467.

Action to enforce trust — Purchase of land by father — Alleged trust for son—Action to compel conveyance — Counterclaim. *Young* v. *Young* (Man.), 6 W. L. R. 724.

Action to establish trust — Joint purchase of land — Quit claim deed—Consideration — Account of profits — Evidence —Onus. *Phillion* v. *Douglas* (Man.), 2 W. L. R. 572.

Appointment of new trustee — *Foreigner.*]—Upon an application to appoint a new trustee, the Court refused to appoint a foreigner resident out of the jurisdiction; and *quære*, whether the Court has power to make such an appointment. *In re Dudley's Trusts*, 40 N. S. R. 36*n*.

Appointment of new trustee — In place of one deceased—Vesting of estate —

Peculiar circumstances—Not a precedent. *Re Rose* (1910), 17 O. W. R. 650, 2 O. W. N. 338.

Assignment of mortgages by father to daughter — Alleged trust in favour of assignor or all his children — Action by assignee of father for declaration of trust—Parties — Addition of assignor — Failure of evidence to establish trust — Absence of fraud — Champerty. *Logan* v. *Drew*, 10 O. W. R. 334, 11 O. W. R. 793.

Assignments by beneficiary—Priorities — Notice — Agent's knowledge of prior assignment — Costs. *Forrest* v. *Sutherland*, 2 E. L. R. 77.

Breach of trust — *Accounts — Evidence — Nova Scotia Trustee Act — Liability of trustee — Judicial discretion — Statute of Limitations.*]—By his last will N. bequeathed shares of his estate to his daughters A. and C., and appointed A. executrix and trustee. C. was weak-minded and infirm, and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicil, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust, nor to shew the amounts necessarily expended for the support, care, and attendance of C., but A. kept books which shewed the general household expenses, and consisted, principally, of admissions against her own interests. After the decease of both A. and C., the plaintiffs obtained a reference to a Master to ascertain the amount of the residue of the estate coming to C. (who survived A.), and the receipts and expenditures by A. on account of C. On receiving the report the Judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *prima facie* evidence of the matters therein contained. (See 37 N. S. R. pp. 452-464). This order was affirmed by the Supreme Court of Nova Scotia *in banco*: — *Held*, affirming the judgment appealed from (37 N. S. R. 451), that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended that, under the Nova Scotia statute 2 Edw. VII. c. 13, and Order XXXII., Rule 3, a Judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust, and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts. *Cairns* v. *Murray*, 37 S. C. R. 163.

Breach of trust — *Liability for, of co-trustee — "Honestly and reasonably."*]—A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy:—*Held*, that the defendant, having acted honestly and reasonably within the meaning of 62 V. (2) c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor. *Dover* v. *Denne*, 22 C. L. T. 204, 3 O. L. R. 664, 1 O. W. R. 207.

Breach of trust — Moneys placed in hands of trustee by mortgagee — Loan to pay off incumbrances and complete buildings on land — Misapplication — Declaration—Account — Liability of partner of solicitor-trustee. *Miller* v. *German*, 12 O. W. R. 179.

Breach of trust — *Purchase by trustee from trust estate — Partnership — Adequacy of price — Delay in bringing action—Evidence — Entries in books.*] — In 1885 the trustees of a certain business sold it at an adequate price to B., who before purchasing stipulated with C., one of the trustees, that he should go into partnership with him; C. did go into partnership, and in 1893 he sold out his interest at a large profit. In 1903 certain beneficiaries commenced an action founded on an alleged breach of trust against C. and the representatives of his deceased co-executor, and asked for an order declaring that the sale to B. was a sham and was really one to C.:—*Held*, that, considering the number of years since the sale took place and that it was for a fair price, C.'s account of the transaction must be accepted, notwithstanding several suspicious circumstances. In cross-examination of a defendant it is admissible to question him as to what disposition he has made of his property since the suit was begun or in anticipation of it, and a defendant so disposing of his property does an act which will be viewed with suspicion. *Per* Hunter, C.J.:—Entries made by the deceased executor in a private book kept by him were not admissible in evidence either for or against the other executor, neither were the entries in the charge book of the solicitor for B. and C. as to instructions received by him from B. in regard to the drawing of certain papers carrying out the arrangement between B. and C. admissible in evidence as against C. *Camsusa* v. *Coigdarripe*, 11 B. C. R. 177.

Breach of trust — *Relief — 61 V. c. 26 — Costs.*]—A testator devised and bequeathed his real and personal estate to his wife "to be hers in such a way that she shall during her natural life have the full use, benefit, and enjoyment thereof." He directed his executors to sell his real estate and to invest any money belonging to his estate in certain specified securities, "so that my said wife may have the interest and income arising therefrom during her life," and appointed his wife and the plaintiffs

executors. Proceeds from the sale of real estate came to the hands of the plaintiffs, and were by them remitted to the widow, living in England. The widow invested part of the proceeds in securities in the name of herself and one of the plaintiffs, and disposed of, though in what way did not appear, the balance of the principal moneys. A suit was brought by the plaintiffs after the widow's death to be relieved from liability for the loss of such part of the estate. By 61 V. c. 26, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court in Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach. Relief granted, but without costs. *Simpson* v. *Johnston*, 22 C. L. T. 38, 2 N. B. Eq. R. 333.

Breach of trust — Seizure under chattel mortgage — Injunction — Damages — Counterclaim — Compensation of trustee—Costs. *Watts* v. *Sale*, 2 O. W. R. 1020.

Breach of trust — Threat of litigation —Promise to make amends by will — Compromise — Consideration — Enforcement—Revocation of will — Claim on estate. *Lee* v. *Totten*, 8 O. W. R. 823, 9 O. W. R. 803.

Breach of trust — *62 V. (2) c. 15 s. 1 — "Honestly and reasonably" — Opinion evidence—Inadmissibility.*] — The provisions of 62 V. (2) c. 15, s. 1, relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably," does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take. The general rule of evidence still applies, that mere personal belief or opinion is not evidence, and that the test of reasonableness is that exhibited by the ordinary business man, or the man of ordinary sense, knowledge, and prudence in the conduct of his own affairs. The nearest approach to a working rule is, that, in order to exercise a fair judgment with regard to the conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time and determine for ourselves what, having regard to the opinion prevalent at that time in the neighbourhood and concurrent with the transaction, would have been considered the prudent course for them to have adopted. This is a different thing to asking the opinion of witnesses of what would have been done or what would have happened under stated circumstances several years ago, as was sought in this case. *Smith* v. *Mason*, 21 C. L. T. 260, 1 O. L. R. 594.

Cestui que trust claiming a beneficial interest of any kind, may lodge a caveat under Land Titles Act, s. 136, whether the trust is evidenced by writing or not. Statute of Frauds or other objections having a question to be determined when raised against a caveat, should not be determined on a summary enquiry and the caveat should be continued until a competent Court can decide the matters in question. *In re Work Caveat* (1909), 3 Sask. L. R. 431.

Charitable purposes — Action to have defendants declared trustees and to compel a conveyance of land—Application of part of it for purchase of school property—Resolution of ratepayers—Meeting not convened according to requirements of school law—Declaration of trust—Conveyance. *Atty.-Gen. for N. S. ex rel. Morrison* v. *Laundry* (1910), 9 E. L. R. 81.

Chattel mortgage on country newspaper — *Taken by trust company for real mortgages — Default — Company failed to renew mortgage — Later took possession—Loss to mortgagees by sale — Action against company for negligence in dealing with property and failing to renew mortgage.*] — Plaintiffs had defendant trust company take a chattel mortgage of a country newspaper, plaintiffs advancing the money. Mortgagor made default and Trust Co. failed to renew the mortgage, but later took possession and ran the paper for some time and finally effected a sale of the plant. After paying expenses a loss resulted to the plaintiffs, and they brought action, charging defendants with failure to renew the chattel mortgage and failure to sell the plant within a reasonable time. At trial Latchford, J., gave plaintiffs judgment for $500.—Divisional Court reversed above judgment, holding that defendants had acted honestly, and no loss had resulted to plaintiffs through their actions in dealing with the property.—*Whitcher* v. *National Trust Co.*, 14 O. W. R. 896, specially referred to. *McDonald* v. *Trusts & Guarantee Co.* (1910), 16 O. W. R. 507, 1 O. W. N. 886.

Commission — *Personal estate — Income — Investments.*]—No fixed rule can be laid down as to the commission trustees will be allowed by the Court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate. Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of five per cent. on income, a commission on the estate was refused, but a commission of one per cent. was allowed on investments made by them. *In re Wiggins Estate*, 20 C. L. T. 462.

Company shares held in trust for several persons — Action by one *cestui que trust* to compel transfer of his portion—Parties — Interests of remaining *cestuis que trust* — Terms of trust — Discharge of trustee piecemeal. *Bechtel* v. *Zinkann*, 10 O. W. R. 1075.

Compensation for care, pains and trouble — Commission — Yearly allowance — Secret profits — Rebates. *Re Prittie Trusts*, 12 O. W. R. 264.

Compensation of trustee — *Action for Pleading — Particulars.*]—In an action by a trustee to recover the just compensation stipulated as belonging to him as trustee under a trust deed, it is not necessary that he should specify fixed charges for each of the different acts done by him in his capacity of trustee. *Hanson* v. *Montreal Park and Island Rw. Co.*, 5 Que. P. R. 355.

Construction of — *Zacklynski* v. *Polushie*, C. R., [1908] A. C. 23, digested under CHURCH.

Construction of statute powers — *Property vested in trust for benefit of Indians — Right of their chiefs to sue for them — Breach of trust.*] — A statute passed before abolition of feudal tenure in Quebec, to vest a fief or sovereignty in an ecclesiastical corporation, in trust, "for instruction, and spiritual care of Algonquin and Iroquois Indians," does not give the chiefs elected by them a right of action against the corporation on ground that it grants lands of the fief to "whites," or others than Indians, and that it interferes with the exercise, by the Indians, of pretended rights of pasturage and to cut wood in the seigniory. *Corinthe* v. *Seminary of St. Sulpice* (1910), 38 Que. S. C. 268.

Conveyance absolute in form—*Mortgage — Resulting trust — Notice to equitable owner — Estoppel — Enquiry.*]—The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners. *Oland* v. *McNeil*, 22 C. L. T. 197, 32 S. C. R. 23.

Conveyance of land to trustee—*Action to establish trust — Evidence—Onus—Finding of trial Judge — Reversal on appeal —Statute of Frauds — Oral evidence — Fraud.*]—Action for a declaration that certain lands standing in defendant's name were held by him in trust for the plaintiff, and for an order for a conveyance of the lands to the plaintiff. The plaintiff alleged that he had bought and paid for the lands and taken deeds in the defendant's name with his knowledge and consent. The defendant positively denies this, and asserted that he had himself bought and paid for the lands. The trial Judge held that the plaintiff had not satisfied the onus that lay on him to establish a clear case upon the evidence, and gave judgment for the defendant: — *Held*, on appeal to the full Court, that, in view of the letters written by the defendant to the plaintiff and of the undisputed facts and circumstances, as set out in the judgments below, the plaintiff's case was clearly made out.—2. When the trial Judge's decision does not depend upon the credit to be given to conflicting testimony, but rather upon inferences drawn from the documentary evidence and the surrounding facts and circumstances, a court of appeal is free to reverse his decision upon questions of fact as well as law. *McKercher* v. *Sanderson*, 15 S. C. R. at p. 301, and *Creighton* v. *Pacific Coast Lumber Co.*, 12 Man. L. R. 546, followed. — 3. Notwithstanding s. 7 of the Statute of Frauds, an express verbal trust of land may be proved by oral testimony, wherever a strict reading of the statute would enable the trustee to commit a fraud. *Re Duke of Marlborough*, [1894] 2 Ch. 141, and *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, followed. *Gordon* v. *Hanford*, 4 W. L. R. 241, 16 Man. L. R. 292.

Conveyance of land to trustee—Action to establish trust — Evidence—Onus—Fraud — Finding of trial Judge — Reversal on appeal — Construction of documents—Inferences from facts — Statute of Frauds —Parol evidence of express trust — Corroboration — Fiduciary relationship—Judgment declaring trust and directing account —Form of. *Gordon* v. *Handford* (Man.), 4 W. L. R. 241.

Conveyance of land to trustee for infant — *Fraud of trustee — Conveyance to creditor as security — Breach of trust—Constructive notice — Solicitor acting for both parties — Purchase for value — Occupation of land by tenant — Negligence — Redemption — Costs.*]—The defendant H., being solicitor for the plaintiff, at his request accepted the trusteeship of the land in question for the plaintiff's infant son, but afterwards, as found by the trial Judge, fraudulently conveyed the land to the defendant S., who had been his client, in satisfaction of the sum of $460, part of his then indebtedness to her. S. had no notice of the plaintiff's claim, and supposed that the land was vacant, although it had a house on it, which, in fact, had been all the time occupied by tenants paying rent to the plaintiff:—*Held*, that notice of the plaintiff's claim should not be attributed to S. on account of her solicitor's knowledge of the facts; because, in carrying out the transaction, the solicitor would naturally suppress that knowledge.—*Rolland* v. *Hart*, L. R. 6 Ch. 678, followed.—2. The occupation of the land by a tenant affected S. with constructive notice only of that tenant's rights, and not with notice of the lessor's title or rights. —*Hunt* v. *Luck*, [1902] 1 Ch. 428, followed. —3. S. was entitled to be treated as a purchaser for value without notice; and, having the legal estate, her claim should prevail over the prior equity of the plaintiff, but only to the extent of the amount by which she had reduced her claim against H., as no new or further consideration passed from her to H. when she acquired the title.—4. The action of the plaintiff in conveying the land to H., and not afterwards enquiring what the trustee was doing with the property, could not be considered as negligence disentitling the plaintiff to relief, in view of the fact that he continued to receive the rents.—*Shorpshire, etc., Co.* v. *The Queen*, L. R. 7 H. L. 507, followed.—5. The infant was entitled to redeem the land upon payment to S. of the $460 with interest, her subsequent outlays, and costs of suit.—6. The defendant H. should pay the infant the amount so found due to S. and the plaintiff's costs. *MacArthur* v. *Hastings*, 15 Man. L. R. 500, 1 W. L. R. 285.

Conveyance of land upon trust — Sale of part by trustee to purchaser for value — Power of sale without notice to *cestui que trust* — Implication from circumstances — Reconveyance of lands unsold — Redemption — Terms. *McMillan* v. *Gunn* (Man.), 5 W. L. R. 479.

Costs — *Set-off — Beneficiary.*]—Trustees cannot set up as a set-off to the claim of one of the beneficiaries for his share of revenue declared not seizable, the amount which such beneficiary owes for the costs of an action for removal of one of the trustees from his office, and paid by the trustees

upon dismissal of such action.—A trustee may charge to the trust the costs which he has incurred in an action to remove him from the office which has been dismissed; and trustees can also charge to the trust the costs of an action which their solicitors have begun against them to force them to pay such costs. *Brunet* v. *Brunet*, 17 Que. S. C. 490.

Creation of trusts — *Co-owners of property — Revenues — Lease — Attachment of rent.*]—The creation of a trust by co-owners of property, in a power of attorney to the trustees, to receive the revenues of the property and apply them to certain uses, but without any conveyance of title or ownership, can have no effect on a lease, made subsequently by one of such co-owners, of his share of the property, or on the relations between him and his lessee. Hence an attachment of the rent by his judgment creditor cannot be attacked or set aside at the instance of one of his co-owners on the ground of the trust created as stated above. *Nelson* v. *Resther*, 16 Que. K. B. 550.

Crown grant — *Quit claim.*]—Plaintiff and her husband took possession of some Dominion land not then open for homesteading entry. After his death she abandoned it, but the land subsequently becoming open for homesteading she and her son took possession, the entry being in her name as representing the estate of her deceased husband. The son for a number of years prior to his death did all the work and from their common fund purchased the farm chattels. To obtain the Crown grant all plaintiff's children, including deceased son, released their claim to the plaintiff so that the patent might issue to her in fee simple: — *Held*, that plaintiff and defendant, the widow of the deceased son, were entitled to moieties in the land and chattels. There had never been any division agreed upon by plaintiff, although she and her deceased son had attempted a division on different occasions. *Campbell* v. *Campbell*, 9 W. L. R. 190. Reversed on appeal, 11 W. L. R. 473.

Debentures — *Validity — Ultra vires —Breach of trust — Crown.*]—In an action for the recovery of interest upon certain debentures issued by the defendants and held by the Crown, the defendants set up that they had no authority to issue the debentures; that the application by them of moneys received from the sale of debentures to the payment of interest on other debentures, was a misapplication of the trust fund and a breach of trust; and that the Crown's advisers knew, when the debentures were acquired by it, that the proceeds were to be so misapplied:—*Held*, that, inasmuch as the defendants had authority to issue and dispose of the debentures, their acts in so doing were *intra vires*, and that complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action. *Rex* v. *Quebec North Shore Turnpike Trustees*, 8 Ex. C. R. 390.

Declaration of trust — *Consideration to support action — Statute of Frauds — Memorandum — Part performance — Mining areas — Equitable interest, assignment of — Judicature Act, s. 19 (5).*]—Where money was advanced by B. to enable the defendant to take up certain coal mining areas for the benefit of himself and other persons, of whom M. was one:—*Held*, that the money so advanced, being advanced with M.'s knowledge, was consideration to support an action by the assignee of M. to enforce a declaration of trust made by the defendant in favour of M., although the latter had contributed nothing towards the acquisition of the areas, and the defendant's act in proposing to give him an interest was purely voluntary; that it was not necessary that there should be consideration to enable the Court to enforce against defendant a declaration of trust made by him in favour of M. after the acquisition of the areas; that, to enable the defendant to avail himself of the defence of the Statute of Frauds against the plaintiff, on the ground that there was no writing as between the plaintiff (the assignee) and M., it was necessary that such defence should have been pleaded. —Nevertheless, as the areas had been sold by the defendant before the making of the assignment, and the assignment only related to the proceeds of the sale and not to the areas transferred, the statute did not apply. —If otherwise, the requirement of a writing was satisfied by a receipt given by M., expressed to be for a share of his interest; and the transfer of a bond from M. to the assignee, and the transfer of shares on the stock book of the company, constituted part performance.—*Held*, also, that s. 19 (5) of the Judicature Act did not apply, this being the assignment of an equitable interest. *Corbett* v. *McNeil*, 1 E. L. R. 368, 2 E. L. R. 257, 41 N. S. R. 110.

Deed of donation in trust — *Interpretation of deed as to the beneficiaries therein mentioned.*]—That the deed of donation, invoked in the pleadings in this case, made on the 21st June, 1875, by the late John Harris before James Smith, notary, to the Reverend Thomas Fry Lewis Evans, rector of the parish of St. Stephen, his successor or successors in office, in trust, to the uses and upon the trusts in said deed mentioned, of the property known as lot No. 1817 St. Ann's Ward in the city of Montreal, was made for the use and benefit of said parish as it existed when said deed was executed; and that said property so donated is not vested in the intervenants, to wit, the rector and church wardens of the church and present parish of St. Stephen, a parish partly situated in the city of Westmount, and not comprising within its limits any part of the territory known as the parish of St. Stephen when the said deed of donation was executed. *Incumbent, etc.* v. *Rector, etc.* (1910), 16 R. de J. 487. (Confirmed in Court of King's Bench; and appeal to the Supreme Court of Canada is now pending.)

Defaulting trustee — *Following trust funds — Assignee.*]—The rules as to following trust funds in the hands of a defaulting trustee apply against the assignee of a defaulting trustee as fully as against the trustee himself.—The beneficial owner has a charge on the property wrongfully disposed of, and may follow it wherever it can be

distinguished. In this respect there is no distinction between an express trustee and an agent or a bailee or anybody else in a fiduciary position. *Smith* v. *Faulkner*, 40 N. S. R. 528.

Discretion — *Lunatic — Setting apart moneys for — Will.*]—Where, under the terms of a will, executors and trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose. *In re Sargent*, 24 C. L. T. 357, 8 O. L. R. 260, 3 O. W. R. 769.

Drunkard interdicted — *Curator's accounts.*]—When the curator to the property of an interdicted drunkard is replaced during the interdiction, his obligation as a trustee is discharged when he accounts to his successor.—The interdict is only entitled to a final account of his curators' administration after his interdiction has been removed. The only remedy he has against those who have already accounted, is to have their accounts amended. *Goyette* v. *Goyette* (1910), 39 Que. S. C. 124.

Ejectment — *Counterclaim to enforce trust and to set aside conveyance as fraudulent — Statute of Frauds — Pleading — Creditors — Improper joinder of causes of counterclaim — Amendment — Election.*]—The plaintiff sought to recover possession of land; and the defendant, by way of counterclaim against the plaintiff and the plaintiff's grantor (her son) alleged that the latter held and conveyed the land subject to a trust in her (the defendant's) favour; and also that his conveyance to the plaintiff was voluntary and without consideration and made for the express purpose of defeating and delaying the defendant and the other creditors of the son, and was fraudulent and void; but the defendant did not directly allege that she was a creditor, nor did she state that she counterclaimed on behalf of all creditors:—*Held*, that the trust, if there was any, resting in parol, there was nothing to take the case out of the Statute of Frauds, and it necessarily failed.—*Held*, also, that if a counterclaim could be asserted on behalf of the defendant and all other creditors of the grantor, the two claims could not be joined in one action of counterclaim; and leave to amend should not be given to enable the defendant to abandon the claim to enforce the trust, and proceed upon the other claim on behalf of all creditors; but the dismissal of the action should be without prejudice to any action which the defendant might bring to set aside the conveyance. — Judgment of Boyd, C., affirmed. *Parker* v. *Tain*, 10 O. W. R. 36, 848, 15 O. L. R. 187.

Enforcement of trust — Cheque delivered on condition — Non-fulfilment — Recovery of amount of cheque — Evidence. *Pool* v. *Huron and Erie Loan and Savings Co.*, 7 O. W. R. 680.

Enforcement of trust — Sale of mining locations — Interest on profits—Agent's commission — Costs. *Long* v. *Loney*, 3 O. W. R. 718.

Farm held by daughter in trust for mother and father's estate — *Declaration granted — Subject to lease to brother —Lien of daughter for moneys paid for interest on mortgage and taxes — Undivided one-half interest—Conveyance of to mother.*] Plaintiff brought action against her daughter and her son, for a declaration that the daughter was a trustee for her of lot 20, con. 4, in township of Tay, and that a lease of said lands from said daughter to said son should be set aside.—Latchford, J., *held*, that the daughter held said lands upon a trust for plaintiff and her deceased husband; that there were no grounds for setting aside the lease, as it was made in good faith between brother and sister for the advantage of their parents. Action against son dismissed without costs. Declaration granted declaring that daughter held said lands as trustee for plaintiff and the estate of plaintiff's husband, subject to said lease, and to a lien claimed by daughter for all moneys paid on account of the mortgage and for taxes on the property, together with interest and costs; that on payment of defendant's lien, plaintiff should be entitled to a conveyance of an undivided one-half interest in the lands, subject to said lease. *Brown* v. *Thompson* (1910), 17 O. W. R. 297, 2 O. W. N. 220.

Funds held in trust by Dominion for Ontario — *Rate of interest — Right to pay over funds and extinguish liability—Tender — Sufficiency of.*]—*Held*, that the Dominion of Canada, prior to the 31st December, 1904, was under an obligation to pay to the province of Ontario interest at the rate of 6 per cent. per annum on the capital of certain trust funds held by the Dominion and belonging to the province, viz., the Upper Canada Grammar School Fund, the Upper Canada Building Fund, and the Upper Canada Improvement Fund. —2. That the Dominion at the date mentioned had no right, without the assent of the province, to reduce the rate of interest from 5 per cent. to 4 per cent. per annum.—3. That the Dominion has the right at any time to pay or hand over to the province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof both as to the principal and the interest.—4. On the 29th December, 1903, the Minister of Finance for the Dominion of Canada wrote to the Premier of Ontario respecting the payment of interest on the above funds as follows:—"It has been decided to pay on the 1st of January, 1904, the interest on these funds at the rate heretofore paid, namely, 5 per cent. After that date, interest at the rate of 4 per cent. will be paid until further notice, or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your government, I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date." On the 6th January, 1904, the Premier of Ontario replied that such proposal was not satisfactory to his government; and intimated that the rate of interest, 5 per cent., was not susceptible of modification without the consent of the province: —*Held*, that the terms of the letter of the Finance Minister did not constitute a good

tender of the amount of the said funds. To make it effective for such purpose, the letter should have been followed or supplemented by an unconditional offer and tender of the money by the Dominion to the province. *Province of Ontario* v. *Dominion of Canada*, 10 Ex. C. R. 292.

Grant of land from Crown to church trustees subject to trusts declared — *Sale of part of land — Conveyance to local trustees — Saskatchewan Land Titles Act — Saskatchewan Real Property Act.*]—Action for a declaration that defendants were trustees for plaintiffs of certain lands:—*Held*, that they were, and directed to execute a transfer to the plaintiff. *Fish* v. *Bryce*, 10 W. L. R. 616, 2 Sask. L. R. 111.

Grant on condition — *Revocation — Release.*]—The owner of land, "in consideration of natural love and affection and of one dollar," conveyed it to the defendants in fee, subject to a life-estate in his own favour, and "subject to the payment thereout by the (defendants)" of certain sums to the plaintiffs; the deed being voluntary as to them. The deed contained a covenant by the defendants with the grantor to make the payments, and was executed by the grantor and the defendants. Seven months later the grantor conveyed the same land to the defendants in fee, for their own use absolutely, free from all incumbrances:—*Held*, that an irrevocable trust was created by the first deed in favour of the plaintiffs, and was enforceable by them, and that this trust was not affected or released by the second deed. *Gregory* v. *Williams*, 3 Mer. 582, and *Mulholland* v. *Merriam*, 19 Gr. 288, applied. *Edmison* v. *Couch*, 19 C. L. T. 383, 26 A. R. 537.

Interest in partnership — Trustees under will — Sale of partnership interest to surviving partners — Discretion of trustee — Adequacy of price — Good-will — Beneficiaries under will —Attack on sale—Account — Costs. *Smith* v. *Smith*, 7 O. W. R. 586.

Investment — *Shares in company — Conversion.*]—An order was made authorising an executrix to convert certain shares in a company bequeathed to her for life with remainder to her children into shares of a new company (in which the old one was about to be merged), such shares not being an investment authorised by the Trustee Investment Act, but it appearing that the arrangement would be for the benefit of the estate. *In re Strathy Trusts*, 21 C. L. T. 339.

Investments — *Realisation — Tenants for life — Remaindermen — Apportionment —Election — Rate of interest.* —A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and a son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees, under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease renewable. When the lease expired in 1893 it was renewed for 21 years at $1,850 a year. The lessee made default in 1894, and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for $47,500:—*Held*, following *In re Cameron*, 2 O. L. R. 756, that the life tenants were entitled to some portion of this sum. But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment. The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest. *Walters* v. *Solicitor for the Treasury*, [1900] 2 Ch. 107, followed. An enquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced $47,500 on the 15th November, 1902, interest being calculated at 4½ per cent., with half-yearly rests, and credit being given for sums actually received by the life tenants from the rents accruing during that period. *In re Clarke, Toronto General Trusts Corporation* v. *Clarke*, 24 C. L. T. 23, 6 O. L. R. 551, 2 O. W. R. 980.

Land alleged to have been purchased by defendant as trustee for plaintiff —*Parol evidence to establish contract — Insufficiency — Statute of Frauds—Agency of defendant's husband — Failure of proof.*] —Action for declaration that Abraham Harris, husband of defendant, purchased the house occupied by plaintiff as plaintiff's agent, and held such property as trustee for plaintiff subject to payment by plaintiff of the purchase money thereof, and for specific performance of agreement to convey said property to plaintiff. At trial Riddell, J., 30th March, 1908, gave judgment for plaintiff, following *Goldstein* v. *Harris* (1908), 12 O. W. R. 797. The Court of Appeal held that the Goldstein case was decided on its facts and was not a case binding upon any Court in any other case. Trial judgment reversed. *McKinnon* v. *Harris* (1907), 14 O. W. R. 876, 1 O. W. N. 101.

Land conveyed to defendant — *Attempt to establish trust by oral evidence—Statute of Frauds — Fraud by defendant's agent — Resulting trust.*]—Action for a declaration that plaintiff has a half interest in certain property and that defendant H. is a trustee thereof for him:—*Held*, that defendant T. was only an agent for defendant H. to purchase the land and could not give plaintiff any interest therein. Since plaintiff could not prove an oral trust, there

can be no resulting trust in his favour. Appeal from judgment in plaintiff's favour dismissed. *Owens* v. *Haslett*, 14 O. W. R. 12.

Land conveyed to son of tenant — Agreement to purchase — Declaration of trusteeship — Conflicting evidence — Improvements by son — Equitable decree — Appeal — Duty of appellate Court — Findings of trial Judge. *Bishop* v. *Bishop*, 8 O. W. R. 877, 10 O. W. R. 177.

Lands alleged to have been purchased by defendant as trustee for plaintiff — Parol evidence to establish contract — Insufficiency — Statute of Frauds — Agency of defendant's husband — Failure of proof. *Goldstein* v. *Harris*, 12 O. W. R. 797.

Lands held by niece — *Trustee for uncle, an execution debtor — Subject to mortgage — Declaration granted that lands were liable to plaintiffs' execution.*]—Execution creditor brought action to have it declared that certain property was that of defendant and did not belong to his niece, and that it, or the equity of redemption in it, was liable to plaintiffs' execution, in the hands of the sheriff.—Britton, J., *held*, that the evidence shewed that the lands did not really belong to the niece, but were held by her in trust for her uncle. Judgment granted as prayed, with costs. — Divisional Court dismissed defendant's appeal with costs. *Union Bank* v. *Taylor* (1910), 17 O. W. R. 224, 1 O. W. N. 939, 2 O. W. N. 130.

Lands held in trust for plaintiff by deceased sister — Action against administrator and heir-at-law — Evidence to establish trust. *Coles* v. *Davis*, 12 O. W. R. 725.

Lien of trustee — *Abortive sale — Foreclosure — Purchase by trustee — Report on sale — Certificate in lieu of — Order — Terms.*] — The defendant having been declared a trustee, with a lien for advances, and the greater portion of the trust estate having been offered for sale, to satisfy the amount found due him under the direction of the Court, and the sale having proved abortive:—*Held*, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure, to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate. *Tennant* v. *Trenchard*, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661, followed.—*Held*, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested. — *Held*, also, that the property embraced in the order not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim. The defendant offering to submit to terms, an order was made providing that he should be allowed to purchase at the amount of his claim less $250, in the event of $17,500 not being realised by a sale by tender or private contract. *Hutton* v. *Justin*, 22 C. L. T. 23, 2 O. L. R. 713, 1 O. W. R. 64.

Mal-investment — Competent advice —Trustee acting honestly and reasonably—Relief — 62 V. (2) c. 15. *Weir* v. *Jackson*, 5 O. W. R. 281.

Management of estate — *Compensation for — Income — Profit — Costs.*] — Remuneration of trustees whose duties extend over a number of years should be an annual allowance for their services in looking after the corpus of the fund for receiving re-payments upon principal and re-investing. This allowance should not be based upon the amount so collected and re-invested, but should be based upon the nature of the property and the amount of responsibility involved. *Re Berkeley's Trust* (1879), 8 P. R. 193, and *Re Williams* (1902), 4 O. L. R. 501, 1 O. W. R. 534, followed. *Re Patrick Hughes* (1909), 14 O. W. R. 630.

Mining lands — Sale of undivided interests — Dispute as to extent of interests —Absence of writing — Evidence — Corroboration — Declaration of title. *Townsend* v. *Stephens and Walton*, 9 O. W. R. 430.

Misappropriation of trust funds — *Payment by trustee to stranger—Appropriation to debt of trustee.*]—A sum of money was bequeathed to B., by his father, "to the use and benefit" of the children of B., for their "support and education," and not in any wise to be subject to or liable for any debts or obligations of B. personally. B. forwarded to T. a sum of £500 to hold "in trust," informing him that it was a special legacy for the benefit of his children. T. acknowledged receipt of the money, as stated, and placed it to the credit of the children of B. as directed. The money so remitted having been subsequently appropriated by T. and his co-defendants, in part payment of the indebtedness to them of B. personally, an action was brought by B., as trustee for the children, and by the children, to have the defendants declared trustees, and for an account:—*Held*, *per* Weatherbe and Henry. JJ., that the appropriation could not be disturbed, it having been made to appear that the money paid over to T. by B. was not the money set forth in the pleadings, but a sum of money bequeathed to B. absolutely.—*Held*, *per* Graham, E.J., that there should be an enquiry to ascertain what sum should be allowed for the support and maintenance of the children of B., and that the plaintiffs, other than B., should have judgment against B. for the balance; that the defendants should make good this balance to the extent of the fund received by them. — *Held*, *per* Henry, J., that the intention of testator was to give the legacy to B., subject only to the obligation to use it for the support and education of the children; that if the sum of £500 became at any time subject to the terms of the trust, it became free from its operation as soon as the purposes of the trust were performed, and that the defendants, having whatever rights in the fund

B. had, were no more answerable to the plaintiffs than B. himself would be. *Bissett* v. *Taylor*, 35 N. S. R. 440.

Money in bank — Disagreement of two trustees — Payment into Court — Application by one — Costs. *Hobbs* v. *Anglo-Canadian Contract Syndicate (Limited)*, 2 O. W. R. 245.

Mortgage to company — *Release by mortgagor of equity of redemption—Alleged trust as to surplus after sale—Absence of writing — Oral evidence—Statute of Frauds —Preponderance of evidence—Consensus ad idem — Consideration — Admission — Burden of proof—Notice of trust.*]—The plaintiff, on the 8th February, 1909, made an absolute transfer to a trading company of an hotel property, upon which the company had a first mortgage for $8,379.23. There was a second mortgage upon the property for $1,500; there were arrears of taxes against the property, and past due insurance premiums; and the plaintiff was indebted to various persons for supplies, wages, etc. The transfer was expressed to be made for the consideration of $1. The plaintiff's liabilities, at the date of the transfer, were found to be about $13,000, including the mortgage debts and other debts above mentioned; and the value of the property was found to be about $16,000. The trading company, on the 12th February, 1909, made a mortgage of the property to the defendants the Canadian Bank of Commerce for $12,815. The plaintiff alleged that the transfer was made upon trust to sell and account to him for any surplus. This was not directly expressed by any writing; but oral evidence was given by the plaintiff and an independent witness on his behalf, which was credited by the trial Judge, and a letter dated the 19th June, 1909, was written to the plaintiff by one D., a member of the defendant company, in which he stated that two other members of the company, who had the management of the company's affairs, "would feel themselves honourably bound to pay" the surplus over to the plaintiff; and "this they feel obliged to do on the understanding that they will continue to have your goodwill towards the business:"—*Quære*, whether this letter was not a sufficient manifestation of a trust to make inapplicable the 7th section of the Statute of Frauds.—But, treating the letter as insufficient for that purpose, *held*, that the evidence of the plaintiff and his witnesses, corroborated by the letter, was sufficient to establish the trust alleged, either on the ground that there was a preponderance of evidence in the plaintiff's favour, or on the ground that there was no *consensus ad idem* between him and the company.—The effect of the statute and the authorities under it is to require, where there is no writing manifesting the trust, very clear and definite evidence of it.—The statement of the consideration as $1 might be taken as a convenient method of indicating that the true consideration was the assumption by the company of all incumbrances and charges against the property, but it was admitted by the company that they were to pay certain debts of the plaintiff not charged against the property; and the burden upon a mortgagor attacking a release of his equity to the mortgagee was lightened by that consideration.—*Held*, also, upon the evidence, that notice of the trust was not brought home to the bank; and against the bank the action was dismissed. *McCue* v. *Smith* (1911), 17 W. L. R. 145, Alta. L. R. .

Municipal corporations — *Mayor and his co-partner purchased city debentures—Re-sale at a profit—Trustee for city—Accounting for profit.*]—Mayor and Corporation of City of Toronto were authorized by the Canadian Act, 13th and 14th Vict., c. 84, to issue debentures to a certain amount, to assist in the construction of Toronto, Simcoe, and Lake Huron Union Rw. At that period B. was Mayor and a member of the Finance Committee, and took an active part in passing a by-law which authorised the issue by the Corporation of debentures for the completion of the railway. B. at the time was engaged in co-partnership with H., and B. & H.'s firm purchased of S. & Co., contractors, for the Rw. Co., some of the debentures so issued, which had been assigned to S. & Co. by the Corporation. B. and his partner afterwards sold the debentures, and thereby realized a large profit. This transaction was without the knowledge of the Corporation.—*Held* (affirming the decree of the Court of Chancery in Canada), that B. must, in the circumstances of his being a member of the Corporation, and the manner in which he acted throughout the transaction, be treated as the trustee of the corporation, and was not entitled to any benefit received from the sale of the debentures, and was liable to account to the Corporation for the ascertained and unquestioned amount of profit made and received by him in the transaction in which he had engaged in respect of the sale of the Corporation debentures.—*Held*, further, that it made no difference that the profit from the sale of the debentures was made by B. and his partner H. jointly, and not by B. alone. *Bowes* v. *Toronto* (1858), C. R. 3, A. C. 10.

New trustee — *Married woman.*]—Under the Trustee Act, R. S. O. 1897 c. 129, a married woman was appointed a trustee to fill a vacancy, in view of the circumstances detailed in the report. *In re Gough*, 22 C. L. T. 112, 3 O. L. R. 206.

Notice of trust — *Constructive notice —Knowledge of solicitor — Priority of equitable claims — Loss of priority by negligence — Vendor and purchaser.*]—The knowledge of a solicitor that a vendor of land holds it only as trustee will not be imputed to his client, the purchaser, merely because the client employs a clerk in the solicitor's office to prepare the necessary transfer and search the title, when the solicitor is not actually informed of the transaction, and the clerk knows nothing of the trust. *Brown* v. *Sweet*, 7 A. R. 725, followed.—The plaintiffs purchased a lot of land from the city of Winnipeg, and took the agreement of sale in Valle's name: *Held*, that it was gross negligence in them not to file a caveat in the Land Titles office or notify the city that Valle was a trustee for them, and that by such negligence they had lost priority as against a purchaser who had bought from Valle without notice of the trust. *North-West Construction Co.* v. *Valle*, 16 Man. L. R. 201.

Owners of lands in undivided shares —*Forced licitation — Purchase by one —*

Trustee for others — Action for account.] —An agreement of co-owners of immovables in undivided shares to have a sale decreed by way of forced licitation at which one of them is to be declared the purchaser at a nominal price, is to acquire the property and administer it in trust for all, is lawful and not contrary to public policy. Therefore, the remedy of an action *en reddition de compte* against the heirs of the one who thus became the purchaser, is open to those who were originally his co-owners. *Anderson* v. *Anderson*, 33 Que. S. C. 143.

Parol evidence to establish trust— Statute of Frauds — Conveyance of land to agent of true purchaser — Subsequent conveyances — *Lis pendens* — Notice — Registry laws — Reference — Accounts. *McMillan* v. *Boyce*, 3 O. W. R. 49.

Passing accounts — *Jurisdiction of Court of Equity — Commission.*]—A trustee under a deed of trust for the benefit of creditors cannot, upon his own application, pass his accounts in the Court of Equity. Trustee allowed a commission of five per cent. on receipts. *In re Van Wart*, 21 C. L. T. 509, 2 N. B. Eq. R. 320.

Powers — *Party wall — Tenants in common — Deed—Description.*]—M., owner of two warehouses, Nos. 5 and 7 (the dividing wall being necessary for the support of both), executed a deed with power of sale of No. 5, by way of marriage settlement on his daughter. M. having died, his executors executed a deed of confirmation by the purchaser of No. 5 from the trustees of the marriage settlement by a description which, it was claimed by the purchaser, conveyed absolutely the freehold estate in the party wall and the land covered by it. An action being brought by the executors of M. to have it declared that the wall in question was a party wall:—*Held*, that the trustees of the will and marriage settlement were bound by the trust declared in the instruments under which they derived their powers, and even if it could be shewn that the confirmation deed had the effect of conveying a greater quantity of land than the deed from the trustees of the marriage settlement, such a voluntary conveyance in favour of one beneficiary, which would operate prejudicially to the interests of the other beneficiaries, would be a breach of trust and consequently void: — *Held*, that, upon the execution of the deed by way of marriage settlement of No. 5, the wall common to the two warehouses, Nos. 5 and 7, became a party wall of which the owners of the warehouses were tenants in common. *Lewis* v. *Allison*, 19 C. L. T. 372, 30 S. C. R. 173.

Pretended sale of trust property by trustee — *Conveyance to wife—Subsequent resale at profit—Liability of trustee and wife to account — Fraudulent representations — Pleading—Amendment.*]—In 1904, the two plaintiffs and the defendant I. B. bought an undivided one-half interest in certain land. The conveyance thereof was made to I. B. as trustee for himself and the plaintiffs; and in 1907 he executed a deed of trust under seal by which the trusts in favour of his co-purchasers were declared. The other undivided interest was owned by P., and in December, 1908, this was acquired by the wife of I. B., also made a defendant. In the spring of 1909 I. B. purported to make a sale of the undivided interest standing in his name to P. for $11,000, which the plaintiffs agreed to sanction, if they got, as their shares of the profits, $1,000 each:—*Held*, upon the evidence that the plaintiffs so assented under the belief, induced by I. B.'s false and fraudulent representations, that a *bona fide* agreement of sale had been entered into by I. B. with P., and that litigation would result to enforce the agreement unless it were carried out.—I. B. then conveyed the property to his wife; and on the 28th September sold both interests in the land for $51,065, or $25,532.50 for the half interest in which the plaintiffs had had a share:—*Held*, upon the evidence, that the wife had no real interest in the transaction; it was nominally entered into on her behalf., I. B. acting as her agent; she was a fictitious purchaser, but, even if she were a real one, she could not be permitted to take advantage of the fraud of her agent.—The defendant I. B. asked leave to amend so as to set up a claim that the plaintiffs and himself were trustees for a certain company, whose moneys they had used, without the leave of the company, to purchase it:—*Held*, that I. B. could not be permitted to deny the trust which he had declared under his seal; and leave to amend was refused.—*Semble*, that, if any action was brought by the company against I. B., he would be entitled to have the plaintiffs added in respect of any of the trust estate that had passed into their hands.—And *held*, that it should be declared that the defendants were trustees for the plaintiffs of the profits of the sale to the extent of one-third for each of the plaintiffs.—As the plaintiffs had, by their statements of claim, asked only for an account of the proceeds of the sale, the defendants could not be held accountable for the present value of the property. *Huggard* v. *Bennetto*, *Smith* v. *Bennetto* (1911), 16 W. L. R. 523, Man. L. R.

Property transferred by mother to daughter—*Evidence — Declarations of deceased mother—Property transferred in trust and forming part of estate of deceased.*]—The testatrix had one daughter and two sons. After making her will, in which she named her daughter as executrix and left the whole of her property to her in trust to distribute the main part among the 3 children in equal shares, the testatrix conveyed and transferred certain portions of her property to the defendant, absolutely so far as the instruments of transfer shewed. There was evidence, however, of declarations of the testatrix that some parts of the property transferred were so transferred to the defendant in trust for the benefit of the testatrix or her estate:—*Held*, upon the evidence, that, with the exception of two mortgages and a house and lot transferred to the defendant, all the property held in her name, at the time of her mother's decease, was held in trust for her mother, and formed part of her estate. *Campbell* v. *Campbell* (1910), 15 W. L. R. 487, B. C. R.

Public harbour — *Alienation of property — Powers — Injunction — Private person.*]—A private individual is not entitled to an injunction to restrain a public corporation such as the Montreal Harbour

Commissioners from entering into a contract with third parties, unless he shews that some private right pertaining to him has been invaded, and that a private injury, separate and distinguishable from the injury to the public generally, will be caused to him by the contract alleged to be *ultra vires*.—2. Although trustees of public property cannot alienate the property of the trust in perpetuity, and although all rights granted must be for a limited time only, nevertheless an alienation or grant of exclusive occupation of wharves by harbour commissioners for forty years, for the due fulfilment of the objects of the trust, is not in excess of their powers; and the contract in the present case by which the Montreal Harbour Commissioners proposed to grant to a syndicate for a term of forty years the exclusive use and occupation of certain wharves, for the purpose of constructing elevators thereon, was valid. *Taylor* v. *Montreal Harbour Commissioners*, 17 Que. S. C. 275.

Public park — *Conveyance to municipality in trust — Conditions — Breach — Forfeiture — Assignee — Champerty.*]—C. conveyed lands to a city corporation for a park and public recreation ground, with conditions prohibiting their use for certain specified purposes, and that the corporation should, within a limited time, clear the lands, seed them, build a road thereto, and maintain the same in good condition. In an action by the assignee of C.'s reversionary interest, for a declaration that the corporation held the lands in trust and for a reconveyance, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, but that the remainder had been cleared and made fit for ordinary athletics, though not level. The road had been built, but, as population did increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, and had not been used, and had become covered with undergrowth:—*Held*, affirming judgment in 10 B. C. R. 31, that there was no such breach of the conditions as would warrant a declaration of forfeiture. *Semble*, that, had there been a breach of trust, the resulting forfeiture could have been decreed in favour of the assignee. *Clark* v. *Vancouver*, 35 S. C. R. 121.

Purchase of land — *Advance of money for — Resulting trust — Evidence to establish — Nonsuit — Jury trial — Withdrawal of issues of fact.*]—The plaintiffs as assignees of M. sought to obtain a declaration that certain lands held in the name of defendant were, at the time of the assignment, the property of M., and, by reason of the assignment, became vested in the plaintiffs. The evidence shewed that the money required by the defendant for the purchase of the properties in question was obtained from M., but that M. had nothing to do with any of the purchases except to advance the money to the defendant, by whom the negotiations were conducted, and in whose name the deeds were taken and recorded, and who, in all cases, acted independently of M. in negotiating for and acquiring the properties from the respective owners:—*Held*, that the doctrine of resulting trusts was not applicable, and, there being no issue of fact for the jury on this phase of the case, that the Judge was justified in withdrawing it from them.—*Held*, also, the Judge having at the close of the trial announced his intention of withdrawing the case from the jury, that counsel for the plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and, having neglected to do so, that it was now too late for them to object.—*Held*, also, that the objection was without merit, as the jury was applied for by the defendants and not by the plaintiffs. *Semble*, that where a cause of an equitable nature has been ordered to be tried with a jury, under the provisions of O. 34, r. 2, the trial Judge cannot, without the consent of both parties, withdraw the case from the jury, and himself try the issues of fact. *McKenzie* v. *Ross*, 33 N. S. R. 252.

Purchase of land. *Corbett* v. *McNeil*, 1 E. L. R. 368.

Purchase of land — Principal and agent — Lien for purchase money — Purchase for value without notice — Damages for detention of land. *Murray* v. *Simpson*, 2 O. W. R. 95.

Purchase of land at sale under power in mortgage — Purchaser acting as trustee for mortgagor — Parol evidence to establish trust — Statute of Frauds — Redemption — Delay — Acquiescence —Explanation of — Account — Reference — Interest — Costs. *Kane* v. *Trusts & Guarantee Co.*, 12 O. W. R. 301.

Purchase of land for company in name of trustee — Fraud of trustee — Conveyance to stranger — Action to set aside — Constructive notice — Solicitor — Priorities — Land Titles Act — Caveat — Costs. *North-West Construction Co.* v. *Valle* (Man.), 4 W. L. R. 37.

Purchase of property — Profits on resale — Oral contract to share profits — Statute of Frauds — Evidence — Correspondence — Condition — Abandonment — Termination of contract — Acquiescence — Reference — Costs. *Chisholm* v. *Armstrong*, 9 W. L. R. 454.

Purchase of timber by agent — *Claimed to have purchased as principal — Burden of proof not satisfied — Question of fact.*]—The plaintiff sued for a declaration that he was the owner of the standing timber, sawmill and fixtures, blacksmithing tools, farming implements, all manufactured timber, tanbark, cordwood and sawlogs, in and upon the west half of lot No. 31 in the concession of King, and that defendant was merely a trustee for plaintiff in the same. At trial, Anglin, J., held in favour of defendant and dismissed plaintiff's action. Divisional Court reversed Anglin, J., holding that the agency having been proved to have at first existed it was incumbent upon the agent to shew that the agency had been determined. Court of Appeal *held*, that it was a question of fact, and in dealing with such cases the question for that Court to decide was—not

whether the first judgment was right—but whether the judgment appealed from was wrong, and not being able to do that defendants' appeal was dismissed. Judgment of Divisional Court, 14 O. W. R. 612, affirmed. *Marsh* v. *Lloyd* (1910), 15 O. W. R. 721.

Purchased land from cestui que trust — *Sold it at a profit — Action by cestui que trust for profit made — Knowledge, acquiescence and laches of cestui que trust.*]—Action by *cestui que trust* for cancellation of conveyances whereby defendant purchased certain lands from plaintiff and resold them at a profit of $300, or to recover the profit made on the resale.—Falconbridge, C.J.K.B., at trial (1 O. W. N. 395), *held*, that the evidence of plaintiff and his wife was unworthy of belief, and that plaintiff was barred by acquiescence and laches. — Divisional Court affirmed above judgment, holding that the facts of the case made it exceptional from the rule against trustees making a profit by dealing with a *cestui que trust*. *Lamb* v. *Franklin* (1910), 16 O. W. R. 588, 1 O. W. N. 1010.

Removal of trustee — *Insolvency.*]—Upon petition to remove a trustee, under c. 11 of the Acts of 1888, ss. 37 and 38, where it appeared that the trustee was insolvent, the Court ordered his removal, and a new trustee was appointed.—The above sections are now incorporated in R. S. N. S. c. 151, s. 26. *In re Hood*, 40 N. S. R. 33.

Remuneration of trustees — *Fixed annual sum — Solicitor-trustee — Profit costs.*]—Appeal by one of the trustees of an estate from the judgment of a Surrogate Court fixing his remuneration. The Surrogate Judge allowed five per cent. on the interest collected only, but nothing for any other services, on the ground that he had allowed two and a half per cent. in a former order for the taking over of the *corpus*:—*Held*, following *Re Berkeley's Trusts*, 8 P. R. 193, that an annual allowance should be made for looking after the *corpus* of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved. — *Held*, also, that the Surrogate Judge, instead of allowing the trustees a percentage on the principal sum taken over, and nothing for the collection of the interest, should have allowed them nothing for the taking over of the estate, but a percentage on all interest collected and paid over, and an annual sum for the care of the estate.—*Held*, also, that the general rule is, that a trustee-solicitor is not entitled to charge the estate with fees for any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in *Crudock* v. *Piper*, 1 Macn. & G. 664, under which a solicitor-trustee, who brings or defends proceedings in Court for himself and his co-trustee, is entitled to recover profit costs, and, therefore, to charge such costs to the estate. *In re Williams*, 22 C. L. T. 323, 4 O. L. R. 501, 1 O. W. R. 501.

Resulting trust — *Intention of purchaser at time of conveyance—Pleading.*]—*Held*, that when it appears that the actual purchaser by whom the purchase price is paid directs that the conveyance be made to a third party, intending that a beneficial interest in the land should pass to the person to whom it was conveyed, no trust results to the real purchaser by presumption of law, although no value is given by the third party.—*Semble, per* Wetmore, J., that while a question of law may be raised without being pleaded, yet the facts upon which such question of law is raised must be pleaded, and therefore it is not open to a defendant who has not pleaded fraud to set up that the plaintiff is precluded from obtaining the relief asked for by reason of fraud, evidence of which is brought out at the hearing.—*Semble*, that undue delay in the bringing of an action to have a resulting trust declared is strong evidence of an intention to convey a beneficial interest. *King* v. *Thompson* (1905), 6 Terr. L. R. 204.

Resulting trust — *Judgment — Interest — Rests — Delay of trustee.*]—In an action by the plaintiff claiming a resulting trust in his favour, a conveyance of certain property to him, and an account of the rents and profits, a decree for the conveyance of the property was granted, and the accounts were subsequently taken by a referee, who in his report made annual rests and charged the defendant interest thereon:—*Held*, that, although interest had not been allowed in the judgment or decree, and had not been asked for in the statement of claim, the Court subsequently was not prevented from allowing interest and directing rests to be made.—If a trustee is guilty of unreasonable delay in investing the fund or in transferring it, he will be answerable to the *cestui que trust* for interest during the period of his laches. *McKenzie* v. *McKenzie*, 40 N. S. R. 246.

Resulting trust — *Land purchased by husband conveyed to wife — Voluntary conveyance — Estoppel.*]—The plaintiff caused the land in question to be conveyed to his wife, the defendant, and registered the deed without her knowledge. His motive was to avoid payment of an anticipated claim against him:—*Held*, that he could not succeed in an action to compel her to reconvey the land to him. *Curtis* v. *Price*, 12 Ves. 103, and *Roberts* v. *Roberts*, 2 B. & Ald. 267, followed. *Childers* v. *Childers*, 1 De G. & J. 481, and *Haigh* v. *Kaye*, L. R. 7 Ch. 469, distinguished. *McAuley* v. *McAuley*, 18 Man. L. R. 544, 10 W. L. R. 419.

Resulting trust — *Oral agreement — Conveyance of interest in land to trustee — Statute of Frauds.*]—The plaintiff, defendant, and M. verbally agreed to purchase from S. his interest in a lot of land, and to become the owners thereof in equal shares, it being also agreed that S. should convey his three-fourths to the defendant, who should, when required, convey to the plaintiff and M. each one undivided third part. The plaintiff, defendant, and M. gave to S. their joint notes for the purchase money, and S. conveyed to the defendant his interest in the land. The defendant subsequently objected to giving the deed, and then each party arranged with the

agent of S. a settlement of his share of the balance due, whereupon the defendant again verbally promised to give the plaintiff his deed of one-third of the lot, but no deed was ever given: — *Held*, that the transactions created a resulting trust in favour of the plaintiff. The Statute of Frauds did not extend to such trust, and, in any event, the defendant having admitted the agreement, a court of equity would not permit him to use the Statute of Frauds as an instrument for accomplishing a fraud. *Sutherland* v. *McKay*, 40 N. S. R. 223.

Right of beneficiary to enforce trust. *Morse* v. *Morse*, 1 O. W. R. 500.

Rights and obligations of trustees — *Re-purchase of hypothecated immovable property—Loaning or using capital to effect repairs—Reimbursement out of revenue.*]— Trustees are bound to give to the discharge of their duties the care of a prudent administrator. Hence, an investment in a mortgage requiring the sale by authority of justice of the hypothecated property and its repurchase by the trust will justify the trustees if the bad condition of the property should make it necessary, in effecting a loan for the purpose of repairing the property and putting it in a revenue-producing state, or devote part of the capital in their hands for such purpose. In such case the trustees should use the revenue from the property to pay off the loan or amount taken from trust funds before paying balance of revenue to beneficiary, and this even when trust deed declares that "the revenue shall be devoted to his maintenance after deducting insurance premiums and assessments." *Arnton* v. *Stevenson & Arnton* (1910), 38 Que. S. C. 213.

Sale of land — *Specific performance—Contract for sale of land by trustees—Evidence of concurrence by all — Statute of Frauds — Correspondence — Authority of trustees to bind co-trustee.*]—One of three trustees assumed in the name of all to make an offer to sell a freehold property, part of the trust estate, for $13,000. A second trustee assented to and approved of the offer when made aware of it; but the third repudiated it as soon as it came to his knowledge:—*Held*, in an action brought against the three trustees for specific performance, by the person who had accepted the offer, that the trust estate was not bound, although the dissenting trustee had, only a fortnight before, assented to a sale of the same property to another person at $12,000. The situation had changed in the fortnight; further inquiries had been made; a new customer had been found; a new negotiation had been opened with the prospect of a better price. The *cestui que trust* had a right to the benefit of the third trustee's best judgment in the changed situation before concluding the new contract, and to have that judgment manifested by his signature, either actual or expressly authorized. Where there are several trustees, all must act. *Gibb* v. *McMahon*, 25 C. L. T. 291, 5 O. W. R. 554, 9 O. L. R. 522.

Sale of lands — *Approval of Court.*]— Trustees, having unsuccessfully offered for sale *en bloc* property of the trust estate, consisting of a hotel and stores and a dock, and subsequently the hotel and stores without the dock, received an offer for the hotel by itself:—*Held*, on an application to the Court to approve and confirm the sale under R. S. O. c. 129, s. 39, and Rule 938, that the Court had jurisdiction to express its approval, and that, under the circumstances, it was a case in which the jurisdiction ought to be exercised. *In re Crawford—Nelson* v. *Bell*, 20 C. L. T. 380, 32 O. R. 118.

Sale of real estate — *Action by cestui que trust for account—Expectancy.*]—In an appeal from an order passing trustees' accounts, the appellants claimed the trustees should have been charged with the value of her expectancy in certain real estate sold with the concurrence of the trustees. Appeal dismissed. *In re Jones Trusts*, 7 E. L. R. 496.

Sale of trust property without authority — Purchaser without notice—Damages. *Adams* v. *Adams*, 2 E. L. R. 280.

Sale of unproductive land — Purchase money—Apportionment — Tenant for life—Income—Capital—Interest—Costs. *Re Childs*, 10 O. W. R. 108.

Settled estate — *New trustee — Resident out of province—Appointment by Supreme Court of N. S.—Appointment by Ontario Court—Appeal from order appointing new trustees — Jurisdiction of Divisional Court to hear appeal—Ont. J. Act, s. 74.*]— Motion by way of appeal to set aside the appointment of one Herbert W. Sangster, trustee under a certain deed of trust in the place and stead of Arthur P. Nagle, on the ground that he resides in Nova Scotia, while the assets are largely in Ontario. The estate which formed the subject of the settlement came from the will of the late John Bell, a resident of Toronto, and his estate was largely in Toronto. It was being administered by the Tor. Gen. Trust Co., one of the trustees resided in New Brunswick and the other in Nova Scotia. The appellant resided in Boston and petitioners resided in Nova Scotia:—*Held*, that enquiries regarding the trust estate, its value and the most opportune time for sale, would have to be made where the estate was, and it would be most convenient in the interests of all parties and beneficial to the estate, aside from other considerations, that one of the trustees should be resident in Toronto. There being no special circumstances as should induce the Court to depart from the well-organized principles applicable in a case of this kind, the order appointing James W. Sangster must be set aside. Costs of all parties here and below out of the estate. *Re Jones Trusts* (1910), 15 O. W. R. 554, 20 O. L. R. 457, 1 O. W. N. 532.

Shares in building society — "*In trust*"—*Notice—Mortgage — Purchaser for value—Consolidation.*] — The defendant A. J., being the holder of six shares of permanent stock in her own name, and six shares in a building society, obtained a loan of $700 from the company, and transferred to the company's treasurer, as security, "all my stock in the said company." Subsequently she obtained a further loan of $600, and transferred to the treasurer, as security, six shares of instalment stock, the intention being to transfer the six shares held "in trust"

and already assigned, as the company contended, to secure the prior loan of $700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance $600 upon the said shares with this mortgage as further security. The defendant A. K. J. became the purchaser of the land subject to the $600 mortgage (which she assumed), and purchased from A. J. her equity in the six shares of instalment stock:—*Held*, that the use of the words "in trust" put the company upon inquiry, and they were affected by the notice that A. J. was not the owner of the shares and had no power to mortgage.—*Held*, also, that s. 53 of c. 205, R. S. O. 1897, did not empower the company to disregard the trusts, although it relieved them from seeing to the execution of any trust to which the shares were subject.—*Held*, that the company could not consolidate the two mortgages as against A. K. J., as she was a purchaser for value, without it being shewn that she was aware at the time she purchased the equity of redemption in the lands that any prior mortgage existed against the six shares in the hands of the company. *Birkbeck Loan Co.* v. *Johnston*, 22 C. L. T. 160, 3 O. L. R. 497, 1 O. W. R. 163, affirmed with a variation as to parties. *Birkbeck Loan Co.* v. *Johnston*, 6 O. L. R. 258, 2 O. W. R. 556.

Shares in company — Contract — Declaration of trust — Statute of Frauds. *Creighton* v. *Carman*, 3 O. W. R. 748.

Shares in company — *Trustee for several beneficiaries — Right of one beneficiary to apportionment.*]—Where a trustee held a number of shares in the capital stock of a company in trust for several persons, each of whom was entitled to a certain proportion of the face value of the same, but no provision was made for sale or division of the stock, and no time was fixed during which the trustee was to hold, and one of the *cestuis que trust* brought an action to compel the trustee to transfer to him a portion of the shares equivalent to his interest, but the other *cestuis que trust* were not made parties to the action, and objected to the transfer being made:—*Held*, that, independently of the question of the interests of the unrepresented *cestuis que trust*, the trustee could not be compelled to discharge his trust piecemeal. *Bechtel* v. *Zinkann*, 16 O. L. R. 72, 10 O. W. R. 1075.

Statute of Frauds — *Express trust — Purchase, to make a home for relative — Implied trust — Absence of fraud.*]—The plaintiff claimed a declaration that certain lands standing in the name of the defendant W. were held by him in trust for the defendant F. and a sale thereof to satisfy the plaintiff's judgment against F. Three things were mainly relied on to establish the trust; (1) that W. on one occasion told the plaintiff that he had bought the land for F.; (2) that in a letter to the inspector of a company, he said that the land would eventually belong to F.; (3) that in his books he had kept an account of his dealings with F., entering the different items of debit and credit in respect to this farm, as well as of other matters:—*Held*, on the evidence, that W., no doubt, intended that F. (a relative) might have a home upon the farm, but was determined to retain the ownership of the land. There was no agreement between the parties, either as to a life tenancy or as to the acquisition of the fee simple in the land by F., which he could have enforced against W. in a court of law; and the plaintiff, under his registered judgment against F., was in no better position than the latter would be if suing on his own behalf. It was urged that there was a trust in favour of F.; that this was a resulting trust and therefore excluded from the provisions of the Statute of Frauds. As no portion of the purchase money of the land was advanced by F., there could be no resulting trust in his favour. No fraud on the part of W. was shewn, and there was no trust which could be enforced. *Thompson* v. *Wright*, 24 C. L. T. 97.

Substitutions — *Representation in substitutions before the code — A trust in general terms for the benefit of the family.*]—In a substitution created before the civil code, when the trust is conceived in general and collective expressions in favour of the descendants or of the family, without special designation of any one in particular, representation will take place unless it is specially provided against. *Deguire* v. *Groulx* (1910), 38 S. C. (Que.) 158.

Taking accounts — Commission — Costs. *Morton* v. *Miller*, 1 E. L. R. 91.

Technical breach of trust — *Relief under Trustee Act — Statute of Limitations —Accounts—Evidence—Books of account— Reference—Report — Correction on further directions.*]—Under the last will of N., after making provision for his daughter E., all the rest and residue of his estate was given to his two daughters A. and C., equally, share and share alike. A. was appointed executrix and trustee, and the share given to C. was directed to be invested, and the interest, dividends, and annual produce paid to her half-yearly during her lifetime for her sole and separate use, etc. A. proved the will and filed an inventory, and paid over to E. the amount bequeathed to her, but with respect to C., who was very deaf and weak-minded, contented herself with supporting her during her lifetime, usually taking from her at the close of each year a receipt mentioning no amount, but sealed and witnessed, and acknowledging payment of the interest due her to the date of each receipt. The incomes of both A. and C. were applied by A. to their joint support, C. being provided with all necessary care and attention. After the death of both A. and C., at the instance of the plaintiffs, claiming under E., a reference was ordered to a Master to ascertain the amount of the residue of the estate of N. to which C. was entitled, and also receipts and expenditures by A. in her lifetime on account of C., and by the defendants as executors of A. after her death. After receiving the report of the referee, the Judge referred the report back to be varied, and with further instructions. On appeal from the latter order:—*Held*, that the whole cause and the matters in controversy being still before the Judge, he had power, in giving further directions to the referee, to correct any errors into which he thought he had fallen, the cause in this respect being unlike a common law action. Also, in the circumstances, that, though there had been a technical breach of

trust on the part of A., the case was an appropriate one for relief under the Trustee Act (Acts of 1892 c. 13); and that the defendants were entitled to avail themselves of the protection of the Statute of Limitations. Also, as to income received by the defendants since the death of A., the Judge was right in holding that they should only be charged within 6 years of action brought. Also, as to a sum of money received by A., and not accounted for, her estate could not be relieved from liability, but with respect to income which should have been derived from the investment of the sum so not accounted for, the same rule must be applied as in the case of income received by the defendants after the death of A., and that the liability must be restricted to the period of 6 years before the commencement of the action. Also, that the Judge was right, under the provisions of O. 32, r. 3, in directing books of account kept by A., and which consisted largely in admissions against her own interest, to be taken as *prima facie* evidence of the truth of the matters therein contained. *Cairns* v. *Murray*, 37 N. S. R. 451.

Timber license—*License taken in name of servant of company—Authority of manager of company.*]—Action to recover price of a timber license staked in the name of the plaintiff:—*Held*, that the staking was done by plaintiff for defendants, who is a trustee for them and was directed to transfer the license to them. *McPhee* v. *Bridges*, 10 W. L. R. 520.

Transfer of mining areas to trustee —*Power to sell—Title of vendee—Action—Parties.*]—In an action for, among other things, a declaration, that, as against the defendants, the plaintiffs were entitled to an undivided one-third interest in certain gold mining areas transferred by the plaintiffs to the defendant McN., and sold by the latter to the defendant W., it appeared that the main objects with which the transfer in question was made were: (1) payment of certain advances made by McN. on account of the purchase money of the property; (2) the payment of an amount due by the plaintiff E. H. O. to the McLaughlin Carriage Co., for which the plaintiff C. G. O. was liable on a bond as surety:—*Held*, that the defendant McN. had power to sell the property for the purpose of carrying out the intentions of the parties. 2. That the plaintiffs not having established their right to the declaration prayed for, the claims or rights of the company, for whose benefit the transfer was made, could not be adjudicated upon without their being made parties to the suit. *Orland* v. *McNeil*, 34 N. S. R. 453.

Trust deeds — *Construction — Status of beneficiaries—Vested interests—Condition as to residence—Condition restricting application of benefits—Will — Postponement of enjoyment of legacies—Allowance for maintenance.*]—*Held*, in the construction of the trust deeds, that the interests of the grandsons are not vested, that the condition requiring residence on the North American continent is valid and binding, but this will not prevent their travelling in foreign countries.—*Held*, further, that under the will, the interests of the two grandsons are vested and they are entitled to be paid their shares now, the other grandson to receive the income of his share, all being over 21. The attempt to postpone the distribution till after the death of the father is ineffectual. Personal attendance of the grandsons at Toronto is unnecessary when receiving payments. *Re McCausland Estate* (1909), 14 O. W. R. 371.

Trust estate — Expenditure of principal on repairs—Consent of beneficiaries—Leave of Court. *Re Heward's Trusts*, 10 O. W. R. 961.

Trustee de son tort — *Infant cestui que trust—Illegal disposition of fund—Payment into Court — Jurisdiction.*] — Moneys payable to a widow as trustee for her infant child were collected for her by M., and by arrangement between them retained by him and employed in his business. By writing addressed to the widow he acknowledged holding the moneys to the credit of the infant, "bearing interest at the rate of six per cent. per annum:"—*Held*, that M. was a trustee *de son tort*, and as such either an express or a constructive trustee, and liable to account to his infant *cestui que trust*, and so entitled to come to the Court, under the Trustee Relief Act, R. S. O. 1897 c. 336, s. 4 (and s. 2, defining "trustee)," and obtain an order allowing him to pay the moneys into Court, against the opposition of the widow, who pressed for payment to her, on the ground that he was simply her debtor. —*Semble*, also, *per* Anglin, J., that the Court had jurisdiction, as custodian of the interests and property of infants, to order, *motu proprio*, that which, upon application of the official guardian or of the infant by her next friend, it could and would direct, by virtue of Rule 938 (*d*); and further, if the widow had resided abroad for a year and was resident abroad when the application for payment in was launched, the order might be made under 62 V. c. 15, s. 3 (O.)—Order of Mabee, J., affirmed. *Re Preston*, 8 O. W. R. 828, 13 O. L. R. 110.

Trustee for bondholders of an insolvent railway may become a purchaser, as such trustee, at the sale of the railway. *Royal Trust Co.* v. *Baie de Chaleurs Rw. Co.* (1907), 13 Ex. C. R. 1.

Trustees' compensation — *Quantum*—Railway bonds—Litigation — Responsibility. *Re Toronto General Trusts Corporation and Central Ontario Rw. Co.*, 6 O. W. R. 350.

Unauthorised dealing with trust property — Breach of trust—Liability to make good loss to *cestuis que trust*—Persons joining in breach of trust—Liability—Will—Mortgage — Improper application of moneys — Knowledge of mortgagees. *London and Western Trust Co.* v. *Dominion Savings and Investment Society*, 12 O. W. R. 77.

Unpatented land worked by mother and son in partnership — Crown grant issued to mother as representative of deceased father — Quit claim by children — Effect of—Beneficial interest of son—Resulting trust—Evidence to establish—Absence of written agreement—Denial by son of interest—Estoppel—Judgment declaring trust for moiety of land. *Campbell* v. *Campbell*, 9 W. L. R. 190.

Vendor and purchaser — *Breach of trust—Notice — Account.*] — Where a purchaser, when he acquires the estate has notice of a breach of trust, he becomes a trustee, and liable, and must account in the same manner as the person from whom he purchased. *Miller* v. *Drysdale*, 40 N. S. R. 256.

Voluntary settlement — *Enforcement —Revocation—Gift — Powers of Court — Intention of settlor.*]—A voluntary settlement will be valid and effectual if the settlor transfers the property to a trustee for the purpose of the settlement, or declares that he himself took it in trust for those purposes. If the transaction is complete, even though voluntary, the Court will act upon it, but, if the matter rests upon a mere voluntary agreement to create a trust, the Court will not interfere.—If there are circumstances connected with the transaction which lead the Court to believe that the grantor did not intend the declaration of trust to be irrevocable, the Court will not enforce it.—Voluntary gifts, not subject in express terms to a power of revocation, but not meant to be irrevocable, may be set aside or revoked by the donor. *Clattenburg* v. *Morine*, 40 N. S. R. 193.

Wife held lot as trustee for husband —*Lot in foreign country—Wife died—Her father became possessed of lot which he sold —Husband paid funeral expenses, etc.—Accounting to husband by father-in-law.*] — Plaintiff advanced his wife money to purchase a lot in Buffalo, N.Y. His wife died in 1903, intestate and childless. Plaintiff paid funeral expenses and for headstone $112, and taxes on lot after wife's death $62.78. Defendant, wife's father, in the ordinary course of distribution by N. Y. law, became possessed of the lot, which he sold for $150:—*Held*, that the father-in-law should account to plaintiff for the $150 which he received. *Wallace* v. *Handley* (1910), 16 O. W. R. 921, 2 O. W. N. 10.

Will — *Annuities—Setting apart securities—Distribution of residue — Realization of estate—Investments—Redemption — Consent—Summary application—Rule 938.*] — An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled:—*Held*, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose. *In re Parry*, 42 Ch. D. 570, and *Harbin* v. *Masterman*, [1896] 1 Ch. 351, followed. *Hicks* v. *Ross*, [1891] 3 Ch. 499, referred to.—*Held*, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue. *In re Medland, Eland* v. *Medland*, 41 Ch. D. at p. 492, and *In re Parry, supra*, followed.—*Held*, that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent. Order of Boyd, C., 21 C. L. T. 380, varied. *In McIntyre, McIntyre* v. *London and Western Trusts Co.*, 22 C. L. T. 90, 3 O. L. R. 212, 1 O. W. R. 56.

Will—*Devise to plaintiff and defendant—Jewellery—Bonds — Personal property—Confidential relationship of defendant — Gift of jewellery to defendant by plaintiff during minority—Transfer of bonds to defendant—Small consideration—Release—Sale of bonds by defendant at fair price—Action to set aside transactions — Accounting.*] — Plaintiff, a minor, and defendant, were left certain property under a will. Plaintiff gave defendant certain jewellery and released his interests in certain bonds for a small consideration. There were certain other dealings between parties. Defendant was executrix of the will. She passed her accounts before Surrogate Court and plaintiff ratified them upon coming of age. Later he repented his dealings with plaintiff and brought action to set aside the transactions and for an accounting. Sutherland, J., *held* (17 O. W. R. 603, 2 O. W. N. 302), that the evidence shewed that plaintiff was intelligent and educated and properly understood what he was doing at the time in question, and dismissed the action with costs. The jewellery to be returned to plaintiff.—Divisional Court *held*, that while an infant is by law incapable of making a valid will for very obvious reasons, yet the modern view as to donations of chattels is that the gift of infants is not void but voidable:—That plaintiff was rightly in Court and should get a return of his things and his costs as to that part of the case:—That he failed as to the part of the case relating to the Petawawa bonds and he should pay costs as to that:—That acting on the well-known rule in the case of divided success there should be no costs to either party of motion or of appeal. *Murray* v. *McKenzie* (1911), 18 O. W. R. 747, 2 O. W. N. 785, O. L. R. .

Will — *Misappropriation by co-trustee—Limitation of actions—Trustee Act — Bar.*] —R. G. died in 1870, having by his will given the income of his estate to his widow for life, and subject to certain bequests, the residue to the children of his brothers and sisters, and appointed T. H., J. G., and the widow executors and executrix of his will with power "to dispose of the property if they see fit." J. G. managed the estate until the time of his death in 1885, by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895, when the widow, after much pressure by her friends, took proceedings against him for an account, the result of which was that he was found largely indebted, and a large sum was lost to the estate. The widow died in 1902:

probate of her will was then granted to the defendants; and T. H. was removed as trustee, and the plaintiffs appointed in his place. In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate:—*Held*, that, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, s. 32 (1) (*b*) of the Trustee Act, R. S. O. 1897 c. 129, was a good defence. *In re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 447, followed. *Gardner* v. *Perry*, 23 C. L. T. 295, 6 O. L. R. 269, 2 O. W. R. 681.

See ACCOUNT—ASSESSMENT AND TAXES—BILLS OF EXCHANGE AND PROMISSORY NOTES—COMPANY — CONTRACT — COSTS — COURTS—GIFT—INSURANCE — INTEREST — PARTIES—PAYMENT INTO COURT — PRINCIPAL AND AGENT — RAILWAY — REGISTRY LAWS—SCHOOLS—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—WILL.

TUTOR.

Appointment or removal — *Power of Court—Family council.*]—The power of appointment or removal of tutors is vested by the Civil Code in the Court or Judge, the function of the family council being merely advisory. The Court will therefore remove a tutor from office against the advice of the majority of the family council, whenever it finds it proper to do so. *Beiser* v. *O'Brien*, 27 Que. S. C. 444.

See ALIMENTARY ALLOWANCES —APPEAL—GUARDIAN — INFANT — SOLICITOR.

ULTIMATE NEGLIGENCE.

See TRIAL.

ULTRA VIRES.

See CONSTITUTIONAL LAW.

UMPIRE.

See ARBITRATION AND AWARD.

UNDERTAKING.

See INJUNCTION—WRIT OF SUMMONS.

UNDUE INFLUENCE.

See CONTRACT—COSTS—COURTS — GIFT — MUNICIPAL ELECTIONS—WILL.

UNINCORPORATED ASSOCIATION.

See CONTEMPT OF COURT—DISCOVERY—PARTIES — PLEADING — TRADE UNION — WRIT OF SUMMONS.

UNION SCHOOL SECTION.

See SCHOOLS.

UNIVERSAL GIFT.

See GIFT.

UNIVERSAL LEGACY.

See SUBSTITUTION.

UNIVERSAL LEGATEE.

See REVIVOR.

UNIVERSAL SUCCESSION.

See PARTITION.

UNIVERSITY OF TORONTO.

See ARBITRATION AND AWARD.

UNLAWFUL ASSEMBLY.

See CRIMINAL LAW.

UNLAWFULLY SOLEMNISING MARRIAGE.

See CRIMINAL LAW.

UNLIQUIDATED DAMAGES.

See ATTACHMENT OF DEBTS.

UNPROFESSIONAL CONDUCT.

See DENTISTRY.

USE AND OCCUPATION.

Foreign consul — *Personal liability for office rent.* —The defendant, a foreign consul, was personally sued for use and occupation of certain rooms which had been used by him and his predecessor as the consulate office. When the defendant assumed office, a lease from the plaintiff to the former consul

was current, but was not assigned to the defendant. The rent had in fact been paid by the foreign Government through the former consul, and the lease had been submitted to the Government and approved by it, both to the knowledge of the plaintiff. The plaintiff did not demise or attempt to demise to the defendant:—*Held*, that the defendant was not liable. *Duncombe* v. *Burke*, 20 C. L. T. 241.

See LANDLORD AND TENANT—VENDOR AND PURCHASER.

USUFRUCT.

Rights of usufructuary and nu-proprietaire — *New shares in company issued to shareholders—Capital or income.*]—The shares of a new issue, made by a joint stock company, and acquired by the original shareholders by virtue of their status as such, are not civil benefits which appertain to the usufructuary. They form an addition to the corpus of the estate, and, therefore, belong exclusively to the *nu-propriétaire*. *Lamb* v. *Lamb*, 34 Que. S. C. 355.

Separation from property — *Reunion —Condition as to alienation — Sale — Defence*]—The appellant had made a gift of land to his daughter subject to the payment of mortgages and to a charge for maintenance of the donor and his family, and afterwards the daughter gave the land to her brother, with the stipulation that he would allow the appellant the usufruct of it, such usufruct being untransferable and unseizable. The brother afterwards gave the land to the appellant, subject to all the provisoes and conditions imposed by his sister's gift to him. The appellant sold the land to one R., now represented by the respondent, with a proviso for redemption, but, when R. wished to take possession at the expiry of the period fixed for redemption, the appellant pleaded that the usufruct was untransferable and that he could not dispose of it:—*Held*, that the acquisition of the usufruct of a property, by virtue of one title, and the acquisition of the bare property, by virtue of a subsequent title, in spite of the fact that these different titles have united the usufruct and the property in the same person, cannot have the effect of annulling the conditions contained in the prior title transferring only the usufruct; that the exercise of the rights of usufruct and bare property in a parcel of land is regulated by the title of acquisition of each of these rights, and the conditions to which they are separately subject are not affected by the reunion of the two rights in the same person.—2. That the defence of alienation, in this instance, was made to protect the donee of the usufruct, and, therefore, he could not dispose of this usufruct, and could himself attack the alienation which he had made. *Gagnon* v. *Gagnon*, 9 Que. Q. B. 62.

See BUILDING—LANDLORD AND TENANT—PARTITION—WILL.

USURPING PROFESSIONAL FUNCTIONS.

See SOLICITOR.

USURY.

See CRIMINAL LAW—INTEREST—MORTGAGE.

VACANT SUCCESSION.

See CURATOR.

VACATION.

Jurisdiction — *Foreign commission.*]—An action for the recovery of money had and received does not fall under the provisions of Art. 15, C. P.; and a commission rogatory will not be granted during long vacation. *Royal Trust Co.* v. *Robert*, 8 Que. P. R. 391.

Jurisdiction — *Landlord and tenant — Rent—Performance of services—Default.*]—Where a part of a rent reserved in a lease consists in the performance of certain services, the obligation to perform the services forms part of the consideration for the lease; and a suit based upon the non-execution of that obligation will be heard during long vacation. *Imperial Ice Cream Co.* v. *Cunningham*, 8 Que. P. R. 391.

Jurisdiction — *Petition for alimentary allowance.*]—The Court has no jurisdiction to decide during vacation upon a petition for an interim alimentary pension. *Dumouchel* v. *Giguère*, 8 Que. P. R. 390.

Jurisdiction — *Trial — Revendication —Incidental proceedings.*]—The Court has no jurisdiction to try an action in revendication on the merits during the long vacation, but can only adjudicate upon any incidental proceedings relating to the seizure made by the plaintiff. *Fournier* v. *Gagné*, 8 Que. P. R. 412.

Motion for interim alimony.]—During long vacation the Court or Judge has no jurisdiction to adjudicate upon a motion for an allowance for interim alimony. *Rivet* v. *Gagnon*, 3 Que. P. R. 214.

Practice — *Fixing interim ailmony — Husband and wife.*]—It is competent for a Judge, during the long vacation, to fix the amount of alimony that a husband must pay to his wife, be she plaintiff or defendant, in an action for *séparation de corps*. *Prud'homme* v. *Goulet*, 35 Que. S. C. 88.

See APPEAL—CONTEMPT OF COURT—HUSBAND AND WIFE—PLEADING.

VACCINATION.

See PUBLIC HEALTH ACT.

VAGRANCY.

See CRIMINAL LAW.

VAGRANT.

See CRIMINAL LAW.

VALUATION.

See ARBITRATION AND AWARD—ASSESSMENT AND TAXES—INSURANCE.

VALUATION ROLL.

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VALUING SECURITY.

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VARYING.

Order-in-Council.] — See *McGillivray* v. *Montreal Assurance Co.* (1861), C. R. 3, A. C. 475. Digested under JUDGMENT.

VENDORS AND PURCHASERS.

1. AGENTS' TRANSACTIONS, 4322.
2. CANCELLATION OF AGREEMENTS. *See* Sub-head 11, RESCISSION.
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1. AGENTS' TRANSACTIONS.

Authority of agent — *Ratification — Receipt of purchase-money — Acquiescence — Specific performance — Agents joined as co-defendants — Alternative relief — Costs.*] —Where the authority of the agent is disputed by the person on whose behalf the contract is made, the agent may be joined as a co-defendant, and relief claimed against them alternatively.—*Bennetts* v. *McIlwraith* (1896), 2 Que. B. 464, followed. — The plaintiff sued the owners of land and their agents, in the alternative, for specific performance of a contract for the sale to him and purchase by him of land entered into by the agents with him, or for other relief. The purchase-money was paid by the plaintiff to the agents, possession was taken by the plaintiff and improvements made, and possession retained for 6 years, but no conveyance or transfer was made to the plaintiff:—*Held*, upon the evidence, that the acts of the agents in effecting the sale, and in the acceptance of the purchase-money were ratified by the owners, and it was not necessary to determine whether or not the agents were agents for sale or whether they were authorised to accept payment of the purchase-money from the plaintiff.—A ratification of an act or transaction will be implied, wherever the conduct of the person on whose behalf it is done or entered into is such as to indicate an intention to adopt it in whole or in part; the receipt of the purchase-money or part thereof operates as a ratification of an unauthorised sale; and in the case of an agent exceeding authority ratification may be applied from silence or acquiescence.—Judgment for the plaintiff against the principals for specific performance, and action dismissed as against the agents without costs. *Taylor* v. *Hegleson* (1910), 15 W. L. R. 273.

Authority of agent — *Ratification — Warranty — Real Property Act — Caveat — Cancellation.*] — The plaintiff's brother, in the plaintiff's absence, and without authority, agreed to sell the plaintiff's land to the defendant for a named price, and upon specified terms. The plaintiff was the registered owner of the land in fee, and the defendant registered a caveat against the land forbidding the registration of any person as transferee or owner of the land, or of any instrument affecting the land, unless such instrument was expressed to be subject to the defendant's claim. The plaintiff, on his return, repudiated the agreement, but afterwards treated with the defendant in such a way as to indicate ratification, but always on the assumption that the defendant would make the terms of payment to suit the plaintiff, which the defendant did not agree to do:—*Held*, that the plaintiff was entitled to have the registration of the caveat cancelled; and that the defendant was not entitled to specific performance of the agreement, nor to damages against the plaintiff's brother for breach of warranty of authority. *Fernie* v. *Kennedy* (1910), 13 W. L. R. 437.

Authority of agent of vendor — *Inference — Incomplete contract — Specific performance.*]—In viewing the relations or dealings between principal and agent, an

unconditional authority to sell land should not be lightly inferred, but it should be clear beyond any reasonable doubt that such authority was conferred. Specific performance of contract refused. *Jull* v *Rasbach*, 7 W. L. R. 404, 13 B. C. R. 398.

Authority of agent of vendor — *Making the contract — Offer and acceptance — Statute of Frauds — Specific performance.*]—*Held*, that authority to an agent to effect a sale *prima facie* means a sale effectual in law, including the execution of an agreement where the law requires a contract in writing; and an agent authorised to conclude a binding agreement for sale. —2. That several documents may be read together so as to constitute a binding contract.—3. That when an offer has been made and accepted a binding contract is constituted, notwithstanding a reference in the documents to a formal agreement to be thereafter prepared. *Harris* v. *Darroch*, 8 W. L. R. 86, 1 Sask. L. R. 116.

Authority of agent of vendor — *Ratification — Estoppel — Part performance — Statute of Frauds.*]—One T., who had been appointed agent for the management of plaintiff's estate at E., by the plaintiff's wife, which appointment was expressly ratified by the plaintiff, had appointed, with her authority, one M., a real estate agent, as agent for sale. M. made several sales, all of which were confirmed by the plaintiff, and, on the 3rd February, 1904, sold to the defendant C. the land in question, of which sale the plaintiff was duly notified; and the defendant went into immediate possession and commenced making improvements, of which the plaintiff was also notified on the 19th February. On the 8th June, after a large sum had been spent in improvements, the plaintiff notified the defendants that he repudiated the sale, and brought an action for possession: — *Held*, that M. had authority from the plaintiff through T. to make the sale to the defendant. 2. That if M. had not been authorised to make the sale, the plaintiff had ratified it by his conduct in standing by and allowing the defendant to make improvements, under the arrangement of purchase, and not immediately repudiating it and giving notice within a reasonable time. 3. That the part performance of the agreement of purchase by the defendants was sufficient to take it out of the Statute of Frauds. *Quære*, whether non-compliance with the Statute of Frauds comes in question in an action of ejectment, or whether the plaintiff could recover possession in such an action by reason of a breach of any of the terms of the agreement. *McDougall* v. *Cairns*, 2 Terr. L. R. 219.

Authority of agent to contract for vendor—Misrepresentation as to instructions — Specific performance — Refusal to enforce. *Walker-Parker Co.* v. *Thompson*, 7 O. W. R. 125, 8 O. W. R. 197.

Contract made with clerk of vendor's agent—Ignorance of vendor of position of vendee — Right to repudiate on discovering truth — Duration of agency — Termination of authority — Vendee acting as representative of actual purchaser. *McGuire* v. *Graham*, 10 O. W. R. 370, 863.

Defendant applied to the plaintiff for a loan of $58,000, but negotiations to that end and for the sale of certain lands for $56,000 failed. Subsequently the person with whom the plaintiff was negotiating was introduced by the prospective purchaser's banker to the agent of the mortgagees, and a sale was brought about for $50,000, the defendant paying the agent a commission. An action by the plaintiff for a commission for having procured the purchaser was dismissed by Irving, J., at the trial and his judgment was affirmed by the Supreme Court of British Columbia, Morrison, J., dissenting, and it was held that as the plaintiff had been engaged to find a purchaser at a certain price and having failed to do so he was not entitled to a commission on the sale subsequently made to the person originally introduced by him at a lower price. It was held by Hunter, C., that when, *prima facie*, the agreement is to pay a commission on a named price it is for the agent to shew in the clearest way that the intention of the parties was to pay a commission on any sum at which a sale might be effected. *Bridgman* v. *Hepburn* (1908), 13 B. C. R. 389, 8 W. L. R. 28, affirmed, 42 S. C. R. 228.

Deficiency in quality—*Innocent misrepresentations by agent of vendor—Proof of agency—Specific performance—Compensation for deficiency.*]—In an action for a declaration that the plaintiff was entitled to be relieved from the obligations arising out of a contract to purchase land from the defendant, on the ground that the defendant's agent misrepresented the quantity of land, and for a return of the moneys paid by the plaintiff:—*Held*, upon the evidence, that L., who made the contract with the defendant and assigned it to the plaintiff, and who made the representations to the plaintiff, was in fact the agent of the defendant in the sale to the plaintiff; and the defendant was bound by the representations; that, in the absence of any conditions of sale, the plaintiff could insist on having all that the defendant could convey, with compensation for deficiency, if any; that the purchase was one on a basis of 80 acres, and there was a shortage of 6.18 acres; and that the representations being innocent and the contract not executed, it should be carried out, with compensation for the deficiency. *Stewart* v. *White* (1910), 14 W. L. R. 596.

Estoppel — "*Land Commissioner*" — *Specific performance.*] — The plaintiffs, as assignees, claimed specific performance of an alleged agreement for the sale of lands based upon the following letter:—"Fernie, B.C., June 5th, 1900.—D. V. Mott, Esq., Fernie, B.C.:—Re sale to you of mill site.—Dear Sir:—The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station, on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5 per acre; payable as follows: When title issued to purchaser, title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan. Yours truly, W. Fernie, Land Commissioner.—

the lands claimed were not those shewn on the sketch plan, but other lands alleged to have been substituted therefor by verbal agreement with another employee of the defendant company, at the time of survey:—*Held*, affirming the judgment in 12 B. C. R. 433, but on different grounds, that specific performance could not be decreed, in the absence of any proof of authority of the agent to sell the lands of the defendant company, and that the mere fact of investing their employee with the title of "Land Commissioner" did not estop the defendants from denying his power to sell lands. *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.*, 39 S. C. R. 169.

Failure of vendor to convey—*Crown lands—Appropriation for town site—Notice—Damages — Improvements made by purchaser.*] — Defendants had an agreement with the Ontario Government that five townships should be withdrawn from general settlement for six years, and should be set apart for settlement by defendants, who had acquired nearly three hundred veterans' claims. Plaintiff applied for one half of a certain lot and defendants forwarded his application to the Government. An agreement was made between plaintiff and defendants by which he was to buy land applied for, and make payments as provided. He made a deposit, took possession and partially cleared the land when the Government notified defendants that the lots sold to the plaintiff along with others were withdrawn, being required for a town site. The defendants failed to notify the plaintiff:—*Held*, that defendants were not plaintiff's agents, but vendors, and that he was entitled to damages. *Monaghan* v. *Ontario Veterans' Land Co.*, 13 O. W. R. 187.

Failure to keep appointment—*Damages—Travelling and necessary expenses — Agent for undisclosed principal.*]—A person who, in execution of a promise of sale, makes an appointment with the intending purchaser to effect the sale, and sign the deed, but who is unable to do so on the day fixed, through legal hindrances and want of authorization of part owners and sellers under age, is liable in damages to the purchaser for his travelling and other necessary expenses. Nor is he relieved therefrom by the fact that he is merely the agent of the owners, having acted in his own name, without disclosing the names of his principals. *Laurin* v. *Thibaudeau*, 34 Que. S. C. 503.

Fiduciary relationship — *Specific performance.*]—Where an intending purchaser, by disguising his intentions under the role of a disinterested friend, imposes on the confidence thus established, and induces the owner of land to accept an offer for the purchase of it, which probably would not otherwise have been accepted without independent investigation, specific performance of an agreement for sale thus procured will not be enforced. *Fellowes* v. *Lord Gwydyr*, 1 Sim. 63, discussed and distinguished. *Henderson* v. *Thompson*, 41 S. C. R. 445.

Formation of contract—*Conditions—Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Avoidance of contract — Fraud—Specific performance.*]—While A. was absent abroad, B. assumed, without authority, to sell certain of his lands to C., and received from C. a deposit on account of the price. On receipt of a cablegram from B., notifying him of what had been done, but without disclosing the name of the proposed purchaser, A. replied by letter stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises, and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B. to communicate these terms to the proposed purchaser. On learning the conditions, C., in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction:—*Held*, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds; that the words "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions, did not import the proposal of a new term; and that A. was bound to specific performance.—*Held*, also, that an arrangement, unknown to A. and made prior to the receipt of his letter, whereby B. was to have a commission on the transaction from C., could not have the effect of avoiding the contract, as B. was not, at that time, the agent of A. for the sale of the property. —Judgment appealed from, *Calori* v. *Andrews*, 12 B. C. R. 236, 4 W. L. R. 259, affirmed. *Andrews* v. *Calori*, 38 S. C. R. 588.

Incomplete contract—*Purchaser dealing with agent—Authority of agent—Offer—Acceptance—Correspondence — Statute of Frauds.*] — The defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400, $900 or $950 cash, balance C. P. R., subject to owner's confirmation;" and telegraphed the defendant: "Deposit on lot Kitsilano, $1,400, Wire approval and instructions." The defendant wired in reply: "$1,400 O.K. Letter instructions;" at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver:—*Held*, affirming the judgment of Hunter, C.J., 7 W. L. R. 40, 13 B. C. R. 268 (Morrison, J., dissenting), that the agents were not authorised to sell; (2) that there was no completed contract; and (3) that there was no memorandum to satisfy the Statute of Frauds. *Williams* v. *Hamilton*, 14 B. C. R. 47.

Making the contract — *Authority of agent—Telegrams — Incomplete contract — Statute of Frauds.*] — The defendants instructed L. & Co., real estate agents, to endeavour to sell certain lots for them (the defendants). L. & Co., accepted a deposit of $200 from the plaintiffs on account of a

proposed purchase of the lots at $25,000. L. & Co., wired the proposal to the defendants, who wired back, "Will not accept offer." L. & Co. wired again: "Telegram received: wire price and terms you will accept." The defendants wired: "Will accept 25,000 net, 8,000 cash, balance mortgage one or two years, 8 per cent. interest:"—*Held*, that L. & Co. had no greater authority from the defendants than to receive and submit offers, and any agreement made by them based upon the telegrams was not binding upon the defendants.—2. That there was no completed agreement between the parties.—3. That there was no sufficient memorandum to satisfy the Statute of Frauds. *Doyle* v. *Martin* (1910), 14 W. L. R. 666.

Mining rights—*Re-sale to company — Commission paid by purchaser—Right to charge against vendors—Appeal from report —Time — Waiver.*]—The defendant, acting on behalf of a syndicate of which he was a member, obtained from the owners of a number of coal mining areas transfers of the areas for the purpose of putting them into a company in which he was interested, and purchase price being payable in some cases in cash and in others in bonds and stock of the company. The plaintiffs were part owners of areas which were to be paid for in bonds and stocks. For the purpose of carrying the transaction through, and paying those proprietors who required payment for their properties in cash, it became necessary to borrow a considerable sum of money. This was obtained from bankers, who charged a commission for the accommodation. The defendant sought to deduct from the amount payable to the plaintiffs a proportion of the commission so paid, alleging assent on their part. It was shewn that the plaintiffs had no knowledge of the expenditure, and that there was no authorization from them to incur it:—*Held*, that, under these circumstances, the plaintiffs were not liable; also, that the defendant's agency for his associates in the purchase excluded the idea of agency for the plaintiffs; also, that the benefit which accrued to the plaintiffs from the loan was too remote to create any liability on their part.—On appeal from the order varying the referee's report the objection was taken that the application for the order was made out of time.—*Held*, that the objection was one which should have been taken before the Judge who made the order, who could have extended the time, and not being so taken was waived; also, that the Court could not, in any case, give effect to the objection in the absence of evidence shewing the date at which the report was filed. *Fultz* v. *McNeil*, 53 N. S. R. 506; *Fultz* v. *Corbett*, 1 E. L. R. 54.

Nominal purchaser—*Name of manager of vendor's agent inserted in sale agreement as purchaser—Ignorance of vendor—Assignment to real purchaser — Specific performance.*]—A sale of land was arranged between the agent of an intending purchaser and the owner's agent, the owner accepting the purchaser's offer, although ignorant of his name. The purchaser refused to allow his name to appear in the agreement, which had been prepared by the vendor's solicitor with a blank for the purchaser's name, on the ground that it would affect other purchases which he proposed making in the neighbourhood. The office manager of the vendor's agent then inserted his own name as purchaser, with the object as he said, of preventing the sale from falling through. Neither the vendor nor her solicitor knew of the position of the ostensible purchaser, and, on the vendor inquiring who he was, he was merely informed by the purchaser's agent that he was a "responsible person," upon which the vendor signed the agreement, which was then assigned to the plaintiff. A few days after a draft deed had been submitted and the deposit made, the vendor discovered who the nominal purchaser was and refused to carry out the sale: — *Held*, that the sale could not be supported, as there had not been a full and fair disclosure of material circumstances in connection with the transaction, in leaving the vendor in ignorance of the position of the purchaser as the representative of the vendor's agent. *McGuire* v. *Graham*, 16 O. L. R. 431, 11 O. W. R. 999.

Proof of contract—*Payment of deposit —Receipt by agent — Owner's approval — Memorandum in writing—Statute of Frauds —Oral evidence to shew real transaction — Admissibility — Liability of agent—Specific performance — Damages.*] — The plaintiff alleged an agreement between himself and the defendant whereby the defendant agreed to sell to the plaintiff certain land, and the plaintiff agreed to purchase the same; and the plaintiff claimed specific performance or damages. The plaintiff paid the defendant $50 as a deposit or part of the purchase-price, and the defendant gave the plaintiff a receipt therefor. The property did not, as the plaintiff knew, belong to the defendant, but the plaintiff sought to make the defendant personally liable because the receipt did not shew him to be an agent. The receipt itself was lost. The plaintiff offered in proof of the agreement his recollection of the contents of the receipt. The defendant, while he could not positively swear that the receipt was not in the terms set out by the plaintiff, said he was sure that it was agreed that it was to be subject to the owner's approval, the defendant being merely agent for the owner:—*Held*, upon the evidence, that the defendant agreed only to submit the plaintiff's offer to the owner for his approval.—*Held*, also, assuming that the receipt was in the exact words stated by the plaintiff, that it was not in form an agreement, but at best only a memorandum of one. Evidence was admissible to shew that the receipt was not a memorandum of the real transaction at all. It would be a fraud upon the defendant to allow the plaintiff to maintain his contention through the Statute of Frauds, which was enacted to prevent and not to assist fraud.—*Held*, also, that, even if the defendant were liable on the receipt, there could be no specific performance, as the property was sold by the owner, without the defendant's knowledge, before the money was paid by the plaintiff; and, as the $50 and another $50 subsequently paid were returned by the defendant and there was no examination of title by the plaintiff, the plaintiff had suffered no damages. *Kirkland* v. *Smith* (1911), 16 W. L. R. 530. B. C. R.

Purchase of town lot under agreement through agent—*Sale approved by owner—Afterwards cancelled as agreement contained not terms which owner desired to be included—Resale to third party, who obtained land titles certificate—Action against vendor for fraudulently depriving purchaser of said lot.*]—Purchaser paid agent of vendor $25 as down payment on a town lot and signed agreement to pay balance, $100, in $25 payments. Vendor approved of agreement, and purchaser erected valuable building on said lot with knowledge of vendor. Later vendor assumed to cancel the agreement and effect a resale to a third party, who acquired a certificate of ownership under the Land Titles Act. Purchaser brought action.—Riddell, J., *held*, that the certificate could not be set aside, but gave purchaser judgment for $1,700 against vendor, with costs. *Bucovetsky* v. *Cook* (1910), 16 O. W. R. 257, 1 O. W. N. 998.

Sale of land by company—Agreement of managing director to repurchase at specified price—Inducement to purchase—Principal and agent—Undisclosed principal—Personal liability of agent — Specific performance. *Litchfield* v. *Saskatchewan and Battle River Land and Development Co.*, 7 W. L. R. 475.

Sale to syndicate—*Subsequent sale to another — Right to syndicate members — Agent's authority—Specific performance.*]—The action arose out of the sale by Dom. Brewery Co. of its property and assets. The Brewery Co. having made default in payment of its debentures, an action was brought in the English High Court on behalf of debenture holders against the Co., and the Railway Share Trust and Agency Co., for the sale of the property, and on July 24th, 1906, an order was made in that action authorising the receiver and manager of the company to sell the property to Charles Russell for £52,000 . . . Russell, on November 16th, assigned his interest in the contract to Gavin Brown Clark. H. S. Foster was then sent to Canada to effect a sale of the property. He employed Case as a suitable broker to find a purchaser. Various negotiations took place and the property was sold to defendant Mackenzie. The action was brought to set aside the conveyance by Lovell (Mackenzie's nominee as purchaser) to the new company as fraudulent as against Clisdell and Orpen, or in the alternative for damages.—Riddell, J., 13 O. W. R. 748, dismissed the action as against all the defendants, except Case, G. A. Case, Ltd., and Millar.—Divisional Court (15 O. W. R. 773, 1 O. W. N. 648), varied above judgment, holding that the case against G. A. Case, Ltd., failed, and that costs should not have been awarded against Case. The plaintiff's case as to him failed, and they obtained no other relief against him. The appeal allowed, and judgment entered dismissing the plaintiff's action as against the appellants as well as the defendants, as to whom it had already been dismissed, but without costs to appellants here or below.—Court of Appeal affirmed Divisional Court. Meredith, J., dissenting, holding that the judgment of Riddell, J., ought to be restored. *Clisdell* v. *Lovell* (1910), 17 O. W. R. 583, 2 O. W. N. 315.

Vendor contracting in representative capacity—*Beneficial interest of vendor not specifically allocated — Specific performance with abatement of purchase-money—Lien for improvements.*]—The defendant, who was administratrix of the estate of her late husband, made a lease of a hotel, part of the estate, to the plaintiff, containing an option to the plaintiff to purchase the property. In previous leases of the hotel to the plaintiff, the defendant had been described as administratrix, but not so in the lease containing the option. The plaintiff, however, knew that the defendant's title was in her representative capacity. In *St. Germain* v. *Rencault*, 2 Alta. L. R. 371, 12 W. L. R. 169, it was held that the option to purchase was void. This action was brought against the defendant in her individual capacity for specific performance of the agreement to sell to the plaintiff contained in the lease to the extent of a one-third interest in the property, presumed to be the defendant's beneficial interest, with an abatement of the purchase-money to the extent of two-thirds thereof:—*Held*, that, as it had not been shewn that the estate had been distributed or the beneficial interests specifically allocated, the equitable rule that a party should be compelled to perform his contract to the extent that he is able to do so, could not be applied; and the action was dismissed.—*Occanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, distinguished.—*Semble*, that the plaintiff was entitled to a lien upon the property for the value of the improvements made by him beyond such as he was bound to make as lessee. *Boudreau* v. *Reneault* (1910), 15 W. L. R. 414, Alta. L. R.

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2. CANCELLATION OF AGREEMENT.

See sub-head 11, RESCISSION.

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3. CONDITIONS OF SALE.

Building restriction — *Construction —Limitation of time — Effluxion.*] — The plaintiffs conveyed an acre of land to the defendant. The agreement for sale contained these clauses: "12. The purchaser agrees that he will not erect or cause to be erected any building nearer than 33 feet from the easterly boundary of said property, and the vendors agree that, should the said vendors want 33 feet of the most easterly side of said land, they will convey to the purchaser an equal amount of land to be immediately adjoining on the south side of the property mentioned herein." "14. Relating to clause 12, the vendors shall have the privilege of taking the road mentioned above only on or before the 14th September, 1909:"—*Held*, that the prohibition contained in the first part of clause 12 was not absolute and general, but was to hold only in case the vendors (plaintiffs) required the easterly 33 feet for a road, before the 14th September, 1909, and this was made clear by the testimony of one of the plaintiffs, which was admissible to shew what was in the minds of the parties.—The plaintiffs not having asked for the road before the 14th September 1909, the restriction no longer existed, and

the plaintiffs could not compel the defendant to remove buildings erected on the most easterly 33 feet. *Menzies* v. *Van Walleghem* (1910), 15 W. L. R. 209.

Affirmed (1911) 16 W. L. R. 646, Man. L. R.

"Cash" payment—*Failure to make—Reasonable delay—Abandonment of contract—Oral evidence—Statute of Frauds.*]—The defendant, being the owner of a city lot, on the 29th October, 1909, signed a document in which she acknowledged the receipt from the plaintiff of $50, "being deposit on purchase of lot" (describing the defendant's lot) "for the sum of $10,000 net to me, and on the following terms, $4,500 cash," also setting out the other terms, and a provision as to possession, etc. The plaintiff never tendered the $4,500, nor was the defendant ever asked to execute any agreement for sale other than the above. On the 4th November the defendant notified the plaintiff orally that unless the $4,500 was paid in two days, the defendant would sell to another. On the 16th November the defendant sold to another: — *Held*, that cash meant "immediate or prompt payment in current funds," and, if any evidence could be given to modify its primary meaning, none was adduced in this case which supported the contention that it meant payment in 30 days. If such special meaning could be attached to the word, it was not shewn that the defendant knew of it, which would be necessary. If oral evidence was admissible at all on this point, the evidence of the defendant and her son (taken subject to objection) shewed that in this case cash meant payment on the Monday or Tuesday following the 29th October. The evidence of notice of intention to resell was not admissible, in view of the Statute of Frauds. But, in all the circumstances, even if time was not of the essence of the agreement, a period of more than 2 weeks was a reasonable time to wait for a cash payment and, when it was not forthcoming within that period, the defendant was justified in treating the agreement as abandoned. *Higginbotham* v. *Mitchell* (1910), 13 W. L. R. 649.

Completion of houses by vendor — Purchaser to have right, on default of vendor, to complete and deduct price from balance of purchase money — Payment of balance of cash—Refusal of purchaser to deliver mortgage for part of price, houses being incomplete—Action for declaration of rights —Mandatory order for delivery of mortgage —Lien—Costs. *Cummings* v. *Doel*, 10 O. W. R. 331, 959.

Deed of sale — "*Contre-lettre*" — Construction of terms of two instruments so as to make one complete contract—Condition—Obligation to maintain insurance—Breach—Forfeiture — Compensation. *Houle* v. *St. Aubin*, 3 E. L. R. 446.

Default—*Time of essence—Forfeiture—Notice—Delay—Assignment of contract by purchaser — Resale by vendor — Parties — Damages—Measure of—Costs — Defendants severing — Apportionment of costs.*]—An agreement of sale contained provision for forfeiture for non-performance by the purchaser of conditions, time being "of the essence of the agreement," or at the option of the vendor a right of resale. After the conditions had been broken, the vendor entered into negotiations with the purchaser to induce him to live up to his agreement, and delayed for some months to give notice of forfeiture required:—*Held*, following *Re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, and *Cornwall* v. *Henson*, [1900] 2 Ch. 1028, that the vendor did not possess the right to cancel the agreement as against the purchaser:—*Held*, however, that where the vendor had actually resold, and the second purchaser had been let into possession, and remained in possession for some months with the knowledge of the original purchaser, before the latter took any steps to assert his rights, that the original purchaser had lost the right to assert his interest under the original agreement as against the second purchaser, but that he was entitled to damages against the vendor.—*Held*, also, that the measure of damages was the amount of the down payment (no other payments having been made), plus the amount of profit on the resale.—The original purchaser having assigned to two persons, only one of whom was made defendant in the action:—*Held*, that it was proper, at the trial, to add the administrator of the other (who had died in the meantime), on his own application, as a party defendant.—*Semble*, where defendants appear by the same solicitor, they are not entitled to be represented by different counsel at the trial, as regards the costs. —Disposition of costs as between the vendor, the original purchaser, and the second purchaser, in the special circumstances of this case. *Crawford* v. *Patterson*, 7 W. L. R. 183, 1 Alta. L. R. 27.

Deferred payments — *Substituted contract—Dispute as to conditions—Tender—Dispensing with—Default — Notice of cancellation—Invalidity — Specific performance —Damages.*]—The plaintiff agreed to purchase from the defendant, a quarter section of land for $1,000, and paid $400 cash. The balance was to be paid in four annual instalments of $300. Before the first deferred payment was due, a new arrangement was made between the parties by which the defendant was to give the plaintiff a transfer of the land upon certain conditions; what these conditions were, was in dispute. The plaintiff alleged that the defendant agreed to give him the transfer upon payment of the balance due with interest to the date of payment, which sum he was to raise by a loan on the land. The defendant testified that the arrangement was that he was to give the transfer upon payment of the balance and interest (amounting to $1,272) and of a note for $315 given in another transaction. The plaintiff arranged for a loan of $1,200 upon a mortgage on the land and, before he received the amount, paid the defendant $372, borrowing the money from a bank on a chattel mortgage. The plaintiff instructed the mortgagees of the land to pay $900 to the defendant, but, after getting the $372, the defendant refused to give the transfer of the land unless the note for $315 was paid, as well as the balance under the agreement. The defendant knew that the money was ready for him. This balance was not tendered to the defendant; and, the next payment under the original agreement not being made, the defendant served

on the plaintiff a notice of the cancellation of the agreement:—*Held*, upon the evidence, that payment of the note was not made a condition upon which the plaintiff was to have a transfer of the land; that, in the circumstance, a tender of the balance of the purchase money would have been useless, and the plaintiff was in the same position as if he had made a proper tender; and, the payment of the purchase money having been prevented by the defendant, he could not afterwards effectively cancel the agreement, without shewing that at a subsequent date he was willing, but the plaintiff was unable or unwilling to carry out the new arrangement, and this he had not done; the defendant's attempted cancellation was therefore ineffective; and the plaintiff, on payment of the balance of the purchase money and any taxes or other sums properly paid by the defendant, was entitled to a transfer:—*Held*, also, that the plaintiff was entitled as damages to the expenses incurred in negotiating the loan; but not to loss sustained by the forced sale of his chattels by the bank as chattel mortgagee, which was too remote; and not to loss of a tenant of the land, which was not proved. *Marvin* v. *Blasdell* (1910), 13 W. L. R. 423, 3 Sask. L. R. 64.

Delay of vendor—*Time of essence — Whether of contract or acceptance of offer —Deed to be prepared at vendor's expense— Effect of—Misrepresentation — Description —Statute of Frauds—Specific performance.*] —Where the non-completion of a contract for the sale of lands within the time limited thereby was caused by the vendor, she was held to be precluded from insisting on the strict performance of the provision in that respect by the purchaser.—The contract consisted of an offer made by the purchaser and its acceptance by the vendor, the offer containing the terms of the contemplated contract, amongst which were the provisions that "time shall be of the essence of this offer," and that the deed should be "prepared at the expense of the vendor:"—*Held*, that the limitation making time the essence referred merely to the acceptance of the offer (Magee, J., dissenting); (2) that the provision as to the deed being prepared at the vendor's expense dispensed with the requirements of the general rule that the purchaser should prepare and tender the deed to the vendor.—In the agreement for sale the land was described as lot No. 22, whereas it should have been lot No. 24. The proper park lot was given, and it was described by its frontage and depth, and was the only lot owned by the vendor in the street, there being in fact, no such number as 22 in the street. The agreement also stated it to be subject to an existing mortgage for $4,000, while a deed containing a proper description had been executed by the vendor, which was held by the solicitor in escrow:—*Held*, that there was not such vagueness and uncertainty in the description as would render the contract void under the Statute of Frauds.—A decree for specific performance was directed. *Foster* v. *Anderson*, 10 O. W. R. 531, 998, 15 O. L. R. 362.

Discharge of mortgage by executor —*Registering probate — Local improvement rates—Covenant to convey "free from incumbrances"—Executions and general registrations.*] — On an application under the Vendors and Purchasers Act, R. S. O. 1897 c. 134:—*Held*, that, as the purchaser was entitled to a registered title, the vendor was bound to register the probate of the will of a deceased mortgagee whose executor had given a discharge in 1888.—*Held*, also, that under an agreement that the vendor "would convey the lands freed and discharged from all incumbrances . . . from and after the day fixed for the completion of the sale," local improvement rates were not apportionable as "taxes, rates, and assessments," and must be removed by the vendor.—*Held*, also, that the purchaser must satisfy himself by the usual searches as to entries in the general register and executions affecting the lands. *Re Taylor and Martyn*, 9 O. W. R. 666, 14 O. L. R. 132.

Fees on sale of land—*Non-payment — Non-registration — Effect of — Statute — Repeal.*]—*Held*, that a sale made by the plaintiff, out of the Province of Quebec, of land in that Province to the defendant domiciled there (55 & 56 V. c. 17, s. 3, relating to dues payable upon transfer of land, being in force at the time), was radically and absolutely void, the defendant not having paid the dues which he was bound to pay, nor registered his title within the time prescribed; and the vendor was in a position to set up this nullity, which is *d'ordre public*.—The repeal of the statute has not rendered valid acts made void *de plano* by default of the carrying out in due time of the formalities required. *Nadeau* v. *Pouliot*, 17 Que. S. C. 184.

Notice—*Improvements.*]—Plaintiff agreed to sell certain lots to M. & F. provided that all improvements placed on these lots should remain there until the final payment had been made. M. & F. agreed to sell to the defendant, who erected a building not affixed to the ground. The defendant commenced to remove this building and plaintiffs applied for an injunction which was refused, as the defendant had no notice of the agreement between M. & F. and the plaintiffs. *Graves* v. *James*, 9 W. L. R. 220.

Performance—Waiver—Time — Equitable right — Possession — Ejectment. *Farr* v. *Foster*, 12 O. W. R. 1286.

Pledge by the donee, *in case of alienation of the property given, to give a particular person an opportunity to buy on conditions offered—Penalty for violation of this pledge—Indirect violation of this pledge—Recourse of the beneficiary on this pledge.*] —A stipulation in a gift of real estate that the donee will give the donor's son a preference, in case of the alienation of the property given, an opportunity to buy it on the terms offered by third parties under pain of paying him $400, is violated and the penalty is incurred when the donee having placed the beneficiary in a position to accept a gift of the real estate *alone* on conditions which being too onerous caused a refusal, and immediately made a gift to a third party on the same conditions, *adding thereto movables of great value*. The real estate given being subject to a lien for the payment of the penalty, the beneficiary may bring an action

on his lien against the purchaser, who has become the detainor. *Bissonnette* v. *Martin*, 1909, 36 Que. S. C. 477.

Provision that no assignment by purchaser be valid unless approved by vendor.]—Appeal from judgment, 10 W. L. R. 539, 2 Sask. L. R. 93 (1906), Dig. Col. 708, allowed. *Sawyer-Massey* v. *Bennett* (1909), 12 W. L. R. 249.

Purchaser ready to complete — *Vendor insisting on restrictive clause—Restraint on alienation—Invalidity—Dispensing with tender.*]—*Held*, that a provision in a transfer of land restraining the transferee from subdividing the property into lots is void as being in restraint of the free power of alienation necessarily implied by a transfer in fee simple.—2. Proof of tender of the purchase in an action for specific performance is unnecessary if the vendor, by his conduct, renders tender unnecessary. *Maloney* v. *Whitlock*, 7 W. L. R. 460, 1 Sask. L. R. 41.

Redemption—*Extension of the term of redemption—Nature of the agreements for that purpose — Procedure — The buyer's remedy when the right of redemption is seized—Lesion as a ground for setting aside a contract.*] — Lesion, being no longer a ground for setting aside a contract, cannot be set up against the creditors wishing to enforce the contract. The purchaser of an immovable has his remedy in an opposition to annul when the right of redemption has been seized, at the instance of a creditor of the seller who stipulated for it, on the ground that the term for redemption had expired. The stipulated term of a right of redemption is to be strictly observed, and it cannot be extended by the Court or by the purchaser. Any agreement or understanding of that nature is without effect with regard to third parties, and, as between the parties thereto, creates a new contract, namely, a promise of re-sale by the purchaser to the original vendor. *Beaucage* v. *Harpin & Paul*, 37 Que. S. C. 351.

Redemption — *Forfeiture.*]—The clause in a contract of sale with right of redemption, that in the event of failure to pay municipal and school taxes, when due, the seller would forfeit the benefit of the term and of the right of redemption, is subject to renunciation by purchaser, even impliedly, by acts which establish his intention. Consequently, when the taxes became due in Jan. and that, several months later, the purchaser claims the interest accrued on the price, accepts payment of it and renews the insurance upon the property in vendor's name, he is debarred from invoking the clause of forfeiture for non-payment of taxes. If, subsequently, a small sum ($1.21) becomes due for taxes, and if the vendor deposits it in Court with the moneys claimed in the first action, as soon as he is served with the writ, by application of the principle "*de minimis non curat prætor*," he will not be declared to have forfeited his right of redemption particularly when it would appear that the action was taken more from spite than from a desire to have a right sustained. *Blanchet* v. *Bessette*, 37 Que. S. C. 92.

Redemption — *Second absolute sale — Ratification by first purchaser with reservation of rights — Registration of judgment against second purchaser—Hypothec.*]—A sale with power of redemption (*réméré*) deprives the vendor of the property in the heritage sold. He cannot sell it to a second purchaser, and a deed of sale executed by him is, in such circumstances, only an assignment of eventual rights. It is of no avail that the first purchaser intervenes and assumes to ratify the second sale, if at the same time he reserves the rights which he has acquired under the deed to him. Therefore, the registration of a judgment against the new purchaser, as if he had become the owner of the land, does not create a legal hypothec thereon. *Ménard* v. *Guibord*, 31 Que. S. C. 484.

Redemption — *Simulation — Pledge—Evidence to establish—Effect between parties—Effect as against third persons.*] — A sale of land described by the parties as a sale *à réméré* is, in reality, as to them, a simple pledge, if it appears that the intention of the purchaser in subscribing it was only to take a security for the payment of a debt, and not to acquire the land as purchaser. The fact that the so-called purchaser is left in possession after the term of *réméré* has expired, and the admission of the purchaser are sufficient to establish such intention. However, whatever may be the effect between the parties, the transaction as against strangers takes effect according to what it purports to be on its face. *Grégoire* v. *Beaurivage*, 30 Que. S. C. 523.

Rents of land — *Apportionment—Contract—Conveyances.*]—The plaintiff, on the 29th May, 1902, contracted in writing with the defendant for the sale to the defendant of certain land, a portion of which was at the time under lease to a tenant whose term commenced on the 1st May, 1902, and was then unexpired. The plaintiff claimed an apportionment of the rent between the 1st May and the 24th June, when the deed was delivered:—*Held*, that the Act respecting the apportionment of rent, R. S. N. S. c. 150, s. 2, did not apply as between vendor and purchaser, and the written contract containing no reservation of rent, the purchaser was entitled to the whole rent. *Miller* v. *Nicholls*, 23 C. L. T. 176.

Representation — Agency — Non-compliance with terms — Action for specific performance — Refusal of Court to adjudge. *Bowerman* v. *Fraser*, 10 O. W. R. 729.

Restraint in alienation—*Invalidity.*]—A prohibition against alienating land sold or given *à titre onereux* is void, even when the prohibition is for a limited time, for example the life of the vendor or donor. The latter cannot be assumed to have intended an additional guarantee of the fulfilment of the charges of alienation; the precise and formal terms of Art. 970, C. C., do not admit of this construction. *Janelle* v. *Courchesne*, 31 Que. S. C. 157.

Right of remere — *Exercise of.*]—One who has reserved the right of *réméré* upon an immovable must seek out the purchaser in order to fulfil the conditions upon which

he has reserved such right, and it is not for the purchaser to seek him out. *Chartrand* v. *Desrouard*. 6 Que. P. R. 131.

Right of remere—*Jus ad rem—Assignment of right.*] — A vendor *à réméré* deprives himself of all his rights of property; he reserves only a simple *jus ad rem* in the property sold, and cannot, consequently, sell it anew to a second purchaser: Art. 1487, C. C. 2. In this case, L., the vendor *à réméré*, was held not to have sold the property a second time to C., but to have merely assigned to him his right of re-purchase, which is assignable. Judgment in 24 Que. S. C. 438, reversed. *Sirois* v. *Carrier*, 13 Que. K. B. 242.

Right of remere—*Payment of taxes — Mise en demeure — Rente viagère — Instalments — Default in payment — Demand.*]—1. A condition imposed upon the reservation of a right of *réméré*, that the vendor shall pay the taxes on the immovables sold, upon their falling due, applies to the reimbursement of the purchaser, who has become a personal debtor in respect of these taxes, and who has paid them. Therefore, a vendor with right of *réméré* cannot be in default for not having made such payment, so long as the purchaser has not regularly called upon him for payment, after having himself paid the taxes.—2. The person liable to pay a life rent, payable by instalments on fixed dates, who lives with the person entitled to receive, is not in default for non-payment simply by the falling due of an instalment; a further demand of payment or *mise en demeure* is necessary. *Labelle* v. *Chaplcau*, 35 Que. S. C. 23.

Right of remere—*Reservation in contract of sale — Subsequent agreement to resell — Default in payment — Forfeiture — Place of payment — Demand — Domicil.*] —A *réméré* is a reservation made by the vendor in a contract of sale; if made afterwards, even the day after the sale, the agreement is not an agreement of *réméré*, but a promise of the purchaser to resell to the vendor, the effect of which is very different. 2. A condition in a contract that default in making payments thereunder will forfeit the right to a stipulated benefit, is subject to the rule that in default of any indication of the place of payment, the payment must be made at the domicil of the debtor, and as long as the creditor does not enable the debtor to make payment at this place, the forfeiture is not incurred. Therefore, the purchaser of an immovable who grants to his vendor the right of repurchasing, in consideration of periodical payments, without indicating a place where they are to be made, but upon the condition that default of paying any one of them will forfeit the right of repurchase, is not in a position to obtain a judgment for payment upon this ground, until he has put the vendor in default by a demand made at his domicil. *Vallée* v. *Dease*, 33 Que. S. C. 299.

Sale of building — *Party wall — Reservation of right of mitoyenneté—Transfer —Notice.*]—The vendor of a building, a wall of which is susceptible of becoming a common wall (*mur mitoyen*), can retain and reserve to himself the right of *mitoyenneté* in such wall. This right is not a real, but a personal, conditional, right of acquiring the common use of the wall without charge, in the event of becoming the owner of the contiguous property, or of recovering the charges and dues prescribed in Art. 518, C. C., from any other party who, becoming such owner, chooses to make the wall a common one.—The vendor who reserves the right of *mitoyenneté* as above, can assign it to others, and the assignée is not bound to signify the assignment to the person who makes the wall common, before bringing suit to recover the charges exigible under Art. 518, C. C. *Duperreault* v. *Roy*, 29 Que. S. C. 343.

Suspensive condition—*Rights of purchaser before fulfilment—Attempt to alienate—Nullity—Declaration.*]—The sale of an immovable under a suspensive condition confers no right upon the purchaser as long as the condition is unfulfilled. An attempted alienation of it by the purchaser in favour of a third person is, in the circumstances, of no effect, and the owner, the original vendor, has the remedy of an action for a declaration of the nullity of the deed by which the alienation is sought to be effected, and its registration. *Walker* v. *Davis*, 16 Que. K. B. 495.

Time of essence — *Waiver—Notice — Rescission — Forfeiture of payments — Receiver—Rents — Laches — Specific performance—Costs.*]—*Semble*, that the acceptance by a vendor of a payment on account of a past due instalment of purchase money is a waiver of his right to take advantage of a provision in the agreement of sale making time of the essence thereof; but, if there be a subsequent default in payment of a subsequent instalment, that, being a new breach, gives the vendor a right to insist on that provision:—*Held*, that a vendor, if he gives to the purchaser a notice limiting a reasonable time within which to complete an agreement to purchase, and informing him that after the lapse of the time limited the agreement will be treated as at an end, and if he does not act subsequent to waiver the effect of the notice thereby legally rescinds the agreement, and the purchaser is not entitled to specific performance.—2. That mere delay in enforcing his rights, consequent upon such a rescission, does not disentitle the vendor to a declaratory order that the agreement is rescinded.—3. That in such a case payments on account of purchase-money are forfeited to the vendor if there be a provision to that effect in the agreement, and, *semble*, even without such a provision.—4. That where, after such an agreement, the property in question passed into the hands of a receiver appointed by the Court, and he, as well as the purchaser, was given a notice of the terms above mentioned, the receiver was accountable to the vendor for the rents received subsequent to the date on which the notice terminated the agreement. The receiver, on the grounds of his being an officer of the Court, and of the delay of the vendor in taking steps to enforce his rights, was not ordered to pay the costs of the application to which the above questions were raised. *Forfar* v. *Sage, Ex p. Wilkins*, 5 Terr. L. R. 255.

Unpatented Crown lands—*Holder of location ticket—Right to sell—Specific performance.*]—Lots granted by the Crown by location tickets under Arts. 1208 *et seq.*, R.

S. Q., may be validly sold before the issue of the letters patent which confer the definite title. Therefore, a contract for the sale of one of these lots may be enforced by the vendor, and upon transfer of the title to the purchaser, the latter will be bound to pay the price agreed upon as in the case of contract of sale of any other immovable. *Fauteux* v. *Guindon*, 31 Que. S. C. 143.

Written offer of purchaser—*Acceptance of vendors by conduct—Receipt of deposit—Action for balance of purchase price — Terms of payment not provided for in offer — Formal contract executed by vendors—Refusal of purchaser to execute—Incomplete contract—Failure of action.*]—In an application for purchase, $25 was payable in cash but other terms of payment were omitted. Plaintiffs accepted contract, received deposit and subsequently sued for balance due: — *Held*, contract incomplete and judgment of non-suit entered. *Imperial Development Co.* v. *Matthew* (Man.), 10 W. L. R. 330.

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4. COVENANTS.

Against incumbrances — *Breach — Measure of damages — Payment of mortgage — Real Property Limitation Act, R. S. M. 1902 c. 100, s. 24 — Charge on land.*]—A claim for damages for breach of a covenant against incumbrances on land is not a claim "to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent," within the meaning of s. 24 of the Real Property Limitation Act, R. S. M. 1902 c. 100, and an action to recover such damages is therefore not barred under that section by the lapse of ten years. —*Re Powers*, 30 Ch. D. 291, followed. *Sutton* v. *Sutton*, 22 Ch. D. 511, and *Fearnside* v. *Flint*, 22 Ch. D. 579, distinguished. — Where the covenant for the breach of which an action is brought is one against incumbrances, the plaintiff is not entitled to recover as damages the amount of all incumbrances, but only such as have been actually enforced, though it would be otherwise if the covenant had been that the land was free from incumbrances.—The defendant covenanted that he would give the plaintiff a deed clear of all incumbrances except a mortgage of $1,000:—*Held*, that the plaintiff's damages should be limited to the excess of the mortgagee's claim over $1,000, notwithstanding that there were at the time registered judgments against the land for further sums of money. *Wilson* v. *Graham*, 3 W. L. R. 517, 16 Man. L. R. 101.

Building restrictions — *Creation of servitudes.*]—A stipulation in a conveyance of land divided into building lots whereby the purchaser covenants not to do certain things, for example, not to build in a space reserved at the line of the street, does not create a servitude upon each lot at the expense of the other. In the absence of a dominant tenement, it creates only an obligation not to so build, of which the vendor and his legal representatives are the obligees, and the purchaser and his representatives the obligors. *Pelletier* v. *Trudeau*, 27 Que. S. C. 196.

Building restrictions—*House—Stable.*]—The owners of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators, and assigns not to "erect or build more than one house upon the property hereby conveyed;" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcels conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold became vested by various *mesne* conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house in the terms of the covenant, which the defendants asserted they intended to build. The defendants also contended that the covenant was inoperative by reason of a change in the residential character of the neighbourhood by the erection of factories, etc.:—*Held*, assuming the plaintiffs were entitled to the benefit of the covenant, and that there had been no change in the residential character of the neighbourhood, that no breach was proved, for the defendant had the right to build the stable as appurtenant to the house to be afterwards erected.—*Bowes* v. *Law*, 18 W. L. R. 102, approved.—Judgment of Street, J., 9 O. L. R. 607, 5 O. W. R. 706, affirmed. *Hime* v. *Lovegrove*, 11 O. L. R. 252, 7 O. W. R. 4.

Building restrictions — Intention of parties — Security — Building scheme — Breach of covenant — Damages in lieu of injunction — Assessment. *Snow* v. *Willmott*, 5 O. W. R. 361.

Construction of covenants—*Dependent or independent — Payment into Court.*]—The plaintiff's claim was for payment of the balance of the purchase money of land under an agreement of sale, in the usual form, in which the purchaser covenanted that he would well and truly pay the said sum of money together with the interest thereon on the days and times mentioned, and the vendor covenanted that, in consideration of the purchaser's covenant and on payment, &c., he would convey and assure or cause to be conveyed and assured to the purchaser, his heirs and assigns, by a good and sufficient deed in fee simple, &c., the said price or parcel of land freed and discharged from all incumbrances:—*Held*, following *Macarthur* v. *Leckie*, 9 Man. L. R. 110, that the two covenants were independent, and that the defendant was bound to pay the purchase money before he could call on the plaintiff to convey the property, and that it was not necessary for the plaintiff to prove the tender of a conveyance, or to allege that he was ready and willing to convey, although it appeared that the property was subject to two mortgages. With the plaintiff's consent, the defendant's purchase money was ordered to be paid into Court so that the incumbrances could be discharged out of it and only the balance paid to the plaintiff. *Sword* v. *Tedden*, 21 C. L. T. 546, 13 Man. L. R. 572.

Conveyance of half interest in land —*Covenant to convey other land.*]—S., the plaintiff's assignor, and the defendant were joint owners of a farm in Manitoba. An agreement was made between them for the

acquisition by the defendant of S.'s interest. The value put upon S.'s interest in the land was $13,760, and in the goods $5,240, in all $19,000. Of this, $6,000 was to be paid by the conveyance by the defendant to S., within one year, of a section of land in Saskatchewan. The remaining $3,000 was settled by notes. S. executed conveyances of his interest in the Manitoba property, and the defendant obtained title thereto, and mortgaged the land, but did not convey the Saskatchewan land within the year or afterwards. The defendant's covenant to convey the Saskatchewan section was contained in a deed whereby he undertook, in consideration of $16,000, to convey to S. within a year, time to be of the essence of the agreement. The defendant admitted that the half interest in the Springfield land was to be taken at $13,760, and that was included in the $16,000: — *Held*, that the amount stated in the deed as the consideration was conclusive. The defendant had the option of paying for the interest in the Manitoba farm within a year by conveying the Saskatchewan section. This he did not do, and the result was that S. or the plaintiff was entitled to receive the agreed consideration in money.—*Held*, therefore, that the plaintiff was entitled to recover $16,000 from the defendant with interest, and to a vendor's lien upon an undivided one-half interest in the Manitoba lands, in respect of $13,760 of the $16,000, and interest, and in default of payment, to enforce the lien by sale.—*Held*, also, that the lien should not be limited to damages for the failure to convey the section, although it appeared to be worth not more than $5,120. By the nature of the transaction, the prompt observance of the stipulation as to time was essential; and to make the plaintiff take damages in the value of the land at a later period would be to force upon him a contract different from that into which S. entered. The measure of damages is the amount of the consideration with interest.—*Held*, also, that the mortgage made by the defendant upon the Manitoba land could not be affected in this action; nor could any deficiency caused thereby be thrown on the defendant's original half interest. *Snider* v. *Webster* (1911), 16 O. W. R. 397, Man. L. R.

Pay ground rent—*Force of the expression "ground on which the mill stands."*]—In a sale of three parcels of real estate, the last of which is described "the beach lots numbered on the government harbour plan as 28 and 29, north side inside, with the mill thereon," a clause providing as follows, "subject to the payment by the purchaser of any ground rent or other moneys due to the government in respect of said lands as well for the past as the future, save and except in regard to the ground upon which the mill stands, which shall be payable by the vendors," must be construed as a covenant by the vendors to pay the taxes on lots numbers 28 and 29 and not merely on the part of those lots forming the site of the mill. *Scott* v. *McNeill* (1909), 18 Que. K. B. 575.

Restrictive covenant — *Prohibition of sale of intoxicating liquors on land sold — Breach of covenant by sub-purchaser — Wholesale liquor license — Vendors owning other lands in the neighbourhood — Ejusdem generis rule — Laches — Squatter — Adverse possession — Subjection to covenant.*]—The plaintiff sold a lot to B., whose husband sold it to defendant. No transfers were registered and defendant was unaware that his vendor's wife was the owner. Plaintiff sold this lot and others with a restrictive covenant that no purchaser or assignor should sell liquor nor carry on the business of a licensed victualler on said lot:—*Held*, that plaintiff owning other lands on which this easement can depend is entitled to an injunction. *Ejusdem generis* rule does not apply and a wholesale liquor business cannot be carried on. The defendant had constructive notice of the covenant. Defendant is not a squatter; even if he were, the restrictive covenant would be good. *International Coal and Coke Co.* v. *Evans* (Alta.), 9 W. L. R. 711.

Restrictive covenants—*Building scheme —Release of covenants by assignee of covenantee — Rights of not specially endorsed has no binding effect, and the plaintiff is free to name.*]—M. sold to C. some vacant land north of his residence, subject to certain building restrictions. Defendant became owner of all the land sold to C. except the rear 20 feet sold to W. Plaintiffs now owned M.'s residence:—*Held*, that W. was not a necessary party to a release of these restrictions given by plaintiffs to defendants. *Cosmopolitan Club* v. *Lavine*, 13 O. W. R. 687.

Running with land — *Charge upon lands.*]—Plaintiff sold certain lands in fee simple to A., from whom defendants bought. The conveyance contained a covenant to the effect that A., its successors and assigns, would give 60 loads of slack coal annually to A. and his heirs:—*Held*, that there is no charge on the lands, no rent reserved nor a covenant running with land. Action for damages for non-fulfilment dismissed. *Carroll* v. *Dominion*, 8 E. L. R. 54.

Sale of mining claims—Mortgage registered against claims—Sale free from incumbrance — Action to compel discharge—Covenant against incumbrances — Covenant for title — Breach — Damages — Measure of. *Rost* v. *Syndicat Lyonais du Klondike*, 9 W. L. R. 352.

Vendor to prepare *land for cultivation and leave hay on land — Misrepresentations by vendor — Amendment — Reformation of contract and rescission — Damages — Counterclaim.*]—Action for balance due under a covenant in an agreement for sale of land. Vendor agreed that 200 acres were broken, whereas only 136 were broken:—*Held*, defendant not entitled to damages for this misrepresentation, as no fraud or deceit. Claim of defendant to have contract reformed refused. Damages allowed defendant for insufficiency and defective preparation of land and shortage in hay. No damages allowed for loss of profits on crops as too remote. *Cross* v. *Douglas*, 10 W. L. R. 163.

Affirmed 12 W. L. R. 273; 3 Sask. 97.

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5. Exchange of Lands.

Action to set aside—Misrepresentations —Failure to prove. *Myronic* v. *Wainstock* (Man.), 4 W. L. R. 522.

Agreement as to taxes—*Special sewer rate — Date of assessment.*]—On the 4th May, 1894, the plaintiff and defendant made an exchange of properties and covenanted reciprocally "to pay all taxes and assessments for which the said properties may be liable from and after the 1st day of April, 1894." Before the exchange, in September, 1893, the city of Montreal had decided to construct a sewer in Woodstock avenue—where the property received by the defendant in exchange was situated — the cost whereof was to be borne by the owners of land bordering on the avenue. The sewer was constructed in October, 1893, and on the 7th May, 1894, a special assessment roll dividing the cost among the owners on the avenue was signed and deposited in the office of the city treasurer for purposes of collection. The name of the plaintiff was entered on the roll as a contributory, and he was obliged to pay the taxes thus imposed. He brought this action for reimbursement:—*Held*, reversing the judgment in 9 Que. S. C. 300, that, in spite of the fact that the roll had not been signed until the 7th May, 1894, the property in question was, before the 1st April, 1894, affected and pledged for the payment of the cost of the sewer, and the plaintiff alone should bear the special tax which had been imposed upon him. *Rochon* v. *Hudson*, 16 Que. S. C. 356.

Conditional contract — *Acquisition of title — Rescission — Notice — Concurrence.*]—When one of the parties to an exchange of immovable properties is not the owner of that which he offers to give, the contract is conditional, and can only be enforced by him when he has fulfilled the condition, i.e., when he has become the owner of the property.—When one party to an exchange has performed his part of the contract by signing the requisite deed to effect a conveyance of the property given by him, and notifies the other to do the same, as to his part, within a delay after which his failure to do so will be taken as a resiliation of the contract, and the latter party first refuses to carry out his undertaking, and afterwards pretends that his refusal was due to error, and takes steps to carry out the contract, but without putting himself in a position to do so effectually, such conduct will amount to an implied concurrence in the notice of resiliation given by the first party. *Blanchard* v. *Walker*, 30 Que. S. C. 171.

Conditions — *Account — Claim and counterclaim — Costs.*]—Action for an account. Purely questions of fact involved. *Dodulitz* v. *Krainean* (1909), 12 W. L. R. 1.

Improvement to building—*Work not completed by vendor — Taken over by purchaser — Allowance for money expended — Rents — Accounts — Reference — Report — Variation on appeal.*]—This action arose over the sale to plaintiff by defendant of the property on the corner of Adelaide and Church streets, Toronto, known as St. James Chambers, and the alleged non-performance of covenants by defendant. Plaintiff claimed $2,340.07 for payments made by him in carrying out the agreement for sale, $2,500 for moneys paid by him to settle a certain action by a creditor of defendant and to remove a *lis pendens* against the property, and $3,000 damages for delay in completing the contract. At trial, judgment was given declaring that plaintiff was not entitled to charge defendant with the amount paid in settlement of said action, and referred it to the official referee, to take account between parties. As a result of taking accounts, the referee found a large balance due by defendant to plaintiff. On appeal by defendant to the Chancellor, 14 O. W. R. 224, Court of Appeal, 15 O. W. R. 606, varied the judgment of the Chancellor, by increasing the rental of 93 Carlton street, chargeable against plaintiff, from $780 to $1,000 per annum. No costs to either party.—Plaintiff moved for judgment on further direction and defendant moved by way of appeal from the report of the official referee. The questions involved were: (1) How should the amount fixed by the Court of Appeal as chargeable against plaintiff for occupation rent, be applied, from time to time, as payments were made, or brought into account at the final adjustment between the parties; (2) time for redemption; (3) costs.—Riddell, J., *held*, that the plaintiff should not charge interest upon his expenditures, etc., so long as these did not exceed the amount which he should be charged for rental, or at least the interest should be charged only on the excess above the amount of rental with which he should be charged from time to time, but he was prevented from giving effect to it by the former decisions; that the Court of Appeal refrained from reversing the Chancellor (14 O. W. R. 224), holding that no interest was to be allowed upon the amount found due for rent, seemed to conclude him to hold that the direction not to allow interest was not overruled or intended to be reversed; that as to the second question, one month should be allowed from the date of judgment, the plaintiff to have the general costs of action; that the registrar to settle adjustment of insurance premiums, etc., as agreed. *Foster* v. *Radford* (1910), 16 O. W. R. 145.

Incumbrances—Plaintiff and defendant agreed to exchange certain lands. Plaintiff was to assume $5,500 on defendant's property. After a conveyance had been made to plaintiff he discovered that the incumbrances were $950 more than he agreed to assume. Having paid the latter sum he now sued to recover it. There was no fraud nor a covenant to pay:—*Held*, that he cannot recover it. *Foster* v. *Stiffler* (1909), 12 W. L. R. 60.

Incumbrances exceeding amount represented — *Conveyance of land by one party — Contract not displaced or merged —Vendor's lien — Realisation.*]—The plaintiff and defendant agreed to exchange certain properties, and entered into a written agreement to that effect, by which it was provided that the exchange should be on the basis that the plaintiff agreed to purchase from the defendant described land in Winnipeg for $11,200, "assuming the sum of $5,500 on the said property," and the defendant agreed to purchase from the plaintiff certain farm lands for $10,500, including chattels, etc., thereon, as per inventory attached, "assuming the sum of $200 on" one parcel of the farm lands, and give $4,600 in two mortgages. The parties also agreed "to raise a first mortgage" on the other parcel of farm lands, the proceeds to be paid to the

plaintiff, and the plaintiff to take a second mortgage for the balance. The parties proceeded to carry out the transaction on the assumption that $5,500 was the total incumbrance against the Winnipeg property, and that $200 was the total incumbrance against the farm lands, and that $4,600, which was, on that basis, the difference in value, was to be paid or secured in the manner set out in the agreement. A first mortgage was raised on the first parcel of farm lands, and the proceeds, amounting to $1,938.15, were paid to the plaintiff; this parcel was conveyed to the defendant, but the second mortgage thereon was not given. The other parcel of farm land was not conveyed. The Winnipeg property was conveyed to the plaintiff, subject to the incumbrances, which were found to exceed $5,500. The plaintiff paid the excess, and brought this action to recover the amount from the defendant, and for a vendor's lien on the farm lands for the amount for which the second mortgage ought to be given:—*Held*, that the agreement was not displaced by or merged in the conveyance made to the plaintiff; the amount due or payable under the agreement had still to be adjusted; and the plaintiff was entitled to a vendor's lien upon the lands conveyed and to be conveyed by him, for the amount due as adjusted, and to realisation thereof in the usual way.—Judgment of Mathers, C.J., 12 W. L. R. 60, varied. *Foster* v. *Stiffler* (1910), 14 W. L. R. 178.

Reformation of contract—Mistake in description — Specific performance — Statute of Frauds — Part performance—Terms of contract — Liquidated damages — Payment into Court — Costs. *Knapp* v. *Carley*, 3 O. W. R. 940.

Time of the essence of agreement—*Waiver by conduct — Notice of rescission—Unreasonable — Breach — Action for damages.*]—Plaintiff and defendant entered into an agreement to exchange properties. The whole matter was to be completely closed on 25th April. Negotiations as to title continued between their solicitors until Friday, 7th May, when defendant's solicitor wrote plaintiff's solicitor, that if certain objections were not removed by Monday, 10th May, the defendant would treat the agreement as at an end. Plaintiff's solicitor was unable to do so and defendant declared the agreement ended. Plaintiff brought action for damages: — *Held*, that time was of the essence of agreement originally, but it had been waived by conduct, and the agreement could only be ended by reasonable notice. Considering that Saturday was practically a half-holiday, defendant did not give reasonable notice. Judgment entered for plaintiff for $125 with costs. *Hetherington* v. *McCabe* (1910), 16 O. W. R. 154.

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6. Fraud and Misrepresentation.

Action for price of land—*Defence — Misrepresentations of vendor as to value—Purchaser not relying on vendor's statements —No ground for avoiding contract.*]—Action to recover $625, selling price of certain lands. Defendant claimed that plaintiff had misrepresented their value, saying they had cost him $775, whereas at the trial plaintiff admitted they had actually cost him not more than $475. After sale completed defendant made other enquiries regarding their cost. As defendant not deceived, he must pay. *Fleming* v. *Bonnie*, 10 W. L. R. 50, 2 Sask. L. R. 30.

As to building on land — *Statute of Frauds — Oral evidence — Damages — Rectification of contract — Common intention — Description — Specific performance —Tender of conveyance.*]—A builder agreed verbally to erect a house of a certain character and value upon a piece of land owned by him and to sell the property complete at a certain price. After the building was apparently complete as agreed, certain latent defects not then being apparent, a written contract was entered into for the sale of the property in accordance with the terms of the original agreement, but omitting the provisions as to the character and value of the house to be erected. In an action for rectification of the agreement by inserting the original provisions as to character and value of the structure:—*Held*, that before there can be rectification of an agreement there must be evidence of a common intention that the document to be rectified should contain the whole of the contract and that the omitted terms were left out by fraud or mutual mistake, and, as the parties when they executed the contract were in a position to judge of the character and value of the building, and believed that it complied with the terms of the original contract, there was no common intention that these terms should be inserted. the purchaser actually believing that the original contract had been complied with; the contract therefore could not be rectified.—*Held*, further, however, that the purchaser having been induced by the vendor to enter into the agreement upon the vendor's representations that the building was of the description and value originally agreed upon, which representations as a matter of fact were false, the purchaser was entitled to damages for misrepresentation, and that the Statute of Frauds was no answer to an action for such damages.—*Held*, also, that in an action for specific performance it is not incumbent upon the purchaser to tender a conveyance before action, it being the duty of the vendor to prepare and execute the same. *Ellerman* v. *Carruthers*, 8 W. L. R. 692, 1 Sask. L. R. 157.

By agent of vendor before written contract made—*Defence to action for purchase money — Specific performance.*] — The negotiations between the parties for the sale and purchase of a town lot were comprised in three interviews: (1) when the defendant agreed to take the lot, when certain representations were made; (2) when he paid a deposit, at which time no representations were made; and (3) when he signed the agreement, when certain further representations were made. In an action to compel specific performance of the agreement to purchase:—*Held*, on appeal (Martin, J., dissenting), that the plaintiffs having failed to carry out some of the material representations made by their agent at the time of and as an inducement to the defendant to enter into the contract, specific performance should be refused. *Crow's Nest Pass Coal Co.* v. *Mills*, 5 W. L. R. 218, 12 B. C. R. 402.

By vendor's agent—*Right of purchaser to rescission of contract—Election to affirm, by conduct — Laches — Damages.*]—1. A misrepresentation by the vendor's agent, without the knowledge of the vendor, as to the locality of the land sold, although innocently made, will, if relied on by the purchaser, be sufficient to entitle him to rescind the contract, although he had the means of knowledge of the true location before he entered into the agreement. *Rawlins* v. *Wickham*, 3 De G. & J. 317, and *Derry* v. *Peek*, 14 App. Cas. 337, followed.—2. But when the purchaser failed to complain of the misrepresentation within a reasonable time after he became aware of the true location of the property, and promised the vendor to pay the next instalment of the purchase money due under the agreement after it was overdue, saying that he was then a little short of money, it should be held that he had elected to affirm the contract and had lost his right to rescind it.—*Clough* v. *London and North Western Rw. Co.*, 7 L. R. Ex. 34, followed.—Judgment for the amount payable under the contract in this case, without prejudice to any right the defendant might have to recover in another action any damages he had sustained by reason of the misrepresentation set up, no such relief having been claimed in this action. *Wolfe* v. *McArthur*, 7 W. L. R. 124, 18 Man. L. R. 30.

Error — *Rescission — Exchange — Improvements — Option — Actio quantum minoris — Latent defects — Damages — Warranty.*]—An action will lie against the vendor of land to set aside the sale and recover the price, on the grounds of error and latent defects, even in the absence of fraud. The purchaser has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price; he cannot be forced to content himself with the action *quantum minoris* and damages, upon the pretext that the property might serve some of his purposes, notwithstanding the defects. Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and to have acted fraudulently in making the sale. Where the vendor represented that a block of buildings had been constructed by him of solid stone and brick, and it was discovered after the transfer that a portion was built of lumber encased with stone and brick in a manner to deceive:—*Held*, that the contract was vitiated for error and fraud, and the vendor, as he knew of the faulty construction, was liable to return the price and for damages. The action *quantum minoris* and for damages does not apply to cases where contracts are voidable for error or fraud. The sale was made in part in consideration of vacant city lots given in payment *pro tanto*, and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials.—*Held*, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in Arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances. *Pagnuello* v. *Choquette*, 24 C. L. T. 77, 34 S. C. R. 102.

Evidence of statement made—*Proof of truth — Matters of opinion — Examination of land by purchaser — Reliance not placed upon representations — Cancellation and damages refused—Counterclaim for balance of purchase money — Acceleration by default.*]—Purchaser sought to set aside an agreement for sale and purchase of land on account of misrepresentations made by defendant which turned out to be untrue:—*Held*, that as plaintiff had examined the crops, inspected the land and seen the well, he bought on his own judgment and did not rely upon defendant's representation. Action dismissed. Judgment on counterclaim for full amount owing, all now being due under the acceleration clause. *Zimmer* v. *Karst* (Sask.), 10 W. L. R. 551.

Good farming lands.]—Defendant, on negotiations for the sale of wild lands, represented to plaintiff's agent that they were fairly good for farming. He had not seen the lands and did not state that he had. It turned out that a large portion was not good enough for farming:—*Held*, that the plaintiff could not succeed in his action for the recovery of damages by reason of the defendant's misrepresentations, which should be considered merely as expressions of opinion not amounting to a warranty. *De Lasalle* v. *Guildford*, [1901] 2 K. B. 221, followed; *Mey* v. *Simpson* (1908), 17 Man. L. R. 597; affirmed (1908), 42 S. C. R. 230.

Inducing contract of purchaser — Approbation after discovery of falsity — Rescission — Damages for deceit — Possession — Costs. *Webb* v. *Roberts*, 10 O. W. R. 962.

Proof of contract — Memorandum in writing — Statute of Frauds—Fraud and misrepresentation — Declaration that no agreement entered into — Land Titles Act —Application to discharge *caveat* — Summary trial of issue. *Re Babbitt & Boileau* (N.W.T.), 6 W. L. R. 263.

Provision that no assignment by purchaser be valid unless approved by vendor — *Validity—Restraint upon alienation — Assignment to plaintiffs without approval of vendor — Subsequent assignment to another — Fraud — Notice — Status of plaintiffs to maintain action to set aside subsequent assignment — Third assignment —Abandonment of — Evidence — Laches.*] —Defendant B., who had agreed to buy certain lands from Canadian Pacific Railway Company, transferred said lands to the plaintiffs as if he were owner in fee simple. The railway company sent a statement of the amount owing to plaintiffs, but refused to recognise them unless plaintiffs obtained an assignment of the agreement: — *Held*, that sending such a statement is not a waiver of the provision requiring all assignments to be approved of by the railway company's commissioner. The agreement was subsequently transferred to M., and through

fraud, the railway company's commissioner approved of the transfer.—*Held*, that such a clause in an agreemnt for sale is valid, and plaintiffs not having been recognised by the railway company, have no *locus standi* to attack the transaction. Action to set aside the subsequent assignment to M. dismissed. *Sawyer-Massey Co.* v. *Bennett*, 10 W. L. R. 539, 2 Sask. L. R. 93.

Purchaser acting on vendor's statements — *Option—Rescission.*]—Purchaser succeeds in action to rescind an agreement for purchase on the ground of fraud and misrepresentation on the part of vendor. *Whitla* v. *Toye*, 10 W. L. R. 89.

Rescission — *Affirmation by purchaser after knowledge — Occupation rent—Judgment.*]—The defendant bought a house and lot from the plaintiff for $1,400, purchase money to be payable by instalments of $10 a month. The contract further provided that, unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although before paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fourth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money paid, and in the alternative damages for misrepresentations: — *Held*, that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and that the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount which he had paid, less a proper occupation rent. *Webb* v. *Roberts*, 16 O. L. R. 279, 11 O. W. R. 639.

Sale of mining rights — *Exaggerated representations — Rescission — Parties.*]—Representations exaggerating the value of rights sold do not constitute acts of fraud which give to the purchaser the right to insist that the sale is void, but they amount to a simple wrong, which is not a ground for nullifying a contract between adults. 2. An action to set aside a sale of mining rights and rights of redemption, of which the plaintiff alleges that he possesses only a part, will be dismissed upon demurrer, if the owners of the other parts of such rights are not before the Court. *Jeannotte* v. *Caron*, 5 Que. P. R. 183.

Secret commission to purchaser's agent—*Collusion—Election.*]—The defendant was induced by his agent to agree to buy the plaintiff's farm for $1,850, although the plaintiff's price was only $1,800. He paid $250 in cash and went into possession. It was represented to him that there were 80 acres of cultivated land on the farm, but it turned out that there were only about 58 acres. On discovering this he asked to have the agreement cancelled and his money returned, but this was refused. He then, on the advice of the same agent, raised a crop on the farm and remained in possession for over a year, but refused to make the further payments agreed on. The plaintiff then brought this action to have the agreement cancelled and the money he had received forfeited. At the trial it came out that the plaintiff had paid the agent $50 out of the money paid by the defendant, who asked to have the agreement cancelled and his money refunded to him:—*Held*, without deciding whether the defendant by his inaction had lost his right to repudiate the bargain on account of the shortage in the cultivated area, and distinguishing *Campbell* v. *Fleming*, 1 A. & E. 40, that, on account of the newly discovered secret payment by the plaintiff to the defendant's confidential agent, the defendant had the right to ask for cancellation of the sale and repayment of the $250, with costs of action. *Panama, &c., Co.* v. *India Rubber, &c., Co.*, L. R. 10 Ch. 515, followed. *Murray* v. *Smith*, 22 C. L. T. 241, 14 Man. L. R. 125; *Sparling* v. *Houlihan*, 22 C. L. T. 306, 14 Man. L. R. 134.

Value of land—*Rental — Abatement of price — Exchange.*] — A person, who has bought a specific immovable property after due examination, and has received delivery of the same, but who alleges that his consent to the contract was obtained by a fraudulent representation of the vendor which had the effect of increasing the buyer's estimate of the value of the property, and of inducing him to buy at a price exceeding that which he would have given if the fraud had not been practised, cannot, while adhering to the contract and retaining the property, bring an action to get back part of the price. 2. General statements by a vendor as to the renting value of the immovable property sold, without any representation as to the actual rental, are not grounds of nullity, and do not give rise to an action for the recovery of part of the price paid.—3. In an action *quantum minoris*, it is necessary to prove that the buyer gave more than the real value of the property (which was not done in this case), and where the contract is one of exchange, the party complaining must establish that he suffered loss by the exchange.—4. In any event where representations are made by vendor to purchaser, as to rental value of the property sold, they are not to be considered as extending beyond the termination of the current leases. *Bailey* v. *Reinhardt*, 17 Que. S. C. 387.

Above judgment was affirmed in review. Doherty, J., did not concur in the first point mentioned in above judgment. S. C. 20 Que. S. C. 225.

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7. Options.

Absence of consideration — *Right to withdraw before acceptance — Company—Notice of withdrawal.*]—An option by the defendant, for which he received no consideration, was given to a company on two parcels of land, and contained the statement that "this offer is open and irrevocable for six months from the date hereof." Before the option expired, it not having been in the meantime accepted, the defendant handed to the company's secretary a letter addressed

to him by name, but not designating him as such, stating that the option was withdrawn. The secretary, while intimating that he did not think the plaintiff had the power to withdraw, stated that there would shortly be a meeting of the company, when the option would probably be accepted. The company met and accepted the option for both lots, which they assigned over to the plaintiff, who brought an action for specific performance of the alleged agreement to sell:—*Held*, that the action was not maintainable, for, there being no consideration for the option, the defendant had the right to withdraw it.—*Held*, also, that the letter of withdrawal must be deemed to have been given to and received by the secretary in his capacity of secretary. *Carton* v. *Wilson*, 8 O. W. R. 781, 13 O. L. R. 412.

Acceptance.] — Defendant conveyed to plaintiff a house and lot and at the same time gave him an option on the vacant lot adjoining, to be exercised within one year. Before the option expired defendant conveyed part of said lot to another party for $500. Plaintiff sought to exercise his option and brought action for specific performance of contract for sale.—Sutherland, J., *held*, 15 O. W. R. 134, that plaintiff was entitled to specific performance of sale for the part retained by defendant, and that the consideration therefor should be reduced by the $500 paid defendant by the other party.—Divisional Court allowed defendant's appeal from above judgment on the ground that the option was an unilateral contract without consideration, a mere offer to sell, and could be withdrawn before acceptance without any formal notice to plaintiff. *Davis* v. *Shaw* (1910), 16 O. W. R. 273, 21 O. L. R. 474, 1 O. W. N. 991.

Acceptance—Provision for formal agreement — No formal agreement executed — Action by vendor for instalment of purchase money — Action maintainable — Waiver of right to formal agreement — Interest — Delay — Default in making title — Possession — Vacant lands — Costs. *Munroe* v. *Heubach* (Man.), 8 W. L. R. 785. Affirmed 10 W. L. R. 196.

Acceptance in name of another — *Time.*]—If the holder of an option to purchase land, instead of accepting the offer himself within the time limited, tenders another person as purchaser, and asks the vendor to sign a contract of sale to such other person, the veador is not bound to sell to such other person, and the holder of the option, if he has delayed accepting it on his own behalf until after the time limited, cannot have specific performance against the vendor. *Vanderlip* v. *Peterson*, 4 W. L. R. 403, 16 Man. L. R. 341.

Assignment — *Notice — Renewal and modification of option — Rights of assignee—Chose in action.*]—An option was held by R. upon property of the defendant company for the sum of $562,586. By agreement dated the 7th August, 1903, reciting the option and that the company had arranged through R. to execute an option to P. and C. for $640,000, it was witnessed that if the property was purchased in accordance with such option, "or mutual modification of the same," the company would pay to R., or his assigns, any excess realised above the option price of $562,586. R. immediately afterwards assigned a one-half interest in the agreement to the plaintiff. By agreement of the same date, the company gave an option on the property to P. and C. for $700,000, who, in case of a sale by them under that option, or any mutual modification thereof, were to be allowed $60,000. This option expired the 1st March, 1904. On the 27th October, 1904, a new option was given by the company to P. and C., and this by subsequent agreement was extended to the 15th June, 1905. On the 10th June, P. and C. agreed to sell the property to I. P. Co. for $725,000. This agreement fell through. On the 2nd October, 1905, a sale was made to I. P. Co. for $675,000. By agreement of the same date the defendant company agreed to pay P. and C. $100,000 for their services in connection with the sale, leaving $575,000 as the net amount to the company from the sale. Prior to the sale the company, having no notice of the assignment by R. to the plaintiff, agreed with R. that his option should be for $580,000. The plaintiff claimed one-half of the difference between the sum realised by the company from the sale and $562,586: — *Held*, that under the circumstances the option given after the expiry of the first option to P. and C. was a modification of it, within the meaning of the agreement with R., but that the company, having no notice of the plaintiff's assignment, were free to deal with R., and that, consequently, the change made by R. in his agreement with the company was binding on the plaintiff, to whom therefore there was nothing coming. *Winslow* v. *William Richards Co.*, 3 E. L. R. 258, 3 N. B. Eq. 481.

Condition — *Payment by purchaser of moneys disbursed by vendor — Revenue of land.*]—The condition, in a promise to sell real estate, that the purchaser shall pay, at the time of the sale, to the vendor, "all sums disbursed" applies only to sums advanced by the latter from his own funds, and does not comprise those taken from the revenues of the real property. *Demers* v. *Demers*, 17 Que. K. B. 481.

Consideration — *Seal — Extension — Notice — Continuing offer — Acceptance—Specific performance.*]—Plaintiff had an option expiring on the 14th September. Vendor's agent wrote to plaintiff extending time to 1st October:—*Held*, that after 14th September this was merely a continuing offer and the sale by vendor amounted to a withdrawal of the offer. The vendor is not bound to sell to anyone but the holder of the option. *Thompson* v. *Skill*, 12 O. W. R. 1033, affirmed, 13 O. W. R. 887.

Delay in signifying acceptance—*No time fixed by instrument — Tacit renunciation — Mining property — Change in circumstances.*]—A promise or option of sale, without limitation of time, may be declared extinguished by the tacit renunciation of the promisee, which may be inferred by the Court from a consideration of the circumstances; especially where it was made to the promisee in view of a mining exploitation which he has never begun, and where he has allowed 23 years to pass without signifying his acceptance, and where, on the other hand, the position and value of the land, the subject of the option, have com-

pletely changed, by clearing, buildings which the promisor has erected, and by the influx of population to the neighbourhood, which has become a village instead of a desert. *Stather* v. *Dodier*, 18 Que. K. B. 90.

Equitable jurisdiction — *Specific performance.*]—Action by vendor for specific performance of a contract for the sale and purchase of land. As plaintiff did not exercise his option within the time fixed by the agreement he has no right to do it afterwards. Under the circumstances in this case the equitable jurisdiction of the Court should not be made use of to compel the plaintiff to convey the land. Action dismissed. *Paterson* v. *Houghton*, 11 W. L. R. 118.

Extension—Notice — Continuing offer—Acceptance — Specific performance. *Thompson* v. *Skill*, 12 O. W. R. 1033.

Given by agent — *Person holding option assigned to plaintiffs — Assigns not named in option — Accepted — Action to enforce — Dismissed.*] — Defendant's agent gave one Murray an option to purchase certain land. Murray assigned the option to plaintiff on same day as it was given. No consideration was expressed in the assignment. The option was accepted by plaintiffs' solicitors. Defendant refused to convey. Action for specific performance or damages in lieu thereof.—Clute, J., *held*, that the agent exceeded his authority in giving the option, and the defendant was only bound to the extent of his assent, which was given upon the understanding that he was to receive the balance of the purchase money within ten days and the money not having been paid, the bargain was off. There was no authority to sell except for cash.—That an option given to a person not naming his assigns is a personal option and not assignable before acceptance.—That it was unnecessary to determine whether the solicitors were authorized to act for the plaintiffs in accepting, or whether what was done by placing the letter of acceptance under the door of the agent was a sufficient acceptance within the time. That the plaintiffs had not made out a case for specific performance or damages. Action dismissed with costs. *Can. Pac. Rw. Co.* v. *Rosin* (1911), 18 O. W. R. 387, 2 O. W. N. 610.

See 17 O. W. R. 747, 2 O. W. N. 375.

Lease with option of purchase — *Amount payable as rent forming part of purchase price — Relationship of lessor and lessee — Remedy arising from contract.*]— A contract whereby the owner of an immovable declares that he leases it in consideration of a certain sum payable by instalments, the last whereof will become due at the expiration of the lease, at which time he promises to sell the leased premises to the lessee, the amount agreed upon being, at one and the same time, the rent during the lease and the price of the sale to follow, establishes between the parties the relationship of lessor and lessee provided for in Arts. 1150 and following C. P. Hence, the owner has at his disposal all the summary proceedings and proceedings by attachment of a lessor to recover the instalments and damages which fall due and for the purpose of setting aside the contract and obtaining possession of the leased premises. *Crevier* v. *Lamoureux* (1909), 38 Que. S. C. 172.

Mineral claim — *Time of the essence—Tender of instalment of purchase money.*]— Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time is to be of the essence of the contract, yet by the nature of the property dealt with, it is clear that time shall be of the essence. —Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to find the payee and tender him the money. Decision of Hunter, C.J., 12 B. C. R. 9, 3 W. L. R. 161, affirmed. *Morton & Symonds* v. *Nichols*, 12 B. C. R. 485.

Payment of sum agreed upon as consideration — *Condition not fulfilled — —Cancellation — Evidence.*]—Action to recover $1,000 consideration mentioned in an option to purchase certain land: — *Held*, that plaintiff cancelled the option, that the title had not been made, that there was a conflict of evidence if option was not in escrow, and that weight of evidence is in favour of defendant. Action dismissed. *McKinley* v. *Frank*, 11 W. L. R. 571. Affirmed 12 W. L. R. 498.

Person holding option to sell—*Offering land by auction — Vendors notifying auctioneer not to proceed — Refusal of auctioneer to sell — Loss of resale — Action for damages.*] — B., one of the beneficiaries of an estate, who had been given a two-weeks' option to purchase certain land for $12,000, less his share of the estate, $1,200, agreed to sell the same for $13,500, but was allowed by his purchaser to first offer the property for sale by auction, to secure if possible a better price. This he proceeded to do, when the defendant, one of the vendors, wrote notifying the auctioneer that the plaintiff had no right to sell, whereupon the auctioneer refused to go on with the auction sale, and the purchaser refused to carry out his agreement to purchase, and the two weeks elapsed without B. being able to carry out his option:— *Held*, that no actionable wrong was shewn on the part of the defendant, for B.'s only right was that secured him by the option, the right to the performance of which on his payment of the amount specified therein was not interfered with, the agreement made by B. with his proposed purchaser being altogether foreign to the transaction. *Bradley* v. *Bradley*, 10 O. W. R. 223, 14 O. L. R. 473.

Registration—Failure to exercise option — Refusal to execute release — Action — Costs. *Dingman* v. *Jarvis*, 7 O. W. R. 244.

Rescission — *Time — Laches.*]—The plaintiff agreed to purchase land from the defendants, and to pay the balance of the purchase price on the 1st July, 1904, the agreement providing that time should be of the essence of the contract, and that in case of the plaintiff's failure to pay the balance at the time agreed, the defendants should be at liberty to treat the contract as cancelled; a deed of the property was executed in Toronto and sent to the defendants'

agent in Vancouver to deliver to the plaintiff when he paid up; the plaintiff did not pay the balance on the 1st July and on the 18th July the defendants notified him that they had re-sold the land:—*Held*, that the defendants had exercised their option of rescinding within a reasonable time, and that the plaintiff was not entitled to any relief. *Peirson* v. *Canada Permanent & Western Canada Mortgage Corporation*, 11 B. C. R. 139, 1 W. L. R. 99.

Resolutive condition — *Possession — Title.*] — A promise of sale subject to a resolutive condition (*e.g.*, failure to pay the price), though made with tradition and actual possession, is not equivalent to sale, and does not pass the ownership of the thing. *Matteau* v. *Godbout*, 32 Que. S. C. 411.

Taken by agent — *Assignment to principal — Estoppel — Absence of consideration.*] — Britton, J., *held*, that an option "in consideration of the sum of one dollar herein acknowledged, I agree to give an option," etc., not being under seal, is a *nudum pactum* and cannot be enforced if in fact no consideration passed.—That where an agent obtains an option the principal may assert his true position as principal and accept the option.—See *Can. Pac. Rw. Co.* v. *Rosin*, 18 O. W. R. 387, 2 O. W. N. 610. *McKay* v. *Wayland* (1911), 18 O. W. R. 696, 2 O. W. N. 741.

Timber limits — *Acceptance—Time — Contract — Specific performance.*]—By a writing under seal signed by the defendant, in consideration of $1, he agreed to give the plaintiff the exclusive right to purchase certain timber limits described, at $1.50 per acre. The only terms stipulated were that examination of and cruising of limits were to be made by the plaintiff within 30 days from the date of the agreement (4th September, 1908), "and, if accepted," the plaintiff "shall pay" the defendant, "the sum of $2,000, and balance of purchase money in equal portions," etc., and a provision for interest on postponed payments. The cruising was done within the 30 days and the timber cruised satisfactorily: — *Held*, that the examination and cruising of the limits, and even the plaintiff's intimation that they cruised satisfactorily, did not constitute an acceptance of the option; that the option should have been accepted within the 30 days, no other time being mentioned in the writing; but, if that were not so, it should be within a reasonable time, and a tender made by the plaintiff on the 23rd October, 1908, was not, having regard to the nature of the transaction and the fluctuating character of the subject-matter, made within a reasonable time; the option never ripened into a contract; and the plaintiff was not entitled to specific performance as of a completed contract; Martin, J.A., dissenting.—Judgment of Irving, J., affirmed. *Cunningham* v. *Stockham* (1910), 13 W. L. R. 312, 15 B. C. R. 141.

Vendor selling to another—Waiver of option — Knowledge of purchaser — Delay — Damages. *Betts* v. *Hiscox*, 3 O. W. R. 345.

Written offer of option to purchase land—Oral acceptance—Refusal of vendor to carry out—Offer not under seal—Consideration — Finding of jury — Taking unfair advantage — Mistake as to title — Statute of Frauds — Registry laws — Commission — Breach of contract — Damages — Loss of profits on re-sale. *Carrick* v. *McCutcheon*, 8 O. W. R. 749.

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8. Oral Contracts.

Conflict of evidence as to its terms—Part performance — Statute of Frauds. *Thibideau* v. *Cyr*, 2 E. L. R. 246.

Execution of deed and mortgage — *Misdescription — Defective title — Innocent misrepresentation — Rescission—Compensation.*]—The plaintiff at an interview with the defendant agreed to purchase "the F. property" belonging to her, for $2,300—$500 cash and the balance in six years with interest, and advised her to get the papers made out, and she instructed her solicitor to prepare the deed and mortgage. When they were ready, she advised the plaintiff, who had, however, changed his mind and refused to go on, but offered to pay the expenses. Under pressure from two solicitors and the issue of a writ, he accepted the deed, executed the mortgage to secure the purchase money, and made the cash payment, without searching the title, relying on the representation of one of the solicitors that the defendant had a good title. Subsequently he discovered that the description in the deed to him covered more property than the vendor owned, and that what he did get was subject to an outstanding lease for life. In an action for a rescission of the contract, the trial Judge having found that the defendant was not guilty of any fraudulent misrepresentation or concealment; that there was no mutual mistake, and no express agreement as to title was innocently made:—*Held*, that fraud having been negatived and the deed having been executed, the plaintiff was not entitled to a rescission of the contract.—*Held*, also, that as an adverse claim to title by possession could not be decided in this action owing to the claimant not being a party, it could not be said there was an entire failure of consideration, and the plaintiff was therefore not entitled to relief on the latter ground, and the action was dismissed, but under the circumstances without costs. *Shurie* v. *White*, 12 O. L. R. 54, 7 O. W. R. 773.

Oral understanding as to procuring release of claim for dower — Addition to written contract of words "if in his power to do so" — Terms of judgment for conditional specific performance. *Toole* v. *Newton*, 10 O. W. R. 322.

Promise to assign interest in land—*Consideration — Execution of power of sale — Offer to pay money — Assignment of contract for purchase of land as collateral security for debt — Position of assignee — Equitable mortgagee without power of sale — Enforcement of contract — Statute of Frauds — Pleading — Amendment.*]—On

the 1st August, 1905, the defendant L., being the owner of certain lands, contracted to convey them to the defendant S. in fee upon payment of $3,200. On the 19th June, 1906, S. assigned the contract and his interest under it to the defendant V. as collateral security for the payment of sums due to V. and secured in the first instance by promissory notes. No provision was made for realising upon the collateral security in the event of non-payment of the notes:—*Held*, that the interest of V. was that of an equitable mortgagee without power of sale.—On the 30th June, 1906, S. sold the lands to the plaintiff by contract in writing for $9,600, a large part of which was paid to S. before December, 1906, when V. became aware of the contract between S. and the plaintiff and of the payment actually made. V. held other collateral securities for the debt due him by S., and S. assured the solicitor for the plaintiff that if the balance due from the plaintiff to S. should be paid to V., the latter would release his claim under the assignment. Negotiations followed, and an agreement was come to, as the trial Judge found, whereby V., on receiving from S. $1,000, and on an instrument being executed by S., under seal authorising V. to sell the lands if payment of his debt in full was not made on or before the 1st May, 1907, agreed with S. and the plaintiff to assign to the plaintiff all his (V.'s) interest in the contract between L. and S. There was no written agreement; but the Judge found that, relying on the oral promise of V. to carry out this arrangement, S. executed the sealed instrument referred to. The plaintiff offered to pay V. the balance due to S. under her contract with S., and S. offered to pay the $1,000, but V. refused to accept these sums or either of them, and refused to assign as agreed:—*Held*, that the plaintiff was entitled to have the land conveyed to her by L. (who, having been paid his money, submitted to do what the Court should adjudge), upon payment of the moneys owing by her and of the $1,000. There was consideration for the promise of V.; the plaintiff having registered a caveat against the lands, V. could not deal with them except subject to her claim.—*Quære*, whether V. had disentitled himself to relief as an equitable mortgagee, without powetr of sale, by his dealings with some of his securities.—*Held*, that the plaintiff should have leave to amend so as to set up the facts upon which she relied; and that the Statute of Frauds had no application. *Newkirk* v. *Stees* (1910), 13 W. L. R. 181, 3 Sask. L. R. 3.

Specific performance — *Statute of Frauds — Part performance — Possession taken by purchaser without consent of vendor — Note or memorandum — Delivery of deed in escrow.*]—Action for specific performance of sale of land. Plaintiff agreed to buy certain Brandon lots, giving in payment an assignment of an agreement to purchase certain Saskatchewan lands, ballance payable in cash to be raised on Brandon lots, and went into possession of the Brandon property. The owner of the Saskatchewan lands would not consent to the assignment and cancelled the agreement, nor could plaintiff get a tenant for the lands, as he had agreed. The plaintiff therefore could not perform his part of the agreement: — *Held*, that plaintiffs taking possession of Brandon property was without knowledge or consent of defendant, so is not part performance within the statute. Leaving the deed and assignment in escrow with the solicitors is not evidence of the verbal agreement. Action dismissed. *Vandervoot* v. *Hall*, 9 W. L. R. 702.

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9. POSSESSION.

Action for possession — Agreement to purchase—Failure by plaintiff to convey—Sale of building—Evidence. *Wile* v. *Joudry* (N.S. 1910), 9 E. L. R. 263.

Agreement for sale—*Default in payment — Further directions — Costs reserved at trial.*]—On a motion for judgment for possession of land in possession of defendant under agreement for sale, *held*, that action was rightly in the H. C. J. to determine the question involved upon the land and its ownership, and that defendant was entitled to specific performance in duly making all future payments till the whole amount owing was paid. On appeal to Divisional Court on further directions, and as to costs reserved at trial, *held*, that there should have been no appeal as to a matter of no importance to the appellants; the declaration of right complained of being no more than a statement of what is the unquestionable right of the respondent, viz., to have a conveyance of the land upon performance of conditions of agreement. As to costs, there was no reason to differ from the disposition made of them. Appeal dismissed. *Hislop* v. *Lester* (1909), 14 O. W. R. 624; affirmed 14 O. W. R. 1054, 1 O. W. N. 197.

Construction — Ambiguity—Inability of vendor to give possession — Rescission by purchaser — Return of part of purchase money paid — Damages — Stock and plant purchased for use upon land — Not in contemplation at time of contract. *Cairns* v. *Dunkin* (Man.), 6 W. L. R. 256.

Delivery of conveyance—Covenant for possession — Enforcement. *Ham* v. *Pillar*, 1 O. W. R. 259.

Expulsion of vendor—*Damages.*]—The vendor who has engaged to give immediate possession of the land sold, and who neglects or refuses to do so, has, nevertheless, a remedy in damages against the purchaser if the latter expels him by force and violence. *Robichaud* v. *Genest*, 16 Que. S. C. 337.

Good faith—*Improvements and expenses — Transfer of rights — Proof — Acknowledging a fact in a point of procedure.*]—The right of the possessor in good faith to keep real estate until paid for his improvements and expenses, is transferable, nothing in the law opposing it. The sale of real estate with the rights and improvements of the vendor, includes the right to keep what he had as the possessor in good faith until repayment for his improvements and expenses. The purchaser of real estate, against whom

an action is brought to set aside the sale, who pleads a right to keep it that his vendor has granted him, the plaintiff may not set up a debt by the vendor, which has been assigned to him, even though it be a part of the price of the real estate which the vendor was owing to his grantor. The possessor of real estate belonging to another who proves that he purchased it from a previous possessor for a legal consideration, and which he has held by himself and his grantors, as owner to the knowledge of the claimant's agent, for fifteen years and during that time he has paid the municipal taxes on the real estate, establish sufficiently the possession in good faith, which gives him the right to repayment for his improvements and expenses made during that period. The acknowledgment of a fact in a procedure (*e.g.*, a deed) produced by a party in the cause proves the fact in another cause. *Frèchette* v. *Gagné*, 1909, 36 Que. S. C. 300.

Instalments of purchase money — *Eviction — Interest.*]—A purchaser of immovables, for the time that he has been in possession, in spite of the fact that he has eventually been evicted, must pay interest upon the portion of the purchase money which fell due during the time that he was in possession. *Beriau* v. *Stadacona Water, Light, and Power Co. & Town of Farnham*, 25 Que. S. C. 525.

Interest—*Equitable relation of parties.*] —The defendant purchased a lot of land from A. for $1,140, under an agreement in writing, by the terms of which A. was to give a deed of the land to the defendant, or to any other person named by him, as receipt of the purchase price, and to accept a mortgage of the property for $1,000, part of the purchase price, on receiving from the defendant all moneys due over and above that amount. After the making of the agreement, the defendant paid A. $140, and entered into possession of the premises, and for a period of two years paid A. interest on the sum of $1,000, as if the deed and mortgage had been executed, although, as a matter of fact, he had not received the deed or given the mortgage as agreed. No further interest was paid, on the ground that A., and the plaintiffs claiming under him after his death, wrongfully and in breach of the agreement, refused and neglected to convey the land to the defendant, and that the agreement itself contained no provision calling for the payment of interest:—*Held*, that the defendant, being in possession of the property and enjoying the fruits of it, was bound to pay interest pending the carrying out of the terms of the agreement, and that the question whether the delay was due to the action of the deceased or not was immaterial.—*Per* Russell, J.—The position of the parties in equity was that of mortgagor and mortgagee, and interest was due by the defendant on that footing, notwithstanding the absence of any stipulation in the agreement, the defendant having gone into possession and enjoyed the fruits. *Anderson* v. *Phinney*, 38 N. S. R. 393.

Purchaser — *Title—Waiver—Improvements.*]—Where a purchaser, entitled by the terms of the contract to a perfect title, upon payment of his deposit entered into and continued in possession as provided by the contract, and made improvements even after alleged defects in the title were brought to his attention, and after he had brought an action for specific performance, the vendor asserting that he had a good title:—*Held*, that the purchaser had not waived his right to have a good title shewn. In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract, and the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements. *Rankin* v. *Sterling*, 22 C. L. T. 230, 3 O. L. R. 646, 1 O. W. R. 243.

Purchaser taking possession — Default in payment of purchase money — Notice of cancellation — Conditions of contract not complied with — Specific performance — Repossession — Account of profits — Misrepresentations — Damages. *Le Neveu* v. *McQuarrie* (Man.), 5 W. L. R. 348.

Purchaser taking possession — *Purchase money payable by instalments — Default — Rescission of contract by notice pursuant to conditions — Forfeiture — Time — Remedy.*]—The defendant held possession of the land in question under an agreement of purchase which provided that, in default of payment of any instalment of the purchase money, the vendor should be at liberty to determine and put an end to the agreement . . . and to retain any sum or sums paid thereunder as and by way of liquidated damages, by serving a notice intimating an intention to determine the agreement, and that, at the end of thirty days from the mailing or delivery of such notice, if such default should not be remedied in the meantime, the purchaser should deliver up quiet and peaceable possession of the land to the vendor or his agent, and the agreement should become void and be at an end and all rights and interests thereby created or then existing in favour of the purchaser or derived under the agreement should thereupon cease and determine, and the premises should revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry, and without any other act by the vendor to be performed, and without any suit or legal proceedings to be brought or taken, and without any right on the part of the purchaser to any compensation for moneys paid under the agreement. The agreement also contained the clause, "Time shall be in every respect of the essence of this agreement:"—*Held*, that a notice served upon the defendant by the vendors' assignee, after default in payment, that "the said agreement is hereby determined and put an end to and unless such default shall be remedied by you within thirty days . . . . you shall then be required to deliver up quiet and peaceful possession of the said lands and premises, and said agreement shall be absolutely null and void and all rights," etc. (following the wording of the clause quoted) was not in accordance with the terms of the power and was therefore ineffectual to put an end to or determine the agreement or to entitle the vendors' assignee

to an order of the Court for possession of the land.—Such powers of rescission must be strictly followed and their exercise subjected to rigorous scrutiny in a court of equity, just as in cases of notices under powers of sale in mortgages.—*Held*, further, that, even if the notice served had been worded in strict accord with the power in the agreement, the latter should be treated as in the nature of a penalty against which the Courts will relieve.—*In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, and *Cornwall* v. *Henson*, [1900] 2 Ch. 298, followed.—*Semble*, that the plaintiff's remedy would be to commence an action in the nature of specific performance to have the contract cancelled by decree on the Court, upon default, after a time to be fixed by the Court. *Hudson's Bay Co.* v. *Macdonald*, 4 Man. L. R. 327, and *Lysaght* v. *Edwards*, 2 Ch. D. 506, followed. *Canadian Fairbanks Co.* v. *Johnston*, 18 Man. L. R. 589, 10 W. L. R. 571.

Tenant — Attornment of—Interest—Possession — Costs. *Re Dickson & St. Andrew's College*, 2 O. W. R. 846.

Tenant in possession under lease—*Knowledge of purchaser — Damages for delayed occupation — Delivery of possession — Art. 1493, C. C.*]—The vendor of an immovable is not responsible for damages suffered by the purchaser by reason of the fact that a lease to a third party hinders him from having the immediate occupation of the immovable; especially when the purchaser knew of the existence of the lease at the time of the sale. A clause in the deed that the purchaser shall enjoy from this date, etc., and shall have possession immediately, imports only the obligation of the vendor to deliver, which is fulfilled as soon as he allows the purchaser to take possession, all obstacles being removed. The possession of the tenant, being that of the owner, that is to say, of the purchaser, from the time of the sale, is not one of the obstacles intended by Art. 1493, C. C. *Brunet* v. *Brisebois*, 32 Que. S. C. 158.

Vendor remaining in possession — *Power of redemption — Grant of hypothec — Cancellation.*]—A sale being perfected by the consent of the parties, though no delivery of the thing sold takes place, the seller of an immovable who remains in possession of it, with a power of redemption at will, ceases nevertheless to be the owner, and has no power to grant a hypothec upon it. Such a hypothec will be declared void at the suit of a subsequent acquirer of the property, and the judgment will order the registration thereof to be cancelled, or will stand in lieu of such cancellation. *Chapleau* v. *Merchants Bank of Canada*, 28 Que. S. C. 38.

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10. Purchase Money.

Account — Construction of contract — Acquiescence — Latent ambiguity — Extrinsic evidence — Conflicting testimony — Finding of referee — Appeal — Interest — Unsettled account — Judgment on report — Costs. *Douglas* v. *Bensley*, 9 O. W. R. 373.

Action — Evidence — Weight of—Corroboration. *Murray* v. *Empire L. & S. Co.*, 1 O. W. R. 310.

Action by vendor for instalment of purchase money — *Fraud and misrepresentation.*]—Actions to recover instalments of purchase money under contracts for sale of Kildonan lots. The trial Judge believing agent in preference to defendant in each action, that there had been no misrepresentation, gave judgment for plaintiff in each action. *Weaver* v. *Whaley. Weaver* v. *Wallace*, 9 W. L. R. 579.

Action by vendor for purchase money — *Title — Tender—Incumbrances.*]—The vendor of an immovable is entitled to demand from the purchaser the price of sale due by an *acte sous seing privé*, on condition only that he tenders to the purchaser a good and sufficient title to the land, free and clear from all incumbrances; otherwise his action will be dismissed on inscription in law. *Derome* v. *Can. North. Quebec Rw. Co.*, 10 Que. P. R. 59.

Action by vendor for purchase money—*Vendor acquiring legal title before action — Vendor equitably entitled when contract made — Delivery of abstract — Condition precedent—Incumbrances — Practice — Defendant not appearing — Judgment against, at trial.*]—Action to recover balance of purchase money of land. Plaintiff held entitled to recover, he having had an equitable interest in the lands in question when the sale agreement was entered into and having obtained title in fee before action brought. It is not the practice to sign final judgment where one defendant does not appear. The proof can be given at the trial. *Maybery* v. *Williams* (1910), 12 W. L. R. 689, 3 Sask. L. R. 125.

Action for — Evidence — Trespass to goods. *Grear* v. *Mayhew*, 1 O. W. R. 529, 2 O. W. R. 140.

Action for — *Time for payment — Acceleration — Insolvency of purchaser.*] — Under Art. 1092, C. C., an action to recover the balance of purchase money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security. Judgment of Court of King's Bench, Quebec, affirmed. *Kensington Land Co.* v. *Canada Industrial Co.*, [1903] A. C. 213.

Action for balance of purchase-money — *Charitable corporation — Proof of ownership — Corporate seal.*]—In an action by an incorporated charitable society to recover a balance of the purchase-money of lands sold by the plaintiffs to the defendant, the plaintiffs, by their statement of claim, alleged the entering into and execution of the agreement for sale, set out the terms thereof, alleged default in the payment of instalments, and also alleged that, by virtue of an acceleration clause, the whole balance of the purchase-money was due. The prayer was for payment and further and other relief generally. By the statement of defence, the defendant admitted all the plaintiffs' allegations except those with respect to default

and acceleration. At the trial the defendant urged: (1) that the plaintiffs had not shewn that they were owners of and in a position to give a valid title to the land; (2) that the plaintiffs had not shewn that their corporate seal had been affixed to the agreement by persons authorised; (3) that the plaintiffs had no power to sell land except for cash, and (4) that, as a charitable institution, they could not sue without the consent of the Attorney-General:—*Held*, as to the first three objections, that they were not raised by the pleadings and were inconsistent with the admissions made in the statement of defence; as to ownership, the implied admission was such that the plaintiffs were not called upon to shew anything in that respect; the execution of the agreement was sufficiently proven by the identification of the seal thereon as their corporate seal; and they were expressly given power by their Act of incorporation to enter into such an agreement as that in question.—*Canadian Pacific Rw. Co.* v. *Cornwallis*, 7 Man. L. R. 1, and *Canadian Pacific Rw. Co.* v. *Burnett*, 5 Man. L. R. 395, distinguished.—*Held*, as to the 4th objection, that the plaintiffs had, by their Act of incorporation, the right to sue without obtaining leave of the Attorney-General under s. 17 of the Charitable Trusts Act, 1853.—*Held*, also, that the plaintiffs were entitled, under their prayer for general relief, to a declaration of lien on the property and to a sale in the event of non-payment—such relief being consequent upon the relief specifically prayed.—The defendant counterclaimed to enforce an alleged collateral agreement that the defendant should have part releases proportionate to the amount of the purchase-price paid:—*Held*, that judgment in the action should not be delayed by reason of the defendant not being ready to go on with the trial of the counterclaim; but that the defendant should be at liberty to set it up in an independent action. *Sisters of Charity* v. *Forrest* (1910), 16 W. L. R. 58, Man. L. R.

Action for instalments of purchase price—*Sufficiency of memorandum of agreement — References to a former contract not actually entered into — Rescission by conduct—Vendor retaining possession and suing for damages —Land situate in foreign country — Pleading — Amendment — Foreign law — Onus of proof — Lex fori — Specific performance — Vendor submitting to jurisdiction — Inquiry into title — Objections to title — Consolidation of actions—Costs.*] —Plaintiff sued defendant for damages for breach of contract to purchase land, and also on a note given as part payment. Actions consolidated. The memorandum referred to a formal agreement of sale which was never executed:—*Held*, that the memorandum was sufficient evidence of a binding contract. The plaintiff had a right to retain possession. There was no repudiation or rescission on his part. The lands were situate in Louisiana.—*Held*, that the *lex fori* governs. Defendant did not plead the effect of foreign law. The defendant resided in Alberta. Specific performance directed on terms. *Hill* v. *Spraid*, 11 W. L. R. 680, 2 Alta. L. R. 148.

Action for purchase-money — *Pleading — Statement of defence — General denial — Rule 290 — Operative agreement — Evidence — Title — Production of copy of Crown grant — Absence of notice — Manitoba Evidence Act, sec. 21 — Imperial Act — Evidence of issue of Crown grant — Nonsuit.*]—The plaintiff and defendants entered into an agreement for the sale by the plaintiff and purchase by the defendants of 160 acres of land in British Columbia for $3,000; $1,000 of which was to be deposited with a bank until such time as satisfactory evidence of the issue of the Crown grant of the land should be produced; and the balance to be paid at later dates. It was also provided that in case the plaintiff obtained a title to part only of the 160 acres, the purchase-price should be reduced so as to amount to $18.75 per acre for the portion for which title should be obtained. The plaintiff brought this action for $1,014, alleging that he had obtained title to 54.08 acres. The defendants pleaded a general denial of all the allegations of the statement of claim:—*Held*, that this form of pleading did not comply with Rule 290 of the King's Bench Act, and might have been stricken out on application, but, as it was left on the record, it must be treated at the trial as a denial of the title.—The defendants attempted to establish that the agreement never became operative—that it was delivered as in escrow—but this was negatived by the facts in evidence.—The plaintiff, before action, as evidence that he had obtained title to the 54.08 acres, shewed the defendants a certificate of title. The defendants then repudiated the agreement and refused to carry it out. Upon the trial, the plaintiff tendered in evidence a copy of the patent from the Crown for the 54.08 acres, which was annexed to the certificate of title. No notice of the intention to produce the copy as evidence was given to the defendants.—*Held*, that under the Manitoba Evidence Act, s. 21, the copy could not be received; that Lord Brougham's plaintiff made the cash payment and all the subsequent half-yearly payments down to and including that of the 1st June, 1909, but did not make the payment due on the 1st December, 1909, on that day; and on the following day the defendant sent the plaintiff a notice in writing, that unless payment of that $300 was made within 20 days, the defendant would cancel the agreement. The plaintiff did not make the payment; he made arrangements, however, with the defendant's admitted agent to pay the full balance of the purchase-price remaining, but, owing to difficulties placed in the way by the defendant's agent, the arrangements for payment were not complete on the 22nd December; and on the 24th December the defendant gave the plaintiff a written notice cancelling the contract. The plaintiff had the $300 and would have paid it over but for the arrangements made with the agent. On receiving the notice of the 24th December, the plaintiff tendered the amount due, but this was refused:—*Held*, that the notice of the 2nd December did not operate as a cancellation of the contract; but the notice of the 24th December was sufficient for that purpose if the defendant was then in a position to cancel.—*Steele* v. *McCarthy*, 1 Sask. L. R. 317, 7 W. L. R. 902, and *Great West Lumber Co.* v. *Wilkins*, 7 W. L. R. 100, followed.—*Held*, however, that the defendant

had, by her agent, waived the right to cancel; and the plaintiff was entitled to judgment for specific performance of the contract. *Timmins* v. *Smith* (1910), 14 W. L. R. 503, 3 Sask. L. R. 264.

Action to recover instalment of purchase-money—*Parties to contract—Identification — Parol evidence — Company — Description of property — Selection of particular lot out of a number described—Contract to enter into formal contract, not binding — Title to land—Tender of formal contract — Return of moneys paid under agreement.*] — Action by vendor against purchaser to recover an instalment of purchase price of land. Parol evidence admitted to identify the parties to the contract. The agreement was one to enter into an agreement for the sale of land and therefore is no binding contract. Action dismissed. Title being unsatisfactory, money paid by defendant to be repaid to him. *Anglo-Canadian Land Co.* v. *Gordon* (Man.), 10 W. L. R. 517.

On appeal judgment amended by striking out relief granted on the counterclaim. *Ibid.* 11 W. L. R. 658.

Assignment by vendor—*Action for balance of purchase-price—Counterclaim—Fraud —Failure to prove—Powers of assignee — Company—Pleading — Title — Readiness to make.*]—In an action for the balance of the purchase-price of land which the defendant contracted to buy from K., who assigned the contract to the plaintiffs, the defendant set up that he was induced to enter into the agreement by fraud, and he counterclaimed for the money which he had paid:—*Held*, that the fraud must be established beyond reasonable doubt; and, not having been so established, the defence and counterclaim failed. —It was contended that the plaintiffs, an incorporated company, were not authorised to hold securities of the character of the agreement sued upon:—*Held*, that, as this defence was not raised by the pleadings, no effect should be given to it.—*Held*, also, that the plaintiffs, being ready and willing to make a good title, were entitled to the balance of the purchase-price. *Winnipeg & Morris Improv. Co.* v. *Watson* (1910), 15 W. L. R. 592, Man. L. R.

Bills of exchange given for purchase-money—*Action on bill—Pleading—Exception — Taxes charged on land—Peril of eviction — Novation.*]—A vendor of land who accepts bill of exchange in payment of the purchase money for which he gives an unconditional discharge, does not thereby make a new contract. Hence the purchaser, when sued for the amount of one of the bills, may set up in answer by way of exception the period of eviction by reason of taxes which were a charge upon the land at the time of sale, and of the existence of which he was ignorant. *Richards & Co.* v. *Théberge*, 29 Que. S. C. 308, 15 Que. K. B. 310.

Cancellation of agreement upon default—*Recovery of amounts paid on purchase price.*]—A purchaser under agreement for sale accompanied by delivery agreed to by a buyer in virtue of a previous agreement for sale, with delivery, who is notified that the original owner is about to take advantage of a clause in the first agreement for sale which provided for the cancellation of the agreement upon any default to pay the price therein mentioned, has a remedy by action against his own immediate vendor to recover any sums paid on account of the purchase price. *Dupre* v. *Brabant* (1910), 38 Que. S. C. 450.

Default in payment of instalment—*Forfeiture — Acceptance of lease by purchaser—Action for cancellation.*] — Defendant agreed to sell to plaintiff certain lands. Time was of the essence of the agreement and the agreement was to be null and void if terms not complied with. Plaintiff expended considerable money upon the premises, which were destroyed by fire. Default was made by plaintiff. On 3rd June, 1908, a lease was executed. Plaintiff brought action to set aside above lease alleging that she supposed she was signing claim papers to get the insurance, and not a lease. She also asked for an account of the insurance and other moneys, including the value of certain lumber.—Mulock, C.J.Ex.D., *held*, that the contract became null and void on 1st June, 1908, and the plaintiff ceased to have any interest in the property or in the insurance moneys arising from the destruction of the premises thereafter. That all of above, together with her payments, had been forfeited to defendant, who had acted harshly towards her, exacting from her his full legal rights, but unfortunately the terms of the contract did not permit granting her any relief. Action dismissed with costs. *Macammond* v. *Govenlock* (1911), 18 O. W. R. 357, 2 O. W. N. 563.

Default in payment of purchase-money—*Cancellation — Notice — Waiver.*] —By an agreement in writing dated the 1st June, 1906, the defendant agreed to sell and the plaintiff to purchase land for $5,000, payable $600 in cash, and the balance in consecutive half-yearly instalments of $300 each, to be paid on the 1st days of June and December in each year, with interest at 8 per cent. The agreement provided that, in default of payment of any of the moneys on the days and times fixed, the defendant should be at liberty to determine the agreement by mailing in a registered letter a notice intimating an intention to determine, and at the end of 20 days from the time of mailing the same the plaintiff should deliver up possession and the defendant should be at liberty to resell, etc. The Evidence Act, 1851, did not apply, the other Act existing; and neither Act contained the means of proof contended for; and, therefore, there was no evidence that the land referred to in the certificate of title was part of the land agreed to be sold to the defendants, and the plaintiff had not complied with the terms of his agreement by producing satisfactory evidence of the issue of the Crown grant; and a nonsuit was entered. *McPherson* v. *Edwards* (1910), 14 W. L. R. 172.

Court of Appeal set aside above judgment on conditions, (1911) 16 W. L. R. 648.

Default of purchaser in making deferred payments—*Attempted cancellation by vendor — Clause in contract declaring time of essence — Intention — Conduct — Waiver.*] — Vendor brought this action to cancel an agreement for sale of land and to

discharge a caveat registered by purchaser:—*Held*, that although time is stated to be of the essence of the contract, yet that same has been waived by vendor. Defendant having brought all arrears into Court, action dismissed. *Crawley* v. *Hamley*, 11 W. L. R. 574.

Instalment of purchase-money to vendor's agent — *Acknowledgment under seal — Estoppel — Fraud of agent — Specific performance.*]—T. paid to D., a real estate agent, $700 as part payment of the purchase price of a certain lot. D. procured from N., the owner of the lot, an agreement under seal for the sale of the lot to T., containing a recital of payment of and a receipt for $700 on account of the purchase price, and delivered the same to T. D. in reality paid only a $20 "deposit" to N., the owner, and afterwards absconded:—*Held*, that N. was estopped from denying receipt of the $700, and that T. was entitled to a conveyance, on payment of the balance mentioned in the agreement. *Gordon* v. *James*, 30 Ch. D. 249, followed. *Tuytens* v. *Noble*, 8 W. L. R. 50, 13 B. C. R. 484.

Instalment payments — *Agreement — Construction—Insolvency of vendee—"Due" — Extrinsic evidence.*] — Appeal from the judgment of Graham, E.J., 8 E. L. R. 229, in favour of defendant in an action claiming damages for breach of an agreement to convey land. *D'Hart* v. *McDermaid* (N. S. 1910), 9 E. L. R. 183.

Instalments—*Acceleration clause—Foreigners not understanding English — Duty of vendor to interpret — Elimination of clause — Action for whole purchase money.*]—Action by vendor to recover amount due on sale of a flour mill. The vendor assumed the burden of explaining the agreement to the defendants who could not speak English. A printed form of agreement was used containing a clause to the effect that if any instalment of the purchase money became in arrears the full amount of the purchase money would become due:—*Held*, that the defendants' signatures had been obtained in ignorance of this default clause, and they are not bound by it, and that the proceedings taken by distress and attachment were malicious and without reasonable and probable cause, and damages given to defendants. *Streimer* v. *Nagel*, 11 W. L. R. 325.

Instalments — Action for instalment—Counterclaim for rescission of contract — Mortgage and transfer by vendor subsequent to contract — Transfer in trust — Judgment for payment of instalment into Court. *Niblock* v. *Ross* (Alta.), 8 W. L. R. 792.

Instalments — Action for instalment—Defence of fraud and misrepresentation — Evidence — Credibility of witnesses — Counterclaim — Rescission. *Weaver* v. *Whaley*, *Weaver* v. *Wallace*, 9 W. L. R. 579.

Instalments — Action for intermediate instalment — Equitable defence — Absence of title in vendor — Burden of proof—Dismissal of action — Leave to commence a new action. *Graves* v. *Mason* (Alta.), 8 W. L. R. 542.

Instalments — Action for specific performance — Rescission by purchaser — Counterclaim for return of deposit—Failure of vendors to make unincumbered title — Statute of Frauds — Completion by conveyance — Conduct of parties — Giving of notes. *Brandon Steam Laundry Co.* v. *Hanna*, 9 W. L. R. 570.

Instalments — *Conveyance on payment of fixed portion of purchase money—Right to sue for instalments without tender of conveyance — Assignment of agreement.*]—Where by an agreement for the sale of land the purchase money is payable by instalments without interest, and, on payment of a fixed portion of the purchase money, the purchaser is to have a conveyance, he giving back a mortgage for the balance due, the vendor is entitled to recover the instalments falling due within such limit, without the tender of a deed to the purchaser.—Where an agreement for the sale and purchase of land is made with the purchaser, "or assigns," the former is not relieved from his obligation under the contract by assigning it, unless the vendor has accepted the assignee in place of the purchaser.—Judgment of a Divisional Court, 15 O. L. R. 280, 10 O. W. R. 758, affirmed. *Vivian (H. H.) Co.* v. *Clergue*, 16 O. L. R. 372, 11 O. W. R. 1014.

Instalments—*Deed to be delivered when three-fifths paid — Right to sue for instalments without tendering conveyance.*] — A vendor of land—under an agreement providing for payment of the purchase money in annual instalments with interest, and that the purchaser so soon as he had paid three-fifths should be entitled to a conveyance, upon executing a mortgage back for the balance—is entitled to sue the purchaser for the payments falling due prior to three-fifths being paid, without proving that he has tendered a conveyance. *H. H. Vivian & Co. Ltd.* v. *Clergue*, 10 O. W. R. 186, 758, 15 O. L. R. 280.

Instalments — *Default — Acceleration clause — Action to recover whole purchase money or in default for cancellation — Default by vendor — Purchaser relieved on terms.*]—By agreement dated the 7th June, 1906, the plaintiff sold to the defendant 625 acres of land for $17,500, $1,000 being payable on the execution of the agreement, and the balance in yearly instalments with interest. It was provided that on default in payment of any instalment the whole of the purchase money and interest should at once become due and payable. Owing to some difficulty over the title to the property, the agreement was not completed until the 8th November, 1907, when each party got a duplicate signed by the other and the defendant paid $957.60 of the $1,000 payable on the execution of the agreement. On that date there was also past due the second instalment of the purchase money, and some taxes which the defendant had covenanted to pay. It was admitted that, prior to the completion of the agreement by delivery, a verbal agreement was arrived at extending the time for payment of the second instalment, but the parties differed as to the terms of this verbal agreement, and, as it would contradict the writing, the trial Judge *held*

that it should not be given effect to and that the plaintiff was not bound by it. The plaintiff demanded payment of the full amount of the purchase money, alleging that it was due by virtue of the acceleration clause above quoted. The defendant asked that, upon payment of all arrears, he might be relieved from the effect of the acceleration clause:—*Held*, that such a provision in a contract is not in the nature of a penalty against which equity will relieve.—*Wallingford* v. *Mutual Society*, 5 App. Cas. 705, followed.—2. The plaintiff, by completing the agreement, waived his right to call in the full balance of the purchase price, because at that date the agreement was, so far as the past due payments were concerned, impossible of performance.—3. For that reason, and also because the plaintiff had made default in carrying out a term of the agreement by which he was to place a mortgage of $10,000 on the property for a five years' term, the defendant was entitled to the relief prayed for. *Vosper* v. *Aubert*, 7 W. L. R. 758, 18 Man. L. R. 17.

Instalments—Default — Assignment of contract by purchasers — Payment by assignee — Agreement as to re-assignment — Consent of vendors — Refusal to give — Breach of condition — Specific performance. *Halliday* v. *Vincent* (Man), 7 W. L. R. 7.

Instalments — *Default—Cancellation—Acquiescence — Return of first instalment paid — Counterclaim — Wrongful seizure of crop.*]—In November, 1907, H. agreed to sell to the defendant and the defendant to purchase from H. a half-section of land, for $6,391.60, of which $1,500 was paid at the time, the balance being payable in ten annual instalments. In January, 1908, the defendant filed the caveat against the half-section to protect his interest under the agreement. A few days later H., in consideration of $2,437, transferred to the plaintiff his interest in the half-section, subject to a mortgage for $2,500 and to the agreement with the defendant, and the plaintiff obtained a certificate of title, subject to the mortgage and the caveat. In March, 1908, H. leased other lands to the defendant, who entered thereon and put in a crop. In October of that year H. served the defendant with notice of cancellation of the lease, demanded possession of the demised premises, and seized the crop. In November of that year the first deferred instalment fell due, and the defendant failed to pay it, and had not since done so. In March, 1909, the defendant was served with notice of cancellation of the sale-agreement, signed by H. and the plaintiff. In November, 1909, the defendant recovered judgment against H. for $568.27 and costs in an action for wrongful seizure of his crop. In December, 1909, the plaintiff brought this action for specific performance of the sale-agreement. The defendant, by his defence, set up that he was unable, on account of the wrongful seizure of his crop, to make the first payment under the sale-agreement; he acquiesced in the cancellation of the agreement, subject to his rights by reason thereof, and counterclaimed against the plaintiff and H. for the $1,500 which he had paid:—*Held*, that the defendant had no claim against the plaintiff on account of the crop seizure, nor for a return of the $1,500, which the plaintiff never got; when the defendant said he acquiesced in the cancellation of the agreement, that must mean the whole of it, and what was reserved could only be his rights enforceable by personal action; nor could the counterclaim succeed against H., for the defendant must be presumed to have got, in the former action, all relief he was entitled to by reason of the crop seizure.—Judgment declaring the agreement cancelled, vacating defendant's caveat, and dismissing the counterclaim. *Miller* v. *Sutton* (1910), 15 W. L. R. 206.

Instalments — *Default — Cancellation —Relief against forfeiture — Specific performance — Instalments of purchase money paid — Right of vendor to retain on cancellation.*]—Action by purchaser to compel specific performance of a contract for the sale and purchase of land. The agreement provided that in case of default the vendors could, with or without notice, cancel the contract and declare the same void, but there were no means provided by which this was to be accomplished. If by notice, they must give the purchaser an opportunity to make good his default:—*Held*, that the agreement is still in force and effect and plaintiff entitled to make good his default. Before the action the plaintiff had tendered the amount in arrears, which defendant refused to accept, maintaining that the notice given had determined the agreement, and that all payments previously made were forfeited to them. *Whitla* v. *Riverview*, 11 W. L. R. 350.

Instalments — *Default—Cancellation by vendor — Action for specific performance—Laches — Resale by vendor at profit — Return of instalment paid by purchaser.*]—The plaintiff purchased land from the defendant M. for $58,950, payable $1,000 in cash and the balance by deferred instalments. The $1,000 was paid and the first instalment of $14,000. Default was made in the other payments. Time was of the essence of the agreement, and the defendant M. gave the plaintiff written notice of the cancellation of the agreement, and thereafter treated the agreement as cancelled, and resold the property at a higher price. The agreement provided for this, and for retention by the defendant M., the vendor, of any amount paid on account of the price, as liquidated damages for the non-fulfilment of the agreement. The plaintiff sued for specific performance or a return of the money paid:—*Held*, that, as the plaintiff had delayed two years in bringing his action, and the land had been sold in the meantime, he was not entitled to specific performance; but, the retention clause providing for something in the nature of a penalty, the Court could relieve against it, under s. 20, s.-s. 7, of the Supreme Court Act; and, the vendor having resold the land at a profit, there should be a return, not of the $1,000 but of the $14,000, less taxes for the period that the plaintiff was in possession.—*In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, and *Cornwall* v. *Henson*, [1900] 2 Ch. 298, followed. *Butchart* v. *Maclean* (1910), 15 W. L. R. 224.

Instalments — Default—Cancellation by vendors — Specific performance — Delay in seeking to enforce contract. *Battell* v. *Hudson's Bay Co.*, 9 W. L. R. 296.

Instalments — *Default—Cancellation of contract by vendor — Notice of cancellation —Post office address — Tender of amount due — Delay — Specific performance refused —Return of moneys paid — Forfeiture — Relief against — Costs.*] — Action by purchaser for specific performance of contract for sale and purchase of land. Instalments having become in arrears, notice was given to plaintiff at his post office mentioned in contract. He having moved to United States did not receive notice of cancellation:—*Held*, not entitled to specific performance, a year having elapsed before he tendered arrears. $2,000 as well as $62 taxes had been paid by plaintiff. Plaintiff relieved from forfeiture. Amount paid to be returned to him. *Hall* v. *Turnbull*, 10 W. L. R. 536, 2 Sask. L. R. 89.

Instalments — *Default—Cancellation of contract by vendor — Notice to purchaser— Incumbrances created by vendor amounting to more than instalments due — Vendor not entitled to instalments — Payment into Court — Specific performance — Transfer free from incumbrances.*] — Action by purchaser for specific performance of a contract for sale of land:—*Held*, that as incumbrances created by defendant amount to more than instalments due he is not entitled to cancellation of the contract, notwithstanding after attempted cancellation by plaintiff balance of purchase money was tendered, tender having been made in ignorance of incumbrances. Plaintiff having acted promptly is entitled to specific performance. Money to be paid into Court. *Keinholz* v. *Hansford*, 10 W. L. R. 534, 2 Sask. L. R. 86.

Instalments — *Default—Forfeiture of moneys paid — Substituted contract — Evidence — Notice — Counterclaim — Breach of covenant in restraint of trade—Damages —Misrepresentations — Judgment — Relief against forfeiture — Payment into Court— Possession — Costs.*]—Action for forfeiture of moneys paid to plaintiff, and for possession of certain property. Tailoring business and goods sold by plaintiff to defendant under an informal agreement. Plaintiff claimed that formal agreements were to be signed, but on the evidence that was held to be incorrect. Payment was by instalments, purchaser to be given 60 days' notice of quarterly payments before contract could be declared void: — *Held*, that plaintiff had made no misrepresentations as to the value of the business.—*Held*, that plaintiff entitled to relief, but as he has not carried out his agreement forfeiture now allowed. Defendant allowed damages for plaintiff carrying on work within restricted area contrary to agreement. Defendant to pay balance into Court before 1st May; on default, agreement declared void with other relief. *Dobson* v. *Doumani*, 9 W. L. R. 692, 2 Sask. L. R. 190.

Instalments — *Default—Forfeiture of sum paid — Relief against — Attempted cancellation — Time — Tender — Specific performances.*] — *Held*, affirming the judgment of Macdonald, J., 11 W. L. R. 350, Howell, C.J.A., dissenting, that the plaintiff (the purchaser) was entitled to be relieved from the forfeiture of the part of his purchase money paid, ensuing upon default of payment of subsequent instalments, under a clause in a contract for the sale and purchase of land, and was entitled, notwithstanding that time was made of the essence of the contract, to enforce specific performance, a proper tender of arrears having been made after notice of cancellation.—*In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, followed.—*Canadian Fairbanks Co.* v. *Johnston*, 18 Man. L. R. 589, 10 W. L. R. 571, approved. — *Steele* v. *McCarthy*, 7 W. L. R. 902, not followed. *Whitla* v. *Riverview Realty Co.* (1910), 14 W. L. R. 359.

Instalments — *Default—Forfeiture of sums paid — Time of essence — Invalidity of contract — Penal clause — Relief against forfeiture — Specific performance — Right of resale — Notice — Time — Liability of vendor to purchaser.*] — An agreement for the sale of lands contained the following clause: "Time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and all moneys paid hereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and resell the said lands, together with all buildings thereon, after giving twenty days' notice to the purchaser, and the purchaser covenants not to remove any buildings whatsoever that may be erected on said land:"—*Held*, that the clause was void in its entirety.—Where the purchase price is payable by instalments, a clause in an agreement making time of the essence so as to apply to the terms of payment is penal; and the Court will relieve against it, by granting specific performance to the purchaser who has remedied or offered to remedy his default with reasonable promptitude. — Independently of any express provision, a right of resale exists in favour of the vendor under an agreement of sale upon default by the purchaser.—*Noble* v. *Edwards*, 5 Ch. D. 378, followed.—But the vendor must first give a perfectly distinct notice of his intention to resell, and allow the purchaser a reasonable time within which to remedy his default.—Thus, where the vendor had resold, without having effectively either rescinded the contract or exercised his right of resale, the defendant was held entitled on his counterclaim to specific performance, or to recover the amount of surplus after the defendant had been charged with the original purchase price and interest, and credited with the purchase money paid by him, plus the selling price on the resale. *Moodie* v. *Young*, 8 W. L. R. 310, 1 Alta. L. R. 337.

Instalments—*Default — New agreement —Construction — Option or substantive agreement — Time — Forfeiture — Title— Specific performance.*]—Action by purchaser for specific performance. A document purported to be an option, but was construed to be a substantive agreement as the amount to be paid was uncertain, the title defective and payments had to be made to other parties. Time could not therefore be of the essence of the agreement. Specific performance granted with a reference. *Jones* v. *Morris* (1910), 12 W. L. R. 651.

Instalments — *Default—Notice—Rescission — Time — Construction of contract.*]

—An agreement for sale of land contained a proviso that, in default of payment of any of the instalments payable under it, the vendor should be at liberty to determine and put an end to the agreement and to retain any money paid, "in the following method, that is to say, by mailing . . a notice . . . intimating an intention to determine this agreement, addressed to the purchaser," and that at the end of twenty days from the time of mailing the same, the purchaser should deliver up quiet possession of the land to the vendor or his agent, immediately at the expiration of the twenty days:—*Held*, that the agreement could not be construed as providing that it could be cancelled immediately on default in payment of the money on the day fixed by the mailing of the notice provided for, but that the purchaser was entitled to the time specified to make good his default. *Paget* v. *Bennetto*, 7 W. L. R. 11, 17 Man. L. R. 356.

Instalments — Default — Notice of cancellation — Remedy by re-sale — Payment of taxes — Specific performance — Laches — Construction of contract — Election. *Manahan* v. *Hamelin* (Man.), 6 W. L. R. 469.

Instalments — Default — Notice of cancellation of contract — Resale by vendor — Action to recover deficiency — Forfeiture — Construction of contract. *Tofft* v. *Agnew*, 9 W. L. R. 610.

Instalments — *Default—Place of payment — Necessity for demand — Re-sale—Possession.*] — Upon an agreement to sell land, where the price is to be paid by monthly instalments, and in default of payment of any instalment, the vendor, who is not to part with the possession of the property, is to be at liberty at any time, after the maturity of any instalment, to retake the land without any expense and without legal proceedings, the payments already made being considered as rent; it is the duty of the purchaser to seek out the vendor and pay the instalments to him, the payment thereof being the condition of his right to continue to occupy the land, and he cannot defend himself against an action for the recovery of the land, for default of payment of instalments, by pleading that, in the absence of any provision for a place of payment, payment should have been demanded at his own abode.—The vendor, having, upon the purchaser's default, resold and promised to deliver possession to a new purchaser, has a sufficient interest to sustain a demand upon the first purchaser to put the second in possession. *Joyal* v. *Rochefort*, 17 Que. S. C. 12.

Instalments — Default—Remedy—Judgment — Sale of land. *Woodward* v. *Kosowan*, 7 W. L. R. 632.

Instalments — Default — Rescission — Notice. *Condell* v. *Lightfoot* (Man.), 5 W. L. R. 333.

Instalments — *Default—Rescission.*]—The plaintiff's claim was for payment of an instalment of the purchase-money overdue on an agreement of sale of a hotel property to defendant, which provided that, upon default in payment, the plaintiff might determine the contract by notice in writing. After the due date of the instalment defendant notified plaintiff that she would not carry out her contract, and about twelve days later plaintiff, without giving defendant any notice, entered into a binding agreement of sale of the property to a third party. He then brought this action:—*Held*, following *Sawyer* v. *Pringle*, 18 A. R. 218, *Sawyer* v. *Baskerville*, 10 Man. L. R. 652, and *McCord* v. *Harper*, 26 C. P. at p. 104, that the plaintiff had practically rescinded the contract of sale to defendant and could not thereafter sue upon it. *Parent* v. *Bourbonnière*, 20 C. L. T. 358, 13 Man. L. R. 172.

Instalments — Default — Rescission—Time of essence of contract — Intention of parties — Penalty — Forfeiture — Relief against — Provision of Judicature Act — Retroactivity — Interest — Notice of cancellation — Wording of contract — Blank in printed form — Counterclaim — Return of moneys paid. *Steele* v. *McCarthy* (N.W.T.), 6 W. L. R. 396, 7 W. L. R. 902.

Instalments—Default—Right of vendor to cancel — Delay — Tender — Re-sale. *Armstrong* v. *Ericson* (N.W.T.), 2 W. L. R. 185.

Instalments—Default—Time of essence —Right of vendor to rescind — Return of instalment or deposit paid — Provision for retention by vendor — Penalty or liquidated damages — Forfeiture — Relief — Set-off — Damages — Depreciation in property. *Skinner* v. *Shirkey & Morris* (Alta.), 8 W. L. R. 56.

Instalments—*Default—Time of essence —Waiver — Rescission — Notice — Specific performance — Instalment paid — Return to purchaser — Deposit — Forfeiture.*]—By an agreement in writing made between the parties on the 25th May, 1905, the defendants agreed to sell land to the plaintiff, for the price of $290; the purchase-money was to be paid in three instalments, the first of $100, which was to be (and was) paid down, the second of $75, which was to be paid in five months and three weeks, and the third, of $115, in eleven months and three weeks, and the latter two instalments were to bear interest at six per cent. until paid. The plaintiff was to be entitled to possession until default, and was to pay the taxes after the date of the agreement. The agreement was on a printed form, and one of its printed provisions was: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the time and in the manner above mentioned, the defendants are to be at liberty to resell the said lands." The plaintiff was given the privilege of paying the residue of the purchase-money at any time, and the defendants were to convey when the whole purchase-money should be paid. According to the evidence, the time for the payment of the plaintiff's purchase-money was arranged to correspond with the time when the defendants were required to make payments to one R., from whom they had purchased the land, with the object that they should be able to pay R. with the money which the plaintiff should

have paid them. The second instalment of the plaintiff's purchase-money fell due on the 15th November, 1905, and was not paid. In the following December the plaintiff asked O'C., the husband of one of the defendants, for a delay of two or three weeks, saying that at the end of that time he would pay the purchase-money in full; O'C. said that it would be necessary to consult the other defendant, and that he would let the plaintiff know by mail whether they would accede to his request. Not having received any word from O'C., the plaintiff waited until February, 1906, when he wrote to the defendants asking for his deed and telling them that he was ready to pay the purchase-money in full with interest. To this and two subsequent letters no reply was received. In April the plaintiff saw O'C., who said that the plaintiff would have to lose the $100, and that the defendants would "stick to the lots and the money as well." A formal tender was made and refused on the 23rd April, and this action for specific performance was begun on the 23rd May:—*Held*, Meredith, C.J.C.P., dissenting, that, in the absence of fraud, accident, or mistake, the provision that time should be of the essence was binding upon the plaintiff, and had not been waived by the defendants; that the latter had the right to rescind upon default in payment of the second instalment; that no formal notice of rescission was necessary; and that the plaintiff was not entitled to specific performance. *Barclay* v. *Messenger*, 22 W. R. 522, 43 L. J. Ch. 449, followed. *In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, and *Cornwall* v. *Henson*, [1899] 2 Ch. 710, [1900] 2 Ch. 298, distinguished. — *Held*, also, that the $100 paid by the plaintiff, not being a deposit, but an instalment of the purchase-money, was not forfeited, but was returnable to the plaintiff upon rescission, and he should be allowed credit for it upon the costs ordered to be paid by him. *Lebelle* v. *O'Connor*, 15 O. L. R. 519, 11 O. W. R. 95.

Instalments — *Default—Use and occupation — Contract — Rent.*]—The plaintiff had promised to sell land to the defendant for $1,000, upon which $50 had been paid. The difference, $950, was payable in 19 years by half-yearly payments of $25, with interest at six per cent., and the plaintiff was to give a deed when the defendant should have paid $500; but, if the latter should make default in two payments, he was to lose all his rights under the agreement, without reimbursement of the sums paid. By the same instrument the plaintiff leased the same land to the defendant for 10 years, at an annual rent of $57, which represented interest at six per cent. upon the $950, which rent was to be diminished according to the sums paid upon the purchase-price. The plaintiff having sued for one year's interest, the defendant alleged that, by default in payment of two instalments, the contract had been rescinded, and that he owed nothing:—*Held*, that the rescission of the contract was discretionary with the plaintiff, and that, in any event, as the defendant had had the enjoyment of the land for one year, he should, even in the case of his default to meet the two payments having effected the dissolution of the contract, pay to the plaintiff the year's interest as to the value of this enjoyment, for otherwise the parties would not be remitted to the same position as they were in before the contract. *Picard* v. *Renaud*, 17 Que. S. C. 353.

Instalments — *Default—Void clause of contract — Remedy — Damages — Specific performance — Rescission — Sale — Forfeiture — Default judgment — Practice—Notice of motion — Service — Relief other than that claimed — Setting aside order.*]—In an action by a vendor against a purchaser on an executory contract for the purchase of land, where the plaintiff is not merely seeking a declaration that he has effectively exercised a legally binding express provision for rescission, or a legally binding express provision or the implied provision for resale, he may claim, (1) damages, (2) specific performance, (3) rescission, (4) sale to realise vendor's lien.—In order to succeed the vendor must shew a good title.—Cases on forfeiture, cancellation, and vendor's remedies discussed, and *Great West Lumber Co.* v. *Wilkins*, 7 W. L. R. 166, 1 Alta. L. R. 155, applied.—Where a plaintiff applies for judgment against a defendant who has not appeared, either *ex parte*, or on notice not personally served, no relief will be granted him further or other than that expressly prayed or claimed by the statement of claim—This rule applied to the special circumstances of this case.—*Semble*, an order made against a defendant *in absentia* may be set aside by a Judge, on motion of the defendant, without the necessity of an appeal to the Court *en banc*. *Merriam* v. *Paisch*, 8 W. L. R. 340, 1 Alta. L. R. 262.

Instalments — *Default after first payment — First instalment not forfeitable as deposit — Rescission — Refund of instalment — Set-off — Vendor's damages — Interest — Occupation rent.*]—Where by the terms of an agreement of sale the purchase-money is payable by instalments, and a cash (or "down") payment is made and referred to in the agreement, the payment is not to be regarded as a deposit, and therefore forfeited, unless there is something specifically stated in the agreement to that effect. — *Semble*, that upon rescission by reason of default and abandonment of the purchaser, the purchaser is entitled to be refunded instalments of purchase-money paid by him, but that the vendor can set off damages occasioned by the purchaser's breach of contract, and a sum of money equivalent either to fair interest on the purchase-money or to a fair rental for use and occupation. *Tavender* v. *Edwards*, 8 W. L. R. 308, 1 Alta. L. R. 333.

Instalments — *Default after some payments — Action to recover subsequent instalments — Time of essence — Remedy on default — Rescission — Forfeiture—Relief against — Specific performance — Judgment for sale — Possession — Form of judgment.*] — Where an agreement for sale of lands provides that time shall be of the essence of the contract, and that on default in payment, the agreement may be cancelled, without any right on the part of the purchaser to any reclamation or compensation for moneys paid thereon:—*Held, per curiam*, that the effect of such a clause is to create a forfeiture, against which the Court will

relieve.—An action for cancellation or rescission merely on the ground of non-payment of purchase money is not maintainable; the vendor's proper remedy is by action for specific performance. In such an action, if the vendor is found entitled to specific performance, an order is made for the payment of arrears within a specified time, and upon default in payment the vendor may then move for an order for rescission; but, as this in some cases may constitute a forfeiture of the purchaser's interest in the land, the Court or Judge has power, under the Judicature Ordinance, s. 8, as amended by 7 Edw. VII. (Alberta) c. 5, s. 7, s-s. 8, to relieve against the forfeiture, by directing a sale of the lands, with proper directions, either on the application of the defendant, or *ex mero motu*, when the defendant has not appeared, even though the sale may be resisted by the plaintiffs. — In the circumstances of this case the trial Judge rightly exercised his discretion in directing a sale.—*Held, per* Stuart, J., dissenting in part, that the effect of the amendment of 1907 is not to give this Court any greater powers than are possessed and exercised by the Courts in England under their equitable jurisdiction. —A purchaser is entitled, in equity, to be relieved against the forfeiture of moneys paid on the purchase price, and to be protected in his right to acquire a title to the property on payment of the balance.—By ordering a sale the Court is in effect enforcing, not relieving against, a forfeiture. There is no discretion to order a sale, if the vendor refuses, and if payment of arrears is not made by a day named, the vendor is entitled, by order of the Court, to rescission.—In exercising this discretion the proper principle to be observed is that of *restitutio in integrum;* to restore the parties, as far as possible, to their antecedent position.—The Court will direct payment to the vendor of principal, interest, and costs on a fixed date; in default order rescission, upon payment into Court by the vendor of the moneys paid by the purchaser, less a fair rental for use and occupation of the premises and the plaintiff's costs of action; if the amount of the costs and rental value exceeds the amount paid on the purchase price, the plaintiff should have, in addition to the order for rescission and possession, judgment for the difference.—Remarks as to form and contents of decree, reference, and order on further directions. *Canadian Pacific Ry. Co.* v. *Meadows*, 8 W. L. R. 806, 1 Alta. L. R. 844.

Instalments — *Default of purchaser — Notice of cancellation of contract—Resale by vendor — Action to recover deficiency.*] — Plaintiff, by written agreement, sold certain lots to defendant. Some payments were made, and defendant defaulted as to others. Under a provision in the agreement plaintiff cancelled it, and having sold a portion of the property now sued defendant for balance of purchase money: — *Held*, that he could not recover. *Tofft* v. *Agnew*, 9 W. L. R. 610.

Instalments — *Default of purchaser — Rescission at option of vendor.*]—A stipulation in a contract for the sale of land, the price whereof is payable by instalments, that upon default by the purchaser in making any one of the payments within sixty days after it falls due, the contract of sale shall become void and the vendor shall have the right to retain all that he has already received as liquidated damages, is a binding contract for the benefit of the vendor, which the latter only can invoke upon default. The purchaser cannot take advantage of his own default in the fulfilment of a part of his engagement in order to free himself from the rest. *Péloquin* v. *Cohen*, 28 Que. S. C. 193.

Instalments — *Deferred conveyance — Default in payment—Remedy of vendor — Reading "or" as "and."*]—Where, in accepting an offer by V. for the sale of land, C. undertook to pay certain instalments of the purchase money before receiving the deed:—*Held*, that V. could sue for recovery of unpaid instalments, his remedy not being confined to an action in damages for breach of contract. *Laird* v. *Pim*, 7 M. & W. 474, distinguished. — The offer having been accepted by C., for "myself or assigns," to avoid holding the contract void for uncertainty as to the purchaser's identity, the word "or" was read as "and;" Idington, J., dissenting, on this point.—Judgment of the Court of Appeal in *H. H. Vivian Co.* v. *Clergue*, 16 O. L. R. 372, 11 O. W. R. 1014, maintaining that of a Divisional Court, 15 O. L. R. 280, 10 O. W. R. 758, affirmed. *Clergue* v. *Vivian (H. H.) & Co.*, 41 S. C. R. 607.

Instalments — *Interest — Construction of contract — Default — Notice of cancellation — Waiver — Tender — Demand of payment—Place of mailing—Mistake as to date of contract—Time of essence—Forfeiture — Relief against — Judicature Act.*]—Where an agreement of sale, in respect of which a "cash" or "down" payment had been made at the time of execution, provided for payment of the balance of the purchase price in instalments, and contained a covenant that the purchaser "shall pay . . . *the said sum* above mentioned, together with interest thereon . . . on the days and times," etc., etc.:—*Held*, that, as the words "the said sum" could not possibly refer to the whole purchase price, and as the total sum of the deferred payments was not mentioned, interest was only payable on each instalment as each fell due, and not on the whole balance of the purchase price.—The agreement provided that "time shall be of the essence . . . and unless the payments are punctually made . . . the said party of the first part may give to the party of the second part thirty days' notice in writing, demanding payment thereof, and in case such default shall continue, these presents shall, at the expiration of such notice, be null and void and of no effect; and the said party of the first part shall be at liberty to resell and convey the said lands to any purchaser thereof, and all the money paid thereon shall be absolutely forfeited to the party of the first part. The notice shall be well and sufficiently given, if delivered at the chief place of business of the party of the second part, or mailed at Red Deer post office under registered cover, addressed as follows: 'The Great West Lumber Company, Ltd., Red Deer, Alta.'" A notice dated the 16th April, 1907, addressed to the Great West Lumber Company, Ltd., Red Deer, Alta., was given by the vendor in the following terms: "Take notice that unless the instalment of $575 now due upon the agreement for purchase, etc., etc., dated March 14th, 1906, together with all interest ac-

crued upon the unpaid balance of principal purchase price, under the terms of the said agreement, is paid to me, on or before the 20th day of May, 1907, I shall, according to the provisions of said agreement, declare the same cancelled: "—*Held*, that the notice contemplated by the agreement was a direct demand, and that the notice in question not being an express, but merely an implied demand, and containing a notice that a subsequent specific act will be done by the vendor, was not a compliance with the agreement.—*Held*, further, that, as the notice inaccurately stated the date of the agreement, it was invalid on this account.—*Held*, further, that, as the notice demanded payment of more interest than was payable on a true construction of the agreement, namely, interest on the whole amount of principal, instead of upon the instalment that had fallen due only, the notice was bad on that account also. In order to form the basis of a forfeiture, the notice must strictly comply with every condition required by statute or contract, as the case may be.—*Held*, however, that the clause did not merely work a forfeiture against which under c. 5 of 1907 (Alberta), s. 7, s.-s. 8, or otherwise, the Court could, in its discretion, relieve; but, in view of the fusion of the Courts of law and equity, and the prevalence of the rules of equity over those of law, was, as a matter of legal construction, "bad" and void. — *Held*, however, that, if the purchaser had not merely delayed but abandoned or repudiated the contract, all his rights in it are gone, and the vendor may deal with the property and payments on account, as if the contract had never been made. — *Cornwall* v. *Henson*, [1900] 2 Ch. 298, and *Stringer* v. *Oliver*, 6 W. L. R. 519, discussed. — Cases on the question of liquidated damages or penalty, forfeiture, etc., reviewed. *Great West Lumber Co.* v. *Wilkins*, 7 W. L. R. 166, 1 Alta. L. R. 155.

Instalments — Interest — Subsequent conveyance of land and mortgage given to secure balance of purchase money—Merger of contract—Extinction of provisions of contract with respect to interest. *Purshall* v. *National Finance Co.*, 9 W. L. R. 497.

Instalments — *Payment of first instalment — Default in deferred payments — Time—Delay — Absence of provision for resale — Authorisation by purchaser — Resale by vendor — Rise in value of land — Tender of overdue payments — Action by purchaser for specific performance — Return of money paid — Resale considered as on joint account — Costs — Set-off of profit on resale.*]—The plaintiff asked specific performance of a contract for the sale of land to him by the defendant C., or, in the alternative, for rescission of the contract and a return of the first instalment of the purchase-money. The contract was made on the 19th February, 1907. The price was $1,600, payable $400 on the execution of the agreement, and the balance in four equal payments of $300 each, the last of which was to be made on the 19th August, 1909. The plaintiff covenanted that he would pay the several sums and interest as each of them became due, and C. agreed to convey on payment of the sums named and interest punctually at the times fixed. The agreement did not contain any stipulation that time should be of the essence, nor any provision for cancellation and resale upon non-payment. The plaintiff made the $400 cash payment, but no further payments. He did not occupy the land. Letters passed between the plaintiff and C., the plaintiff explaining that he was not able to pay the instalments, and C. pressing for payment. On the 29th May, 1908, the plaintiff wrote: "Cannot you make a big effort to sell these lots and relieve the situation?" On the 15th July, 1908, C. wrote giving the plaintiff notice that he (C.) would sell after 30 days, at the best possible price, and would look to the plaintiff to make up any deficiency. The plaintiff never replied to this letter, and C. made efforts to sell, but was unsuccessful until February, 1910, when he sold to B. for $1,500. On the 4th April, 1910, the plaintiff paid into a bank to C.'s credit the amount due under the agreement; but C. promptly returned the amount to the plaintiff. An unexpected rise had taken place in the value of the property, and the plaintiff had an offer for it of $2,500; hence his sudden activity: — *Held*, having regard to the plaintiff's conduct, that he was not entitled to specific performance. — C. mortgaged the property after the agreement for sale to the plaintiff was made and registered.—*Held*, that the mortgages did not affect the right of C. to be paid the instalments; and, if the right was affected, it would not help the plaintiff in his action for specific performance.—*Held*, also, that the plaintiff was not entitled to a return of the $400 paid.—*Howe* v. *Smith*, 27 Ch. D. 89, and *Sprague* v. *Booth*, [1909] A. C. 576, followed.—Review of the authorities.—*Held*, therefore, that the plaintiff must fail in the action and must pay the costs; but, as C. had intimated his intention of charging any deficiency to the plaintiff, and as C. contended that he was authorised by the plaintiff to sell, the resale might be regarded as made upon their joint account, and against the costs payable by the plaintiff should be set off any profit made by C. on the resale; C. crediting the $400 and the $1,500, and deducting the costs of the action and C.'s expenses of the resale and efforts to sell. *McCready* v. *Clark & Wootton* (1910), 14 W. L. R. 480.

Instalments — *Payment of part — Action for balance — Counterclaim for rescission — Misrepresentation by vendors and their agent.*]—Plaintiff sought to recover an instalment of purchase money on a contract for sale of land. Defendants counterclaimed for rescission of contract, and return of moneys paid, on grounds of misrepresentation.—*Held*, that there was no misrepresentation by plaintiff, but that defendants had relied on statement of an agent that he could sell the property for them at an advance. Judgment for plaintiff for amount claimed. *McCallum* v. *Hart*, 1 Sask. L. R. 482, 9 W. L. R. 338.

Instalments — *Possession — Default — Notice — Time — Waiver — Right of rescission — Attornment.*] — In an agreement for the purchase of land, with possession, purchaser covenanted, *inter alia*, that vendor should have power to enter and determine tenancy on default, and that notice of default addressed to purchaser at Vancouver, B.C., should be sufficient. Purchaser having become in default, and his address

changeable, vendor wrote to a firm of brokers who were in communication with him, after two demands for payment of moneys in arrear, desiring them to instruct purchaser of the cancellation of the agreement:—*Held*, affirming the judgment of Clement, J., at the trial, that the time allowed purchaser was not a waiver of the right of rescission under the agreement. *Scott* v. *Milne*, 8 W. L. R. 23, 13 B. C. R. 378.

Instalments — *Purchaser taking possession — Failure to make payments — Cancellation — Covenant — Damages.*] — 1. A person who goes into possession of land under an agreement of purchase by instalments is liable for damages for breach of contract if he fails to make the payments stipulated for, even when the vendor has cancelled the agreement for such default in pursuance of one of its provisions, but the vendor could bring no action upon the covenant for payment after such cancellation. — *Fraser* v. *Ryan*, 24 A. R. 444, and *Icely* v. *Grew*, 6 N. & M. 467, followed.—2. In such a case the damages allowed should include: (1) the value of any crop taken off the land by the purchaser after the cancellation; and (2) the amount of any diminution of the value of the land for which the defendant is responsible, as, for example, the cost of summer fallowing again a number of acres which were well summer fallowed when the defendant took possession, and of which work he had the benefit. *Harvey* v. *Wiens*, 4 W. L. R. 410, 16 Man. L. R. 230.

Instalments — *Purchaser taking possession — Payment of first instalment — Default as to second — Recovery by vendor of judgment for whole balance of purchase-price — Subsequent determination of contract by vendor for default — Retention of instalment paid — Effect of judgment — Right of purchaser to recover moneys paid — Terms of contract — Distinction between rescission and determination — Penalty or forfeiture — Judicature Act, s. 30 (5) — Equitable relief — Grounds for vacating judgment for purchase-money — Costs.*]— K. sold land to the plaintiff on terms of payment of the purchase-price by instalments. The plaintiff took possession, and paid the first instalment, and, before any other was due, brought an action against K. for rescission of the agreement for sale, on the ground of mistake and misrepresentation. In that action K. counterclaimed for payment of the entire balance of the purchase-price, having, under the terms of the agreement, declared the whole amount to be due and payable by reason of the plaintiff being in default as to the second instalment. That action was dismissed, and judgment was given for K. upon the counterclaim for the full amount. The plaintiff did not pay the amount of the judgment or any part thereof, and, after the judgment, K. determined the contract, under a clause in the agreement, and notified the plaintiff that he intended to retain the instalment paid as liquidated damages, as provided in the agreement. K. then sold the land to the defendant E. This action was brought against K. and E. to compel specific performance of the agreement, or, in the alternative, for damages for breach thereof:—*Held*, that taking judgment for the balance of the purchase-money did not deprive K. of the right to cancel the contract for default in payment of the purchase-money.—*Held*, also, that the plaintiff was not entitled to a return of the instalment he had paid.—In cases of agreements which do not contain a clause enabling the vendor upon default to determine the contract and retain the moneys already paid, he may rescind, and get back his land, but he must return to the purchaser the moneys paid (except perhaps the deposit); but where the agreement provides for determination of the contract and retention of the moneys paid, the vendor is not rescinding the contract when he determines it, and the purchaser's only remedy is to apply to the equitable jurisdiction of the Court to be relieved from the consequences of his default. And *semble*, that the determination of the contract is neither a penalty nor a forfeiture, within the meaning of s. 30 (5) of the Judicature Act, nor otherwise. — *Steele* v. *McCarthy*, 1 Sask. L. R. 317, 7 W. L. R. 902; *Hall* v. *Turnbull*, 2 Sask. L. R., 10 W. L. R. 536, and *Banton* v. *March*, 12 W. L. R. 598, discussed.—But, assuming in the plaintiff's favour that the retaining of purchase-money is a penalty against which the Court might relieve, a proper case was not made out for the exercise of the Court's equitable jurisdiction. The purchaser cannot come to a Court of equity relying on his own default He must first purge himself of that default, and that he can only do by coming to the Court ready and willing to perform all that he agreed to do in the contract. The plaintiff having not only failed to pay the balance of the purchase-money, but never having tendered or offered to pay it, could not be heard to say, "Give me my money back."—*Held*, also, that the plaintiff was not entitled to have the judgment on the counterclaim in the prior action vacated, although equity would restrain its enforcement as to costs.—*Jackson* v. *Scott*, 1 O. L. R. 488, followed. *Simmer* v. *Karst* (1910), 15 W. L. R. 58, 3 Sask. L. R. 304.

Instalments—Resale by purchaser—Default in payment of instalment—Action by vendor against purchaser and sub-purchaser —Forfeiture — Recovery of instalment — Cancellation of contract — Parties — Leave to sub-purchaser to apply. *Schurman* v. *Ewing & Moore*, 7 W. L. R. 610.

Instalments — *Right of purchaser to accelerate — Tender — Interest — Action for specific performance — Costs — Title.*] —A purchaser under an agreement of sale of land has no right to accelerate the due date of future instalments of the purchase money, even though he tender interest, at the rate provided by the agreement, up to the date of the final payment. If the purchaser, by reason of such tender, and upon refusal by the vendor, after demand, to execute and deliver conveyance, begins an action for specific performance, *semble*, the action will be dismissed with costs against the purchaser. —*Semble*, a purchaser cannot be compelled to make any of the deferred payments until the vendor can shew a clear title. *Rutherford* v. *Walker*, 8 W. L. R. 52, 1 Alta. L. R. 122.

Instalments—*Specific performance—Rescission by purchaser—Failure of vendors to make encumbered title — Statute of Frauds.* — Action for specific performance of an agreement to purchase plaintiffs' buildings, plant and machinery for $40,000, payable $10,000 cash, balance spread in 6 equal notes payable yearly. — *Held*, that conveyance was to be delivered on payment of cash and handing over notes, therefore, as existing encumbrances could not be paid off, then defendants had a right to rescind. Action dismissed, cash deposit to be returned to defendant. *Brandon* v. *Hanna*, 9 W. L. R. 570.

Instalments—Time of essence of contract —Acceptance of first instalment after default—Refusal to accept second — Notice cancelling contract—Issue as to waiver — Forfeiture of moneys paid — Relief against —Costs. *Stringer* v. *Oliver* (N.W.P.), 6 W. L. R. 519.

Instalments — *Written agreement silent as to possession—Collateral oral agreement for immediate possession by purchaser—Purchaser taking possession and re-selling—Default — Notice of cancellation — Vendor taking possession — Improvements — Interest—Right of purchaser to regain possession—Account of rents and profits—Estoppel.*]—Plaintiff, by written contract, agreed to purchase lands from defendant, to be paid in instalments. Plaintiff re-sold and purchasers went into possession and began cultivation. Plaintiff having made default defendant went on and spent a large sum on improvements. Subsequently, on plaintiff being served with notice of cancellation, all arrears were paid up. Plaintiff sued for possession and accounting of rents and profits. —*Held*, that there was a collateral oral agreement by which plaintiff entitled to immediate possession when contract entered into. He is also entitled to rents and profits from date of contract, defendant to be allowed for reasonable expenses and some allowance for improvements to the land. *Halsey* v. *Marshall*, 10 W. L. R. 321.

Judgment for purchase-money — *Subsequent rescission by vendor.*]—A vendor obtained judgment against a purchaser for certain instalments of the purchase money, less a sum allowed to the purchaser by way of set-off. The agreement for sale provided that the vendor might rescind in case of default, and that all moneys theretofore paid should be forfeited; and, after execution under the judgment had been returned unsatisfied, and after default in payment of further instalments, the vendor gave notice of rescission:—*Held*, that he was entitled to do this, and that his doing so did not entitle the defendant to an order setting aside the judgment and for payment to him of the amount allowed by way of set-off. *Jackson* v. *Scott*, 21 C. L. T. 227, 1 O. L. R. 488.

Land outside of province—*Defendant resident out of the province—Action for purchase money — Default — Specific performance — Rescission — Forfeiture — Jurisdiction.*]—The defendant agreed in writing to purchase land in Saskatchewan from the plaintiff and to pay for it in instalments. There was a proviso in the agreement for cancellation by the plaintiff upon default after notice, and a covenant that, in the event of default, the whole purchase money should become payable. In an action in the Court of King's Bench, Manitoba, to recover the balance due, upon default, the defendant contended that, as the land was not in Manitoba, and the defendant did not reside there, the Court had no jurisdiction:—*Held*, that the contract was to be treated as containing no provision regarding forfeiture; and under such a contract the Court, upon it appearing that the defendant was in default, has jurisdiction to order that the purchaser perform his contract within a reasonable time, and to declare that, in default, the contract is rescinded. In such cases the Court acts *in personam*, and its right to so act is not limited to cases where the property purchased is within the jurisdiction. *Burley* v. *Knappen* (1910), 13 W. L. R. 715.

Lien of vendor *for unpaid purchase money — Death of purchaser — Action against executors — Addition of devisees as defendants — Judgment declaring lien — Reference — Costs.*] — In an action by executors of the will of Alfred Hayward to recover from defendants, executors of the will of William Hayward, $3,800 and interest under a covenant to pay $225 a year to Alfred Hayward, during his life, it was *held*, that plaintiffs were entitled to a lien on the lands conveyed for the amount due. Judgment of Riddell, J. (1909), 14 O. W. R. 59, affirmed. *Ferguson* v. *Hayward* (1909), 14 O. W. R. 617.

Making the contract—*Stipulation for formal contract — Waiver.*] — Action to recover payment of an instalment of purchase money under an agreement of sale of land in the form of a written option signed by the plaintiffs and accepted in writing by the defendant. The option contained all necessary terms of the proposed purchase, including a provision that, should the defendant sell any portion of the lands, the plaintiffs would execute a transfer or conveyance of the lands sold, provided that the amounts had been agreed upon between the plaintiffs and defendant, and, in the event of their being unable to agree, then provided that the selling price was at a fair valuation to be determined by named arbitrators. It contained also a clause providing that upon the exercise of the said option a formal agreement of sale should be entered into between the parties containing such terms and conditions as are suitable and usually contained in the form of an agreement of sale in common use by a firm of solicitors named. The letter of acceptance also contained the defendant's statement: "I shall be pleased to have you arrange for the preparation of the formal agreement of sale." No formal agreement was ever prepared or executed, but the defendant, before the due date of the instalment sued for, entered into an agreement for the sale of a considerable portion of the property, and applied and obtained a conveyance of such portion from the plaintiffs, upon payment of an amount agreed upon between the parties: — *Held*, that there was a completed contract between the parties, enforceable by the plaintiffs, notwithstanding the absence of the more formal agreement contemplated. — The principles laid down in *Chinnock* v. *Marchioness of Ely*, 4 De G. J. & S. 638, and *Rossiter* v.

Miller, 3 App. Cas. 1124, adopted.—2. That, if it had been otherwise, the defendant had waived his right to have a formal agreement executed, by making the sale referred to. *Munroe* v. *Heubach*, 18 Man. L. R. 450, 10 W. L. R. 196.

Money paid for interest in land — *Syndicate — Change in contract — Absence of assent — Return of moneys paid — Evidence.*]—Plaintiff thought he was purchasing a one-fourteenth interest in a syndicate property, whereas he really would have got that part of four-sevenths of the property. He was held entitled to a refund of what he had paid. *Drury* v. *Dart* (1909), 12 W. L. R. 520.

Opening of street—*Access to land cut off—Recovery of purchase money paid—Improvements.*]—When a lot in a town was sold bounded on one side by land reserved for an intended street (*une rue projetée*), and the purchaser remained in possession of it for a space of 23 years, after which the intended street was laid open by the municipal authorities, but with a reduction of 10 feet in its width, so that a strip was left between it and the lot, thus cutting off access from one to the other:—*Held*, that an action lay by the purchaser against the seller to recover the price paid for the lot and the cost of improvements made thereto by him during his possession. *Courberon* v. *Grant*, 31 Que. S. C. 197.

Part payment by conveyance of other land — *Option of payment in cash —Election — Evidence — Delay.*]—*Held*, that plaintiff never elected to demand transfer and thereby abandon his right to the money. Judgment for plaintiff. *Rowes* v. *Christie*, 11 W. L. R. 565.

Affirmed (1909) 12 W. L. R. 497.

Payable by instalments — *Default — Action for balance — Defence — Abstract of title not produced — Conveyance not tendered — Right to recover — Construction of contract — Judgment — Reference as to title—Direction to convey on payment of claim and costs.*]—The plaintiff and defendants on the 6th May, 1907, entered into an agreement for the sale of land by the plaintiff to the defendants for $3,420, payable in instalments upon named days extending for one year from the date of the agreement. The defendants covenanted to pay these sums to the plaintiff on the days named, and to pay interest. The defendants paid the first instalment and part of the second, but made no further payments; and, after the time for payment of the last instalment had elapsed, the plaintiff brought this action upon the covenant to recover the balance due. At the time the agreement was entered into, the plaintiff had only an equitable title to the land by virtue of an agreement for the purchase of it, but he acquired the legal title on the 22nd January, 1908, and had issued to him a certificate of title free of incumbrance. After the last instalment became due, the plaintiff notified the defendants that the purchase-price was due, and demanded payment. The defendants paid no attention to this demand. The plaintiff testified that he had a clear title to the property, and that he was prepared to execute a conveyance to the defendants upon being paid the balance of the purchase-money. No abstract of title was procured or shewn to the defendants or either of them:—*Held*, in these circumstances, that the omission to produce and shew an abstract of title was not a defence to the action; the purchaser has a right to require that a good title, free from incumbrances, be shewn; but he cannot rest and say nothing and do nothing, pay no attention to the contract, and then be held not liable for the purchase-money, if the vendor is in a position to make out a good title, because the vendor has not produced an abstract before action brought. —Review of the authorities, and remarks upon the inapplicability of many of the English and Ontario cases by reason of the difference in conditions as to registration of title—the registration in Saskatchewan being conclusive to some extent.—If the defendant had expressed himself dissatisfied with the title which the plaintiff had to offer, it was quite open to him to ask for a reference; but he did not choose to do so.—No conveyance of the property was prepared or tendered to the defendants. The agreement contained the covenant of the defendants to pay and the covenant of the plaintiff, "on payment of the said sums of money," to convey:—*Held*, that the payment of the money was a condition precedent to the making of the conveyance, and it was not necessary for the plaintiff to tender a conveyance before action; but there should be a reference as to title.—Judgment of Johnstone, J., in favour of the plaintiff for recovery of the balance of the purchase-money, varied by directing a reference as to title, and that the plaintiff should, upon title being shewn, and his claim and costs being paid, execute a conveyance to the defendants. *Maybery* v. *Williams* (1910), 15 W. L. R. 553, 3 Sask. L. R. 350.

Payable by instalments — *Default — Cancellation — Acquiescence — Return of first instalment paid — Counterclaim — Wrongful seizure of crop.*]—Appeal by the defendants from the judgment of Prendergast, J., 15 W. L. R. 206, dismissed. *Miller* v. *Sutton* (1910), 15 W. L. R. 632, Man. L. R.

Payable by instalments — *Default — Notice of cancellation — Non-compliance with contract — Tender of amount due — Refusal to accept — Specific performance.*] — The defendants, in May, 1905, agreed to sell land to the plaintiff for $3,200, payable $600 on the execution and delivery of the contract, and the remainder in deferred annual instalments with interest. The agreement contained a clause by which, in case of default on the part of the plaintiff in paying the instalments, the defendants were to be at liberty to declare the agreement null and void by giving 30 days' notice in writing to that effect, and thereupon all the rights and interests of the plaintiff under the agreement were to cease, and the premises to revert to and revest in the defendants, without any further declaration, forfeiture, or notice, and without any right on the part of the plaintiff to any reclamation or compensation for moneys paid thereunder. The plaintiff made the first payment of $600, and went into possession. No further payments were made; and in April, 1909, the defendants

served on the plaintiff a notice which referred to the contract and the instalments to be paid thereunder, which set out the default of the plaintiff, and notified him that the "contract is now declared null and void in accordance with the terms thereof as above stated." The plaintiff then made a tender of the amount unpaid under the agreement, and asked for a conveyance. The defendants refused to accept the money or to make a conveyance. The plaintiff then brought this action, wherein he claimed specific performance, or a return of the $600, and further and other relief:—*Held*, that the notice of April, 1909, was not the notice provided for in the agreement; it was not a 30 days' notice; and could not of itself have the effect of putting an end to the contract. To entitle the defendants to determine the contract, and retain for themselves the money paid, they must strictly comply with the requirements of the agreement; and, not having done so, they were in the same position as if there was no such clause in the agreement as that providing for cancellation by notice. And, considering the agreement without that clause, the defendants' notice had not the effect of rescinding the contract, the default of the plaintiff not being such as to amount to an abandonment or repudiation by him of the contract. Abandonment of a contract is to a certain extent a matter of intention. The plaintiff's default, of three years' duration, would be some evidence of abandonment; but, in view of other facts and circumstances (set out below), the failure to pay the instalments did not indicate an intention to abandon. In his statement of claim the plaintiff alleged that the agreement was still a subsisting one at the time the action was commenced; in his reply he explicitly denied that the notice terminated the contract; and nowhere in the pleadings did he allege an acceptance of the notice. The trial Judge held that the plaintiff was not entitled to specific performance, but gave judgment for the return of the $600. From that judgment the defendants appealed. During the hearing of the appeal, counsel for the plaintiff stated that he accepted the notice as terminating the contract, and asked the Court so to consider it.—*Held*, that it was not open to the plaintiff's counsel on appeal to set up a state of facts diametrically opposite to that on which he went to trial. The refusal to grant the equitable relief of specific performance did not terminate the contract; its effect was to leave the parties to their remedies at law. A purchaser can be entitled to a return of the purchase-money paid only after the contract has been rescinded, either by the parties themselves or by the Court. But the plaintiff's alternative claim for a return of the $600 must carry with it a claim for a rescission by the Court, for the Court cannot grant the relief asked for while the contract is still subsisting. The pleadings were, therefore, sufficient to enable the Court to direct a return of the purchase-money paid, if the plaintiff was entitled to have it returned.—*Held*, also, that the $600 was an instalment of the purchase-money, and not a deposit, and there was no agreement, express or implied, that it should be forfeited, other than the clause in the contract within which the defendants did not bring themselves by giving proper notice; and, the vendors having refused to accept the balance of the purchase-money and convey the land, the plaintiff was entitled to have the contract rescinded and the purchase-money returned to him, on the principle laid down in Williams on Vendors and Purchasers, p. 950. It is only in cases where the purchase-money has been forfeited to the vendor, that it is necessary to appeal to the equitable jurisdiction of the Court for relief, under s.-s. 5 of s. 30 of the Judicature Act. The defendants' refusal to carry out the contract entitled the plaintiff to have the contract declared to be rescinded, and, as there had been no forfeiture, to a return of the moneys paid, less any damages which the defendants had suffered; but, as no damages were claimed, the $600 should be returned in full. Judgment of Johnstone, J., 12 W. L. R. 598, affirmed. *Banton* v. *Marsh Bros. & Wells* (1911), 16 W. L. R. 338. Sask.

Payable by instalments — *Default — Notice terminating contract — Clause of contract entitling vendor to retain money paid.*] — In November, 1907, the plaintiff and defendant entered into an agreement in writing by which the plaintiff agreed to sell to the defendant certain lots of land, with the privileges and appurtenances appertaining thereto, including a livery barn and a machine or implement business carried on upon the premises, for $8,000, payable $2,000 on the execution and delivery of the agreement, $2,000 on the 4th December, 1907, and the balance in four equal annual instalments. The agreement contained a provision by which, on default of payment by the defendant of any moneys due under the contract, the plaintiff had the right to declare the contract null and void, by written notice to that effect, personally served upon the defendant, and thereupon all the rights of the defendant under the contract should cease and determine, and the land should become revested in the plaintiff, without any further notice and without any right on the part of the defendant to any reclamation or compensation for moneys paid thereon. The defendant made the cash payment of $2,000, and entered into possession. He failed to make the payment due on the 4th December. On the 31st December the plaintiff served upon the defendant a notice, in proper form, declaring the contract null and void. The defendant refused to give up possession, and the plaintiff brought this action, for a declaration that the agreement was null and void, for possession, and for a declaration that the $2,000 paid should remain her property. The defendant admitted the agreement and set up that he had paid $2,000 thereon, but alleged that the plaintiff had not performed her part of the contract, and had on the 31st December cancelled it and refused to return him the $2,000; and he counterclaimed for a return thereof. The trial Judge held that the plaintiff had performed the contract, as far as any obligation thereto rested on her, but that the defendant had made default, and the plaintiff had cancelled the contract in accordance with the terms thereof, and gave judgment declaring the contract rescinded and the plaintiff entitled to possession of the premises, and he dismissed the counterclaim:—*Held*, *per curiam*, that an appeal by the defendant from the part of the judgment dismissing the counterclaim should be dismissed. *Per* Lamont, J.:—The

contract having provided that, on default by the defendant in the payment of the purchase-money, the plaintiff might cancel it, and the plaintiff having given a proper notice cancelling it, the contract was at an end, and the premises became revested in the plaintiff without any right of reclamation on the part of the defendant of the $2,000. That was the contract of the parties. Were it not for the clause taking away the right of reclamation, the defendant would be entitled to be restored to his original position: Williams on Vendors and Purchasers, p. 951. This clause prevented that, and in effect worked a forfeiture of the defendant's right to such restitution, against which the Court had jurisdiction to relieve: Judicature Act, sec. 30, sub-sec. 5. But, before a party appealing to the equitable jurisdiction of the Court is entitled to relief, he must make out a proper case therefor; and, in view of the circumstances in evidence, the defendant had not made out such a case. He was not now, nor had he ever been, ready and willing to pay the instalments of purchase-money. He did not ask that the plaintiff should be compelled to carry out the contract, because he was not in a position to perform his part of it if she were willing. He had not done equity to the plaintiff, and was, therefore, not in a position to ask a Court of equity to consider the merits of his case. *Per* Brown, J.:—The defendant's whole ground of defence, and the sole basis of his counterclaim, was that the plaintiff agreed to transfer to the defendant certain implement agencies which formed part of the implement business, and that she failed to carry out her contract in this respect. On this point the trial Judge found against the defendant, and the defendant had not appealed from that finding. Having accepted that finding, and not having asked by his pleadings to be relieved from the forfeiture clause of the agreement, he was precluded from contending on the appeal that he should be so relieved. But, apart from the question of pleading, the defendant was not entitled to be relieved, having regard to all the circumstances of the case. Judgment of Prendergast, J., 10 W. L. R. 145, affirmed. *Hole* v. *Wilson* (1911), 16 W. L. R. 352. Sask. L. R.

Payable by instalments — *Default* — *Termination of contract* — *Retention of moneys paid.*] — In October, 1906, the defendants agreed to sell land to the plaintiff for $500, payable $60 in cash and the balance in deferred monthly payments of $20 each, with interest. By a clause in the contract, in default of payment of the instalments on the days named, the defendants were to be at liberty to determine the agreement and "to retain any sum or sums paid thereunder as and by way of liquidated damages." The plaintiff made payments amounting to $310.20, the last being $40 in December, 1907. In June, 1908, the defendant gave the plaintiff notice, in accordance with the contract, that the agreement was determined; and in April, 1909, conveyed the land to another for $300. In July, 1910, the plaintiff brought this action, for specific performance or damages or relief from the forfeiture of the moneys paid: —*Held*, that specific performance was out of the question; but, the Court could relieve from the forfeiture of the money paid. *Whitla* v. *Riverview Realty Co.*, 14 W. L. R. 359, 19 Man. L. R. 746, specially referred to. Equitable relief, however, will not be granted where injustice to another would result; and, as it appeared that the property had depreciated in value, the loss therefrom should be borne by the defaulting plaintiff; the defendants should be ordered to repay the moneys paid, less the amount of the loss on the resale. *Dalziel* v. *Homeseekers' Land Co.* (1911), 16 W. L. R. 406, Man. L. R.

Payable by instalments — *Default* — *Termination of contract by vendor.*] — By an agreement in writing, under seal, dated the 14th June, 1907, the plaintiffs agreed to purchase an undivided third interest in certain lands from the defendant, for $11,150, part of which was payable, and was paid, at the execution of the agreement, and the remainder of which was payable by deferred instalments with interest. The agreement contained the following provisions: (1) that in the event of default being made in the payment of principal and interest or any part thereof, the whole purchase-money should become due and payable; (2) that, upon such default, the defendant should be at liberty to determine and put an end to the agreement and to retain any sum or sums paid thereunder as and by way of liquidated damages, upon giving notice in a prescribed manner; (3) that time should be in every respect of the essence of the agreement. The plaintiffs made default as to the first deferred instalment; and the defendant, on the 16th November, 1907, terminated the agreement by notice in the manner prescribed. On the 14th May, 1908, the plaintiffs offered to pay the defendant the amount to which they would then have been liable under the agreement had it not been terminated, and were about to tender the amount, which they had with them in a bag, when the defendant escaped from them. The money was not their own, but was temporarily raised for the occasion, when it became plain that the land had increased in value. The action was brought in September, 1909:—*Held*, upon the evidence, that the plaintiffs were never ready, willing, and able to carry out their contract, which had been virtually abandoned by them before the date of the cancellation by the defendant; and they were, therefore, not entitled to enforce specific performance. The plaintiffs, in their statement of claim, alleged cancellation and termination of the contract by the defendant, and this was admitted by the defendant in his statement of defence. No waiver was alleged. The plaintiffs purchased at $11,150, of which they paid $5,340.96. The defendants sold the property in December, 1907, at $75 an acre; and, at that price, considering the sum agreed to be paid by the plaintiffs, he lost a considerable sum through the failure of the plaintiffs to carry out their contract. The plaintiffs sought relief against forfeiture and asked for a return of the $5,340.96.—*Held*, not a case in which equitable relief could be given. *Steele* v. *McCarthy*, 1 Sask. L .R. 317, 7 W. L. R. 902, followed. The defendant did not put an end to the contract merely for the purpose of gain, or for some other reason against which a Court of equity might grant relief, but

merely to save himself from loss; and the effect of ordering a restitution of the purchase-money would be to place a premium on wrong-doing. *Enkema* v. *Cherry* (1911), 16 W. L. R. 480, Sask. L. R.

Payment—*Purchase of lots from city corporation.*]—Action for balance of purchase money for sale of two lots. Plaintiffs claimed that they had sent the transfer of these lots to defendant in error. The transfer contained the usual acknowledgment of the receipt of the purchase money, which plaintiffs say was not paid, and defendant claims was. The onus being on plaintiffs, action dismissed. *Regina* v. *Garrett* (1909), 12 W. L. R. 96.

Payment — *Time* — *Default* — *Rescission.*]—A stipulation upon a sale of land upon terms of credit that time shall be of the essence of the contract does not constitute a binding contract and does not give a right to the vendor to claim rescission of the sale in default of payment of the price at the time agreed upon. *Carroll* v. *Drolet*, 16 Que. S. C. 329.

Payment of full purchase-price — *Receipt given inapplicable to such payment — Consensus ad idem not reached—Subsequent signing of application — Restrictions on purchase — Specific performance — Return of money paid — Pleading — Amendment.*] — The plaintiff paid the defendants $1,500, the full purchase-price of certain lots of land, and accepted from the defendants a receipt for that sum, stated therein to be "the first payment" made by the plaintiff for the purchase of the lots, and stating also that the receipt was "subject to the terms of application, conditions, and completion of agreement of purchase for above property. The defendants intended to sell all the lots in the tract in which the lots in question lay, subject to certain restrictions, which were indicated in a transfer afterwards offered to and refused by the plaintiff, as follows: "Subject to the reservations of mines, materials, coal, and valuable stones in or under the said land, and subject to caveat No. 2096." By the caveat the defendants claimed "an interest under agreement of sale," in the whole tract, "for the purpose of preventing the purchaser from using the property" for certain purposes. The plaintiff signed no application before or at the time he paid his money, but afterwards, upon one being sent to him, signed it and sent it back, but, in his letter enclosing it, pointed out that it was not applicable to his case, as he had paid for the lots, and a clear title was "due to him." The application stated that he agreed to purchase subject to the restrictions and covenants. The plaintiff sued for specific performance, that is, for a transfer of the land free from restrictions insisted upon by the defendants: —*Held*, that there was no *consensus ad idem*, and the plaintiff was not entitled to specific performance.—*Held*, also, that the defendants were not entitled to stand upon the legal position that there was a contract, binding in law, in the terms indicated by the transfer tendered by them, and that, if the plaintiff did not choose to accept the transfer, the defendants might retain the $1,500; the plaintiff was not precluded from proving, in an action for the return of the $1,500, that he had not consented to the special provisions set forth in the caveat.—*Hussey* v. *Horne-Payne*, 4 App. Cas. 322, followed.—The signing of the application failed to bring about a complete agreement evidenced by writing; and what followed was disagreement rather than agreement.—*Held*, therefore, that the plaintiff was entitled to a return of the $1,500, upon a permitted amendment of his pleading.—Judgment of Stuart, J., varied. *Dobell* v. *Grand Trunk Pac. Devel. Co.* (1910), 15 W. L. R. 149.

Payment of money — *Condition—Nonfulfilment—Action for return of money — Authority of agent—Parol evidence to shew condition upon which written contract was signed—Admissibility of—Consistency or inconsistency with terms of written contract.*] —Plaintiff brought action to recover $480 paid by plaintiff in April, 1908, to one Webster as agent of defendants, in connection with a proposition of defendants that a syndicate would be formed to purchase 10,000 acres of land in Saskatchewan. Plaintiff alleged that it was agreed that if the syndicate was not completed—if purchasers were not secured for the whole 10,000 acres—the money paid would be returned. The syndicate was not completed; only 2,880 acres were subscribed for. Plaintiff subscribed for 960 acres and paid Webster $480 by cheque in favour of defendants, who cashed it. Defendants pleaded that the $480 had been forfeited.—Latchford, J., *held*, that Webster represented to plaintiff that defendants would return the money in the event of the syndicate not being completed, and entered judgment for plaintiff for $480 with interest and costs.—Divisional Court affirmed above judgment, Meredith, C.J.C.P., *dissenting.*—*Ontario Ladies College* v. *Kendry*, 10 O. L. R. 328, 5 O. W. R. 605, followed. *Carter* v. *Can. Nor. Rw. Co.* (1911), 18 O. W. R. 42, 1 O. W. N. 892, 2 O. W. N. 639, O. L. R.

Payment of part purchase-money in cash—*Default in defence payment—Notice of cancellation — Resale — Action for refund of part paid—Legal right—Equitable relief against forfeiture—Circumstances of case.*]—The defendant agreed to sell land to the assignor of the plaintiffs for a price to be paid half in cash and the other half by deferred payments. The cash payment was made, but there was default as to the first deferred payment, and the defendant gave a notice in writing of cancellation of the agreement, stating his intention to resell and call on the purchaser for any deficiency, in this purporting to follow the terms of the contract. The contract undoubtedly provided for a notice of cancellation on default, and the notice was given and accepted by the plaintiffs as a notice of cancellation. The plaintiffs sued for a return of the cash payment, alleging the default, the notice, a resale by the defendant, depriving the plaintiffs of their right of redemption, and claiming a declaration that the agreement was rescinded, and a refund of the cash payment and interest:—*Held*, that it was not open to the plaintiffs to contend that the notice was not sufficient; and the fact of the resale, if it took place, was not material:—*Held*, also, that the plaintiffs had no legal right to a return of the moneys paid, and no right to equitable relief from the forfeiture of these moneys, which was provided for by

the terms of the contract—in all the circumstances (set out below) the equity of the case not being with the plaintiffs.—Judgment of Sifton, C.J., affirmed. *Sanders* v. *Thomlinson* (1910), 13 W. L. R. 121.

Penal clause and charge laid on donee—*Sale by decree of immovables subject to lien on the donation — Judgment liens.*]—A penalty of a thousand dollars in case of the alienation of goods given, stipulated in a gift of immovables made in a rent charge service and other protestations forms no part of these charges nor of the obligations that spring direct from contract. Hence, the sale by decree of immovables given, subject to the charge of the donor "to pay, acquit and fulfil all the obligations imposed on the donee by the deed of gift," does not render the latter liable to the penalty incurred before the execution and does not compel him to repay that amount to a third party who had paid it to the donor with the subrogation of the rights of the latter. *Belanger* v. *Ouellet*, 18 Que. K. B. 369.

Promissory note given for part of purchase-money — *Issue as to whether taken in payment — Default — Cancellation of contract — Pleading — Evidence.*]—On the 7th February, 1908, the plaintiff entered into an agreement with the defendant for the purchase from the defendant of certain land of which the defendant held an agreement for sale from one L. The price to be paid by the plaintiff was $2,240, to be paid as follows: $1,000 by the delivery of a certain stallion upon the execution of the contract; $200 on or before the 1st November, 1908; and the balance by the plaintiff assuming the L. contract—such assumption to take place upon the payment of the $200 on the 1st November, 1908. At the time of the execution of the agreement, a promissory note for the $200 to be paid on the 1st November, 1908, was made by the plaintiff in favour of the defendant, payable on that day; and the horse was handed over to the defendant. The contract contained a clause providing that, upon the purchaser's default in making any of the payments, the vendor should be at liberty to cancel the contract and retain any payments made on account thereof, and that time should be considered of the essence of the agreement. The plaintiff did not make payment of the note when it became due, or at all; and the defendant, on the 12th February, cancelled the contract by notice in accordance with the provision of the contract. The plaintiff then brought this action for a declaration that the notice of cancellation was void and for specific performance of the contract, or, in the alternative, for the return of the note and for the value of the horse. The plaintiff, by his pleading, alleged that the note was given and accepted in lieu of the $200, and that, at the time it was given, it was understood and agreed that the defendant would immediately execute and deliver to the plaintiff an assignment of the L. contract; and that his reason for failure to pay the note was that the defendant had not executed and delivered the assignment as agreed. The defendant pleaded that the note was given as collateral security only, and that the plaintiff was not entitled to an assignment of the L. contract until the note was paid. The evidence at the trial shewed that, at the time of the execution of the contract, the defendant agreed to forward the L. contract and an assignment thereof to the office of W., a conveyancer, to shew title, and that the documents were to remain in the possession of W. until the note was paid; and that the defendant failed to forward either the contract or the assignment; but this was not alleged in the pleading, and no amendment was asked for:—*Held*, that the question suggested by this evidence, not being raised by the pleadings, should not be considered; and the sole issue to be determined was, whether the note was given in full discharge of the covenant in the agreement for the payment of $200. And *held*, upon the evidence, that that issue must be determined against the plaintiff.—*Held*, therefore, following *Steele* v. *McCarthy*, 7 W. L. R. 902, that the defendant had a right to cancel the contract, and it was at an end; and the plaintiff was not entitled to any relief on the ground which alone he had set up. *Midgeley* v. *Bacon* (1911), 16 W. L. R. 496, Sask. L. R.

Reformation — Omission of provisions as to acceptance of whole purchase money—Mistake — Abandonment of option — New agreement—Costs. *Heath* v. *McLenaghan* (Man.), 5 W. L. R. 358.

Rights of the purchaser—*Danger of eviction — Hypothec to guarantee a claim payable only after purchase price—Right to security and how it should be demanded.*]—The purchaser of an immovable property, when sued for the recovery of the purchase price, cannot set up, in a plea to the merits, the danger of eviction resulting from a hypothecary debt, which he has bound himself to discharge, and which is payable only after the purchase-price claimed by the action.—When there is danger of eviction from a hypothec registered on his property, the purchaser has but the right to obtain security from the party suing him for the purchase-price, and this ground of defence should be set up by dilatory exception. *Alain* v. *Parent* (1910), 37 Que.. S. C. 473.

Sale by vendor to another—Application of purchase money — Payment of mortgage—Subrogation to rights of mortgagee. *Quider* v. *Hedges*, 3 O. W. R. 555.

Sale of land at auction en bloc — *False bidding — Part payment.*]—Where an immovable composed of several lots is sold at auction *en bloc*, in pursuance of notice of sale, a sum paid on account of the purchase price should be deducted from the total price, and one of the purchasers cannot escape the consequences of false bidding by saying that he has paid his part. *Marceau* v. *Morin*, 5 Que. P. R. 349.

Separate agreement as to profits — *Condition — Defect in title — Right of vendor to recover on condition — Right of purchaser to set up defence of defect of title — Judicial admission — Specific performance.*]—The appellant, by notarial deed, sold to the respondents certain immovable property, the price of which was acknowledged in the deed to have been fully paid. By another notarial agreement, executed at the same time, the appellant deposited with the respondents a sum of money equal to one-

third of the price, the condition being that the respondents should pay him one-third of the profits made by them by selling the property in lots, but he reserved the right to demand the return of this deposit if he were dissatisfied with their management of the enterprise: — *Held*, that the two contracts must be deemed to be, and were, distinct and independent transactions — the one being an absolute sale of the property to the respondents, and the other a joint venture with them, for the disposal of the property in lots. And the appellant, having exercised his option to take back his deposit, was entitled to recover the same, and the respondents could not, by dilatory exception, set up a defect in the title of the property transferred by a deed of sale, or ask, under Art. 1535, C.C., that the disturbance be removed before repayment of the deposit, the respondent's recourse against a defect in title being by a separate action against the appellant as warrantor. 2. Where ambiguity exists in one or more of the answers of a party examined as a witness, an isolated expression cannot be detached from the context, to serve as a judicial admission for the purpose of making proof against an authentic act. 3. In case of uncertainty, the law which the parties have made for themselves in the text of contracts formally executed by them, should be literally enforced by the Courts. *Anderson* v. *Provost*, 13 Que. K. B. 458.

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11. RESCISSION.

Abandonment by purchaser—*Cancellation by vendor—Action by purchaser for return of moneys paid.*]—Action to recover an amount paid by a purchaser under an agreement for purchase of land:—*Held*, that as plaintiff had abandoned the contract he cannot recover. *Smithneseki* v. *Wiltsie* (1909), 12 W. L. R. 533.

Act of sale—*Droits de mutation—Failure to pay — Nullity — Improvements — Mortgage — Priorities — Payment to insolvent mortgagor.*]—The defendant mortgaged a lot of land to C. in 1888 and 1889. In 1899 P., the possessor of the lot, sold the improvements thereon to C. The plaintiff, a judgment creditor of P., caused the lot to be seized in the possession of P., invoking a sale by the defendant to P. in 1894. The defendant claimed the property as his, and sold it to C. for $25:—*Held*, that the act of sale in 1894 was absolutely null and void and must be considered as non-existent, because the dues thereon had not been paid; that such nullity not only prevented the transmission of the property, but took away all probative value as to establishing the sale, and that such an act, being non-existent in the eye of the law, did not even prove the payment and the receipt of the moneys mentioned in it.—2. That C. committed no fraud in purchasing from the defendant.—3. That, besides, in the actual case, the plaintiff, a creditor of P., claiming to be the earlier purchaser, alleging that P., his debtor, was charged with the mortgage debt of the defendant to C., thereby affirmed the bad faith of P., who, not having the mortgage debt, could not invoke his lien for the improvements, the mortgage debt of C. having priority in law over such improvements. — 4. There is nothing illegal in a mortgagee paying for the improvements upon the mortgaged premises with the object of protecting his security, even if he whom he pays is insolvent, inasmuch as it is not fraud for a debtor to pay his insolvent creditor. *Nadeau* v. *Roseberry*, 18 Que. S. C. 542.

Action by purchaser—Misrepresentations — Knowledge of purchaser — Evidence as to falsity of statements — Statements made in good faith. *Robb* v. *Samis*, 3 O. W. R. 907.

Action to rescind — Fraud—Misrepresentation of agent for vendors as to value —Large commission paid to agent—Crediting on purchase money—Acquiescence. *Krolik* v. *Essex Land, Loan, & Improvement Co.*, 3 O. W. R. 508.

Action to rescind—Undue influence — Mental incompetency — Vendor's understanding of transaction — Inadequacy of consideration — Conflicting evidence. *Bernst* v. *Kuhn* (Man.), 2 W. L. R. 448.

Actual fraud—*Damages for deceit.*]—Plaintiff brought action for rescission of a contract for sale by defendants of 7 acres of land, because of alleged false and fraudulent misrepresentation, or, in the alternative, for damages as in an action of deceit:—*Held*, that plaintiff had failed to establish actual fraud, and the claim for rescission must fail, and on account of the absence of actual fraud and because it was not shewn that plaintiff was induced to enter into the contract through any misrepresentation, the action of deceit also failed. Judgment of Meredith, C.J.C.P., affirmed. *Borrett* v. *Guesner* (1909), 14 O. W. R. 1151, 1 O. W. N. 231.

Attempted cancellation by vendors—*New agreement with sub-purchaser—Evidence to establish—Negotiations with agent of vendors — Assignment of rights of original purchaser—Sub-purchaser taking possession—Improvements under mistake of title —R. S. O. 1897, c. 119, s. 30—Lien—Compensation—Costs.*]—Plaintiff under special agreement sold lands to B., who getting in arrears gave a quit claim deed to L. Negotiations for purchase were carried on by L. with plaintiff's agent. Plaintiff gave to B. notice of cancellation under terms of said agreement, but unknown to L., who made a payment on account, which was received by plaintiff; L. took possession and made improvements:—*Held*, L. was entitled to a lien for these improvements, or he might retain the lands on making payment of all arrears and making proper compensation. *Colonial Loan & Investment Co.* v. *Longley*, 13 O. W. R. 388.

Cancellation—*Return of moneys paid on account of purchase—Alternative claim for damages for deceit—Untrue representations by agent of vendor—Purchaser not relying on representations.*]—Plaintiff purchased from defendant Y., through his co-defendant, M., certain Manitoba property. Plaintiff brought this action for damages or the return of the moneys paid on the grounds that the representations made by M. were false:—*Held*, that the land in question was within the representations made by Y. in his letter to plaintiff. Plaintiff not having relied upon

representations made by the agent, M., action dismissed. *Kerfoot* v. *Yeo*, 11 W. L. R. 355.

Cancellation by vendor on default of payment of instalments of purchase-money—*Tender by nominee of purchaser — No assignment to nominee — Executions against purchaser registered against the land — Refusal of vendor to execute — Transfer to nominee—Specific performance denied — Right of purchaser to return all moneys paid on account of purchase.*]—Action by purchaser for specific performance or for return of moneys paid on account of purchase money. Plaintiff had made default and was notified that contract was cancelled. M. tendered the balance due but there was never any assignment of the agreement to him. There was a written request by plaintiff to defendant to issue transfer to M. As there were executions against plaintiff's lands, and the duplicate agreement was not produced, defendants refused to give the transfer. Specific performance refused but judgment for amount of cash payment. *Banton* v. *March* (1909), 12 W. L. R. 598.

Cancellation under provisions of agreement.] — After making some payments to defendant on account of purchase of land under an agreement, plaintiff discovered he had made a poor bargain and repudiated the contract. Defendant cancelled the agreement under provisions thereof:—*Held*, that plaintiff failed in his claim for damages founded on alleged misrepresentations of defendant and could not recover as an alternative the moneys paid on account of the purchase. *Kerfoot* v. *Yeo* (1910), 20 Man. L. R. 129, 11 W. L. R. 355, 15 M. L. R. 351.

Collateral undertaking — *Non-fulfilment—Right to recover price—Rescission of contract—Abatement in price.*]—A stipulation in a deed of sale by which the vendor collaterally undertakes to procure for the purchaser, by way of expropriation, an immovable belonging to a third person, is not a condition upon the fulfilling of which the right of the vendor to recover the purchase price depends. At the most it is only a ground for an action on the part of the purchaser to rescind the sale or for an abatement in the price. *Price* v. *Ordway*, 15 Que. K. B. 67.

Construction — Payment of purchase-money by instalments — Default — Action by vendor for cancellation—Acceleration of further payments — Payment into Court — Stay of proceedings on payment of instalments due and costs. *Read* v. *Richardson* (N.W.T.), 4 W. L. R. 123.

Construction — Payment of purchase-money by instalments — Default — Failure of crop — Cancellation — Notice — Time — Action — Forfeiture. *McAuley* v. *Dick* (N.W.T.), 1 W. L. R. 381.

Contract not carried out as intended —*Mental incapacity of vendor—Action by executor to set aside transaction—Onus—Mortgage — Postponement — Priority of charge for down payment.*]—M., the plaintiff's testator, was the owner of an hotel, subject to a mortgage to a brewing company for $6,000. The defendant proposed to purchase the hotel, and a memorandum of agreement for sale was signed by M. and the defendant, the price being $26,000. The memorandum stated that the $26,000 was to be made up as follows: $5,000 in cash; $2,700 by the transfer of the defendant's equity of redemption in a dwelling-house; the brewing company's mortgage for $6,000, to be assumed by the defendant; a second mortgage for $12,300, to be given on the hotel property by the defendant. The transaction was not carried out as provided in the memorandum, but in this way: M. executed a transfer of the hotel property to the defendant; the mortgage to the brewing company was discharged, M.'s certificate of ownership was cancelled, and a new one issued to the defendant; the defendant executed a mortgage to the brewing company for $11,000, and a subsequent mortgage to M. for $12,000, and these mortgages were registered; the defendant also transferred his equity of redemption in the house, and paid $300 by an arrangement in a collateral matter:—*Held*, upon the evidence, that the true agreement was that which the memorandum expressed.—M. died a month after the transaction of softening of the brain; he had been, for years previously, an invalid and addicted to drink; for many months before his death he had been in a very weak physical and mental condition, and during the greater part of the time actually drunk; his usual condition was one of incapacity, as the defendant knew:—*Held*, that the onus of shewing capacity was on the defendant: —*Held*, however, upon the evidence, that the agreement was not an unfair one, and it should not be entirely set aside; but M. did not understand that, contrary to the expressed agreement, the amount of the cash payment was to form a charge upon the property prior to the intended mortgage to himself or the balance of the purchase-price.—Had the brewing company been a party to the action, their mortgage should have been postponed, to the extent by which it exceeded $6,000, to M.'s mortgage for $12,000; but, in the absence of the company, all that could be done was to adjudge that the defendant pay the plaintiff $5,000 and interest and the costs of the action (brought to set aside the transaction), and that the total be a charge upon the property. *Murray* v. *Weiler* (1910), 14 W. L. R. 677.

Crop-payments — Default—Attempted cancellation by vendor — Assignment of contract by purchaser — Resale by vendor — Rights of assignee of purchaser — Specific performance — Delay — Damages — Costs — Defendants severing — Lien. *Crawford* v. *Patterson* (Alta.), 7 W. L. R. 183.

Declaration of nullity—*Negotiation—Conditional execution by vendor — Insertion of term — Incomplete instrument — Necessity for acceptance by purchaser.*]—Action to declare an alleged agreement between plaintiff and defendant J. void and for delivery up for cancellation, a quit-claim deed from defendant J. to defendant E. J.'s agent took to plaintiff an agreement for sale of land. Before plaintiff signed, a clause was inserted regarding interest, and plaintiff was given a letter to make everything satisfactory. The agent then took the agreement

to J., who accepted, but did not so notify plaintiff. Defendant shortly after gave a quit claim deed of the property to his wife for a nominal consideration:—*Held*, that as the approval of the alteration had never been communicated to plaintiff there was no contract. Appeal allowed and relief claimed granted. *Hill* v. *Linden* (1909), 14 O. W. R. 422.

Default—*Rescission—Demand on notice—Necessity for—Costs of pending opposition.*]—The plaintiffs had sold to the defendants a bit of land for construction of their line, for an annual rent of $25 as long as the purchase-money, $500, should not have been paid, it being stipulated that if the defendants made default in payment of any gale of rent for six months after it fell due, the sale should be rendered void and of no effect, and it should be lawful for the plaintiffs to resume possession of the land and to dispose of it as their own property without indemnity or reimbursement of the sums paid. The defendants having made default in payment of one of the gales of rent for more than six months after it fell due, the plaintiffs began an action to rescind the sale, and, besides, claimed the costs of a pending opposition which they had filed to protect their rights upon a seizure of the land being made as against the defendants:—*Held*, that, by reason of the default clause above referred to, the plaintiffs had the right to demand the rescission of the sale, without any demand of payment of the gale of rent, or any *mise en demeure* having been addressed to the defendants, the latter being in default by the very terms of the contract.—2. But the plaintiffs could not recover from the defendants the costs of the opposition, seeing that litigation was still pending on the subject of such costs, no adjudication having been made upon such opposition. *Maison St. Joseph du Sault au Récollet* v. *Montreal Park & Island Rw. Co.*, 19 Que. S. C. 484.

Default in payment of instalments of purchase-money—*Defence, that contract not fulfilled by vendor—Procuring or endeavouring to procure business for purchaser—Time of essence of contract—Forfeiture of payment made—Purchaser not ready and willing to fulfil agreement—Counterclaim—Expenses of resisting vendor's re-entry—Right to possession—Costs—Pleading.*]—Action by vendor for a declaration that a contract for sale of land is void, that she is entitled to possession, and to retain a cash payment made by purchaser. Defendant claimed that plaintiff had not transferred 3 implement agencies to him:—*Held*, (1) that plaintiff had only agreed to do her best to get them, which she did, but unsuccessfully; (2) that time was of the essence of the agreement, and that the subsequent actions of the parties shewed such was the intention. The forfeiture clause is not in the nature of a penalty, but a matter of agreement. The defendant is not willing to carry out the agreement. The defendant is not entitled to any costs in connection with his disputing plaintiff's possession, as her re-entry was quiet and peaceable, and he should have vacated same on receiving notice. There is no necessity of declaring plaintiff entitled to retain the part of purchase money paid. *Hole* v. *Wilson*, 10 W. L. R. 145, 2 Sask. L. R. 59.

Default of payment—*Registration.*]—The vendor cannot demand that the sale of an immovable effected by him shall be declared void, and that he shall be placed in possession of the immovable, without alleging and proving that the stipulation for the rescission of the sale in default of payment has been registered. *Beaudoin* v. *Gaudry*, 4 Que. P. R. 161.

Deferred payments—*Default—Breach of covenants—Power of cancellation by notice—Penalty—Time of essence of contract—Equitable jurisdiction of Court—Sufficiency of notice—Construction of contract.*]—*Held*, Lamont, J., dissenting, that when in a contract for sale of land the parties expressly agree that time is of the essence of the contract, and that upon default the vendor may cancel the contract by notice to the purchaser, and in pursuance of such power the vendor cancels the contract, the Court has no jurisdiction to relieve against such cancellation, which is purely a matter of contract between the parties.—*Held*, also, that failure to fill in a blank in a printed agreement has not the effect of rendering the clause in which such blank is found of no effect.—*Held*, further, that a notice of cancellation which is substantially in the terms of the covenant authorising it is sufficient. *Steele* v. *McCarthy*, 1 Sask. L. R. 317, 7 W. L. R. 902.

Delay in making title—*Pleading—Oral demand.*]—The delay of a vendor to make title to his purchaser of the immovable, which he has sold him, is not a ground for rescinding the sale.—2. When the purchaser has not demanded the rescission of the sale by his pleading, he cannot obtain it upon a demand made *ore tenus*, and this is so even when the grounds which he invokes for obtaining it, appear upon the record. *Brunet* v. *Berthiaume*, 21 Que. S. C. 314.

Description—*Rectification—Specific performance—Rescission—Negotiations—Laches—Delay in giving possession—Evidence.*]—Action for specific performance and rectification of an agreement for the sale of land. Agreement rectified. Defendant to have option of having agreement cancelled by re-paying plaintiff his money; if not, plaintiff to be put in possession on paying balance due on contract. *Campbell* v. *McKinnon*, 11 W. L. R. 721.

Failure to make payments—Cancellation — Construction of contract — Person entitled to give notice of cancellation—Garnishing proceedings — Notices — Title to land — Trustee — Assignment — Beneficiaries — Foreign law as to attachment of debts — Forfeiture — Return of deposit — Laches — Evidence — Admissibility—Documents — Copies. *Gudgel* v. *Case* (N.W.T.), 4 W. L. R. 462.

False representations — Mistake. *Cohen* v. *Sydney Land & Loan Co.*, 4 E. L. R. 101.

Fraud—Agency—Coercion—Improvidence—Specific performance. *Jarvis* v. *Gardner*, 2 O. W. R. 640, 3 O. W. R. 458.

Fraud — Representations — Value — Agent's commission — Laches — Acquiescence. *Krolid* v. *Essex Land, Loan & Improvement Co.*, 2 O. W. R. 87.

Fraud and misrepresentation — *Evidence — Counterclaim for specific performance—Payment of instalments of purchase money — Interest — Costs.*] — Action to rescind contract for sale of land on ground of misrepresentation. Counterclaim for specific performance:—*Held*, on the evidence that there was no misrepresentations. Action dismissed. Defendant entitled to specific performance. *Bennett* v. *McLeod*, 10 W. L. R. 56.

Fraudulent misrepresentation of vendor's agent—Replevin of documents — Damages for detention. *Dillabough* v. *Scott* (Man.), 3 W. L. R. 449.

Fraudulent representations — *Failure of proof—Alleged conditions of contract not proved.*]—An action for rescission of a sale by the defendants to the plaintiffs of a two-thirds interest in a quarter-section of land, on the ground of fraudulent representations by the defendant C. as to the nature, quality, and value of the land, and also on the ground that it was part of the agreement that the joint credit of the plaintiffs and of C. should be utilized for the purpose of financing the expense of breaking 400 acres the same year, so as to make the land more readily saleable, and that C. should not part with a certain promissory note for $1,600 which the plaintiffs gave him as consideration for the sale, nor with his remaining one-third interest, until a sale of the whole could be effected, and that C. observed none of these conditions, was dismissed; it being *held*, on the evidence, that there was no fraudulent representation on C.'s part, but that the plaintiffs purchased with their eyes open, and that the conditions alleged to be part of the agreement were not so in fact. *Lundy* v. *Clouthier* (1910), 15 W. L. R. 190.

Interest in land—Rescission of contract — Misrepresentations — Title — Grant from Crown — Reservation of minerals — Concealment of facts from purchaser—Promissory note given for part of purchase money —Transfer by vendor to third person—Notice of misrepresentations. *Schellenberger* v. *McPherson, Brown* v. *Schellenberger*, 12 O. W. R. 26.

Lien for unpaid purchase-money — *Cancellation of contract — Release of purchasers — Findings of trial Judge—Contradictory evidence—Weight of evidence—Delivery of deed—What constitutes — Intention of parties — Conditional delivery—Escrow—Revocation.*]—The plaintiffs and the defendants other than the company and one A., a trustee for the plaintiffs and such other defendants, acquired a right to purchase a large tract of land from the Canadian Pacific Railway Company. The defendant company were organised for the purpose of acquiring these rights at an advanced price. The contract with the railway company was made directly with the defendant company, and provided, as a condition precedent and of the essence of the contract, that the contracts should become null and void upon default in any payment thereunder. The defendant company also agreed to pay the advanced price referred to, to A. as trustee for the option-holders. The defendant company, being unable to sell the lands as rapidly as anticipated, made default in the payments to the railway company, which company threatened to cancel the contracts. It being represented to the railway company, however, that the shareholders of the defendant company upon such cancellation would suffer a heavy loss, the railway company thereupon agreed, if the holders of the original option would waive their claim to the advanced price, to grant easier terms and an extension of time for making payments. Thereupon a release was prepared and executed by all the members of the original syndicate, releasing all their claims to such increased price. Both plaintiffs subsequently requested that their names be struck off the release, one after it had been signed by all members of the syndicate, and one before it had been so signed. They then brought this action, alleging insolvency of the defendant company, claiming a lien on the land for the advanced purchase price, a declaration that the contract with the defendant company should be cancelled, and alleging that they had been induced to make the release by fraud, that it was never delivered, and was merely an escrow:—*Held*, that the trial Judge having found that the plaintiffs were not induced by fraud and misrepresentation to execute the release, and the evidence being evenly balanced, the appellate Court should not interfere with his findings.—2. That in determining whether a deed was delivered as an escrow the Court must consider the intention of the parties, and, while the deed in question would not become operative until all parties had executed it, yet in so far as the plaintiffs were concerned they executed it and delivered it to take such effect as they could give it, and released all their rights in the contract, and it could not therefore be said to be delivered in escrow.—3. That the deed being effectual in so far as the plaintiffs could make it effectual could not be revoked by them even before it had been executed by all the parties, and so become operative.—4. That delivery is entirely a matter of intention on the part of the party executing the deed; and actual delivery to the party taking under or benefiting by the deed is not essential. *Huggard* v. *Ontario and Saskatchewan Land Corporation*, 1 Sask. L. R. 526, 6 W. L. R. 645, 8 W. L. R. 866.

Misrepresentations — *Consideration—Possession—Laches — Waiver — Ratification.*]—The defendant, by falsely representing that he had a serious offer for the purchase of his property for a brewery, induced the defendant to take a deed of it, the defendant fearing that a brewery might be an injury to a hotel which he was projecting near by. Payment of the purchase money was deferred. On discovering the falsity of the representations, the defendant notified the plaintiff that he repudiated the contract, and invited him to bring an action to test its validity if he was unwilling to take back the property. The plaintiff delayed some time in bringing this action for the recovery of the purchase money, and in the meantime the defendant remained in possession and collected the rents:—*Held*, that, under the provisions of the Quebec Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal

consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that the defendant's administration of the property in the meantime could not be construed as ratification of the contract. *Barnard* v. *Riendeau*, 31 S. C. R. 234.

Misrepresentations — Knowledge — Deceit — Damages. *Robb* v. *Samis*, 2 O. W. R. 706.

Misrepresentations of vendors as to quality of land—Failure of proof—Absence of title in vendors—Pleading—Equitable right under agreement for sale — Purchase money payable by instalments—Recovery by purchaser of moneys paid—Reservations in original agreement—Release — Abstract of title. *Hartt* v. *Wishard-Langan Co.*, 9 W. L. R. 519.

Mutual mistake—*Innocent misrepresentation—Rescission of contract—Damages — Costs—Fraud.*] — Plaintiff entered into a contract for the purchase of land from the defendant, after the latter had personally shewn him what he honestly thought was the land he owned. After payment of certain instalments of the purchase money and certain sums of money for taxes and otherwise in connection with the land, the plaintiff bought an outfit of horses, implements, lumber, etc., and took them out to the railway station nearest the land, intending to take possession and commence farming operations. He then discovered that the property which he had bought was not the one which had been shewn to him, but was greatly inferior to it in value. He then brought this action in which he charged the defendant with fraudulent misrepresentation as to the locality of the property: — *Held*, that the plaintiff was entitled to have the contract rescinded and to repayment of all moneys paid by him under it with interest at five per cent. per annum. *Adam* v. *Newbigging*, 13 App. Cas. 308, followed. (2) The plaintiff was not entitled to damages, as the defendant's misrepresentation had not been fraudulently made. (3) Appearances having justified the charge of fraud, though this was not proved, costs should be allowed. *Hopkins* v. *Fuller*, 25 C. L. T. 481, 15 Man. L. R. 282.

Part performance of contract—*Non-fulfilment of conditions—Abandonment.*] — The defendant had sold his restaurant to the plaintiffs, who had paid a part of the price in cash, another part being agreed to be paid on the day of the transfer of the liquor license, and the balance by monthly payments thereafter. The defendant put the plaintiffs in possession of the restaurant, but afterwards retook possession. The plaintiffs took no steps to obtain the transfer of the license, and the defendant did not offer them a transfer. Subsequently the plaintiffs sued for the cancellation of the sale and to be reimbursed what they had paid to the defendant, alleging that he had dispossessed them:—*Held*, that the parties not having executed or really intended to execute the bargain made between them, there was ground for adjudging the cancellation of the sale. *Coté* v. *Neveu*, 22 Que. S. C. 268.

Payment in goods—*Rescission—Failure of consideration—Trover for goods—Reconveyance.*]—V., being desirous of purchasing a lot of land in the possession of F., was negotiating with him about it, but no agreement of purchase had been arrived at. W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle. He refused to sell, stating that he wished to exchange them with F. for the land. W. then went to F. and agreed to extinguish a debt of $79 that he had against him if he would convey the land to V. W. went again to V. and offered him the land in exchange for the two head of cattle and his note for $20. This offer V. accepted. The parties then met at the office of a justice, and F. gave V. a warranty deed of the land, and V. gave W. his note for $20. W. selected the cattle, asked V. to turn them out, and said he would come again and take them away. V. recorded the deed, but, discovering that F. had not title on the records, told W. he could not have the cattle. W. afterwards went and took the cattle from V.'s pasture without his consent. V. alleged that W. told him that F. had a good title, and agreed to give him a good title, and if he did not do so the bargain was to be off. W. denied that he told V. that F. had a good title, or that he agreed to give V. a good title. In an action of trover in a County Court to recover the cattle and note, the Judge told the jury that if they believed V.'s version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff. The jury found for the plaintiff:—*Held*, on appeal, that V. having accepted and registered the deed under the contract, the consideration had not entirely failed, and V. could not rescind the contract and sue in trover for the cattle and note without reconveying or offering to reconvey the land, and the appeal should be allowed and a nonsuit entered. *Vanbuskirk* v. *Vanwart*, 36 N. B. R. 422.

Purchaser refusing to carry out because of incumbrances—*Action for return of deposit—Intention of parties — Written contract—Terms not embodied in—Evidence dehors—No concluded agreement — Money paid by plaintiff for use of defendant—Pleading—Amendment — Interest — Jurisdiction of District Court—Title to land not brought in question—District Courts Act.*]—Action to recover deposit paid by plaintiff on a contract for purchase of land from defendant:—*Held*, that there was no concluded and complete agreement between the parties, and plaintiff is entitled to a return of the deposit. —*Held*, that title to land is not brought in question, and under s. 37 of above Act the District Court has jurisdiction. *Brynes* v. *McIvor*, 10 W. L. R. 492.

Re-assignment of interests assigned —Payment of value—Specific performance—Injunction—Counterclaim to set aside judgment obtained by fraud and perjury—Dismissal—Costs—Interest — Lien. *Moses* v. *Bible* (N.W.P.), 5 W. L. R. 520.

Remedies of vendor — *Purchaser refusing to carry out purchase.*]—The vendor of an immovable, under agreement for sale, when the purchaser refuses to discharge his obligations under the deed, has but two remedies: An order enjoining upon the purchaser the completion of the deed or can-

cellation of the agreement of sale coupled with a claim for damages. He cannot, without authority from the Court, re-sell the property over the head of the original purchaser and then sue him to recover the difference (including the expenses incurred by the re-sale) between the price stipulated in the promise of sale and the amount received by such re-sale. *Park Realty Co.* v. *United Shoe Machinery Co.* (1911), 12 Que. P. R. 239, 17 R. de J., 218, 17 R. L. n. s. 178.

Requisitions — *Right of vendor to rescind — Waiver of right by negotiations — Conveyancing practice.*]—The benefit of a provision in a contract for the sale of land that if any objection or requisition be made by the purchaser which the vendor shall be unable or unwilling to comply with, the vendor shall be at liberty, by notice in writing, to rescind the agreement, is lost if the vendor's solicitor attempts to answer the requisitions and enters into negotiations with the purchaser's solicitor in regard to them. A vendor should either cancel the contract when he first reads the requisitions; or, when embarking on the attempt to comply with them, or to remove the objections, should reserve to himself the benefit of the right to rescind further on during the negotiations. *Crabbe* v. *Little, Moses* v. *Little*, 9 O. W. R. 551, 14 O. L. R. 631.

Sale of land — Counterclaim by purchaser to rescind—Misrepresentations—Deceit—Damages—Money lent — Interest — Price of land—Abatement for deficiency in acreage—Costs — Set-off. *Turner* v. *Zas* (Man.), 6 W. L. R. 191.

Sale pendente lite — *Creditors attacking vendor's title — Purchaser in good faith.*]—One who has in good faith purchased land while an *action paulienne* is pending for the purpose of impeaching the title of the grantor of the vendor, who also purchased after the commencement of the action, cannot, when the *action paulienne* has been successful, demand the rescission of the sale by alleging fear of eviction, the judicial revocation of the sale made in fraud of creditors of the vendor not affecting the rights of purchasers or mortgagees in good faith, even when such rights arose during the action for revocation. *Barsalou* v. *Royal Institution for Advancement of Learning*, 5 Que. Q. B. 383, followed. *Laramée* v. *Collin*, 16 Que. S. C. 346.

Title—*Conveyance—Notice — Tender.*] —The plaintiff agreed to purchase land from the defendant, and to pay the purchase-money in instalments. The last payment was not made when due, and more than a year afterwards the plaintiff tendered to the defendant the amount due, demanded an immediate transfer, and, because the defendant did not produce a transfer forthwith, brought an action, on the day after the tender, to rescind the sale. The defendant's title was under an agreement of sale from another person, and he could at any time procure title by payment of the balance due to that person. The plaintiff at the time of the purchase was aware of the nature of the title, and there was a clause in the agreement to the effect that the defendant agreed to use all reasonable diligence to obtain title, that the defendant was not to be required to furnish evidence of title, and that the plaintiffs accepted the title. Time was originally of the essence of the contract on the part of the plaintiff, but this was waived by the defendant: — *Held*, that, under the provision of the contract referred to above, the defendant was entitled to a reasonable time to obtain title after the plaintiff had completed his part of the contract by paying the purchase-money, and, on a strict construction of this clause, the plaintiff would have to accept an assignment of the defendant's agreement of sale.—But, apart from this clause, the plaintiff had no right to determine the contract without notice; where the defect is merely one of conveyance, and not of title, the purchaser must give a reasonable time to remove the defect before repudiating the contract.—*Wood* v. *Machu*, 16 L. J. Ch. 21, and *Hatten* v. *Russell*, 38 Ch. D. 346, followed. *Gregory* v. *Ferrie* (1910), 14 W. L. R. 219, 3 Sask. L. R. 191.

Want of title—*Pleading — Removal of objection to title after action begun for rescission.*]—*Held, per* Howell, C.J.A., and Phippen, J.A., that in an action by the purchaser for rescission of the agreement of sale on the ground of fraud and misrepresentations, it is too late for the plaintiff, at the hearing of the appeal, for the first time to take the position that he is entitled to rescind because the defendants' title is not good.—2. The title of the defendants to the lands in question, although it was only under an agreement of purchase from the Q. company, which in turn only held under an agreement of sale from the Canadian Northern Railway Co., was a sufficient equitable title with a right to get in the absolute title before they should be called upon to convey, and the plaintiff could not rescind, although the defendants purported to agree to sell and convey the fee simple in the lands.—*Shaw* v. *Foster*, L. R. 5 H. L. 350, *Egmont* v. *Smith*, 6 Ch. D. 476, *Re Head's Trustees*, 45 Ch. D. 310, *Want* v. *Stallibrass*, L. R. 8 Ex. 175, and *Re Bryant*, 44 Ch. D. 219, followed.—3. The purchaser, not having demanded an abstract of title or called on the vendor to make the title good, had no right to rescind the contract, and, as certain reservations in the agreement under which the defendants held had been released by the companies interested before the trial, the Court would not now rescind the contract.—4. The reservation not released, viz., that in the agreement from the Canadian Northern Railway Co. reserving any land that might be required for right of way and station grounds of the Grand Trunk Pacific Railway, should not be held fatal to the title, as no evidence was given to shew that any of the lands bought by the plaintiff were or would be affected by it.—*Held, per* Richards, and Perdue, JJ.A., that the Court will not force a purchaser to take an equitable estate except where the vendor has the whole equity in the land and controls the legal estate in such a way that he can readily procure it, and the defendants had not, either at the time the contract was made or at the trial, such a title as the plaintiff was compellable to accept: *Craddock* v. *Piper*, 14 Sim. 310; *Esdaile* v. *Stephenson*, 6 Mad. 366; *Madeley* v. *Booth*, 2 De G. & Sm. 718; Fry on Specific Performance, 4th ed., p. 586.—2. The defendants were too late in procuring the release of the reservations after the commencement of the suit, though it might be otherwise in an action for specific performance: Dart, p.

1005. The reservation in favour of the G. T. P. Rw. Co. was a fatal objection to the title, as it had not been and could not be removed.—3. The position taken by the defendants in their statement of defence, setting up the various contracts under which they held, was a repudiation of their contract to furnish a title in fee simple, and an attempt to set up that the plaintiff had only bought the equitable interest they had in the land, which entitled the purchaser at once to treat the contract as rescinded: *Wrayton* v. *Naylor*, 24 S. C. R. 295.—4. The bringing of the suit for the return of the money paid, alleging that the vendor had not a good title, was a sufficient repudiation of the contract on the part of the plaintiff, and it was not necessary for him to give notice of rescission or demand the repayment of the money before commencing suit: *Want* v. *Stallibrass*, L. R. 8 Ex. 175. Neither was it necessary for the plaintiff to demand an abstract of title, as the defendants' agent shewed the plaintiff the nature of the company's title before the action.—5. Although in Ontario the Court may allow money to be paid into Court to secure the purchaser against an outstanding incumbrance, as in *Cameron* v. *Carter*, 9 O. R. 426, that course is permissible under the Act respecting the Law of Transfer of Property, R. S. O. 1897, c. 119, s. 15, and there is no similar statutory provision in Manitoba.—6. So far as the question of pleading was concerned, the statement of claim was quite sufficient, for the plaintiff was entitled to join two grounds of relief as he had done and to rely upon either or both of them.—The Court being equally divided, the appeal was dismissed without costs. *Hartt* v. *Wishard-Langan Co.*, 18 Man. L. R. 376, 9 W. L. R. 519.

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12. SPECIFIC PERFORMANCE.

Acceptance of lease by purchaser—*Estoppel—Pleading.*]—1. A person is not estopped by entering into a lease of land, which has expired before the commencement of the action, from bringing an action for specific performance of an agreement for the sale of the land to him by the lessor, alleged to have been made before the signing of the lease.—2. A plea that the plaintiff had never been in possession of the land, except only as tenant to the defendant under a lease in writing made between the parties, does not amount to a plea of estoppel. *Poliquin* v. *St. Boniface*, 8 W. L. R. 561, 17 Man. L. R. 693.

Action brought by company incorporated after contract made—Contract with promoters of company — Action — Refusal of leave to amend by adding promoters as parties—Oral agreement—Part payment —Possession — Trespass — Injunction account. *Great West Lumber Co.* v. *Grant & Pennefather* (Alta.), 6 W. L. R. 845.

Action by purchaser to compel specific performance — Dispute as to payment — Absence of receipt—Burden of proof. *Boyd* v. *Chessum*, 7 O. W. R. 843.

Action by vendor to enforce—Right of vendor to relief—Conditional agreement of sale by vendor to third parties—Effect of —Wrongful registration—Costs. *McConnell* v. *Lye*, 6 O. W. R. 314.

Action for rectification of conveyance—*Estoppel—New trial—Same finding as at former trial—Action dismissed.*] — Divisional Court dismissed plaintiff's appeal from 16 O. W. R. 240, 1 O. W. N. 839. *Lecroix* v. *Longtin* (1910), 17 O. W. R. 877, 2 O. W. N. 416.

Action for specific performance — *Dwelling houses infested with cockroaches.*]—Teetzel, J., dismissed an action for specific performance of contract for sale of two houses as the evidence shewed they were infested with cockroaches and that plaintiff had misrepresented that they were not so infested. *Labelle* v. *Bernier* (1911), 18 O. W. R. 444, 2 O. W. N. 634.

Action for specific performance — *Pleading—Statement of claim—Prayer for general relief — Judgment for return of moneys paid based on forfeiture of contract — Inconsistency — Refusal of plaintiff to amend.*]—The relief which a plaintiff may have under the prayer for general relief in his statement of claim is limited to the facts which are alleged and the relief which is expressly asked; the plaintiffs cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for.—*Cargill* v. *Bower*, 10 Ch. D. 502, followed.—The plaintiff alleged an existing agreement for the sale of land to his assignor, and asked for specific performance, but contended that, as the agreement had been forfeited by the defendant reselling the land, he, the plaintiff, was entitled to a return of the portions of the purchase money paid by his assignor and himself; no amendment of the statement of claim was asked for, and none was made, but the trial Judge pronounced judgment for the repayment of the moneys paid: —*Held*, that the plaintiff was not entitled in this action to that relief, and that the action should be dismissed, and without prejudice to an action for that relief, if the plaintiff were advised to bring one.—Judgment of Dubuc, C.J., reversed. *Hamilton* v. *Macdonell* (1910), 13 W. L. R. 495.

Action for specific performance — *Possession—Statute of Limitations—Reservations and exceptions in original deed—Damages—Costs.*]—Plaintiff brought action for specific performance of an agreement made by defendants, the Kaministiquia Power Co., with plaintiff for sale of land to plaintiff, reserving minerals, etc., and for possession of the lands, damages for interference with possession, mesne profits, etc. Defendant Hyndman claimed the lands under Statute of Limitations.—Sutherland, J., *held*, against Hyndman. Judgment for plaintiff for possession, subject to payment of balance of purchase money to defendant company, and subject to rights of defendant Hyndman under reservations, and exceptions in his original deed. Plaintiff given $10 damages and costs of action against defendant Hyndman. Plaintiff to pay costs of defendant company, fixed at $50. *Sewargngen* v. *Hyndman* (1911), 18 O. W. R. 157, 2 O. W. N. 530.

Action for specific performance — *Statute of Frauds—Letters and telegrams—Sufficient compliance.*] — Action for specific performance of an agreement by the defend-

ant to sell to the plaintiff the east half of lot No. 2 in the sixth concession of Georgina, in the county of York.—Meredith, C.J.C.P., *held*, upon the state of facts disclosed, a contract sufficient to satisfy the provisions of the Statute of Frauds had been proved. That the plaintiff was entitled to judgment for the specific performance of the contract with costs. If desired, there could be a reference as to title and to settle the conveyance, and further directions and subsequent costs in that event to be reserved. *Latimer* v. *Park* (1910), 17 O. W. R. 724, 2 O. W. N. 354.

Agreement for sale of house and lot.]—Plaintiff brought action for specific performance of agreement for sale of a house and lot. Defendant paid $300 down and went into possession. She also paid $50, the first annual instalment, but before the second instalment came due she ascertained that the land was of less extent than as she alleges was represented, whereupon she demanded her money back and refused to pay any more:—*Held*, that specific performance should not be enforced upon defendant, giving to her only the land plaintiff owns, excluding a lane which appeared to be part of defendant's intended purchase. Defendant allowed to stay in possession as a monthly tenant or until end of year by declaring her election within 15 days, and on payment of rent. *Rose* v. *Dunlop* (1909), 15 O. W. R. 12.

Agreement for sale of land — *Incumbrances — Statute of Frauds.*] — Action for specific performance of an agreement in writing by the defendant to purchase the property in question for $43,000 "payable as follows: $10,000 cash, and six equal notes with interest at seven per cent. for balance to be handed over for such time payments." There were incumbrances on the property aggregating over $8,000, part of which was overdue, but the greater part was to mature at various dates within four years and some of the holders were unwilling to accept payment. The agreement did not state for what time the notes were to run, but the parties understood that they were to be six equal yearly payments, the first in one year and the last in six years, also that a transfer and bill of sale were to be given at once and a mortgage taken for the deferred payments, although the document was silent on these points. The defence raised the Statute of Frauds because the agreement did not state when the instalments of purchase money should fall due:—*Held*, without determining this point, that the purchase was intended to be complete at once and the title was not one which could be forced on an unwilling purchaser because there were incumbrances which the vendor was not in a position to pay off at once. *In re Weston & Thomas's Contract*, [1907] 1 Ch. 244, followed. *Brandon Steam Laundry Co.* v. *Hanna* (1909), 19 Man. R. 8; 9 W. L. R. 570, 11 W. L. R. 101.

Authority of agent — *Statute of Frauds—Memorandum in writing—Absence of vendor's name—Inadequacy of price.*]—In an action to enforce specific performance of an alleged contract for the sale of land the only written memorandum of the contract was a receipt for $100 "in part payment of lot 16," etc., describing it, mentioning also the balance of the price and the purchaser's name, but not disclosing the name of the vendor, and signed "P. W. Black, agent:"—*Held*, that this was not sufficient to satisfy the Statute of Frauds, parol evidence to supply the name of the vendor not being admissible.—*Semble*, also, on the evidence, that the agent had no authority to bind the vendor by executing a contract, and that, on account of the inadequacy of the price, the court would be slow to enforce specific performance. — Judgment of Falconbridge, C.J., reversed. *Bradley* v. *Elliott*, 11 O. L. R. 398, 7 O. W. R. 137.

Concealment by purchaser of material fact affecting value of land — Misrepresentation—Refusal of Court to adjudge performance. *Irish* v. *McKenzie* (Man.), 6 W. L. R. 209.

Contract by vendor to sell to others — Conduct of plaintiff — Cancellation — Notice to second vendees—Defence—Registry laws. *McConnell* v. *Lye*, 7 O. W. R. 851.

Contract of parties—*Costs.*] — The plaintiff purchased leasehold property from the defendant for $340.50, and paid $300 on account. The plaintiff alleged that the property was sold free of all unpaid rent and taxes, and refused the pay the balance of purchase money unless the defendant contributed towards the unpaid rent which was due at the time of the sale. The defendant alleged that no such agreement as to unpaid rent and taxes was made, and was willing to execute a conveyance on payment of the true balance, but refused to entertain any proposition for settlement unless certain other dealings between the parties were adjusted at the same time:—*Held*, that the plaintiff was entitled to a decree for specific performance.—*Held*, also, that, as the evidence failed to establish the plaintiff's contention as to the agreement for sale and the unpaid balance; and that, as the defendant had acted wrongfully in attempting to make the settlement of this matter contingent upon the settlement of other dealings between the parties which were distinctly foreign, there should be no order as to costs. *Edgecombe* v. *McLellan*, 4 N. B. Eq. 1, 6 E. L. R. 46.

Correspondence — Agent — Completion of contract—Subsequent formal offer to purchase and refusal—Effect of. *Bohan* v. *Galbraith*, 8 O. W. R. 559.

Correspondence — *Offer — Quasi-acceptance — Agent.*] — The defendant, the owner of land in Ontario, being abroad, arranged with an estate agent to send him any offers of purchase which he might receive. The plaintiff filled up and signed a printed form offering $13,000, naming terms of payment and other details. This was sent by the agent to the defendant, who refused it. The plaintiff then signed another offer of $14,000, on a similar form, half cash, balance payable by instalments, offer to be accepted by a certain day, and sale to be completed by a certain day. This was sent by the agent to the defendant, who, upon receiving it, wrote to the agent a letter in which he intimated that he would take $14,000 in cash. In reply the agent, on instructions from the plaintiff, wrote to the defendant informing him that the plaintiff accepted the terms and would pay the $14,000 in cash. On receipt of the letter, the de-

fendant drew up an offer at $14,000, containing the same terms, but changing the date for acceptance and for closing, and forwarded it for engrossment and for signature by the plaintiff. This was engrossed and then signed by the plaintiff and sent to the defendant, who then wrote to the agent declining to accept it:—*Held*, in an action for specific performance, that no contract binding upon the defendant could be made out from the documents and correspondence. *Harvey* v. *Facey*, [1893] A. C. 552, followed. *Bohan* v. *Galbraith*, 8 O. W. R. 559, 9 O. W. R. 95, 13 O. L. R. 301; affirmed by the Court of Appeal, 10 O. W. R. 143, 15 O. L. R. 37.

Correspondence — *Uncertainty as to amount of purchase money — Ambiguous offer by letter — Acceptance by telegram — Construction of documents—Specific performance denied.*]—Defendant wrote plaintiff that he would take $1,000 for lot A., half cash, balance in 6 months, with 5 per cent. interest; or, "will allow 10 per cent. discount for cash." Plaintiff telegraphed in answer, "Will take lot as per your letter, $900 cash." Plaintiff now sued for specific performance. Action and appeal dismissed. The letter was void from uncertainty as it cannot be determined on what sum the discount was to be allowed. *Watson* v. *Jamieson* (1910), 12 W. L. R. 667.

Correspondence — Uncompleted negotiations—Authority of wife as agent — Death of husband — Pledging. *Trick* v. *Canniff* (Man.), 4 W. L. R. 515.

Costs — Title not shewn until after date set in contract—Delay of purchaser. *Javan* v. *Glenfield*, 12 O. W. R. 410, 771.

Damages.] — The measure of damages recoverable by a purchaser under an agreement where the vendor has sold wrongfully to a third party is the difference between the value of the land at the date of the second sale and the amount which remains owing by the original purchaser.—*Semble*, if the sale were rightful the vendor, in the absence of agreement validly providing otherwise, would be liable to account on the same basis. *Sandford* v. *Murray*, 2 Alta. L. R. 87.

Damages for breach — Substituted agreement—Finding of fact—Default in payment of purchase money—Stipulation as to time—Rescission of contract — Estoppel — Laches—Waiver — King's Bench Act, R. S. M. 1902 c. 40, s. 32 (*m*)—Court of equity—Discretion. *Barlow* v. *Williams* (Man.), 4 W. L. R. 233.

Defence—Misrepresentation of vendor's agent as to situation of land—Evidence — Commission paid to agent by vendor—Agent becoming one of the purchasers. *Cairns* v. *Crawford* (Man.), 8 W. L. R. 449.

Defence—Time of essence — Reasonable promptness. *Hill* v. *Rowe*, 9 W. L. R. 302.

Defence of fraud — *Misrepresentations —Findings of fact—Appeal—Caveat emptor.*] —The defendant resisted the plaintiff's claim for specific performance of a contract for the sale of a farm to him, alleging that he had wholly relied on the plaintiff's representations that the land consisted of a black sandy loam 18 to 20 inches deep with clay bottom, free from white sand, and worth $15 per acre, and that these representations were all untrue. The defendant had not inspected the land before purchasing, but had consulted persons other than the plaintiff as to the quality, location, and value of the property. The trial Judge's findings of fact, both as to the alleged representations and as to their falsity, were adverse to the defendant:—*Held*, with doubt as to whether, upon the written evidence, the Court would have decided in the same way, that the verdict of the trial Judge could not properly be reversed.—The trial Judge had held that, apart altogether from the conflict of testimony, the defendant could not succeed in having the contract rescinded on the ground set up, as public policy requires that persons should be expected to exercise ordinary prudence in their business dealings, instead of calling on the Courts to relieve them from the consequences of their own inattention and negligence, citing *Attwood* v. *Small*, 6 Cl. & F. 232, and *Slaughter* v. *Gerson*, 13 Wall. (U. S.), 379.—Perdue, J.A., dissented from this opinion, following *Redgrave* v. *Hurd*, 20 Ch. D. 1, and *Smith* v. *Land Corporation*, 28 Ch. D. 7. *Hannah* v. *Graham*, 7 W. L. R. 554, 8 W. L. R. 271, 17 Man. L. R. 532.

Delay in carrying out contract — Specific performance — Interest — Costs. *Connell* v. *Jewell*, 2 O. W. R. 655.

Delay of purchaser — *Abandonment.*] —*Held*, that where a party to a contract, of which he is entitled to demand specific performance, has been guilty of undue delay in performing his part of such contract, the Court will treat the contract as abandoned and refuse specific performance. *Battell* v. *Hudson's Bay Co.*, 8 W. L. R. 760, 1 Sask. L. R. 169.

On appeal to Saskatchewan Supreme Court held that plaintiff not entitled to specific performance. He had no means with which to meet payments as they matured, and was three years in default, and could not then have paid had he not the prospect of disposing of the property. *Battell* v. *Hudson's*, 9 W. L. R. 296.

Delivery and taking effect — *Postscript included in agreement—"South part" —Uncertainty as to land covered by agreement — Specific performance.*]—Action for specific performance of an agreement in writing whereby defendant agreed to sell certain lands to plaintiffs. The property was "the south part of the late William Kidd estate . . . cottage, barn, and lake included." After the signatures the following was added: "P.S. This property lies east of Sprague road." Defendant alleged that the agreement was too vague, and did not comply with Statute of Frauds.—Magee, J., *held*, that the matters in controversy rested on evidence, and considering the burden of proof and all the circumstances, the plaintiff had failed to prove conclusively what parcel of land was intended to be covered by the agreement, and dismissed the action without costs. *Fasken* v. *Weir* (1910), 16 O. W. R. 229, 1 O. W. N. 891.

Description — *Latent ambiguity—Evidence—Rectification—Specific performance—*

Statute of Frauds.] — B. on behalf of D. negotiated with C. for the purchase of C.'s property on the north-west corner of Hastings street and Westminster avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price, leaving the description blank for C. to fill in, as he did not know the land registry description, but adding the description "N.W. cor., etc." below the space reserved for C.'s signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner, and were owned by C. B. sued to have the agreement or receipt rectified or performed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed:—*Held*, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement. *Borland* v. *Coote*, 24 C. L. T. 383, 10 B. C. R. 493.

Description — *Parol evidence—Statute of Frauds—Specific performance.*]—A written agreement to sell "lots 16, 17, block 196, district lots . . ." must be taken to refer to land belonging to the vendor, and is a sufficient description within the Statute of Frauds to make extrinsic evidence admissible for the purpose of identifying the land and shewing the subject-matter of the negotiations between the parties. *Plant* v. *Bourne*, [1897] 2 Ch. 281, followed. *Lewis & Sills* v. *Hughes*, 13 B. C. R. 228.

Duress—Evidence — Interest — Reference as to title. *Tirschmann* v. *Schultz*, 7 W. L. R. 525, 8 W. L. R. 210.

Enforcement by purchaser against vendor company — *Defective organization — Provisional directors — Authority of manager—Manitoba Joint Stock Companies' Act, s. 22.*]—Action by purchaser for specific performance of a contract for sale and purchase of land. When defendant company became incorporated certain parties were called provisional directors. No by-laws were adopted, no directors elected, nor any subsequent proceedings taken:—*Held*, that these directors are the directors of the company. The contract was made by a *de facto* manager, with the acquiescence of the directors, and is binding on the defendant company. The property was referred to in the agreement as 330 Arnold street.—*Held*, that description was not vague. Parol evidence can be adduced to shew property intended. —*Held*, that the contract was subsisting and enforceable. Sec. 22 above is in the nature of a condition subsequent imposing a duty upon directors and is directory only. *Muldowan* v. *German Canadian Land Co.* (Man.), 10 W. L. R. 561.

Execution by foreigner—Understanding—Onus—Terms of sale — Plaintiffs not prepared to carry out. *Weidman* v. *Pelakise* (Man.), 2 W. L. R. 308.

Falsa demonstratio — *Position of vendor's signature—Specific performance.*]—On the conclusion of negotiations between C. and B. as to the sale of two city lots on the corner of Hastings street and Westminster avenue, in Vancouver, B.C., C. signed a document as follows:—"Vancouver, June 28th, 1902. Received from James Borland the sum of ten dollars, being a deposit on the purchase of lots Nos. 9 and 10, block 10, district lot 196, purchase price twenty thousand dollars ($20,000), the balance to be paid within 10th July . . . days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances. Jos. Coote, N. W. Cor. Hastings & Westr. Ave." The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and the trial Judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:—*Held*, affirming the judgment appealed from, *Borland* v. *Coote*, 10 B. C. R. 493, 24 C. L. T. 383, Killam, J., dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy, which should be disregarded, and a decree made for specific performance in respect of the lots actually bargained for between the parties. *Coote* v. *Borland*, 25 C. L. T. 28, 35 S. C. R. 282.

Fixed price payable in money or by cross-sale of land — *Absence of title in defendant — Action for specific performance or damages — Defence — Misrepresentations — Contradictory evidence.*]—Action for specific performance:—*Held*, that as there was a road through plaintiff's land which formed an encumbrance and which he could not get rid of when action brought, specific performance refused and contract cancelled. *Wellwood* v. *Haw*, 10 W. L. R. 41.

Foreign divorces.]—In an action for specific performance of an agreement for the sale of land, and in the alternative for damages, plaintiff (vendee) having wholly fulfilled his part of the contract, defendant pleaded that (1) before action brought he had been sued for divorce by his wife, in an American Court, where suit was still pending, and that said Court had issued an injunction enjoining him from "transferring any property of any kind whatsoever or wheresoever situate" during pendency of the divorce proceedings, and that he was resident within the jurisdiction of such Court and amenable to such injunction; (2) that he was ready and willing to perform his part of said contract for sale, but had been hindered from so doing solely by such injunction and by reason of his wife refusing to sign away her dower in the land in question, but that he would complete said contract immediately on determination of said divorce suit and annulment of said injunction:—*Held*, (*per* Graham, E.J., in Chambers) that the injunction of the Court of a foreign State granted after the contract was made did not discharge defendant from performance of such contract; but that if plaintiff elected to proceed for damages rather than for specific performance, because of refusal of defendant's wife to release her dower, there ought to be an order striking out defence as to that alternative claim and to have damages assessed. *Devenne* v. *Warren* (1910), 8 E. L. R. 453.

Incumbrance — *Lis pendens — Notice — Interpleader — Rule 1103 (a).*]—Action brought against one who had contracted to purchase lands for the purchase price. Pending the action the Molsons Bank sought to set aside, as fraudulent as against themselves and his other creditors, a grant of certain lands by one Sanderson to his wife, the vendor. Before accepting conveyance of these lands or paying the purchase money, the purchaser from Mrs. Sanderson was apprised of the registration of a certificate of *lis pendens* issued in the action brought by the bank:—*Held*, that the registration of a certificate of *lis pendens* is not an incumbrance within the meaning of R. S. O. c. 119, s. 15. It did not create any lien or charge upon the lands against which it was registered. Nor was this case one in which it would be at all possible to comply with the requirements of the statutory provision which the purchaser invoked. The Molsons Bank could not assert any liability on the part of the purchaser to pay to them such purchase money. Their claim must have been to have it declared that the lands in question were exigible to meet the demands of themselves and the other creditors of the vendor's grantor. Rule 1103 "deals with a liability in one person to pay a specific sum of money, while at the same time two other persons are making claims in respect of that sum:" *Ingham* v. *Walker*, 3 T. L. R. 448, 31 Sol. J. 271. *See* too *Baxter* v. *Day*, 73 Wisc. 27. The application was wrongly conceived, and should be dismissed with costs to be paid by the applicant to the vendor. The Molsons Bank, having supported the motion, should have no costs. *Molsons Bank* v. *Eager*, 6 O. W. R. 93, 180, 10 O. L. R. 452.

Inequitable contract — Discretion—Appeal — Mistake or fraud. *Drummond Mines Co.* v. *Farnholm*, 8 O. W. R. 864.

Interest — *Purchase-money ready and vendor notified — Costs.*] — The vendee is discharged from the duty of paying interest by a tender of the purchase-money when it becomes due and a continued readiness to pay it since, or by depositing it in a bank, with notice to the vendor, subject to his order, to be delivered to him on the execution and delivery of a deed. *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56, *In re Golds and Norton's Contract*, 33 W. R. 333, and *In re Riley and Streatfield*, 34 Ch. D. 386, followed. In this case no tender was made by the plaintiffs, the vendees, nor was the money paid into a bank, subject to the order of the defendant, the vendor, on delivery of a deed, as the defendant requested; but the money was deposited by the plaintiffs with a private person at the place of payment fixed in the agreement, and kept there until the commencement of the action (for specific performance), when it was sent to the plaintiffs' solicitor, who notified the defendant that he had the money, and would pay it over to him upon delivery of a good and sufficient deed:—*Held*, that this was sufficient to stop the interest; and the plaintiffs should pay interest only up to the date when the money was available to the defendant.—*Held*, also, that there should be no costs to either party; the matter should not have been brought into Court. *Quinlan* v. *O'Connell* (1911), 16 W. L. R. 288, Sask. L. R.

Interest in land—Specific performance — Assignment and delivery of plaintiff's agreement with owner — Dispute as to terms of contract—Waiver—Costs, *Brown* v. *Hoare* (Man.), 2 W. L. R. 33.

Interest in land—Specific performance — Tender of conveyance and cash payment — Conduct of vendor dispensing with — Terms of contract — Title — Waiver — Reference, *Bisnett* v. *Teskey*, 12 O. W. R. 18, 336.

Laches — *Stipulations that time is to be of essence of contract — Possession as excuse for delaying suit — Damages in lieu of specific performance.*]—The variation of an agreement for the sale of a lot of land, by a subsequent conveyance of a part of the lot to the purchaser in fee simple, will not of itself operate as a rescission of the agreement as to the remainder.—2. A stipulation in an agreement of sale of land that time shall be considered to be of the essence of the contract will be treated, in circumstances such as appeared, and when everything goes to shew that it was not the real intention of the vendor to insist on its being strictly carried out, as only in the nature of a penalty which a court of equity should relieve against. *In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. 1022, *Lowther* v. *Heaver*, 41 Ch. D. 248, and *Hipwell* v. *Knight*, 1 Y. & C. 401, followed.—3. A purchaser of land under an agreement of sale who takes and retains possession will not be barred from taking proceedings for specific performance, although he delays them for more than six years.—4. When specific performance for any reason cannot be granted, a plaintiff may now be awarded damages in lieu thereof as at common law, and no delay in seeking his remedy, short of that imposed by the Statute of Limitations, would afford a sufficient defence. *Barlow* v. *Williams*, 4 W. L. R. 233, 16 Man. L. R. 164.

Leasehold interest—*Action for specific performance — Vendor holding lands under sub-lease — Objection of purchaser—Waiver — Time — Approval of assignment — Existence of easement or right of way not known to purchaser — Inaccurate description of property — Materiality — Validity of objection — Dismissal of action — Unfounded charges of fraud.*]—Action for specific performance. Under an agreement to sell a leasehold interest a purchaser is not bound to accept an interest under a sub-lease:—*Held*, that defendant had waived his right to raise this objection. An easement existed known to plaintiff, but not mentioned in the agreement, nor known by defendant until a survey was made subsequently. As there was, therefore, a material mis-description action dismissed, but without costs, defendant having failed in charges of fraud against plaintiff and his solicitors. *Dineen* v. *Young*, 13 O. W. R. 722.

Making out contract—Letter — Offer to sell or quotation of price — Oral acceptance. *Blackstock* v. *Williams* (N.W.P.), 5 W. L. R. 85, 6 W. L. R. 79.

Memorandum of agreement—*Statute of Frauds — Construction of will—Title — Conveyance by executors.*]—Action for specific performance:—*Held*, that there was a completed binding agreement for the purchase and sale of the property, and that the trustees' conveyance with the widow's concurrence will pass a good title. *Fenety* v. *Johnston*, 7 E. L. R. 245.

Mineral claim — *Specific performance — Unilateral contract or option — Fluctuating value — Time of the essence — Place of payment — Tender — Intoxication.*]—Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet, by the very nature of the property dealt with, it is clear that time shall be of the essence.—Where the transaction is an option, or unilateral contract, for that reason time is to be taken as intended to be of the essence.—Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction. On the evidence the defendant was not, when he signed the contract, so intoxicated that he did not understand the nature of the instrument he was signing. *Morton & Symonds* v. *Nichols*, 12 B. C. R. 9, 3 W. L. R. 161.

Misdescription — *Innocent mistake as to frontage of city lot—"About" and "more or less"*]—An action for specific performance of a contract for sale of certain lands, and if defendant could not convey all the lands described in the contract, that she may be required to convey such portion thereof as she can convey, and that the plaintiff shall be compensated by the defendant by way of abatement from the purchase money for the difference—Purchase price not fixed per foot—Specific performance—Knowledge of purchaser—Question of title or conveyance — Action dismissed with costs. *Bullen* v. *Wilkinson* (1911), 19 O. W. R. 408, 2 O. W. N. 1202.

Mistake as to depth of city lot—*Described as 110 ft. "more or less"—Actually only 98 ft. 6 in.—Purchase price not fixed per foot—Action by purchaser for specific performance with compensation.*]—Defendant entered into an agreement to sell a lot, in the City of Toronto, to plaintiffs for $12,000, describing it as having a frontage of 110 feet more or less. It turned out to have a frontage of only 98 ft. 6 in. Plaintiff brought action for specific performance with compensation.—Meredith, C.J.C.P., *held*, that the words "more or less" added to the statement of the depth control that statement, so that neither party would be entitled to relief on account of a deficiency or surplus unless in case of so great a difference as would naturally raise the presumption of fraud or gross mistake in the very essence of the contract.—*Noble* v. *Goggins* (1868), 99 Mass. 231, followed.—Plaintiffs given option of taking what defendant owned without compensation or costs or having their action dismissed with costs. Election to be made within ten days. *Wilson Lumber Co.* v. *Simpson* (1910), 17 O. W. R. 820, 2 O. W. N. 410, O. L. R.

Mistake as to number of lot.]—Action by purchaser for specific performance for sale of lot A. Defence that it was B. and A. that was intended to be sold. Plaintiff not having rescinded, defendant given one month to carry out agreement, otherwise deposit to be returned with interest. *Gwillam* v. *Lott* (1909), 12 W. L. R. 4.

Mistake as to quantity — Reformation of contract — Specific performance — Absence of misrepresentation — Removal of timber by vendor — Deduction from purchase money. *McIntyre* v. *McLaughlin*, 10 O. W. R. 195.

Mistake of vendor as to quantity—Specific performance as to part only of land contracted to be sold. *De Rosiers* v. *De Calles*, 8 O. W. R. 91.

Necessary for allegation in bill that contract was in writing — Demurrer — Statute of Frauds — Parties. *Mutch* v. *Moffatt*, 5 E. L. R. 491.

Negotiations — *Concluded agreement—Correspondence — Authority of agent — Non-disclosure of purchaser's name—Statute of Frauds.*]—A., who temporarily resided in England, had had certain dealings with a firm of real estate agents, C. & Co., in Vancouver, who cabled to him inquiring the lowest price, cash, he would accept for a certain lot in Vancouver. He replied "$13,000 net." C. & Co. cabled back that the best offer they could get was $12,000, net to him, and asking if they could accept. A. made no reply. Subsequently C. & Co. cabled that they had sold the lot for $13,000 net, had accepted, without stating purchaser's name, a desposit of $500, and asking confirmation by cable. A. cabled "writing acceptance." The letter following upon this stated that his reason for cabling in those terms was that he "wanted it distinctly understood that I could not complete the deal until I returned. . . . It would be impossible to close before, as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to 1st April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall. Kindly make it known to the purchaser so that there will not be any misunderstanding; be sure and tell the purchaser that I cannot give him possession of the premises; he will simply have to accept the present tenant. Of course I accept the $13,000, net cash offer, with the understanding that I am not to be called upon to produce any title papers other than these in my possession; no doubt you have explained all this to your client. . . . Kindly write and let me know if your client accepts these terms." C. & Co. handed this letter to the plaintiff's solicitors, who accepted "unreservedly the stipulations made by Mr. Andrews," but added, "We are ready at any minute to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction." C. & Co. communicated this to A. The latter in reply repeated, in effect, the terms of his former letter. There was some evidence at the trial about a proposed change in the

terms of payment from a cash basis to instalments:—*Held*, Irving, J., *dissentiente*, that A.'s letter following his cable "writing acceptance," read with C. & Co.'s cable announcing sale at $13,000, and the letter of the plaintiff's solicitors to C. & Co., constituted a memorandum of a contract between the plaintiff and defendant sufficient to satisfy the Statute of Frauds; that the letter of the plaintiff's solicitors to C. & Co. contained an unqualified acceptance of the terms proposed in A.'s letter to C. & Co., and did not import the proposal of a fresh term. *Calori* v. *Andrews*, 12 B. C. R. 236, 4 W. L. R. 259.

Notice of prior unregistered sale—*Fraud.*]—Under ss. 71 and 91 of the Real Property Act, R. S. M. 1902 c. 148, the title of the holder of a certificate of title, as against the claimant under a prior unregistered sale, can only be impeached for fraud, and fraud cannot be found merely because the purchaser had been told of the prior sale by the solicitor of the prior purchaser, when it appeared that he had afterwards been informed by the vendor himself that he had not sold the property, and by a real estate agent, that the property had not been sold but had been placed by the vendor in his hands for sale, also that due search had been made in the land titles office. *Stark* v. *Stephenson*, 7 Man. L. R. 381, followed. *Shaw* v. *Bailey*, 6 W. L. R. 197, 17 Man. L. R. 97.

Objection of purchaser — Jurisdiction of Court over foreign defendant — Title — Will — Conveyance by executors — Period of distribution — Further evidence on appeal. *Cooke* v. *McMillan*, 4 O. W. R. 523, 5 O. W. R. 507.

Objections to title — *Rescission of contract — Solicitor's letter — Finding of trial Judge — Reference as to title.*]—Action for specific performance. The trial Judge found there was a valid contract for sale of land and directed a reference. In some way the direction to the master to ascertain when plaintiff was in a position to make title was omitted from the judgment. On appeal, judgment varied accordingly. *Bird* v. *Lavallee*, 13 O. W. R. 1197.

Offer — Acceptance — Conditions—Incomplete contract. *Tiel* v. *Taylor* (N.W. T.), 2 W. L. R. 458.

Offer in writing — Acceptance — Administrator of estate — Consent of official guardian — Binding contract — Specific performance — Perjury. *McCullough* v. *Hughes*, 10 O. W. R. 691.

Offer to sell land—Absence of consideration — Right to withdraw before acceptance — Company — Service of notice of withdrawal on secretary — Notice addressed to secretary personally. *Carton* v. *Wilson*, 8 O. W. R. 781.

Outstanding legacies against property — *Barred by Statute of Limitations — R. S. O. (1897) c. 134.*]—Defendant purchased a lot from plaintiff, paying $100 as a deposit thereon. He entered into possession and made considerable alterations to the property. He then refused to pay over balance of purchase money or give up possession. Plaintiff made application under V. & P. Act for specific performance of contract of purchase. Defendant pleaded that there were several outstanding legacies under a will, charged against said lot:—*Held*, that the legacies in question were barred by Statute of Limitations and as the vendor had power to sell, and as the purchaser had gone into possession that the defendant must pay over the balance of the purchase money and interest thereon, since he went into possession. *Mulholand* v. *Morris* (1909), 14 O. W. R. 1112, 1 O. W. N. 214, 20 O. L. R. 27.

Part performance — *Delivery of deed in escrow — Statute of Frauds.*]—As part of the consideration for the sale of a house and lot to the plaintiff, the defendant verbally agreed to take an assignment of the plaintiff's interest in certain farming lands under an agreement of purchase from one E., provided that one B. would take a lease of the lands. A deed of the house and lot and an assignment of the agreement of sale were prepared and executed and left with the defendant's solicitors in escrow:—*Held*, that the plaintiff's failure to secure B. as a tenant barred his right to specific performance, as did also the fact that the plaintiff had, pending the action, lost his interest in the farm lands through cancellation by E. of the agreement.—2. The receipt by the plaintiff of a payment of rent from the tenant of the house, without the consent or acquiescence of the defendant, was not such a part performance of the contract as would take the case out of the Statute of Frauds.—*Semble*, that the documents left in escrow could not be used as evidence of the verbal agreement sufficient to take it out of the statute. *Vanderwoort* v. *Hall*, 18 Man. L. R. 682.

Parties—*Costs.*] — The defendant held two half sections of land from the Canadian Pacific Railway Co. under interim receipts signed on behalf of the company acknowledging payment of $160 on each, stating the price, and expressed to be given "subject to the conditions of the company, and pending completion of agreement for the purchase of said land." The plaintiff afterwards agreed to buy the defendant's interest in the land for $1,440 and to assume the debt still due to the company. He paid $720 cash, and was to pay the other $720 in 30 days on receiving assignments from the defendant of the agreements of sale to be given by the company. When the 30 days expired the defendant had not yet procured the agreements from the company, but offered to assign them to the plaintiff and hand over interim receipts on payment of the money:—*Held*, that the plaintiff was not bound to accept such offer, but was entitled to withhold the money until the defendant should procure the agreements from the company and hand them over with assignments. After the receipt of the company agreements, the defendant refused to carry out the sale to the plaintiff, and entered into an agreement to sell one of the parcels to one W., who was aware of the plaintiff's claim.— *Held*, that the plaintiff was entitled to specific performance by the

defendant of the contract of sale between them, and that the defendant could not rely on his objection that W. had not been made a party to the action, because he had not raised such question by his pleadings.—One-fourth part of the counsel fees that would ordinarily have been allowed for the trial was ordered to be struck off, because the plaintiff's counsel had unnecessarily prolonged the trial by neglecting to go through the documents relating to the cases before the trial and select those they wished to use. *Brown* v. *Hoare*, 16 Man. L. R. 314.

Partnership land — Authority of one partner to sell — Statute of Frauds — Description of land — Mutual mistake — Dominion Lands Act — Interest in homestead — Want of mutuality. *Grierson* v. *Johnston* (N.W.T.), 1 W. L. R. 83.

Possessory title — *Knowledge of purchaser — Easement — Extinguishment.*]— Purchaser's action for specific performance. Vendor claimed to have a good possessory title to a 20-foot road or lane laid out on a plan:—*Held*, that vendor had not shewn that rights of dominant tenements east and west of this property had been extinguished. Plaintiff knew there was some question of defendant's title to this lane.—*Held*, that plaintiff did not know it was impossible to get a good title thereto. *Currah* v. *Ray*, 13 O. W. R. 652, 1071.

Prior agreement to sell same property.]—Plaintiff brought action for specific performance of an agreement for sale of land: — *Held*, that specific performance should not be decreed, nor damages awarded in lieu thereof, as the parties entered into the agreement under a mistake, as to the effect of a prior agreement made with W. for sale of same property, and plaintiff having had notice of the prior agreement, the action should be dismissed, but under the circumstances without costs. *Bowley* v. *Cornelius* (1910), 15 O. W. R. 414, 1 O. W. N. 526.

Purchase-money — *Payment to vendor's agent — Scope of authority not to receive purchase-money.*] — An action for specific performance of an agreement to sell plaintiff three lots in New Liskeard for $850, which plaintiff alleged and defendant denied that he had paid. At trial Mulock, C.J.ExD., 18 O. W. R. 350, 2 O. W. N. 560, entered judgment declaring payment by plaintiff to Weaver of the purchase money ($850), was payment to defendant, and ordering specific performance, with costs. Divisional Court *held*, that this was another instance of the deplorable litigation which arises between two innocent parties who have been wronged by a trusted intermediary, and the apparently hard rule usually is that he who trusts most has to suffer most. The defendant's letter made it clear that Weaver was agent to complete the sale, but was not agent to receive the purchase-money. There was simply a breach of trust in the application of the money as between the plaintiff and Weaver, but no satisfaction of the price as between the parties to the action. Appeal allowed with costs and judgment for defendant with costs. *Hendry* v. *Wismer* (1911), 19 O. W. R. 204, 2 O. W. N. 1054.

Relief from contract — Hardship — Equitable terms — Payment of damages and costs — Evidence of contract. *Dundas* v. *Dinnick*, 7 O. W. R. 124.

Sale by vender to another — *Purchaser for value without notice — Damages — Fraud — Amendment — Costs — Cancellation of contract — Notice.*]—The plaintiff made an agreement in writing for the purchase of the land in question from the defendant H., paid $200 on account, went into possession, and erected a good house on the lot. The title to it was under the Real Property Act. The plaintiff did not register his agreement. Some time afterwards the defendant R. procured an assignment from H. to himself of the agreement, and also a transfer of the title to the lot. The trial Judge found that these transfers were obtained by fraudulent promises on the part of R. or his solicitor to protect the plaintiff's interests. R. afterwards transferred the lot for value to the defendant P., who was not proved to have had any notice or knowledge of the plaintiff's rights or that he was in possession of the property:—*Held*, that the plaintiff could not have specific performance of the agreement as against P., but should be allowed to remove the house from the lot if he desired.—In his statement of claim the plaintiff had asked only for specific performance of the agreement, but, under the power conferred on the Court by s. 38 (k), of the King's Bench Act, and Rules 344 and 346, as to amendment of the pleadings, if found necessary, the Court, having found the defendant R. guilty of fraud, granted the plaintiff further relief against him by ordering him to pay the plaintiff, by way of damages, what he had paid to H. on the lot with interest.—Action dismissed as against the defendants H. and P.—*Held*, as to costs, that the defendant R. should be ordered to pay not only the plaintiff's costs, but also those of his co-defendants directly to them: Daniel's Ch. Pr., 7th ed., p. 980.—*Rudow* v. *Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600, followed.—There were two clauses in the agreement providing for cancellation in case of default, the first saying that, after such default, the vendor might cancel with or without notice, the second providing for the manner of giving the notice of default.—*Held*, that the vendor might elect to adopt one or other of such modes of cancellation; that, if he elected to cancel without giving notice, he could not do so by a mere operation of his mind, but must do something by which he gives the purchaser clearly to understand that he decides to avoid the contract, and that the relation of vendor and purchaser no longer exists between them, or do some act directly affecting the vendee in his position or interest, as, for example, a sale to another. *McCord* v. *Harper*, 26 C. P. 104, and, on the other hand, if he adopts the mode of cancellation by notice, he must conform strictly to the mode prescribed. *Czuack* v. *Parker*, 15 Man. L. R. 456.

Sale to syndicate — *Subsequent sale to another — Rights of syndicate members — Agent's authority — Specific performance.*]—Action for a declaration that transfer of a brewery by defendant L. to de-

fendant D. was void, and that plaintiffs were entitled to a share in the property and for damages and specific performance. The agreement which had fallen through was to be taken up anew, the purchaser to pay £100 additional. The intended purchaser then repudiated the agreement and requested the vendor to convey to another:—*Held*, that the agreement cannot be enforced against the defendant, and that plaintiffs are entitled to damages from C. Limited. *Clisdell* v. *Lovell*, 12 O. W. R. 90, 13 O. O. W. R. 748.

Shortage in dimensions — *Reduction in purchase price.*]—When, in a deed of sale of immovable property, the description contains an estimate of its superficies, but refers to it under its cadastral number and, to more clearly define it, gives the adjoining properties, the purchaser cannot claim a reduction in the purchase price if the dimensions are found to be short. *Bessette* v. *Seguin* (1911), 39 Que. S. C. 473.

Subsequent deficiency in acreage — *Action by purchaser for specific performance with abatement in price — Mutual mistake — Executed contract — Remedy — Rescission — Option — Election — Unfounded allegation of fraud — Costs.*] — Where, on a sale of lands, there is a mutual mistake, going not necessarily to an essential, but to a material, substantial, and important element of the contract, the Court will ordinarily order rescission, even though the contract has been completely executed, if it can do so on equitable terms.—Where, therefore, the vendor and purchaser had contracted for the sale and purchase of a block of land under a common mistake that it contained 160.86 acres, whereas, in fact, it contained only 97 acres:—*Held*, that the deficiency was so material, substantial, and important an element as to entitle the purchaser to relief, although the contract had been completely executed by conveyance.—*Held*, in the circumstances, that the purchaser, the plaintiff, was entitled to have the contract rescinded, and his purchase money returned with interest, and a fair sum for compensation for permanent improvements made by him; but with the option to the defendant of paying to the plaintiff compensation for the deficiency in acreage.—As this relief was not claimed by the plaintiff, who sued for specific performance with an abatement in the price, or in the alternative for damages by reason of the deficiency, which the Court refused, and, as the plaintiff had made unfounded allegations of fraud, the plaintiff was refused his costs. *De Clerval* v. *Jones*, 8 W. L. R. 300, 1 Alta. L. R. 286.

Time of essence.] — Defendant agreed to take up plaintiff's interest in certain property on the 1st December if the latter decided to dispose of it. Plaintiff asked defendant to buy on 4th December, but defendant then said it was too late:—*Held*, that plaintiff must succeed as he had come with sufficient promptness. *Hill* v. *Rowe*, 9 W. L. R. 302.

Time of essence contract — Delay of vendor — Description — Statute of Frauds — Specific performance. *Anderson* v. *Foster*, 42 S. C. R. 251.

Trifling amount involved — Conduct of parties — Costs. *Edgecombe* v. *McLellan*, 6 E. L. R. 46.

Undertaking of purchaser to build — Condition — Representation — Acts of agent of vendor — Waiver — Acceptance and retention of cheque for part of purchase money — Time for making payments — Time of the essence of the contract — Tender of formal agreement for execution by vendor. *Bowerman* v. *Fraser*, 10 O. W. R. 229.

Vendor declining to convey—Action for specific performance — Defence—Caveat —Incumbrance created by purchaser. *White* v. *Edgar*, 7 W. L. R. 800.

Written contract for sale of land—Enforcement by vendor — Parol variation of contract — Specific performance — Description of land — Statute of Frauds. *McNab* v. *Forrest*, 2 O. W. R. 821.

Written contract signed by one of two tenants in common — Specific performance — Statute of Frauds — Conveyance by the other tenant delivered in escrow — Time for completion of purchase. *Goodman* v. *Wedlock*, 6 O. W. R. 777.

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13. Statute of Frauds.

Alternative payment of money—*Validity of, in part—County Court appeal—Divisional Courts—Independent judgment.*] —Although a part of a contract for the sale and purchase of land may not be binding under the Statute of Frauds, another part of it, if in the alternative and distinct from the agreement to purchase—*e.g.*, that either party will pay to the other a named sum if he does not fulfil his agreement to sell or purchase—may, on his refusal to do so, be enforced against the party refusing. Review of English and American cases.—A Divisional Court, being the Court of last resort on appeal from a County Court, should, on such an appeal, give an independent judgment. *Canadian Bank of Commerce* v. *Perram*, 31 O. R. 116, followed. *Mercier* v. *Campbell*, 9 O. W. R. 101, 14 O. L. R. 639.

Authority to agent to sign offer.]—The defendant verbally expressed her willingness to sell the land in question, which was her property, to the plaintiff for $300, but referred him to her husband, who was not then living with her. The plaintiff then obtained from the husband a document, signed by him, giving the plaintiff an option, to hold good for one week, to purchase the land at that price. The plaintiff alleged that within the week he handed to the defendant a letter addressed to her husband containing an absolute acceptance of the offer. This letter was not produced at the trial. The plaintiff had kept no copy of it, but undertook to give the contents of it in his evidence. The offer did not contain a sufficient description of the property. The defendant and her husband both swore that the defendant had not given her husband any authority to sign the offer:—*Held*, that

specific performance of the agreement should not be decreed. *Heath* v. *Sanford*, 6 W. L. R. 203, 17 Man. L. R. 101.

Evidence to connect documents — *Sufficiency of a statement of consideration and terms.*]—In an action for a specific performance against a vendor, the evidence to satisfy the Statute of Frauds consisted of a receipt signed by the plaintiff for $50, "to apply on equity on Canadian Pacific Railway land," describing it "at $5.50 per acre," and a letter from the vendor offering to return the $50 and referring to the sale as having been "declared off long before." The agreement alleged was to sell the land at $5.50 per acre, the purchaser paying off the balance due the railway company out of his purchase money:—*Held*, that the letter from the defendant could be used with the receipt to satisfy the Statute, although it repudiated the sale.—*Held*, however, that the requirements of the Statute of Frauds were not satisfied, the writing indicating an agreement to sell for $5.50 per acre, subject to the railway company's claim and not the agreement alleged. The plaintiff had done some breaking upon the lands without the knowledge of the defendant.—*Held*, that the breaking done upon the lands by the plaintiff, being unknown to the defendant, could not be relied upon to show the part performance of the agreement. *Berry* v. *Scott* (1906), 6 Terr. L. R. 369.

Memorandum in writing — *Purchaser not named — Cheque — Agency.*]—A writing signed by the defendant not under seal agreeing to sell a parcel of land for $2,000 on terms stated, and acknowledging the receipt of a cheque for $100 deposit on same, but not mentioning the name of any person as purchaser or containing anything to indicate who the purchaser is, is not a sufficient memorandum in writing to bind the defendant under the Statute of Frauds; and, if the person whose name is signed to the cheque is not acting as the agent of the purchaser in the transaction, the cheque and the agreement do not together constitute such sufficient memorandum. *Pearce* v. *Gardner*, [1897] 1 Q. B. 688, distinguished. *Grant* v. *Reid*, 5 W. L. R. 361, 16 Man. L. R. 527.

Memorandum in writing incomplete as to terms — *Admission of terms by plaintiff — Parol evidence — Purchaser for value — Enforcement of contract against — Notice to solicitor — Registry laws — Misconduct — Costs.*] — The action was brought to compel specific performance of an agreement for the sale by the defendant S. to the plaintiff of a house and premises. The plaintiff paid $10 on account of his purchase and obtained the following receipt signed by S.: "Hamilton, Oct. 10, 1904. Received from Mr. Edwin Green the sum of ten dollars on house and lot number 328 East avenue sold by Mr. James Stevenson for $350 by paying (fifty dollars) to Mr. Stevenson, allowing one-half for lawyers' fees, also paying water rates. Balance $40 on house." S. afterwards sold and conveyed the property to the defendant B. for $425. The plaintiff admitted that the agreement orally made was for a sale of $400, payable $50 in cash and $350 by the assumption of an existing mortgage, and for payment by the plaintiff of the taxes for 1904 and interest upon the mortgage since the 14th May. The receipt was the only memorandum of the bargain. The solicitor for B. had full knowledge of the previous sale to the plaintiff, and it was held that this was notice to B., who was thus deprived of the protection of the Registry Act. The second point ruled was that the receipt plainly shewed a contract for a sale at $400, of which $350 was to be paid by the assumption of the existing mortgage and $50 in cash; and the third that the receipt sufficiently shewed that Edwin Green was the purchaser. The defendants escaped, however, upon the fourth question raised, which, like the second and third, depended upon the Statute of Frauds—the omission from the receipt of all reference to the special terms as to interest and taxes. The defendants averred that these terms were part of the bargain, and the plaintiff admitted that it was so, and expressed his willingness to perform that part of the contract as a condition of obtaining specific performance. The Court (distinguishing *Martin* v. *Pycroft*, 2 De G. M. & G. 785), reluctantly gave effect to this defence. "The receipt," said Anglin, J., "not purporting to contain the whole terms of the bargain, offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left in part parol. Its special equitable jurisdiction not being invoked by the defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats the plaintiff's claim without any indulgence which it is peculiarly the province of a court of equity to afford. By evidence admissible in any court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if it would suffice, to enable the Court to avoid the effect of the statute; nor part performance to satisfy it in the absence of a sufficient memorandum. *Green* v. *Stevenson*, 25 C. L. T. 354, 5 O. W. R. 761, 9 O. L. R. 671.

Memorandum of agreement — *Signature of party charged or his agent—Tender of conveyance.*]—An agent to purchase or sell land need not be authorised in writing in order to bind his principal. It is sufficient, under the Statute of Frauds, if the agent, though authorised only by parol, has signed an agreement in writing so as to satisfy the statute.—2. The writing of the purchaser's name near the beginning of a written agreement of sale, prepared by a solicitor under the instructions of the purchaser's duly authorised agent, may be a sufficient signature by the purchaser's agent within the meaning of the statute, although the agreement is signed by the vendor only. *McMillan* v. *Bentley*, 16 Gr. 387, *Evans* v. *Hoare*, [1892] 1 Que. B. 593, and *Schneider* v. *Norris*, 2 M. & S. 286, followed. — 3. When the purchaser has formally refused

to carry out the purchase, it is not necessary for the vendor to tender a conveyance of the land before commencing an action to recover the purchase money.—Illustration of correspondence and documents together constituting a memorandum in writing sufficient to satisfy the Statute of Frauds in a case of a sale of land. *McIlvride* v. *Mills*, 16 Man. L. R. 276.

No name of purchaser in memorandum — *Laches — Agent's duty to furnish name of purchaser.*]—Action for specific performance of an alleged contract by the defendant to sell to the plaintiff two lots of land. The writing relied on was an acknowledgment signed by the agents for the defendant (naming firm) of having received from B. & R. $25 deposit on the purchase of the lots, describing them, with the price and terms of sale. The plaintiff asserted that he was the purchaser, though his name did not appear in the agreement. B. & R. were his solicitors and agents. The defence was that the agreement did not comply with the requirements of the Statute of Frauds, as the name of the purchaser did not appear in it; that the plaintiff by his laches had disentitled himself to specific performance of the agreement; and that, on account of the default of the plaintiff, the defendant had rescinded the agreement:—*Held*, that the plaintiff had not made out a case entitling him to specific performance of the agreement in question, and the action should be dismissed with costs. The note or memorandum of an agreement for the sale of real estate must contain the names of the contracting parties, or such a description of them that there cannot be a fair dispute as to their identity. The term "vendor" is not in itself a sufficient description of one of the contracting parties: *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Williams* v. *Jordon*, 6 Ch. D. 517; *White* v. *Tomalin*, 19 O. R. 513. In the present case the purchaser was neither named nor described in the agreement. As the agreement did not comply with the requirements of the Statute of Frauds, the plaintiff was not entitled to recover. *Maber* v. *Penkalski*, 24 C. L. T. 407.

Resolution by municipal corporation — *Acceptance of offer to purchase — Evidence — Written instruments — Statute of Frauds — Estoppel.*]—T. offered to purchase lands which the municipality had bid in at a tax sale, and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs, and interest" against the lands, and authorised the reeve and clerk to issue a deed at that price:—*Held*, reversing the judgment appealed from, that, even if communicated to T. as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest. An instrument, which was never delivered to T., was executed by the reeve and clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution, but without a reference to any contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T.:"—*Held*, that these circumstances could not be relied upon as an admission of a prior contract of sale.—*Held*, also, that, even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communication in respect thereto made on behalf of the municipality, and, consequently, the alleged admission of a contract did not satisfy the Statute of Frauds, and could have no effect. *District of North Vancouver* v. *Tracy*, 24 C. L. T. 114, 34 S. C. R. 132.

Specific performance — Description of land — Sufficiency — Parol evidence. *Lewis* v. *Hughes* (B.C.), 4 W. L. R. 269.

Specific performance — Letters—Unsigned agreement — Authority of agent — Misrepresentations of vendor — Tender of conveyance — Waiver — Amendment. *McIlvride* v. *Mills* (Man.), 1 W. L. R. 229.

Specific performance — Memorandum in writing — Cheque for part of purchase money — Receipt — Authority of agent — Part performance — Possession. *Stevenson* v. *McRae* (N.W.T.), 3 W. L. R. 259.

Specific performance — *Memorandum in writing — Receipt — Insufficiency — Part performance — Possession — Improvements.*]—In an action for specific performance against a vendor, the evidence to satisfy the Statute of Frauds consisted of a receipt signed by the plaintiff for $50, "to apply on equity on Canadian Pacific Railway land," describing it, "at $5.50 per acre," and a letter from the vendor offering to return the $50 and referring to the sale as having been "declared off long before." The agreement alleged was to sell the land at $5.50 per acre, the purchaser paying off the balance due the railway company out of his purchase money:—*Held*, that the letter from the defendant could be used with the receipt to satisfy the statute, although it repudiated the sale.—*Held*, however, that the requirements of the Statute of Frauds were not satisfied, the writing indicating an agreement to sell for $5.50 per acre, subject to the railway company's claim and not the agreement alleged.—The plaintiff had done some breaking upon the lands without the knowledge of the defendant.—*Held*, that the breaking done upon the lands by the plaintiff, being unknown to the defendant, could not be relied upon to shew the part performance of the agreement. *Berry* v. *Scott*, 3 W. L. R. 84, 4 W. L. R. 282, 6 Terr. L. R. 369.

Specific performance — Memorandum in writing — Transfer in blank — Cheque — Supplying name of purchaser — Terms of payment — Variation — Authority of solicitor — Collateral contract — Amendment. *Taylor* v. *Grant* (N.W.T.), 3 W. L. R. 254.

Specific performance — *Names of parties—Laches—Default — Discretion.*]—1. A note or memorandum in writing containing an agreement for the sale of land must, to satisfy the Statute of Frauds,

name both the contracting parties or describe them so that they can be ascertained without extrinsic parol evidence, and it is not sufficient that the agent of the intending purchaser is named.—2. An intending purchaser of land who has been guilty of laches, bad faith, and default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favour. *Maber* v. *Penskalski*, 24 C. L. T. 407, 15 Man. L. R. 236.

Specific performance — *Possession.*] —The land which the defendant agreed to purchase from the plaintiff for the sum of $5,000 was subject to mortgages and registered judgments for amounts exceeding in the aggregate the sale price, and the plaintiff had no means of paying them off except out of the purchase money, and he undertook to negotiate with the judgment creditors to get releases for less than the sums due to them respectively, but he had not, up to the commencement of the action, been able to get his arrangements for these releases definitely concluded. By the agreement the defendant was to pay the purchase money "as soon as a loan can be arranged and title found satisfactory." The agreement was silent as to when the purchaser was to have possession of the property, and the plaintiff remained in possession during the negotiations for completion, which lasted about nine months:—*Held*, that specific performance of the agreement should be refused, on the following grounds: (1) the plaintiff had failed to shew a clear title of his ability to give such a title; (2) such failure caused such delay in the defendant getting possession that it would be a great hardship on him to enforce the contract, as specific performance is purely a discretionary remedy available according to the equities of each case: Fry on Specific Performance, p. 183 *et seq.*; (3) the provisions in the agreement that the purchase money was to be paid "as soon as a loan can be arranged" was so indefinite, obscure, and uncertain as to render the contract incapable of being the subject of an action for specific performance: Am. & Eng. Encyc. of Law, vol. 26, p. 137. *Major* v. *Shepherd*, 18 Man. L. R. 504, 10 W. L. R. 293.

Specific performance — *Transfer in blank—Mortgage back—Payment by instalments.*]—A transfer of land, in the statutory form, complete except for the insertion of the name of any person as the person by whom the consideration has been paid or as transferee, is a sufficient memorandum under the Statute of Frauds to charge the transferor; the person who paid the consideration being identifiable by parol evidence, and for form of transfer requiring the insertion of his name in both blank spaces.—In an action in which the plaintiff relies upon such a transfer as the memorandum to satisfy the statute, but admits that the purchase price was not all paid, the agreement being that part of it should be payable by instalments, secured by mortgage, the defendant cannot rely upon this to shew that the transfer is not a complete memorandum containing all the terms of the agreement, since to contradict the acknowledgment in the transfer he must accept the admission as a whole, not only as an admission of non-payment. *Taylor* v. *Grant*, 3 W. L. R. 254, 6 Terr. L. R. 353.

Time of essence — *Time for completion —Delay of purchaser—Default of vendor to tender conveyance—Duty as to preparation—Misdescription of land—Statute of Frauds—Misrepresentation—Mistake — Specific performance.*]—The contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, *inter alia*, the following provisions: "This offer to be accepted by September 25th, A.D. 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense:"—*Held*, that time was of the essence as to all the terms of the contract; but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted; and, having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance. — Among the words of description of the parcel of land in question, the contract contained the words, "being the premises known as number 22 Ann street." The correct number was 24; there was no number 22; and the defendant owned no other property in Ann street:—*Held*, that, there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds; Osler, J.A., *debutante.*—*Held*, also, upon the evidence, that misrepresentation and mistake such as would afford ground for refusing specific performance were not shewn.—Judgment of a Divisional Court, 15 O. L. R. 362, awarding specific performance, affirmed. *Foster* v. *Anderson*, 16 O. L. R. 565, 11 O. W. R. 1037.

Transfer in blank.] — A transfer of land in the statutory form complete except for the insertion of the name of any person as the person by whom the consideration has been paid or as transferee, is a sufficient memorandum under the statute of Frauds to charge the transferor, the person who paid the consideration being identifiable by parol evidence, and the form of transfer requiring the insertion of his name in both blank spaces. Where in an action in which the plaintiff relies upon such a transfer as the memorandum to satisfy the statute, but admits that the purchase price was not all paid, the agreement being that part of it should be payable by instalments, secured by mortgage, the defendant cannot rely upon this to show that the transfer is not a complete memorandum containing all the terms of the agreement, since to contradict the acknowledgment in the transfer he must accept the admission as a whole, not only as an admission of non-payment. *Taylor* v. *Grant* (1906), 6 Terr. L. R. 353.

Written agreement — *Oral evidence to shew true agreement—Admissibility* —

Agreement partly written and partly oral — Statute of Frauds — Rectification — Immaterial collateral conditions—Specific performance with addition of terms.]—When two parties enter into a formal written agreement for the sale and purchase of land containing all the particulars necessary to make it binding under the Statute of Frauds and all the terms they intended to embody in it, and there is no suggestion of accident, fraud, or mistake in the preparation or execution of it, specific performance of it may be decreed, notwithstanding that the parties at the same time verbally agreed upon a number of collateral agreements or subsidiary conditions for conveniently carrying out the written agreement, and notwithstanding the Statute of Frauds.—The following variations of or additions to the written contract made in that way in this case were held not to stand in the way of specific performance being decreed, the plaintiff being willing to carry out the agreement as thereby modified:—1. The vendor was to allow a deduction of $30 per acre from the price mentioned for any deficiency in the estimated acreage that might be found on actual measurement.—2. The purchaser agreed to accept possession at a date two weeks later than the time fixed by the agreement for taking possession.—3. Taxes, interest on a mortgage, and insurance premiums were to be adjusted as of the date of the agreement, which was silent on these points.—4. It was understood that, although the plaintiff had a certificate of title under the Real Property Act, the defendant's solicitor was to examine the title and see if it was all right, whilst the written contract declared that the purchaser accepted the vendor's title and should not be entitled to call for an abstract or evidence of title or any deeds, papers, or documents other than those in the possession of the vendor. *Byers* v. *McMillan*, 15 S. C. R. 194, and *Martin* v. *Pycroft*, 2 De G. M. & G. 785, followed.—*Green* v. *Stevenson*, 9 O. L. R. 671, distinguished.—*Held*, also, *per* Howell, C.J.A., that evidence should not have been allowed to prove such variations and additions, in the absence of anything in the defendant's pleading setting them up.—*Per* Perdue, J.A., that the evidence should not have been admitted at all.—*Per* Phippen, J.A., that the evidence of the variations and additions in this case was properly received. *Anderson* v. *Douglas*, 18 Man. L. R. 254, 8 W. L. R. 520, 9 W. L. R. 378.

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14. TITLE.

Absence of title in vendor — Failure to procure title—Evidence — Damages for breach of contract — Loss of increased value of land — Improvements. *Hutchinson* v. *Schleuter* (Sask.), 8 W. L. R. 682.

Absence of title in vendor — *Repudiation by purchaser—Time — Trial—Amendment — Costs — Specific performance—Form of judgment.*]—The purchaser under an agreement of sale of lands can repudiate the contract for want of title in the vendor at any time before the vendor has acquired or placed himself in a position to acquire and convey title according to the exigency of the agreement.—*Semble*, the Judge has power to direct an amendment of pleadings *ex mero motu* at the trial to do full justice between the parties.—Special circumstances considered as to costs and contents of decree for specific performance in this case. *Nimmons* v. *Stewart*, 1 Alta. L. R. 384.

Agreement for sale of land — *Possession — Title not satisfactory—Rescission of contract — Return of deposit.*] — Plaintiff brought action to recover $300 paid to defendant as a deposit and interest on an agreement to purchase No. 232 Bloor street west, if title satisfactory to plaintiff. The title not being satisfactory, plaintiff demanded his deposit back, and on defendant's refusal, brought action. At trial judgment was given for plaintiff for $301.68 and costs. Divisional Court allowed defendant's appeal with costs. Judgment below set aside and judgment entered for defendant dismissing the action without costs. *Cotton* v. *Medcalf* (1910), 15 O. W. R. 787.

Agreement for sale of land — *Tender of transfer from third party—Action for purchase money — Repudiation—Penalty —Specific performance—Election.*]—Where at the time of an agreement for sale and purchase of land, the title to the land stood in the name of the vendor's wife, but the vendor obtained and tendered a transfer from his wife to the purchaser before the purchaser repudiated the agreement:—*Held*, following *Paisley* v. *Wills*, 19 O. R. 303, 18 A. R. 210, that the purchaser was liable to an action for balance of purchase money. Right to repudiate discussed. If a thing be agreed to be done, though there be a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty. *Hamilton* v. *McNeill*, 2 Terr. L. R. 31.

Application under Vendors and Purchasers Act — Scope of — No dispute as to validity of contract—Question of title—Registered title standing in name of two persons, one of whom is dead—Survivor desiring to sell—Affidavit that deceased had no interest—Refusal to declare title valid on summary application. *Re Farmer & Reid*, 12 O. W. R. 1076.

Breach by vendor — *Guaranty of title —Assignment of contract—Failure of title—Representation of interest—Cause of action — Pleading — Damages.*]—Action by purchaser for damages for breach of contract for sale and purchase of land. Defendant, a foreigner, while not expressly guaranteeing title to certain lots, led plaintiff to believe he was; although believing he had, yet he had no title to them. Plaintiff had transferred certain property to defendant, the part of the consideration being defendant's supposed interest in said lots. Damages equal in amount to said interest given to plaintiff. *Graham* v. *Dremin* (Man.), 9 W. L. R. 641.

British Columbia Land Registry Act, s. 71 — *Refusal of registrar to register deed without deposit of map or a sketch —Survey and plan procured by purchaser on refusal of vendor to procure—Compulsion of law.*]—Plaintiff bought a block of land subject to defendant's agreement to purchase a lot therein. On plaintiff applying to register his conveyance, the registrar required under s. 71 above, the production of a map

or sketch of the land conveyed, but which he did not supply. When the defendant received his deed, he applied for registry, but it was refused, owing to the non-registration of plaintiff's title. On request, plaintiff refused to obtain the necessary map, and then defendant had a survey made of plaintiff's block and plan prepared, when defendant succeeded in having his deed registered. It was compulsion of law, forcing him to protect his interest. Section 71 above requires a map or sketch made from the survey, not a mere picture of the survey. Defendant, on his counterclaim, received amount paid surveyor, and a reasonable sum for his expenses in having survey made. *Alder* v. *Lelion*, 11 W. L. R. 23.

Charge — *Assessment — Municipal by-law.*]—A charge upon immovables imposed by a municipal by-law is apparent within the meaning of Art. 1508, C. C. Therefore, a vendor is not obliged to guarantee his purchaser against special assessments imposed or exigible after the sale by virtue of a by-law in force at the time the sale is made. *Bourdon* v. *Deslongchamps*, 16 Que. K. B. 163.

Completion — *Delivery of registrable conveyance—Repudiation before completion —Immoral purpose of purchaser—Defective description — Operative deed.*]—The plaintiff, through an agent, negotiated a sale of land, and had executed a conveyance, and received part of the purchase money, when he heard that the purchaser's intention was to allow the land to be used for immoral purposes, and refused to complete unless some assurance to the contrary should be given. Meanwhile the conveyance had been sent to the registry office and returned unregistered because of uncertainty in the description. The plaintiff inserted words to identify the land properly, and also a provision by which the land should be forfeited and returned to the owner in case a house of ill-fame should be erected and maintained thereon. The deed thus altered was registered by the purchaser, and the transaction completed by payment to the plaintiff, the forfeiture clause not having been noticed by the purchaser. The plaintiff brought this action claiming a reconveyance on the ground of breach of the above condition:—Held, that as between the plaintiff and the vendee the transaction had been completed when the deed was sent back to the former from the registry office for correction; and the conveyance was operative to pass the property, the fault in the description merely rendering it equivocal and causing latent ambiguity, which might be removed by extrinsic evidence; and the plaintiff could derive no right under the condition inserted, even if in form valid, because made without consent after the execution and delivery of the deed.—Judgment of Boyd, C., 12 O. L. R. 529, 8 O. W. R. 151, reversed. *Owen* v. *Mercier*, 10 O. W. R. 1, 14 O. L. R. 491.

Conditional devise over to children of named woman — *Possibility of issue extinct — Presumption — Evidence.*]—Land was devised to the vendor for life with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the vendor's son dying without issue. The son was living and had had issue, and he and the existing children of M. (all being of age) had conveyed their interests to the vendor. M. was now a widow and 54 years of age:—*Held*, on an application under the Vendors and Purchasers Act, that the Court should, without evidence as to the physical condition of M., act on the presumption that there would be no further issue of her body, and declare that the vendor could make a good title in fee simple—such a title as could be forced upon an unwilling purchaser. *In re Tinning & Weber*, 25 C. L. T. 38, 8 O. L. R. 703, 4 O. W. R. 514.

Contract for sale — *Payment — Conveyance—Dependent obligations — Title — Dower — Payment into Court—Costs.*]—By an agreement entered into between plaintiff and defendant for the sale of land, it was provided that if the purchase money was paid by instalments the deed was to be given when and not before the last instalment was paid. If defendant exercised his option and paid the whole purchase money at any time within four years, then the deed was to be given when the money was paid:—*Held*, that the obligations were mutual and dependent, and that the acts were performed concurrently. By the terms of the agreement, a good title was to be given, and this could not be done, as a release of dower could not be obtained, but defendant signified his willingness to retain possession and to accept compensation. The matter being a small one, and there being some question as to the jurisdiction of the County Court to afford relief: *Held*, that the matter should be transferred to this Court, and the judgment for defendant in the County Court set aside, that the plaintiff should have leave to apply to Chambers to ascertain the value of the dower, and that the balance of the purchase money should be paid into Court within one month after the ascertainment of the value of the dower; otherwise defendant should be taken to have abandoned his option, and plaintiff should have judgment for the amount of his claim with costs.—*Held*, that plaintiff's claim being for an amount under $80, costs must be taxed according to the scale of the County Court in such cases. *Arenburg* v. *Wagner*, 33 N. S. R. 396.

Covenant running with land—Building restriction affecting title of vendor — Risk of action for damages for breach. *Ham & Cameron, Re* (1910), 1 O. W. N. 821.

Crown lands — *Vendors not covenanting for title—Knowledge of purchaser that vendors not owners of land—Application by vendors to Crown Lands Department—Expenditure of money by purchaser on improvements.*]—Action to compel defendants to convey certain lands to plaintiffs and for damages. The defendants were settling Crown lands and plaintiff applied for a portion of a lot. The defendants informed him that it might be required by the Government for a town site:—*Held*, that contract not absolute but subject to contingency above. There was no covenant as to title. There was no legal duty on defendants to notify plaintiff that land was wanted for a town site. Estoppel does not apply as plaintiff had knowledge of all the facts. Appeal allowed. Defendants have paid into Court all moneys received from plaintiff. *Moore* v. *Ontario Vet. Land Co.* (1909), 14 O W. R. 379.

Defective title — *Improvements by purchaser — Compensation — Estoppel.*]—*Held*, that defendant, an agent, who had acquired title to certain property, held as trustee for plaintiff, he being manager for plaintiff company, and, under the circumstances, is estopped from setting up his deed. *Empire* v. *Patrick*, 6 E. L. R. 266.

Deferred payment — *Default — Forfeiture of down payment — Failure of vendors to make title.*]—By an agreement of the 2nd November, 1908, the plaintiff agreed to buy and the defendants to sell lands, the object of the plaintiff being the exploitation of a gypsum deposit. The price was to be $18,000, of which $1,500 was payable on the execution of the agreement, and the balance on the 1st May, 1909, and, in addition, 2 per cent. of the total shares of a company to be formed by the plaintiff for the purpose of mining the gypsum. The date for delivery of the shares was not stated, but, by the agreement, the plaintiff undertook to have the incorporation of the company completed before the 1st May, 1909. The plaintiff was also to be at liberty to sell the lands, and if he sold them before the 1st May, 1909, he was, in lieu of the shares, to pay $4,000 or more, according to the amount obtained, to the defendants. The defendants agreed to convey the lands after payment of the purchase money and delivery of the shares, and they covenanted that they had a good title. The plaintiff was given immediate possession, with liberty to mine until default in payment of the purchase price, and, in case of such default, the defendants were to be at liberty to repossess, and all payments made by the plaintiff were to be forfeited, and time was made of the essence. The first payment of $1,500 was made, but the defendants had not obtained a patent for the land on the 1st May, 1909, and the plaintiffs had not formed the company, and he did not pay or tender the $16,500 on the 1st May, 1909. On the 3rd May the defendants notified him that the contract was cancelled, and he accepted this, and demanded back the $1,500 paid, and brought this action therefor: — *Held*, that evidence to shew that the Department of the Interior, which was to issue the patent, had on occasions allowed an assignment of the claim to a patent to be filed was inadmissible; but, even if admissible, it was not shewn that the plaintiff had agreed to accept such an assignment in lieu of a deed; the plaintiff knew the nature of the title, but expected that the title would be in the hands of the defendants by the 1st May.—The defendants were bound under the covenants in the agreement to deliver a title in fee simple to the plaintiff, on his paying the balance of the purchase money on the 1st May, 1909, and on delivery of the shares or payment of the additional money in the event of a sale; and, not being in a position to give title, they were not in a position to forfeit the $1,500 paid; and the plaintiff was entitled to a return of it, in all the circumstances. *Tuhten* v. *Loewen* (1910), 13 W. L. R. 374.

Doubtful title — Forcing on purchaser. *Re Campbell & Horwood*, 1 O. W. R. 139.

Execution against vendor — *Registration of purchaser's title.*]—Where the vendor has continued in open and public possession of the immovable sold, and the title of acquisition had not been registered by the purchaser until after the seizure of the property by a third party, under a judgment against the vendor, the registration is without effect as regards the seizing party. *Bernard* v. *Demers*, 17 Que. S. C. 402.

Failure of title as to parts of land contracted to be sold — *Materiality to purchasers — Specific performance refused —Offer to substitute equivalents — Expert evidence — Return of part of purchase money paid — Expenses incurred by vendors — Costs — Multiplicity of actions—Interest.*] —Appeals from judgment, 12 O. W. R. 706, dismissed. *Clarkson* v. *Crawford*, *Bayer* v. *Clarkson* (1909), 14 O. W. R. 411.

Failure of vendor to make title to part — *Repudiation by purchaser — Letters — Rescission of contract — Purchaser's lien for purchase price — Interest—Specific performance.*]—The defendant agreed to sell a section of land to the plaintiff, a portion of the purchase price being paid down, and the balance payable on deferred payments. The defendant did not have any title to one-half of the land sold, nor could he procure title. On this being communicated to the purchasers, it was arranged that the money paid should be applied in payment of that portion of the land for which the vendor could give title. The vendor did not carry out this arrangement, but, later, offered to return the money. To this suggestion the purchaser acceded, but demanded interest. No money being re-paid, the purchaser then wrote the vendor on two occasions demanding the money, and, getting no response, brought an action for specific performance: —*Held*, that when a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of from any other person, the purchaser, so soon as he finds that to be the case, may rescind the contract and recover back his purchase money.—2. That upon payment of a portion of the purchase price the vendor became the trustee of the purchaser to convey to the purchaser the ownership of a corresponding portion of the estate, and the purchaser was therefore entitled to a lien upon that portion of the land to which the vendor had title to the extent of the purchase price paid by him. *Bannerman* v. *Green*, 1 Sask. L. R. 394, 8 W. L. R. 441.

Failure of vendor to procure title —*Right of purchaser to damages — Duty of vendor — Statute of Frauds.*]—The plaintiff applied to the defendants in writing to purchase certain lands, upon stated terms. The defendants, *bona fide* believing that they had the right to sell the land, sent the plaintiff a formal contract for the sale thereof, which he executed and returned. The defendants subsequently found that they could not secure the land, the same having been previously sold by the company for which they were agents. The evidence disclosed that they had done everything in their power to secure the land from the company for which they were acting; but had not applied to the party to whom such company had sold for the purpose of securing the

same. It also appeared that they had not notified the plaintiff of their inability to secure the land for nearly six months after they learned that it was not obtainable. In an action by the purchaser for specific performance or damages:—*Held*, that the exception to the ordinary rule of law rendering a party unable to complete a contract liable to damages, obtaining in the English Courts in cases of contracts for sale of land, exempting a vendor from liability in damages in the event of inability to complete title, being founded on the uncertainty of title prevailing in England, did not apply here, where the system of land titles was simple and certain; and therefore the ordinary rules applicable to contracts applied, and the defendants were therefore liable in damages.—*Held*, further, that in any event the defendants were liable, as it did not appear that they had applied to the party entitled to sell the land for a title, and had not acted promptly on learning of their inability to procure title. *O'Neill* v. *Drinkle*, 1 Sask. L. R. 402, 8 W. L. R. 937.

Failure to make title—*Action to recover deposit—Defence of husband and wife—Severing.*]—Plaintiff brought action to recover $200, amount paid as a deposit on an agreement to purchase a house from defendants who failed to make title. Defendant Thos. S. alleged that he could give and offered to give possession, and counterclaimed for $200 for breach of contract and his wife denied making any contract with plaintiff.—Boyd, C., gave plaintiff judgment for $200 with interest and costs against defendant Thos. S. and dismissed his counterclaim without costs. Action against defendant wife dismissed without costs. *Parkes* v. *Sanderson* (1911), 18 O. W. R. 368, 2 O. W. N. 586.

Failure to make title—*Description of land—Tender of deed of transfer—Action for return of purchase-money—Necessity for rescission of agreement—Notice by action itself—Ability to make title at time of trial—Changed conditions — Speculative character of property—Return of money—Interest—Expenses—Costs — Damages.*] — The plaintiff agreed to purchase from the defendant land described according to a preliminary unregistered plan of a proposed subdivision. The agreement contained the provision that the defendant was not to be called upon to convey the property with reference to the plan, and was not to be liable in damages if, through no fault of his, he was unable to register the plan, so long as, after the plaintiff had fulfilled his part of the agreement, the vendor should convey the actual land, even though describing it by metes and bounds. The plaintiff paid the purchase-price, by instalments, in full, and endeavoured to get title from the defendant. Failing to obtain title, the plaintiff brought this action to recover the moneys paid by him. The plaintiff was advised, through the defendant's solicitor, that title to the lands could not be had either by metes and bounds or according to the plan:—*Held*, that, in these circumstances, the tender by the plaintiff of a transfer was a useless proceeding; but, if such a tender was necessary, the plaintiff had sufficiently complied with his agreement by tendering a transfer with a description according to the plan, leaving the defendant to substitute a description by metes and bounds if he thought fit.—*Held*, also, that the plaintiff was entitled to ask for a return of the purchase-money, without having rescinded the agreement, and without seeking rescission—where there is a want of title, a notice of rescission and demand for the deposit is not necessary before bringing action; the commencement of an action for the money is the strongest kind of a demand and of notice of rescission.—*Yasne* v. *Kronson*, 17 Man. L. R. 301, 7 W. L. R. 119, distinguished.—*Hartt* v. *Wishard-Langan Co.*, 9 W. L. R. 519, followed.—The plaintiff became entitled to a transfer on the 13th July, 1909. It appeared at the trial (more than a year afterwards), that title could be made:—*Held*, that it would be inequitable, in view of the changed conditions since July, 1909, and of the speculative character of the property, to force it now upon the plaintiff.—*Held*, also, that the plaintiff was entitled to recover the money paid by him, with interest, expenses and costs; but was not entitled to damages, as the failure of the defendant to make title was through no fault on his part.—*Rowe* v. *School Board for London*, 36 Ch. D. 620, followed. *Laycock* v. *Fowler* (1910), 16 W. L. R. 441. Man. L. R.

Failure to make title to part of land purported to be conveyed — *Breach of covenant — Innocent mistake of vendor — Failure to shew notice to purchase — Refusal to decree rectification — Offer of refund before action — Judgment for amount offered — Interest — Costs — Recovery of small sum — "Event."*] — Action for damages because defendants have not given plaintiff a good title to certain land. Through an oversight the fact that defendants had previously conveyed to another purchaser part of this land was overlooked. Before action defendants offered to compensate but omitted to specially mention payment of interest. Judgment for plaintiff for amount offered with interest. *Hird* v. *Esquimalt*, 11 W. L. R. 504.

Free from incumbrance — *Caveat of purchaser—Subsequent caveat of prior purchasers—Priority—Land Titles Act, s. 97—Notice of knowledge—Lis pendens—Prior action—Default—Equitable relief—Extension of time—Specific performance—Discharge of caveat—Costs.*] — On the 11th September, 1909, the defendants W. and J. entered into an agreement to sell lands to the plaintiff for $12,000. The vendors were at that time the registered owners of a portion of the lands, free from incumbrance, and held a transfer from a company who were the registered owners of the remainder, free from incumbrance. The plaintiff made the down-payment, $5,000, and the vendors, in pursuance of the terms of the agreement, executed transfers of the land, and deposited them, together with their duplicate certificates of title and the transfer from the company, with a third person for the purpose of being delivered to the plaintiff, upon his paying, on or before the 11th March, 1910, the balance of the purchase-money. On the 22nd September, 1909, the plaintiff registered in the land titles office a caveat against the lands, claiming to be interested as purchaser under the agreement. The balance of the purchase-

money was not paid; the plaintiff was ready and willing to pay it, and tendered it, but the vendors were not able to convey a clear title, because the defendants B. and H. had, on the 15th November, 1909, registered a caveat forbidding any dealing with the land. The claim of the defendants B. and H. was founded in earlier agreements with the vendors for the purchase of the lands. An action had been brought by the vendors to enforce these agreements, and a decree for specific performance and sale in default made, under which, after default, there was a sale, at which the vendors themselves became the purchasers; but on the 31st December, 1909, the order for sale and the sale were set aside, reserving the rights of the plaintiff in this action:—*Held*, upon the evidence, that the plaintiff had no knowledge, at the time of entering into his agreement, of any right or claim of right on the part of B. and H., nor of any facts which might have given rise to any suspicion so as to put him on inquiry.—The plaintiff did not base his claim for specific performance of his contract or damages on any title of his vendors except that which they held, at the time the agreement was entered into, as the registered owners or as entitled to become registered:—*Held*, that by virtue of the prior registration of his caveat, the plaintiff had, under s. 97 of the Land Titles Act, acquired priority over the defendants B. and H., both as to the lands of which the vendors were the registered owners and those for which they had only a transfer from the registered owners.—The defendants B. and H. contended that the principle of *lis pendens* applied, and that, by virtue of the action upon the first agreement pending at the time of the second agreement, the plaintiff, even without notice, must be subject to the rights of the parties in that action. No such defence was suggested by the pleadings, nor was any amendment asked:—*Held*, that, if the issue could be raised, the defendants B. and H. had, on the facts, no equitable right to claim the lands; up to the time of the filing of the caveat they had neither the ability nor the willingness to pay what was due under the agreements; it was then more than 8 months after the time had elapsed within which they were entitled to redeem by the terms of the decree in the first action; and the facts were not such as would justify an extension of time—certainly, as between the plaintiff and these defendants, it would be inequitable to grant any such relief.—The plaintiff should, therefore, be declared entitled, upon payment to the vendors of the balance of his purchase-money, to a transfer free from all incumbrances, and to a discharge of the caveat registered by the defendants B. and H.; the costs of the plaintiff and the defendants W. and J. to be paid by the defendants B. and H. *Brooksbank* v. *Burn* (1910), 15 W. L. R. 661, Alta. L. R.

Inability of vendor to make title—*Right of purchaser to rescind.*]—Action to rescind an agreement for the purchase of certain land and for return of moneys paid. Defendant never had title. Plaintiff held entitled to return of moneys paid but not entitled for improvements made as no permission to go into possession. Agreement rescinded. *Wirth* v. *Cook* (1909), 12 W. L. R. 102.

Incumbrances created by vendor — *Registered lien — Notice to lienor of sale to purchaser — Removal of lien — Purchase money — Payment into Court.*]—*Held*, that the defendants N. had knowledge, at the time they obtained their lien, that the plaintiff held an agreement for sale of the land. N. to remove their lien. Defendant C. to make title. *Taskar* v. *Carrigan*, 11 W. L. R. 621.

Judgment against vendor — *Title of purchaser — Priority — Registry laws.*] — The hypothec resulting from a judgment against the vendor of an immovable registered before the title of the purchaser, has priority over the rights of the latter. *Crepeau* v. *Bruneau*, 24 Que. S. C. 368.

Misdescription — *Re-sale — Action by sub-purchaser for abatement in price — Remedy of first purchaser against vendor — Action en garantie — Defence — Common error — Knowledge of purchaser.*]—A person who, having bought land under an erroneous description, resells it to a third party, and is sued by him for a rebate in the price and for damages, has a remedy by an action *en garantie* against his vendor for indemnity. In that action the vendor cannot defeat the claim by setting up a common mistake, and alleging that he relied for the description upon the notary who prepared the deed, to the knowledge of the plaintiff *en garantie*, and that the latter discovered the mistake of the notary before re-selling; his obligation of *garantie* subsists none the less. *Paradis* v *Venne*, 35 Que. S. C. 158.

Motion by vendor for order declaring that he was able to make title — *Registered plan — Amended by order — Road allowances — Title vested in abutting owners — Surveys Act.*] — Order granted declaring vendor able to make good title to certain lands. The effect of the registration of the plan and the order amending it was to divest the title of original owner to the road allowance and to vest it in the abutting owner. *Re Purse & Forbes* (1910), 16 O. W. R. 750, 1 O. W. N. 1085.

Objections to vendors' title—Tax sale deed to rear 28 feet of lot—Sutherland, J., held it a cloud on title—To be removed by vendor—Proofs of adverse possession not satisfactory or adequate—No order as to costs. *Re National Trust Co. & Ewing* (1911), 18 O. W. R. 770, 2 O. W. N. 801.

Offer to sell — *Purchaser pendente lite —Certificate of lis pendens — Specific performance — Delay — Damages.*]—A letter by the vendor's agent to a probable purchaser, giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and, upon the person so written to stating that he wishes to buy at the price named, a contract of sale and purchase is constituted between the parties. After the contract for the sale had been entered into, the vendor sold and conveyed the land in question, which was of a speculative character, to a third person, who purchased in good faith and without notice of the prior contract. Before he

registered his deed the original purchaser began this action for specific performance and registered a certificate of *lis pendens*, but, although he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months: — *Held*, that the second purchaser's rights were not affected by the registration of the certificate, and that in any event the delay would have been fatal to the claim for specific performance as against him. The vendor having deliberately broken his contract because of a better offer, substantial damages were assessed against him. *Clergue* v. *McKay*, 23 C. L. T. 243, 6 O. L. R. 51, 1 O. W. R. 178-241, 2 O. W. R. 647, affirmed. *Clergue* v. *Preston*, 24 C. L. T. 330, 8 O. L. R. 84; *Clergue* v. *McKay*, 3 O. W. R. 860.

Power of executor to sell — *Legal estate and power of sale impliedly given by will — Application under Vendor and Purchasers Act.*]—*Held*, that as this estate consists of real and personal property, the direction to hold, manage, control, invest and reinvest, impliedly involves the conferring of the legal estate in the land on the executors, and gives them power to sell and make title thereto. *Re Sherman & Keenleyside*, 13 O. W. R. 487.

Previous sale of land — *Partition — Title of vendor confirmed — Costs of vendee — Evidence — Ancient documents.*]—Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money. Where a document, of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother, and now in the grandson's custody, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution. *Patterson* v. *Patterson*, 25 C. L. T. 91, 3 N. B. Eq. 106.

Recital in deed more than twenty years old — *Evidence — Onus.*]—A deed more than 20 years old, by which certain lands were conveyed to the grantee in fee, contained the recital that the grantee was the administrator of his father's estate, and that the land was conveyed to him in satisfaction and discharge of a debt due to his father. It appeared that some four years prior to the date of the deed letters of administration *ad litem* had been granted by a Surrogate Court to the father's widow. In an action brought for specific performance of a contract for the sale of the land: — *Held*, that such recitals were sufficient evidence of the facts so recited, and were not displaced merely by the fact of the prior grant of administration to the widow for a stated limited purpose. Judgment of Teetzel, J., at the trial, affirmed. *Gunn* v. *Turner*, 8 O. W. R. 796, 13 O. L. R. 158.

Registered hypothecs — *Cloud on title — Validity of registration.*] — The registration, alone, of hypothecs affecting an immovable property sold gives the purchaser the right to invoke the benefit of Art. 1535, C. C., and he is not obliged to contest with the creditors the contention made by the vendor that such registrations are without effect. *Malbœf* v. *Leduc*, 19 Que. S. C. 67.

Registered title in two persons — *Survivor desiring to sell.*]—Registered title stood in the names of two persons, one deceased who had died intestate leaving her husband and infant daughter surviving. The survivor desiring to sell made an affidavit that deceased had no interest in the property:—*Held*, that vendor cannot now make a title. Leave given to survivor to bring action. *Re Farmer & Reid*, 12 O. W. R. 1076.

Registry Act — *Judgments binding land — Prior unregistered deed.*]—In May, 1856, L. conveyed certain lands to J., but the deed was not registered until April, 1860. Subsequent to the execution of the deed, but before registration, certain judgments were recovered in the Supreme Court against L., but no memorial was registered. In 1859 defendant exchanged these lands for lands of the plaintiff, and a good clear title was to be given, and defendant tendered a deed which plaintiff refused to accept on the ground that the judgments recovered against L. previous to the registration of the deed from him affected the title. The question raised was, whether a judgment, no memorial of which was on record, bound lands previously conveyed to a *bona fide* purchaser who had neglected to register his conveyance until after the judgment was entered up:— *Held*, Peters, J., that such judgment would not bind the lands. *Reddin* v. *Jenkins* (1863), 1 P. E. I. R. 232.

Removal of incumbrances — *Certificate of registrar.*]—One who has bought an immovable, free and clear of incumbrances, is entitled to compel his vendor to make title to him in respect of such immovable and to remove the charges upon such immovable. 2. The documents of title to an immovable include a certificate of the registrar stating that the property is free from every charge and hypothec. *Ville-Marie Bank* v. *Kent*, 4 Que. P. R. 206.

Requisitions on title — *Dower — Taxes — Executions.*]—The purchaser made these requisitions: (a) That evidence should be given shewing that dower rights do not attach in the cases of conveyances made without bar of dower (in 1852 and 1853) before commencement of the period of possession relied on. (c) That the vendor should furnish evidence that the lands to be conveyed by her are not incumbered by any executions or arrears of taxes or local improvement rates:—*Held*, that the vendor was bound to comply with the requisitions. *In re Clayton & Vandecar*, 21 C. L. T. 337.

Reservation of coal and other minerals — *Inability of vendors to convey*

lands with minerals — Dominion Lands Act —Certificate of title — Land registration— Rescission of contract — Return of moneys paid — Interest — Demand — Action — Costs.]—Action by purchaser for a return of moneys paid under a contract for sale and purchase of land. Judgments for plaintiffs as prayed, as defendants had contracted to sell "lands," whereas they were not the owners of the minerals therein. No interest allowed. *Raymond* v. *Knight*, 11 W. L. R. 687; 2 Alta. L. R. 157.

Sale of land without title — *Remedy of purchaser — Executor — Power to convey.*]—A purchaser of land troubled in his possession has no right of action *en garantie* against his vendor who has sold him the land of another, but has a right of action for indemnity. 2. In the absence of express provisions in a will, an executor cannot, without the consent of his co-executors, as such executor, transfer the title to property. *Gosselin* v. *Martel*, 5 Que. P. R. 265.

Sale under power in will — *Debts charged on lands — Devise after payment— Executors' power to sell — Gifts to widow in lieu of dower — Evidence of election — Release.*]—A testator by his will directed his executors to pay his debts, and, subject to the payment of debts, devised a particular portion of the estate, and directed that the balance of that portion of his estate, after payment of the debts, should be divided among his four children in equal shares. Then followed a paragraph declaring that the property willed should go to the parties direct:—*Held*, that a power of sale was given to the executors under the provisions of s. 19 of R. S. O. 1897 c. 129, and that purchasers were, by s. 19, released from the necessity from enquiring as to the due execution of the power. The will also contained gifts to the widow, including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower. — *Held*, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower. *In re Bradburn & Turner*, 22 C. L. T. 142, 3 O. L. R. 351, 1 O. W. R. 152.

Specific performance — *Purchaser at judicial sale — Administration proceedings —Mortgage — Advertisement of sale — Form of — Sheriff's deed.*]—A lot of land was devised to M. for the term of her natural life, and, after her death, to any child or children that she might have by the devisor. At the time of the devisor's death the property was subject to a mortgage, and there was one child by the marriage, who subsequently married. M. instituted an administration suit for the settlement of the estate, as the result of which, a sale was ordered; and she became the purchaser at the sale, and the Master's deed was made out to her. Subsequent to the purchase, M. executed a paper by which she agreed to convey the property in question to her daughter K. for her life, subject to the life interest of M.; then to go to the children of K. in fee simple:—*Held*, following *Kearney* v. *Kean*, 3 S. C. R. 339, that the purchase by M. at the administration sale must be presumed to have been an act done in the due course of administration; that it was in substance a mere discharge of an incumbrance; and, notwithstanding the fact that the Master's deed was absolute in its form, M. took the property in question subject to the life interest in herself, in trust for her daughter K., who had a clear title to the remainder in fee, paramount to any title derived under the agreement. 2. That, as against the title of K., the instrument executed by M. purporting to give K. a life estate only had no effect. 3. That K. had a good title to the land, and that, as against the defendant, who purchased at a sheriff's sale under the decree in an action on a mortgage made by K. and her husband, and who refused to complete the purchase, the plaintiff, the holder of the mortgage, was entitled to a decree for specific performance. 4. The advertisement of sale was in the following form: "All the estate, right, title, interest, and equity of redemption of K., and of all persons claiming, or entitled from or under the said K., of, in, to, or out of all that lot, piece, or parcel of land," &c.; and the form of the order was that "the said land and premises be sold," &c. — *Held*, that this form was sufficient to cover all the estate, right, title, interest, and equity of redemption of the defendant at the time of giving the mortgage. 5. That the deed was given by virtue of the statute (Acts 1890 c. 14. ss. 5 and 6), and by virtue of the provisions of the statute the land ordered to be sold by virtue of the sheriff's deed was vested in the grantee. 6. *Semble*, that the form of words in use in Nova Scotia was adopted in consequence of the practice of not settling conditions of sale, and offering a specific title: *Diocesan Synod of Nova Scotia* v. *O'Brien*, Ritch. Eq. Dec. 352; and that the form is suitable for a good title, or a limited one, and a more specific reference to the title is not made. *Power* v. *Foster*, 34 N. S. R. 479.

Vendor unable to make title — Bona fides — Damages — Return of deposit — Pleading — Amendment — Costs. *Moody* v. *McDonald* (Man.), 4 W. L. R. 303.

Vendor without patent for land entered into contract for sale—*Purchaser went into possession—Made permanent improvements—Failed to make payments—Right of vendor to retake possession—Lien of purchaser for improvements — Damages and costs.*]—Vendor without having patent for land entered into contract for its sale, and purchaser went into possession. He made certain permanent improvements, and later found that vendor had no patent. He refused to make further payments, and tried to get a patent from the Crown in his own name.—Riddell, J., *held* (16 O. W. R. 569, 1 O. W. N. 988), that upon non-payment the vendor was entitled to rescind the contract. He allowed purchaser $340 for permanent improvements made prior to the time he learned that vendor had no patent, but refused to allow purchaser a lien for $280 for improvements made after that time. Amounts paid by purchaser to vendor to be returned to him with interest, and possession delivered to vendor.—Divisional Court held, that above judgment should be varied, and the defendant let in to redeem upon payment to plaintiff of the full amount of purchase money,

including the return of cheque to defendant's solicitor for $395, and payment out to plaintiff of the $470.70 in Court with interest and cost of payment into Court. No other costs allowed in appeal or in Court below. *Devlin* v. *Radkey* (1910), 17 O. W. R. 665, 2 O. W. N., 22 O. L. R. 399.

Vendor's heir is the purchaser's warrantor, and as institute in a substitution created in his favour, he cannot revendicate from the purchaser the immovable sold. It does not become necessary to prove his acceptance of the vendor's succession. Such acceptance is presumed. — *Semble*, the purchaser of substituted property, when his vendor's only title is contained in the deed creating the substitution, should not be permitted to take advantage of the absence of registration of the substitution. *Taillefer* v. *Langevin* (1910), 39 Que. S. C. 274.

Warranty of title — *Eviction—Special agreement — Damages.*]—A sale of land, including a dam, was accompanied by a warranty of the vendor of his title. The vendee, having been evicted from the portion of the premises used for the dam, brought an action to recover back the price he paid, and for damages. The vendor tendered the price and costs of resisting the action for eviction, but denied liability for damages on the ground that there was no special agreement as to the cause of eviction under Art. 1512, C. C.: —*Held*, that the warranty of title did not constitute a special agreement which would entitle the vendee to damages under Art. 1512, C. C. *Allan* v. *Price*, 20 C. L. T. 432.

Warranty of title — Title outstanding in Crown — Purchaser obtaining Crown grant — Damages. *Nelson* v. *Wallace*, 1 E. L. R. 500.

Will — *Motion for construction — Devise to two persons as joint tenants for life —Right of survivorship — Remainder — R. S. O. (1897), c. 119, s. 11.*]—Jacques Gignac by his will devised lands in question to his two daughters, Febronie and Delima, "and to the survivors of them, her heirs and assigns forever." Febronie died in 1895, and Delima agreed to sell the land, and objection was taken to her title.—Middleton, J., *held*, that the above words conferred a separate estate in remainder upon the survivor. Order granted declaring that notwithstanding the objection taken to the title, the vendor could convey in fee. *Re Gignac & Denis* (1910), 16 O. W. R. 965, 2 O. W. R. 40.

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15. Warranty of Vendor.

Action for partition — *Recourse to a warranty — Sale — Offer to buy followed by acceptance — Executor's acceptance of an offer to buy by one of several executors —Revudiation by the others set up in a partition action by the buyer — Recourse of the latter.*]—A partition action of an immovable is a real action, and recourse on a formal guarantee against the vendor is open to the plaintiff whose rights to a share are contested. An offer to buy at a fixed price an immovable under a devise where there are three executors accepted by means of a letter in terms for all and signed "Succession D" by T. B. V. (on of the executors) constitutes a sale on its face perfect. The repudiation by the other two executors acting together, set up as a defence to a real action for his share by the buyer, that the above letter had not been written with their consent, but by the sender alone without their consent. This renders the latter liable to the plaintiff in an action on the warranty of his authority. *Vinet* v. *Martel*, 18 Que. K. B. 390.

Against eviction — *Accessory rights— Rights arising from contiguity — Disturbing rights — Claim to set aside a boundary agreed upon.*]—The seller of an immovable such as acquired by its grantor under a title to which it refers is a guarantor to the purchaser against eviction through collateral rights which arise from agreements with third parties coming in afterwards. In vain it is claimed that having sold the immovable under its registered number, this obligation extends no further. Notably to the effect of a boundary agreed upon between the grantor and the neighbouring owner, the immovable sold by its registered number comprehends as its appurtenances the rights which may arise from the boundary. The claim to set aside a deed agreeing upon a boundary, urged by one of the neighbours against the grantee of the other, is raising a question of title which gives the latter the right to have recourse to his grantor on the guarantee which his grantor as owner of the immovable sold, has covenanted for in the deed attacked. *McLennan* v. *N. S. Steel & Coal Co.*, 18 Que. K. B. 317.

Against eviction — *Boundary and demand for a boundary line implying eviction — Action in warranty — Relationship of such action with principal action — Subsidiary personal conclusions — Sale of immovable described by its conterminous lands — Precise boundaries and area — Mention of a cadastral number as one of the boundary — Failure to deliver — Damages resulting thereby.*]—The purchaser of an immovable who, in an action of boundary, is met by his neighbouring proprietor with a boundary line acquired by prescription and entailing partial eviction, has a recourse by action in warranty against his vendor. Under such conditions, the action in warranty is none the less connected with the principal action because of the fact that it contains subsidiary conclusions for a condemnation in money in case of eviction. The sale of an immovable described by its conterminous lands, is of a certain and determined property, and it is the precise boundaries contained in the title and not the area of the land which should be the guiding mark. When in the description of the immovable sold, one of its boundaries is stated to be a cadastral number, the latter must be interpreted to mean the cadastral number contained on the official plan and in the book of reference and does not include additions which its owner may have acquired by prescription. By application of the rule that in cases of inexecution of obligations, the debtor is held to pay such damages only as are the direct and immedi-

ate result of his default, the vendor of a vacant lot is bound to indemnify the purchaser evicted from a part of such lot, to the extent merely of the value of such part, and of the diminished value of the lot sold resulting from its reduced area. He is not bound to the extent of the extra value of the buildings erected by the purchaser when such would result from the whole lot sold remaining in the possession of one person. *Vallee* v. *Gagnon*, 37 Que. K. B. 165.

Against eviction — *Claim of third party — How shewn — Demand and threats —Insufficiency.*]—The remedy in warranty against an eviction threatened by a third party, is open to the purchaser only where the third party has shewn what he claims by taking possession of the property sold, or by bringing an action to establish his rights. Therefore, a simple demand for payment of the price of a previous sale, even accompanied by threats of cancellation, will not suffice. *Mathieu* v. *Trudeau*, 17 Que. K. B. 531.

Against eviction — *Municipal taxes— Extent of — Subsequent imposition—Special taxes.*]—The warranty which the vendor of land gives to the purchaser as regards municipal taxes extends only to such as are due or accrued at the time of the sale, and not to those which become exigible afterwards. This rule applies as well to special or extraordinary taxes as to general and ordinary taxes. *Bourdon* v. *Deslongchamps*, 30 Que. S. C. 477.

Against eviction — *Trouble de droit— Action by contiguous owner to annul deed fixing boundaries.*]—An action by the owner of an immovable against the owner of a contiguous immovable to have a deed, in which the division line had been agreed upon by their predecessors in title, declared null and void, "under reserve of the plaintiff's right to afterwards proceed *en bornage*, or otherwise, to recover the part of his property possessed by the defendant under the authority of the deed," is a *trouble de droit* which gives the defendant the right to sue his vendor in warranty against eviction. *Cf. Ville de Chicoutimi* v. *Lavoie & Guay*, 30 Que. S. C. 148. *Montreal Harbour Commissioners* v. *Nova Scotia Steel and Coal Co. & McLennan*, 34 Que. S. C. 446.

Appurtenant water power — *Easement of flowage — Covenant — Right to overflow lands on payment of indemnity — Implied condition — Warranty.*]—A declaration, in the English language, in a deed of sale of an immovable which includes a water power, that it comprehends "all rights of flowage" on lots Nos., etc., refers to the legal right of riparian owners to dam back the water of a river which they use for industrial purposes upon the lands above, in consideration of an indemnity. Therefore, the transfer of this right being regarded as made under an implied condition of indemnity, the vendor does not warrant the purchaser against claims which may arise after the sale for the flooding of the lands above. *Hovey* v. *Lefebvre*, 33 Que. S. C. 123.

Assessment for building church — *School taxes — Payment of arrears by purchaser — Recovery — Prescription.*] — In case of a sale of land "with warranty against all troubles, hypothecs, debts, dowers, donations, substitutions, alienations, and incumbrances whatsoever," the existence of an assessment (*répartition*) for the building of a church, at the time of the sale, cannot give the purchaser a right of warranty or to be indemnified against the vendor if he knew at the time of the deed of assessment. The school taxes and assessments for building a church affecting land, being public charges or of common law, ought to be taken into consideration in the purchase of land, and as to future payments to be taken into account at the time of sale. The purchaser with legal warranty, who has paid municipal or school taxes owing by the vendor, cannot recover these taxes from the latter, if, when he commenced his action, the debt due the municipality by the vendor for payment of these taxes had been prescribed; the purchaser, being subrogated to the rights of the school corporation, has no greater rights than the latter against the vendor. *Peabody* v. *Vincent*, 26 Que. S. C. 37, 253.

Charge on land — *Municipal by-law— Drainage — Assessment roll.*]—A by-law was passed by the municipal council of a town, providing for the construction of a drain, which drain was to pass in front of an immovable property subsequently sold by the defendants to the plaintiffs. The by-law also provided that the immovables on either side were charged for the construction of this drain at the rate of $1.75 per running foot. The drain was constructed before the sale to the plaintiffs, and subsequent to the sale an assessment roll was prepared in accordance with the by-law:—*Held*, that, as the by-law created the charge and determined the amount, independently of the assessment roll, which merely registered the determination already arrived at by the town council, the charge was covered by the legal warranty of the vendor. *Masson* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal*, 17 Que. S. C. 573.

Construction of deed — *Sheriff's deed —Sale of rights in land — Eviction by claimant under prior title.*]—By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff of the lands therein mentioned, and of which he was actually in possession, and that "the immovable belonged to him as having been acquired from the sheriff:"—*Held*, reversing the judgment appealed from, Strong, C. J., and Taschereau, J., dissenting, that the warranty covenanted by the vendor had reference merely to the rights he might have acquired in the lands under the sheriff's deed, and did not oblige him to protect the purchaser against eviction by a person claiming prior title to a portion of the lands. *Ducondu* v. *Dupuy*, 9 App. Cas. 150, followed. *Drouin* v. *Morissette*, 22 C. L. T. 79, 31 S. C. R. 563.

Description — *Plan of subdivision — Change in street line — Accession—Troubles de droit — Eviction — Issues on appeal.*]—A vendor of land described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the

purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line. A party called into a petitory action to take up the *fait et cause* of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is *ipso facto* ousted of jurisdiction to entertain or decide upon the merits of the principal action. *Monarque* v. *La Banque Jacques-Cartier*, 22 C. L. T. 7, 31 S. C. R. 474.

Eviction — *Charges.*]—A purchaser of immovables cannot sue his vendor, nor the grantor of his vendor, to obtain from him a clear title, before eviction from his property, or before having been sued for charges or claims upon it which were not made known to him at the time of the purchase. *Trudeau* v. *Molleur*, 5 Que. P. R. 221.

Eviction — *Special agreement — Damages.*]—A sale of land, including a dam, was accompanied by a warranty of the vendor of his title. The vendee, having been evicted from the portion of the premises used for the dam, brought an action to recover back the price he paid, and for damages. The vendor tendered the price and costs of resisting the action for eviction, but denied liability for damages, on the ground that there was no special agreement as to the cause of eviction under Art. 1512, C. C.:—*Held*, that the warranty of title did not constitute a special agreement which would entitle the vendee to damages under Art. 1512, C. C. *Allan* v. *Price*, 20 C. L. T. 432, 30 S. C. R. 536.

Failure of title — *Specific performance —Rescission — Payment by vendor to real owner — Remedy against arri re-garant.*]—The purchaser of an immovable with a legal garantie, whose vendor was not the owner at the time of the sale, may, without waiting until the true owner claims possession of the immovable, sue his vendor for rescission of the sale or to compel him to make a good title. 2. When, in such a case, the vendor can obtain a good title by paying a fixed sum to the true owner, the purchaser may have judgment against the vendor for payment of this sum to the true owner, and upon default by the vendor in the payment of it within the time fixed, the purchaser may make the payment and charge the vendor with it. 3. The purchaser may exercise this remedy against the vendor's predecessor in title who has given a garantie. *Trudeau* v. *Molleur*, 24 Que. S. C. 27, 5 Que. P. R. 418.

Incumbrance — *Discharge—Title deeds —Certificate of registrar.*]—The purchaser of an immovable, sold to him with garantie, may demand that the vendor be ordered to pay off a creditor who at the time of the sale had a hypothec upon the immovable. 2. On such a sale, the vendor is bound to hand over to the purchaser the title deeds of the immovable sold, and among them the certificate of the registrar stating that the immovable is free from all charges and hypothecs. *In re Banque Ville-Marie*, 22 Que. S. C. 162.

Incumbrance — *Special Municipal charge — Apparent charge.*]—The warranty of the vendor of an immovable property does not extend to a charge imposed by the municipality in which the property is situate, for a term of years, as a special tax for the cost of a drain, except as to the arrears of such tax due by the vendor at the date of the sale. *Thibault* v. *Robinson*, 3 Que. Q. B. 280, and *Les Ecclésiastiques du Séminaire de St. Sulpice* v. *Masson*, 10 Que. K. B. 570, followed. *Sharpe* v. *Dick*, 22 Que. S. C. 527.

Incumbrance — *Special Municipal tax — Apparent charge.*] — When an immovable is sold after the passing of a municipal by-law providing for the execution of certain works in the municipality where the immovable is situated, and for payment for such work by means of a tax upon the immovables in such municipality, but before the completion of an assessment roll for the purpose of levying such tax, the vendor is not liable as a warrantor to pay such tax. 2. It is only by the putting into force of such roll that the tax becomes a charge upon the immovables of the municipality. 3. One who buys an immovable in a municipality is supposed to have knowledge of all the municipal by-laws which can affect it, and a charge made by a by-law is therefore an apparent charge, as to which the vendor is not a warrantor. 4. The vendor who has sold with a guaranty of title, but without any stipulation "*de franc et quitte*," is not obliged to extinguish a charge which exists upon the immovable sold, as long as the debt which constitutes such charge is not exigible. Judgment in 17 Que. S. C. 573, reversed. *St. Sulpice Séminaire* v. *Masson*, 10 Que. K. B. 570.

Land abutting on street — *Reduction in width.*]—A vendor who has sold land fronting on a street is not obliged to indemnify the purchaser because, subsequent to the sale, the municipal authority has reduced the width of the street so that the land sold is no longer upon the street line. Judgment in 19 Que. S. C. 93, reversed. *Banque Jacques-Cartier* v. *Gauthier*, 10 Que. K. B. 245.

Misrepresentations — *Warranty as to value — Evidence — Opinion.*] — The defendant, on the negotiations for the sale to the plaintiff of a number of parcels of wild land, represented to the plaintiff's agent that they were a fairly good lot of farm lands. He had not seen the lands and did not state that he had. It turned out that a large portion of the lands was not good enough for farming purposes:—*Held*, that the plaintiff could not succeed in an action to recover damages by reason of the defendant's representations, which should be considered merely as expressions of opinion not amounting to a warranty. *De Lassalle* v. *Guildford*, [1901] 2 K. B. 221, followed. *Mey* v. *Simpson*, 8 W. L. R. 472, 17 Man. L. R. 597.

Terms of warranty — *Right of action.*]—The purchaser of land, who has paid the price thereof, has no right of action against his vendor for damages and a clear title, if the deed of sale does not contain a clause of *franc et quitte*, but simply that the vendor warrants the buyer against trouble and will hold him harmless against all incumbrances. *Vail* v. *Baker*, 6 Que. P. R. 159.

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16. Miscellaneous Cases.

Action by vendor to enforce after default — *Personal judgment for purchase money — Foreclosure — Remedies—Statute of Limitations.*] — Plaintiffs sold land to defendant under an agreement. He defaulted and this action brought for personal judgment and foreclosure. Plaintiffs given judgment for amount claimed under covenant, though it appeared to be barred, defendant not having appeared, and pleaded Statute of Limitations. Foreclosure not ordered, the vendor's remedy being action on the covenant for specific performance, when agreement may be cancelled and sale ordered or contract may be cancelled. Leave given to amend and serve amended statement of claim here if more than personal judgment wanted. *Canadian Pacific Rw. Co.* v. *McAnnany* (Sask.), 10 W. L. R. 47.

Assignment of contract — *Fraudulent second assignment — Priorities—Knowledge — Notice — Registry of caveat — Equitable rights — Damages.*]—The defendant company, in Feb., 1906, entered into a contract (in writing) with P. to convey land to P., upon payment by P. of $2,270, with interest, by instalments. The contract provided that no assignment should be valid unless for the entire interest of P. and approved by the company. In October, 1908, P. assigned the contract to the defendant G. On the 2nd November, 1909, G. agreed to procure an assignment of the contract to the plaintiff; and on the 5th November assigned his interest to the defendants M. and B. The plaintiff, on the 10th November, lodged a caveat in the proper land titles office, as owner of the land, and in February, 1910, began this action against G., M. and B., and the company, for specific performance or damages. The other defendants had no knowledge of G.'s dealings with the plaintiff, and there was no evidence of notice to them, other than proof of the lodging of the caveat:—*Held*, following *Shaw* v. *Foster*, L. R. 5 H. L. 321, that the defendant company were justified in receiving the balance of the purchase-money due them, in approving of the assignment to M. and B., and in completing the sale made to P. The position of M. and B. was much stronger in equity than that of the plaintiff.—The plaintiff's action was dismissed as against the defendants other than G.—*Held*, following *Day* v. *Singelton*, [1899] 2 Ch. 320, that the plaintiff was entitled to damages against G.; the amount to be ascertained by a reference. *Alexander* v. *Gesman* (1910), 15 W. L. R. 261.

Bond by owner of land — *Charge on land.*]—J. E., the owner of certain land, executed a bond (which was registered) whereby, for himself, his heirs, executors, or administrators, he covenanted that, on his effecting a sale of the land, which, however was to be entirely at his option, he would pay to A. E. half the purchase money. He died without having effected a sale; and subsequently A. E. died. J. E. by his will devised the land to I. E. for life with remainder in fee to L. D. E., and they both joined in an agreement to sell to D.:—*Held*, without deciding whether the bond was in force as between J. E. and A.E.'s representatives, that it did not constitute a charge on the land, the liability thereunder being merely of a personal character. *Baker* v. *Trusts & Guarantee Co.* (1898), 29 O. R. 456, distinguished. *Re Eagan and Dawson* (1909), 18 O. L. R. 638, 13 O. W. R. 694.

Breach of contract — *Damages—Price of resale — Rising market — Speculative contract — Loss of profits — Increase of damages on appeal.*]—Damages for breach of a contract for sale of lands should be awarded on the same principle as for breach of contract for sale of goods, and the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341, applies (Harvey, J., *dubitante*).—If the lands are bought for speculation on a "rising market," and this is known to the vendor.—*Semble*, that the purchaser can recover by way of damages for breach of contract the profits that he might have made, up to the time of the trial, but in ordinary circumstances the difference between the purchase price and the selling value at the time the purchaser was to be let into possession of the lands will be the measure of damages.—The rule as to damages in *Hadley* v. *Baxendale* applied. *Robertson* v. *Dumaresq*, 2 Moo. P. C. 366, distinguished. Upon the plaintiff's cross-appeal the damages were increased. *Dunn* v. *Callahan*, 8 W. L. R. 169, 1 Alta. L. R. 179.

Building — *Party wall — Deed — Reservation — Indemnity.*]—The vendor of land with a building thereon of which a wall is in a position necessary to become a party wall, may make a reservation in his deed of this wall as a party wall. By this reservation the right of the vendor and his assigns to one or two alternatives is established; either to make the wall a party wall without paying the indemnity provided by Art. 518, C. C., if he acquires the adjoining lands; or to recover such indemnity from a third person who acquires such adjacent lands, if he makes the wall a party wall. *Duperrault* v. *Roy*, 28 Que. S. C. 519.

Building restrictions — Height and situation of house — Party wall. *MacCallum* v. *Morgan*, 3 E. L. R. 323.

Consideration stated in deed.]—Action for taking and converting to defendant's use certain personal property which plaintiffs claimed as having been transferred to them by defendant as an inducement to complete the purchase of a farm. The deed of the farm was expressed to be made for a specific consideration, and no reference was made to the personal property, the subject of the action:—*Held*, that it was open to plaintiffs to shew that their agreement to

purchase the farm for the consideration expressed in the deed was conditional upon defendant transferring to them the personal property claimed. That evidence was not receivable on the part of the plaintiffs to shew any other consideration outside of that expressed in the deed. Also, that plaintiffs were called upon to account for delay of four years after the taking by defendant in commencing their proceedings. Also, that the trial Judge erred in not giving sufficient weight to the fact that certain acts of plaintiffs after they entered into occupation of the property, were inconsistent with the claim subsequently set up by them to ownership of the personal property. *Newell* v. *Campbell* (1908), 43 N. S. R. 11.

Contract by correspondence — *Acceptance — New offer.*] — Defendant made a written offer to buy certain property payable either in cash or on terms. Plaintiffs' writing in acceptance added "that property is to be taken just as it is without any repairs":—*Held*, that there was no completed agreement. *St. Lawrence* v. *Levesque*, 5 E. L. R. 58.

Contract by correspondence — Acceptance — New offer — English and Quebec law. *St. Lawrence Investment Society* v. *Levesque*, 6 E. L. R. 58.

Contract by correspondence — *Non-resident.*]—A contract made by correspondence between a resident purchaser and a non-resident vendor for sale of land in the Territories—the acceptance of the vendor's offer to sell having been mailed in the Territories — is one which, according to the terms thereof, ought to be performed within the Territories.—In an action for damages for breach of such a contract:—*Held*, that service out of the jurisdiction was properly allowed.—The question, where it is doubtful, whether there was a completed contract should not be determined on an application to set aside the order for service *ex juris*. *Bishop* v. *Scott* (1904), 6 Terr. L. R. 54.

Correspondence — *No concluded agreement.*]—The plaintiff endeavoured to establish a contract by correspondence between himself and the defendant H., the president of the defendant company, for the sale to him by the company of certain lots of land; but the Court *held*, upon the evidence, that there was no actual agreement between the parties, either written or oral; and affirmed a judgment dismissing an action for specific performance. *Frewen* v. *Hays* (1911), 16 W. L. R. 253, B. C. R.

Description — *Mistake — Building included — Abatement in price.*] — The sale *en bloc* of lots of a certain size, described by their cadastral numbers, "with the buildings thereon excepted," does not include the adjoining land upon which is a stable, one of these buildings, which the vendor erroneously believed to be situated on one of the lots sold. His judicial admission of this mistake is not an acknowledgment of default in conveyance, and does not give the purchaser the right to an abatement in price, especially where it appears that the lands described and conveyed are of the extent mentioned in the deed. *Laurin* v. *Bégin*, 18 Que. K. B. 77.

Furnished hotel — *Removal of furniture — Security for payment of purchase money — Time for payment.*] — A purchaser of a furnished hotel and of the right to sell alcoholic liquors by virtue of a license granted to the vendor, not being able to obtain a renewal of this license, removed the furniture to another place:—*Held*, that he did not thereby diminish the security given to his vendor, and did not lose the benefit of the time which he had for payment of the price. *Vien* v. *Gosselin*, 33 Que. S. C. 373.

House and portion of land — *Boundary line — Interference by fence with enjoyment of vendee — Light and air — Derogation from grant — Injunction.*] — The defendant, being the owner of certain land, on the east end of which was a house lighted by windows on the west side, sold and conveyed part of the land, including that part upon which the house was built, to the plaintiff. The defendant subsequently built a high fence very close to the house, entirely on his own land, but up to the boundary line. The fence cut off the light, and by excluding the air impaired the ventilation, and the snow and ice collected in the narrow space between the fence and the house, from which it could not be removed, and when melting in the spring the water could not run away, but soaked through the walls of the house:—*Held*, that the defendant could not derogate from his own grant, and, as the plaintiff was thus deprived of that comfortable and reasonable enjoyment of the house which he had a right to expect, an injunction was granted restraining the defendant from continuing the fence in such a way as to interfere with that enjoyment. *Ruetsch* v. *Spry*, 9 O. W. R. 696, 14 O. L. R. 233.

Interest of judgment debtor in lands — *Indemnity — Warranty — Eviction — Sheriff's title.*] — The purchaser at a forced sale of the rights of the judgment debtor in an immovable, who sells them as they are conveyed to him in the sheriff's title, is bound to indemnify the buyer for loss from eviction of the immovable by reason of its never having belonged to the judgment debtor. — The prosecuting creditor is only bound to warrant the purchaser at a forced sale against eviction by reason of informalities in the proceedings or of the property seized not ostensibly belonging to the debtor. *Mahoney* v. *Diotte*, 28 Que. S. C. 314.

Judicial sale under decree in mortgage action.]—Plaintiffs sold under their mortgages, and after payment of their claims an amount remained in Court. The purchaser now sought to have a portion of the moneys in Court applied towards paying off arrears of taxes:—*Held*, he was not entitled to this. If these taxes, as well as the noxious weed rates, are a charge on the land, the purchaser must assume them. *Canada Permanent* v. *Martin* (1909), 12 W. L. R. 440.

Lien — *Bailleur de fonds — Charge on purchase money — Gift — Acceptance.*] — Although an act of sale or gift does not contain a stipulation for an hypothecary guaranty, the immovable sold or given remains

burdened with a lien in the nature of a *bailleur de fonds*, for appreciable charge in money stipulated for in the act of gift, or for what remains due of the price of sale. Such hypothec exists in favour of the vendor or donor, or of the third person to whom it is stipulated in the act of gift or sale that the charges upon the gift or the price of the sale shall be paid.—2. The lodging of his claim by a creditor with the liquidator to be collocated upon the product of the sale of an immovable, of which the price is due to him, as a creditor indicated in the act of sale, constitutes a sufficient acceptance of the stipulation on his part. *Canadian General Electric Co.* v. *Shipton*, 21 Que. S. C. 83.

Making the contract — *Letters—Offer to treat—Terms only partly indicated—Acceptance.*]—The plaintiff alleged a contract for the sale of land to him, made out of two letters, the first of which (in response to an enquiry by the plaintiff) was written on the 5th January by the defendant to the plaintiff, saying: "I would sell those 4 lots for $16,000, about one-half cash and the balance 6, 12 and 18 months, interest at 7 per cent. I expect to be back to Vancouver about or shortly after the 15th inst., and will call on you at once, when we can talk it over if you wish." The second letter was written by the plaintiff to the defendant on the 18th January, and said: "I have left a deposit . . . on your lots, which I take on terms mentioned in your letter:—*Held*, that the defendant's leiter was a mere offer to treat, and could not be converted into a binding contract, even if accepted according to its terms. *Reid* v. *Sinclair* (1910), 14 W. L. R. 478.

Making the contract — *Letters — Terms — Prices — No concluded contract.*] —The plaintiff sought specific performance of an alleged agreement by the defendants (a company and others) to sell him a number of lots in a townsite. The plaintiff relied on two letters as constituting the contract. By their terms the lots were to be selected by the plaintiff with the concurrence of the defendant company; and the only lots which the company would concur in transferring to the plaintiff were those in the "Phillips list." The prices were to be fixed by the company; and the company and the Government employed valuers, who put reserve prices on the lots; but these were not communicated to the plaintiff as the prices which the company would accept from him:—*Held*, that this was not a price-list binding on the company at the option of the plaintiff, and that the only prices which the company were bound to accept were those in the Phillips list, which were repudiated by the plaintiff. There was no concluded agreement which the Court could recognise and enforce. *Frewen* v. *Hays* (1910), 14 W. L. R. 632.

Mistake — *Rectification of agreement.*] —Suit for rectification and specific performance. The defendant agreed to sell to the plaintiff lots 26, 27, and 28 according to a subdivision in Kildonan; he gave him a transfer under the Real Property Act, which the plaintiff registered, and he received a certificate of title. The plaintiff supposed the lots so sold to him to be those which were really 27, 28, and 29, and took possession of the last named three, and made improvements on lot 29. Later on the defendant sold lots 29 and 34 to another person, when they were located by a surveyor, and the plaintiff discovered that the lot on which his improvements were was lot 29, instead of 28, as he had supposed. The plaintiff brought this action to have it declared that the intention had been to sell him the lots which were really 27, 28, and 29, and to have the sale agreement rectified, and for specific performance of the rectified agreement. The plaintiff testified that the defendant told him that a house, which since turned out to have been on lot 29, was on lot 28, and he relied on that representation in buying, and making his improvements. The defendant said he told the plaintiff he was selling by the plan only, and that the plaintiff must find the lots for himself. It was admitted that the plaintiff looked over the property before buying, though he did not measure the distance from the railway track to the lots he chose, which, if done, would have shewn him their numbers and probably prevented the mistake:—*Held*, that the plaintiff did not rely on any representation by the defendant, but looked over the property with a knowledge of how to find the lots according to their actual numbers, and his misfortune was the result of his own mistake only. It was argued that the case was one of a unilateral mistake, but to entitle the plaintiff to damages as in a case of unilateral mistake a plaintiff must shew fraud on the defendant's part: *May* v. *Platt*, [1900] 1 Ch. 616. There was no suggestion of fraud in the present case. *Williams* v. *Hespeler*, 24 C. L. T. 409.

Mortgage—*Payment into Court—Interest — Bonus — Municipal corporation.*] — Where the corporation of a city acquired the property of a light, heat, and power company, which was subject to a mortgage for a large sum, the Court refused to exercise the powers conferred on it by ss. 15 and 16 of the Act respecting the law and transfer of property, R. S. O. 1897, c. 110, by requiring the company to accept, on an existing mortgage, three per cent., the Court rate of interest, instead of 5 per cent., the rate secured by the mortgage for the unexpired period thereof, and to authorise the corporation to deduct the amount of the mortgage so computed from the purchase money. *In re Kingston Light, Heat & Power Co. & City of Kingston*, 24 C. L. T. 358, 8 O. L. R. 258, 3 O. W. R. 769.

Mortgage sale—*Notice of sale—Service of—Recitals in deeds—Assigns—Meaning of —Devolution of Estates Act—Caution—Non-registration of.*]—Where, by a provision in a mortgage, no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible, and the conveyance made on a sale under the power of sale contained recitals that service had been duly made on the mortgagor and his wife, the accuracy of such recitals being in no way disproved, a subsequent vendor of the land, in making title on a sale thereof, is not called upon to furnish any other evidence of such service; and further, the objection being as to the proof of service on the wife, no such proof was in

any event required, for, by the terms of the mortgage, service only was to be required to be made on the mortgagor and his assigns, and the wife was not an assign. Where, after the death of a mortgagor, a married woman, and after the coming into force of the Devolution of Estates Act, R. S. O. c. 127, and the expiration of a year from the mortgagor's death, without any caution being registered, sale proceedings were taken on the mortgagor, service of notice of sale on the husband and her heirs, two infant daughters, is sufficient, it not being necessary to serve the personal representatives. *In re Martin & Merritt*, 22 C. L. T. 116, 3 O. L. R. 284.

Municipal taxes—*Secretary-treasurer*—M. C. 371, 373, 948, 999, 1000, 1001.]—When several immovable properties have been assessed and put up for sale for non-payment of municipal taxes, under the provisions of the Municipal Code, as being one property, for taxes due on each of them, only a small part of each of such immovables may be sold and not one of such properties alone. A secretary-treasurer charged with the sale of immovable property for municipal taxes is a public officer who should strictly observe his duties as prescribed by law; he can exercise no latitude nor discretion and cannot give a buyer the choice of the immovable sold. *Corp. of County of Shefford* v. *Donais* (1910), 16 R. L. n. s. 439.

"Offer"—*Pleading.*] — An offer of sale means the existence of a mutual agreement, and not simply an unaccepted offer, and therefore an action based upon such an offer will not be dismissed on inscription in law. *Racette* v. *Vanier*, 7 Que. P. R. 449.

Partnership lands—*Death of one partner—Conveyance to surviving partner by administratrix — Infants — Consent of official guardian—Personalty.*] — Two brothers in partnership in business were the owners of certain land as partnership assets used in the business. One of them died intestate, leaving a widow and infant children, and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died, and his personal representative agreed to sell the land. On an application under the Vendors and Purchasers Act, R. S. O. 1897, c. 134, in which the purchaser contended that the consent of the official guardian should be obtained to the conveyance to the surviving partner, under s. 8 of the Devolution of Estates Act, R. S. O. 1897, c. 127:—*Held*, that the latter Act did not apply, as the property devolved by operation of law upon the personal representative *virtute officii*, and not by virtue of the statute, and that the children were not concerned or interested in the land in any sense contemplated by the Act. *In re Fulton & McIntyre*, 24 C. L. T. 225, 7 O. L. R. 445, 3 O. W. R. 406.

Purchaser of a substituted immovable from an institute who has the power to sell, on condition of investment of the price in other immovable property, to be held subject to the substitution, has an action against the institute for specific performance of the condition of investment of the price (*remploi de prix*), even after he has paid it voluntarily, instead of seeing to its investment at the time of the sale. *Paquette* v. *Laurendeau* (1910), 38 Que. S. C. 417.

Recital—*Covenant—Additional consideration if sold—Rule against perpetuities — Lien on lands — Personal remedy.*]—The plaintiff sold certain land to E. and S., the deed containing a recital that the plaintiff had agreed for $200 to sell the land to E. and S., their heirs and assigns, for railway purposes, with a proviso that the land should remain the absolute property, in the possession of and under the absolute control of E. and S., and should not be fenced in otherwise than as provided in the deed; and in the event of E. and S. selling, etc., the land, or erecting a fence contrary to the terms of the deed, E. and S., or their heirs, executors, administrators, or assigns, should immediately pay to the plaintiff, his executors, administrators, or assigns, the further sum of $500 as additional consideration for the sale of the land, making in all $700 therefor. The land, in consideration of the payment of the $200 and the further consideration of the several covenants to be kept and performed by E. and S., their heirs and assigns, was then conveyed to them. The covenant was in effect that E. and S., for themselves, their heirs and assigns, covenanted with the plaintiff that they, the said E. and S., or their heirs or assigns, would, in the event of their disposing of or conveying the said land, immediately pay to the plaintiff the further sum of $500. E. and S. sold and conveyed the land, with other lands, to the E. and S. Company, subject, in express terms, to the covenants set out in the original deed; and the E. and S. Company sold and conveyed the lands, with other lands, to the defendants, also subject to the covenants. In an action to recover $500 for the breach of the covenant not to sell, claiming the payment of the $500, a lien on the lands, and a personal remedy against the defendants:—*Held*, Riddell, J., dissenting, affirming the judgment of Boyd, C., 12 O. W. R. 3, that the plaintiff was entitled to a lien on the land, and to a sale thereof to realise the lien, the rule against perpetuities not applying, for, though under the covenant it might be held applicable, that was controlled by the recital; but the judgment was reversed in so far as it gave a personal remedy against the defendants. *Quart* v. *Eager*, 18 O. L. R. 181, 12 O. W. R. 735.

Rectification of conveyance.] — Defendants, husband and wife, conveyed to plaintiff, a farm, wife joining to bar dower. When plaintiff went to register his deed, he found that defendant husband had conveyed said farm to defendant wife some 16 months previous. Plaintiff brought action for rectification of the conveyance by substituting wife's name for that of her husband as grantor, and by eliminating wife's name as party of the second part. Clute, J., at trial, found that it was not present to the minds of the defendants that the husband had conveyed the land to his wife, and held, that there was no agreement by wife to sell and action failed. On appeal to the Divisional Court, it was argued that the wife having been a party to the negotiations, was estopped from setting up her title against the

plaintiff:—*Held*, 15 O. W. R. 34, that a new trial should be granted, that this aspect of the case might be heard by the trial Judge.—Britton, J., *held*, that the second action should be dismissed, the plaintiff to pay only the costs of this trial. No costs of the former trial or for the application for a new trial; that the plaintiff was entitled to the promissory note for $400 made by him, now in Court; that the defendants were entitled to a declaration that the conveyance in question was of no validity or effect. *Lecroix* v. *Longtin* (1910), 16 O. W. R. 240.

Reference—*Report of referee — Setting aside judgment.*]—A contract for the sale of land had been assigned by M. to plaintiffs as collateral security. Plaintiffs sued for arrears of instalments. Judgment was given at trial in favour of plaintiffs with reference to ascertain amount of liability. The Nova Scotia Supreme Court set this judgment aside and directed the referee to ascertain first, what, if anything, was due plaintiff from M. and, if anything, then to ascertain defendant's liability. The Supreme Court of Canada quashed an appeal. The setting aside the trial judgment is a mere matter of procedure. *Union Bank* v. *Dickie*, 6 E. L. R. 88.

Reference to Official Referee—*Title by possession — Costs.*]—Application under Vendors and Purchasers Act. On further directions ordered that each party bear his own costs. *Re Aiken & Ray* (1909), 14 O. W. R. 744, 1 O. W. N. 95.

Re-sale by purchaser—*Subsequent re-sales of parcels to various sub-purchasers—Assignment of sub-purchasers' agreements to original vendor — Credit for sums paid by sub-purchasers—Payments by way of bonuses made by sub-purchasers — Account — Construction of contract — Refund of payments not made voluntarily — Specific performance —Form of judgment.*]—Plaintiff sold to M. certain land, who sold to defendant, who sold to a number of different persons. All sales were under agreement. Plaintiff in dealing directly with sub-purchasers, refused to make title unless bonuses were paid him in addition to the amount mentioned, in each agreement:—*Held*, that plaintiff was not entitled to demand these bonuses, and, being liable to return them to the sub-purchaser, is not bound to give plaintiff credit for them. If plaintiff consents to indemnify defendant against these bonus payments order to go for specific performance with other directions. *Rankin* v. *Wadleigh*, 10 W. L. R. 462.

Right of redemption—*Payment of interest — Default — Extension of time — Letter of purchaser.*]—The purchaser of land upon condition of redemption by the vendor within 6 years, who allows the vendor to remain in possession in consideration of an annual rent, with a stipulation that default in any payment for 2 months after it falls due will destroy the power of redemption, extends for 3 months the period of 6 years by writing to the vendor a letter in these terms: "In reply to your letter, I am going to leave the deeds as they are; as to the interest which fell due lately, I hope you will not exceed 3 months; it is your advantage even more than mine to work to meet the regular interest, for the more money one has to pay at a time, the more difficult it is to pay. Be easy, although your *réméré* is finished, I shall not sell anything, and will wait 3 months for your interest. Hoping to give you satisfaction by this delay, which I consider reasonable, yours," etc. *Dupont* v. *Cloutier*, 30 Que. S. C. 514.

Sale of land—Payment to be made upon plaintiff producing purchaser—Refusal of defendant to make sale—Damages for breach of contract—Interest of plaintiff in lands—Forfeiture—Construction of contract. *Rogers* v. *Braun* (Man.), 4 W. L. R. 40.

Sale of land to religious society — Religious Institutions Act — Meetings of congregation — Election of trustees — Notice — Time — Advertisement — Public auction. *Re Levinsky & Hallett*, 5 O. W. R. 1.

Sale of timber—Prior unregistered deed —Notice. *White* v. *Allen*, 2 E. L. R. 91.

Sale under the direction of Court—*Error in fixing reserve bid — Opening biddings.*]—A purchaser at a sale under the direction of the Court, having no knowledge of an irregularity in fixing the reserve bid, cannot be affected by such irregularity; and a motion made to set aside a sale and open the biddings, on the ground that in fixing the reserved bid the value of one part of the property was not taken into consideration, was dismissed with costs. The referee not having in his report approved of the sale, but having made a special report regarding it, the purchaser, although ready, was unable to pay the balance of his purchase money into Court:—*Held*, that he should be allowed to pay it in without interest, and without prejudice to his right to object to the title. *In re Jelly, Provincial Trusts Co.* v. *Gamon*, 22 C. L. T. 64, 3 O. L. R. 72.

Scrip certificate — *Half-breed scrip — Acquisition of rights in—Purchase of land allotted.*]—The payment of money to a half-breed entitled to land scrip, and the delivery of the scrip certificate by the half-breed to the person paying, conveys to the latter no right in the certificate, the transaction being no more than an agreement by the half-breed to exercise his rights under the certificate as he may be directed, and the delivery of the certificate being merely to protect the person paying the money against the exercise of such rights adversely to him.—An assignee of the person who made the original agreement with the half-breed has, therefore, no rights against an innocent purchaser from the half-breed of the land allotted to him under the certificate. *Patterson* v. *Lane*, 6 Terr. L. R. 92.

Signing and what may take the place of it—*Tacit acceptance of the grant by the grantee.*]—The grantor of an incorporeal right is seized to the use of the grantee, on the tacit acceptance of the grant by the latter, who is not henceforth permitted to set up a failure to sign the grant. This acceptance is inferred from acts of the

grantee such as his handing over to him guarantees furnished by the grantor for the due fulfilment of his contract. The continued relation of creditor and debtor between the grantee and grantor, as the result of the grant, springs from rights that are its object. *Montreal* v. *Montreal Light, Heat & Power Co.*, 18 Que. K. B. 414.

Taxes — *St. John Assessment Act.*] — By agreement dated the 18th March, 1902, for the sale of land in the city of St. John, the vendee was to be given a "good title free of all claims on the 1st May," the date when possession was to be given. Section 131 of the St. John Assessment Act, 52 Vict. c. 27, enacts that "any assessment upon or in respect to real estate shall be a special lien on such real estate from the 1st day of April in the year of the assessment," etc. By 58 Vict. c. 49, s. 1, power is given to the city to sell real estate, on failure of the person assessed to pay taxes assessed in respect of the land. On the 1st May, 1902, the rate of taxation for the year from the 1st April had not been fixed by the assessors, and the rate was not determined, nor was the assessment list filed by the assessors with the common clerk until a number of weeks after the 1st May. The vendee contended that the taxes for the year beginning on the 1st April should be paid by vendor, and the matter was referred to the Attorney-General, whose decision it was agreed should be final:—*Held*, that the vendee should pay the taxes, save one month's proportion thereof, to be borne by the vendor. *In re de Forest*, 22 C. L. T. 400.

Tenant by sufferance—*Use and occupation of lands—Art. 1608, C. C.—Promise of sale — Reddition de compte — Action ex vendito — Practice.*] — The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by action *ex vendito* or for *reddition de compte*. *Cantin* v. *Bérubé*, 26 C. L. T. 850, 37 S. C. R. 627.

Variation as to terms—Written memorandum — Construction — Specific performance. *Smith* v. *Livingston* (B.C.), 8 W. L. R. 242.

Words "from the same vendor" in Art. 2098, s. C. C., apply to a purchaser through one or more intervening sellers, and not exclusively to one who purchases immediately from the common vendor. *Lacroix & Nault* v. *Rousseau* (1909), 18 Que. K. B. 455.

VENDOR'S LIEN.

See BANKRUPTCY AND INSOLVENCY — RAILWAY.

VENTE A REMERE.

See BANKRUPTCY AND INSOLVENCY.

VENUE.

Accident to workman — *Accident happening in Ontario—Defendant domiciled in Province of Quebec—C. P. 94.*]—Although the accident happened in Ontario, a suit under the Quebec Workmen's Compensation Act will lie in Quebec, where defendant has its domicil. *Gabella* v. *Grand Trunk Rw. Co.* (1911), 12 Que. P. R. 329.

Action against license commissioners — R. S. O. 1897 c. 88, s. 15. *McDonnell* v. *Grey* (1910), 1 O. W. N. 527.

Action for libel — Motion to change place of trial — Newspaper — Statutory right — R. S. O. 1897 c. 68, s. 11. *McAlpin* v. *Record Printing Co.*, 12 O. W. R. 1.

Action to rescind contract—Construction of proviso in contract as to place of trial — Jury notice — Action not brought under contract. *Greer* v. *Sawyer-Massey Co.*, 6 O. W. R. 560, 594.

Affidavit—Information and belief—Convenience — Expense. *McKay* v. *London Street Rw. Co.*, 6 O. W. R. 511

Affidavits — *Discovery—Examination of foreign corporations.*] — Change of venue from Berlin to Toronto refused as there would be a speedier and therefore less costly trial at Berlin. *Saskatchewan* v. *Leadley* (1905), 9 O. L. R. 556, 5 O. W. R. 449, followed. Neither affidavits of solicitors nor those made on information and belief, not giving the source, are receivable. *Leach* v. *Bruce* (1904), 9 O. L. R. 830, 4 O. W. R. 441 followed. Officers residing in a foreign country, of a foreign corporation, can not be examined for discovery. *Perrin* v. *Algoma Tube Works* (1904), 8 O. L. R. 634, 4 O. W. R. 289, followed. *Elmira Interior Woodwork Co.* v. *Engineering & Contracting Co.* (1909), 14 O. W. R. 911.

Cause of action—*Con. Rule 529 (b)—Declaratory action.*]—"Cause of action" in Con. Rule 529 (b) means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part, or the whole, in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience:—*Quære*, whether an action for a declaration of right falls within the Rule? *Conner* v. *Dempster*, 23 C. L. T. 307, 6 O. L. R. 354, 2 O. W. R. 833.

Cayuga to Welland or St. Catharines —Alleged inconvenience to business — Not sufficient reason — Motion dismissed—Costs in cause. *Higgins* v. *Coniagas Reduction Co. & Ont. Power Co.* (1911), 18 O. W. R. 911, 2 O. W. N. 953.

Change — *Affidavit of merits—Preponderance of convenience — Speedy trial — Costs.*]—Upon a motion by the defendant in a County Court action to change the venue from Digby to Halifax:—*Held*, that where an affidavit of merits is required, it should, if made by the party himself, state that he has a good defence on the merits,

as he is advised (by his solicitor or counsel) and verily believes; but if made by the solicitor, it should state that the party has a good defence on the merits, as the deponent is instructed (by his client, or the client's agent) and verily believes. 2. That the preponderance of convenience was, upon the affidavits, entirely in favour of a trial in Halifax rather than in Digby. *Levy* v. *Rice*, L. R. 5 C. P. 119, and *Church* v. *Barnett*, L. R. 6 C. P. 116, followed. 3. That the fact that the trial would take place on an earlier day at Digby, which would suit the plaintiff's convenience, as he intended to go away, was not a justification for laying the venue at Digby. 4. That the order changing the venue should be with costs, as it had been opposed on unreasonable grounds. *O'Hearn* v. *Keith*, 21 C L. T. 572.

Change—*Agreement before action.*] — A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction, it is agreed that the trial will be held only in" (the place where the vendors carried on business):—*Held*, that this condition was binding, and in an action by the purchaser to recover damages because of the unsatisfactory condition of the article sold, an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ. *Dulmage* v. *White*, 22 C. L. T. 260, 4 O. L. R. 121.

Change—Cause of action—Residence of parties — Expense — Undertaking. *Bertram* v. *Pursley*, 2 O. W. R. 264.

Change — *Contradictory affidavits — Defence on merits.*]—An application under Order XXXIV. R. 2, on the part of the defendant company, to change the venue from Halifax to Pictou. The defendants filed an affidavit which stated that they had a good defence to the action on the merits. The plaintiff opposed the motion and read affidavits tending to shew that the defendant had not a good defence on the merits:—*Held*, that the plaintiff's affidavits could be read on such a motion; and the Judge, not being satisfied that the defendant had a good defence to the action on the merits, refused to change the venue. *Cooper* v. *Copper Crown Co.* 21 C. L. T. 313.

Change — Convenience—Admission—Recital. *Cockshutt Plow Co.* v. *Maneely*, 12 O. W. R. 124.

Change—Convenience — Cause of action —Witnesses — Expense — Undertaking — Security — Delay in moving. *Dwyer* v. *Garstin*, 2 O. W. R. 879, 1105.

Change — *Convenience — Fair trial.*]—The writ of summons was issued in Rossland, where all parties resided. The venue was laid in Victoria, and the defendants applied, on the ground of greater convenience, for a change of venue to Rossland. This application was refused because a fair trial by jury could not be had there, on account of the feeling among the mining classes. The defendants then applied for a change to Nelson, where they contended a fair trial could be had, but the plaintiffs filed affidavits to shew that the feeling was the same as in Rossland:—*Held*, that, although the expense of a trial at Nelson would be less than at Victoria, still the venue should not be changed, unless it was clear that an absolutely fair trial could be had. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 24 C. L. T. 198, 10 B. C. R. 306.

Change — Convenience—Proper place for trial — Expense — Burden of proof — Solicitor. *Dowler* v. *Brown*, 12 O. W. R. 270.

Change—Convenience — Witnesses—Expense — Action against assignee for benefit of creditors. *Halliday* v. *Armstrong*, 3 O. W. R. 285, 410.

Change — Convenience — Witnesses — Place where cause of action arose — Rule 529. *Barclay* v. *Whitby*, 11 O. W. R. 209.

Change—County Court action—Change to District Court — Rule 539 (b) — Residence of parties — Power to make change. *McNeil* v. *Mortson*, 11 O. W. R. 1075.

Change—*County Court action—Contract —Clause governing venue — Construction —Enforcement.*]—In an action brought in the County Court of the county where the plaintiffs' head office was situated, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located," a motion to change the venue to another county was refused, on the ground that the word "Court" is to be understood as meaning "the Court having jurisdiction" mentioned in s. 1a of 3 Edw. VII. c. 13 (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that in case of litigation, the suit should be carried on in the Court, whether High Court, County Court, or Division Court, having jurisdiction in the locality where the head office was:—*Quære*, whether stronger grounds must be shewn on motion to change the venue in a County Court than a High Court action. *Noxon Co.* v. *Cox*, 24 C. L. T. 58, 6 O. L. R. 637, 2 O. W. R. 1046, 1057.

Change—County Court action—Convenience — Discretion — Practice — Appeal. *Sawyer-Massey Co.* v. *Massey-Harris Co.*, 9 W. L. R. 1.

Change—County Court action—Convenience — Number of witnesses — Prejudice —Fair trial — Expense — Undertaking. *Hisey* v. *Hallman*, 2 O. W. R. 403.

Change — County Court action — Preponderance of convenience — Expense — Fair trial — Jury — Affidavit — Solicitor —Scandal — Costs. *Baker* v. *Weldon*, 2 O. W. R. 432.

Change — County Court action — Preponderance of convenience—Special circumstances — Apportionment of costs. *Pretty* v. *Lambton Loan Co.*, 2 O. W. R. 417.

Change—County Court action — Residence of parties — Cause of action. *Cornell* v. *Irwin*, 2 O. W. R. 466.

Change—County Court action — Venue improperly laid by plaintiff — Costs of motion to change — Affidavit — Solicitor. *Leach* v. *Bruce*, 4 O. W. R. 441.

Change — County Court action — Witnesses — Expense. *Thorp* v. *Walkerton Binder Twine Co.*, 2 O. W. R. 845, 889.

Change — *Defence on merits.*]—For a defendant to obtain a change of venue to the county in which he resides, or in which the cause of action arose under the Judicature Act, 1900, Order XXXIV., as amended in 1901, he has only to satisfy the Judge that he has a good defence, on the merits—not an absolute defence, but a probable one. *Cowan* v. *Logan*, 21 C. L. T. 356.

Change — Grounds — Counterclaim respecting land — Local venue — Preponderance of convenience — Witnesses — Expense — Poverty of defendant. *McIntyre* v. *Cosens*, 2 O. W. R. 1149.

Change—*Place of trial fixed by order for directions — Practice.*]—Where the usual order for directions names the place of trial, a subsequent application to change the venue will not be entertained; at all events where there has been no intervening alteration of conditions. *Huggard* v. *North American Land and Lumber Co.*, 13 B. C. R. 280.

Change—Practice — Affidavit — Materiality of witnesses — Costs. *Roman Catholic Episcopal Corporation* v. *Macpherson*, 5 E. L. R. 542.

Change—Preponderance of convenience—Books of municipality — View of premises. *Drew* v. *Fort William*, 2 O. W. R. 467.

Change—*Preponderance of convenience—Undertaking as to expense.*]—The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place:—*Held*, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's *prima facie* right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary.—*Held*, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point. *McDonald* v. *Dawson*, 24 C. L. T. 322, 8 O. L. R. 72, 3 O. W. R. 773.

Change—Preponderance of convenience—Witnesses — Expense — Fair trial—Affidavits — Examination for discovery. *Hanrahan* v. *Wellington Cold Storage Co.*, *Bayly* v. *Wellington Cold Storage Co.*, 4 O. W. R. 203.

Change—Preponderance of convenience—Witnesses — Expense. *Wellington* v. *Fraser*, 12 O. W. R. 1141, 1171.

Change—Residence of plaintiffs —Extra-provincial corporation — Rule 539 (b) — Convenience — Delay — Sittings of Court. *American Street Lamp Co.* v. *Ontario Pipe Line Co.*, 11 O. W. R. 911.

Change — Slander — Preponderance of convenience — Costs of trial. *Butt* v. *Butt*, 2 O. W. R. 423.

Change — Speedy trial — Postponement of sittings — Second application by plaintiffs for change. *Whelihan* v. *Hunter*, 1 O. W. R. 788, 2 O. W. R. 20.

Change—*Statement of claim — Amendment.*]—A plaintiff who wishes to name some place other than that named in the original statement of claim as the place of trial, must obtain leave to do so on a summons, which clearly shews that it is desired to change the venue, and not on a summons simply to amend statement of claim. *Wade* v. *Uren*, 9 B. C. R. 274.

Change — Substantial grounds—Preponderance of convenience — Cause of action—Residence of parties — Witnesses — Expense — Increased security for costs. *McDonald* v. *Park*, 2 O. W. R. 455, 492, 812, 972.

Change — Substantial grounds—Preponderance of convenience — Witnesses. *Cook* v. *Waldie*, 12 O. W. R. 605.

Change — Writ of summons—Estoppel—Consent — Cause of action — Preponderance of convenience — Witnesses — Books —Expense — Fair trial — Costs. *Oakville* v. *Andrew*, 2 O. W. R. 608.

Change of — *Grounds for — Criminal libel — Political bias.*]—*Held*, that in criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the libel is alleged to have been committed, and that therefore the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not *per se* a reason for change of venue. *Regina* v. *Nichol*, 20 C. L. T. 319, 7 Brit. Col. L. R. 278.

Change of venue.—*Bowers* v. *Roper* (1881), 2 P. E. I. R. 435.

Companies—Place of residence — Place where cause of action arose — Preponderance of convenience — Witnesses. *Royal Electric Co.* v. *Hamilton Cataract Co.*, 7 O. W. R. 73.

Conflict of affidavits—*Convenience of witnesses — Expense.*] — *Held*, upon the facts disclosed in the affidavits that this was

eminently a case for trial at Parry Sound. *McDonald* v. *Park* (1903), 2 O. W. R. 812, 972, followed. *McGuire* v. *Burk's Falls* (1909), 14 O. W. R. 569.

Contract—*Sale of goods—Agreement as to place of trial — Action to set aside contract.*]—An action for the cancellation of a contract of sale on the ground of failure of consideration is an action "arising out of the transaction" within the meaning of a provision in the contract that any such action shall be tried in the county where the head office of the vendors is situated, and, apart from any question of convenience, the venue if laid elsewhere will be changed to that county. *Wright* v. *Ross*, 11 O. L. R. 113, 7 O. W. R. 69.

Contract—*6 Edw. VII. c. 19. s. 22 (O.) —Retroactivity.*]—An action was brought in the High Court by the purchasers of a machine against the sellers, for a return of money paid on the agreement of sale, damages for breach thereof, the return of the plaintiffs' promissory notes given thereunder, and cancellation of the agreement. The plaintiffs based their action upon a new agreement which they alleged superseded the original one as to some of the terms, but, except as specified, the engine was to fulfil the terms and conditions of the original agreement. The original agreement contained a clause providing that if any action or actions arise in respect to the machine or notes or any renewals thereof, the same should be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the defendants is located, *i.e.*, at Sarnia, and another clause providing that any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the town of Sarnia, and the purchaser's consent to have the venue in any such action changed to Sarnia:—*Held*, that the action did not come within either clause; but, if it did, that s. 22 of 6 Edw. VII. c. 19 (O.) applied, although the contract was made before it was enacted.—Order of the Master in Chambers refusing to change the venue to Sarnia affirmed. *Bell* v. *Goodison Thresher Co.*, 12 O. L. R. 611, 8 O. W. R. 567, 618.

Convenience — Action to set aside tax sale. *Hamilton* v. *Hodge*, 8 O. W. R. 351, 421.

Convenience — Delay — Counterclaim. *McDougall* v. *Meir*, 8 O. W. R. 471.

Convenience — Expense — Early trial. *Houston* v. *Houston*, 5 O. W. R. 798.

Convenience—Expense—Speedy trial — Residence of parties and solicitors—Costs. *Miller* v. *Bayes*, 8 O. W. R. 671.

Convenience — *Expense — Witnesses.*]—Motion to change venue from St. Thomas to Sandwich refused, the result being to delay the trial, the difference in the expense being small. *Brown* v. *Windsor, Essex and Lake Shore Rapid Ry. Co.*, 13 O. W. R. 766.

Convenience — Witnesses — Affidavit—Solicitor. *Jordan* v. *Macdonell*, 8 O. W. R. 947.

Convenience—Witnesses — Cause of action. *Gardiner* v. *Beattie*, 6 O. W. R. 975, 7 O. W. R. 136.

Convenience—Witnesses — Expense — Fair trial — Jury — Undertaking—Costs. *Gillard* v. *McKinnon*, 7 O. W. R. 161, 208.

Convenience — *Witnesses — Postponement of trial — Payment of additional expenses.*]—Order made changing venue from Perth to Sault Ste. Marie. Plaintiff had four witnesses, defendants 16. The latter would be unable to get to Perth in time for trial, so a postponement would be necessary. Defendants to furnish such sum as reasonable to take plaintiffs to the trial. *Gorman* v. *Hope Lumber Co.*, 13 O. W. R. 643.

Convenience of witnesses—*Expense.*]—Considering the convenience of the majority of the witnesses, change of venue from Welland to Ottawa was granted. *Gardiner* v. *Beatty* (1905), 6 O. W. R. 975, affirmed, 7 O. W. R. 136; *Seaman* v. *Perry* (1907), 9 O. W. R. 537, affirmed, 761, and *McDonald* v. *Dawson* (1904), 8 O. L. R. 72, 3 O. W. R. 773, followed. *Doherty* v. *Macdonell* (1909), 14 O. W. R. 658.

Convenience of witnesses—*Expense.*]—In an action for damages for alleged false representations regarding a farm in the county of Grey, made at Owen Sound, where the plaintiff, defendant, his solicitor and a third party were present, it was *held* that it was eminently a case for trial at Owen Sound. *McDonald* v. *Park* (1903), 2 O. W. R. 812, 972, and *Gardiner* v. *Beattie* (1905), 6 O. W. R. 975, affirmed (1906), 7 O. W. R. 136, followed. *Clemens* v. *Faulkner* (1909), 14 O. W. R. 637.

County Court action — *Contract — Agent's representations.*]—Action on a written contract, admittedly executed by defendant. Defence, misrepresentation by plaintiff's agent. Contract set out that plaintiff not responsible for any violation of contract by any verbal representations of agent. Motion to transfer action from one County Court to another refused. *Empire Cream Separator Co.* v. *Pettypiece*, 13 O. W. R. 740, 902.

County Court action — Convenience—Expense. *Humphrey* v. *Jory*, 6 O. W. R. 440.

County Court action — Convenience—Witnesses — Counterclaims. *Servos* v. *Lynde*, 8 O. W. R. 119.

County Court action — *Discretion of Judge — Practice — County Courts Act, s. 77.*]—Under s. 77 of the County Courts Act, R. S. M. 1902. c. 38, which provides that it shall be competent for the Judge, upon what shall appear to him to be sufficient grounds, to order the transfer of a suit from one judicial division to another, the Judge has an absolute discretion to order such transfer if the grounds shewn appear to him sufficient, and it is not even necessary for

him to have affidavits before him shewing such grounds, but he may act upon statements of the parties or their counsel, and the practice in the King's Bench relating to applications for change of venue does not apply in County Court actions. *Sawyer & Massey Co.* v. *Massey-Harris Co.*, 18 Man. L. R. 409, 9 W. L. R. 1.

County Court action — Extra expense —Motion for leave to amend — Forum. *Bank of Montreal* v. *Hoath* (1910), 1 O. W. N. 892.

County Court action — *Venue improperly laid by plaintiff — Costs of motion to change — Affidavit — Solicitor.*]—Motion by defendant to change venue and transfer action to the County Court of Northumberland and Durham from the County Court of Victoria. Case under Rule 529 (b), which in *Corniel* v. *Irwin*, 2 O. W. R. 466, it was held to apply to the County Court:—*Held*, there was nothing to satisfy what was said in *Pollard* v. *Wright*, 16 P. R. 507, to be necessary to have a change of venue. Not only was there no proof of "a very strong case," but, strictly speaking, there was no proof that could be considered. The only affidavit was one of plaintiff's solicitor. According to *Hood* v. *Cronkrite*, 4 P. R. 279 (*per* Draper, C.J.), affidavits on these motions should be made by the party and not by his solicitor, who can only repeat what his client has told him. Attention drawn to this in *Baker* v. *Weldon*, 2 O. W. R. at p. 434. The solicitor's affidavit was vague and indefinite. If plaintiff could not speak more positively and precisely he could not expect to obtain an order to have the trial at Lindsay. *Leach* v. *Bruce*, 4 O. W. R. 441, 9 O. L. R. 380.

County Court action against executor for specific legacy—*County Courts Act. R. S. O. (1897), c. 55, ss. 23 (10), 36 — Pleading — Witnesses — Convenience.*]—Order granted defendant to transfer an action from County Court of York to that of Hastings as the County Courts Act, R. S. O. (1897), c. 55, ss. 23 (10) and 36 (1), require that actions by a legatee seeking payment or delivery of a legacy shall be brought and tried in the Courts where letters probate were issued or where the deceased resided. *Macdonald* v. *Park*, 2 O. W. R. 972, followed. *Curlette* v. *Vermilyea* (1910), 15 O. W. R. 863.

Deliberate choice — *Convenience.*] — Where there is no overwhelming preponderance of convenience and plaintiff deliberately laid the venue, he cannot have it changed if defendant opposes. *Buchanan* v. *Bogue*, 12 O. W. R. 932.

Expense—*Stidwell* v. *Township of North Dorchester* (1910), 1 O. W. N. 444.

Fair trial—*Convenience.*—*Dunsmore* v. *National Portland Cement Co.* (1910), 1 O. W. N. 480.

Fair trial — Convenience—Expense — Witnesses. *Sturgeon* v. *Port Burwell Fish Co.*, 7 O. W. R. 359. 380.

Grounds for—Transitory action—Cause of action arising in another county—Manifest preponderance of convenience. *Farquharson* v. *Weeks* (P.E.I.), 6 E. L. R. 456.

Inspection by trial Judge.]—Action for price of waggon. Defendants pleaded nonconform of contract. Change of venue granted from Toronto to Stratford, where the waggon could be inspected by the trial Judge. *Canada Carriage Co.* v. *Down & Fleming* (1910), 1 O. W. N. 443.

Laying in wrong county—Rule 529 (b) — Opposition to change — Fair trial—Prejudice — Jury—Costs of motion. *Brown* v. *Hazell*, 2 O. W. R. 784.

London to Goderich—Stratford natural place of trial—Questions as to expense—Convenience—Speedy trial—Witnesses about to leave province—Master in Chambers refused motion—Clute, J., dismissed appeal—Application to strike out jury notice—Referred to trial Judge. *Keyes* v. *McKeon* (1911), 18 O. W. R. 593, 2 O. W. N. 899.

Motion by defendants to change venue from Sudbury to North Bay, where cause of action arose — Defendants willing to pay plaintiff's expenses to attend trial — Trial at non-jury sittings—Election of plaintiff — Costs in cause. *Levesque* v. *North Bay Light, Heat & Power Co.* (1910), 17 O. W. R. 381, 2 O. W. N. 255.

Motion by plaintiff to change — Deliberate choice — Convenience — Expense — Costs. *Buchanan* v. *Bogue*, 12 O. W. R. 932.

Motion by plaintiff to change — Mistake in laying venue — Solicitor's slip —Costs — Speedy trial. *Garland* v. *York Mutual Fire Ins. Co.*, 7 O. W. R. 322.

Motion for — *Convenience for evidence and witnesses — Order granted.*]—Motion for a change of venue from County Court of York to County Court of P. E. county. The action was for the price of cream separators and upon promissory notes alleged to have been endorsed by defendant. Defendant denied the endorsement and alleged that the separators were useless.—Master in Chambers granted the order asked on the ground that the evidence as to the alleged defects in the separators would be found at or near Picton. *Empire Cream Separator Co.* v. *Pettypiece*, 13 O. W. R. 740, 902, distinguished.—*Gardiner* v. *Beattie*, 6 O. W. R. 975, 7 O. W. R. 136, followed. *Empire Cream Separator* v. *Ross* (1910), 16 O. W. R. 922, 2 O. W. N. 26.

Motion for on grounds of fair trial and prejudice.]—Plaintiff brought action to recover $3,700 which he alleged he was induced to invest in shares of the Toronto Roller Bearing Co., by fraudulent representations of defendant. Defendant was at that time the minister of the First Methodist Church at Owen Sound. The sales in question, with others, were admittedly made by defendant to persons in Owen Sound and throughout the county of Grey. Defendant alleged that such a strong feeling had been

raised against him in Owen Sound and throughout the county that it would be impossible for him to have a fair and impartial trial before a jury of that county. Statement of claim was delivered but no place of trial was named. Afterwards an order was made allowing Owen Sound to be named, subject to right of defendant to move to change. Defendant was willing to have case remain at Owen Sound if the jury notice was waived, but plaintiff would not consent to this.—Master in Chambers *held*, 16 O. W. R. 939, 2 O. W. N. 43, that in a case so vital to defendant he was entitled to have a trial before a jury of some other county, and this had better be at Toronto, as it seemed probable that several of the necessary witnesses would be found here, or would have to come from Montreal. Costs in the cause.—Latchford, J., affirmed above judgment. *Allen* v. *Turk* (1910), 17 O. W. R. 40, 2 O. W. N. 92.

Motion to change—Action for alimony —Interim disbursements — Terms — Costs. *James* v. *James*, 9 O. W. R. 309.

Motion to change—Convenience—Witnesses — View — Costs — Postponement of trial. *Pettypiece* v. *Sault Ste. Marie*, 10 O. W. R. 536, 573.

Motion to change—County Court action —Preponderance of convenience — Witnesses. *Canadian Oil and Waste Saving Machine Co.* v. *Toronto Suburban Rw. Co.*, 9 O. W. R. 569.

Motion to change—Malicious prosecution — R. S. C. c. 185, s. 1. *Canada Biscuit Co.* v. *Spittal*, 2 O. W. R. 387. 735.

Motion to change — Place for trial — Convenience — Place of residence of plaintiffs — Defendants out of the jurisdiction. *Geedy* v. *Wabash Rw. Co.*, 9 O. W. R. 507.

Motion to change — Preponderance of convenience — Witnesses — Expense — Terms. *Wade* v. *Elliott*, 9 O. W. R. 570, 680.

Motion to change — Preponderance of convenience — Witnesses — Place for trial —Terms as to expenses. *Scaman* v. *Perry*, 9 O. W. R. 537, 761.

Motion to change—Residence of parties —Nominal plaintiff — Real plaintiff — "Party" — Preponderance of convenience —Witnesses — Expense — Costs. *Brigham* v. *McAllister*, 10 O. W. R. 117.

Motion to change—*Time for.*]—Application by the defendant to change the place of trial. A defence had been put in but the time for replying had not elapsed. The plaintiff's solicitor made affidavit that he intended specifically to reply:—*Held*, following *Kidd* v. *Henderson*, 20 N. S. R. 441, that the application was premature. Such an application should not in general be made until after issue joined or until it could clearly be seen what the issues would be. The defence raised many different questions, but, until the replication was in, no one could say whether or not the defendant would be obliged to sustain the whole of them by evidence. *Balcom* v. *Croft*, 20 C. L. T. 412.

Motion to set aside—*Notice of trial.*]—Plaintiff's statement of claim laid venue at Yarmouth, but as case did not come on for trial at Yarmouth sittings, he gave notice of trial at Tusket. Defendant moved to set aside notice.—Meagher, J., *held*, that plaintiff had the right to try his case at any place in the county in which the place of trial named in statement of claim was situated. Motion dismissed with costs. *Crosby* v. *Yarmouth Elec. Co.* (1910), 8 E. L. R. 542.

Naming place of trial in writ of summons — *Nullity.*]—The mention of a place of trial in a writ of summons not specially endorsed has no binding effect, and the plaintiff is free to name another in his statement of claim. *St. Mary's and Western Ontario Rw. Co.* v. *Webb*, 18 O. L. R. 336, 13 O. W. R. 903.

No adequate reason for — *Books of defunct company — Relevant entries could be verified and admitted.*]—Motion by defendant to change venue in these actions from Welland to Toronto:—*Held*, that there was no adequate reason for any change, and the motion in each case should be dismissed with costs. The books, etc., spoken of in defendant's second affidavit, being those of a defunct company, could easily be taken to Welland if required, but copies of any relevant entries could, no doubt, be verified here and admitted. *McKeedie* v. *Dalton* (1910), 15 O. W. R. 875.

No sufficient ground to postpone trial.]—Motion to change venue from Toronto to Port Arthur:—*Held*, that the evidence as to the contract in question would be largely documentary and there was no good reason to postpone the trial for five months. Motion dismissed with costs in the cause, defendant to be allowed extra costs, if it is shewn that the expense of the trial at Toronto has been greater than it would have been at Port Arthur. *Can. St. Car Adv. Co.* v. *Port Arthur* (1910), 15 O. W. R. 170.

Number of witnesses—*Defendants refused to give names—Increased expense.*]—Master in Chambers refused defendants change of venue from Hamilton to Toronto. Defendants stated they had 10 witnesses in Toronto but refused to give names or shew what they would prove. Plaintiff had only 4 witnesses, 2 in Toronto. Increased expense by trial at Hamilton only $20. Not sufficient to take away plaintiff's right to have trial at Hamilton. There are serious objections to bringing cases from outside to Toronto; almost inevitably increases expenses. *—Cameron* v. *Driscoll*, 17 O. W. R. 649, 2 O. W. N. 338, and *Saskatchewan, etc.*, v. *Leadlay*, 9 O. L. R. 526, 4 O. W. R. 441, followed. *Dickenson* v. *Toronto Rw. Co.* (1911), 18 O. W. R. 431, 2 O. W. N. 832.

Omission to lay—Amendment—Charge —Convenience — Affidavits — Jury notice. *Meiers* v. *Stern*, 2 O. W. R. 392.

Order allowing plaintiff to deliver new statement of claim—New place of trial named — Irregularity — Practice — Agreement of counsel. *Bradwin* v. *Gagnier*, 12 O. W. R. 868.

Patent for invention — Action for infringement — Statutory venue — Corporation defendant. *Overend* v. *Eclipse Manufacturing Co.* 6 O. W. R. 438.

Place for reference—*Trial before local Master — Witnesses — Convenience of — Expense — Costs — Con. Rule 529 (b).*]— Plaintiff moved to change the reference from St. Catharines to Hamilton. pursuant to leave reserved in the judgment.—Master in Chambers *held*, that the action by Con. Rule 529 (b) had still to be tried and the trial must be had at St. Catharines unless a very strong case was made out for a change: *Pollard* v. *Wright*, 16 P. R., followed, and considering affidavits as to witnesses and expense, the motion should not prevail. *Crain* v. *Bull* (1910), 16 O. W. R. 950, 2 O. W. N. 48.

Place of trial named in indorsement on writ of summons — Another place named in statement of claim — Motion to strike out — Waiver of irregularity by previous motion to change venue. *Geedy* v. *Wabash R. R. Co.* 9 O. W. R. 677.

Place where cause of action arose and parties reside — Rule 529 (b) — Libel — Letter — Place of posting—Publication — Change of venue — Preponderance of convenience — Fair trial. *Lewis* v. *Moore*, 9 O. W. R. 841.

Plaintiff resident out of jurisdiction —Change to place where defendants reside and cause of action arose. *Appleyard* v. *Mulligan*, 6 O. W. R. 929.

Preponderance of convenience.] — As sufficient preponderance of witnesses, venue changed from Toronto to Picton. *Wellington* v. *Fraser*, 12 O. W. R. 1141. Appeal allowed, 12 O. W. R. 1171.

Preponderance of convenience — Counterclaim. *Farmer* v. *Kuntz*, 7 O. W. R. 829, 8 O. W. R. 4.

Preponderance of convenience — County Court action. *James* v. *Shemilt*, 7 O. W. R. 828.

Preponderance of convenience — *County Courts Act — Action by relative of registrar.*]—The plaintiff's right to select the place of trial is not lightly to be interfered with, and the onus is on the defendant moving to change the venue under s. 68 of the County Courts Act. to shew that the preponderance of convenience is against the place selected.—Under s. 70 of the Act, the venue will not be changed because the plaintiff is a near relative of the registrar of the Court in which the action is begun, unless indeed it is shewn that the registrar himself is the true plaintiff. *Phair* v. *Sutherland*, 12 B. C. R. 293.

Preponderance of convenience — Expense — Cause of action. *Sharpin* v. *Nicholson*, 7 O. W. R. 57.

Preponderance of convenience — Personal injuries — Place of injury — Expense — Witnesses — View — Discretion —Appeal. *Forster* v. *Hook*, 6 O. W. R. 591, 697, 928.

Preponderance of convenience — Witnesses — Expense — Other considerations. *Mitchell* v. *Hagersville Contracting Co.*, 8 O. W. R. 410, 446.

Provision of contract as to venue — Application of statute — County Courts — Division Courts. *Goodison Thresher Co.* v. *Wood*, 5 O. W. R. 717, 6 O. W. R. 19.

Recovery of land — Violation of Rule 529 (c) — Motion to change — Onus — Fair trial. *Bank of Hamilton* v. *Anderson*, 2 O. W. R. 1127.

Renfrew Co. C. to Carleton Co. C.— *Action for $200 for lumber sent to Ottawa—Rejected—Not good merchantable stuff—Lumber still at Ottawa—Order granted as lumber could there be inspected—Witnesses—Costs in cause.*]—*Irwin* v. *McFee*, 16 O. W. R. 972, 2 O. W. N. 72, and *Gardiner* v. *Beattie*, 6 O. W. R. 975, affirmed; 7 O. W. R. 136, followed. *Cameron* v. *Driscoll* (1910), 17 O. W. R. 649, 2 O. W. N. 338.

Residence of defendant—Irregularity in statement of claim — Leave to amend. *Tierney* v. *Tierney*, 3 O. W. R. 350.

Residence of parties — Change—Sheriff a party — Affidavits — Solicitors — Costs. *Harcus* v. *Macdonald*, 3 O. W. R. 411, 445.

Residence of parties — *Convenience of witnesses — Expense.*] — Where plaintiffs were induced to buy a horse by alleged false representations, it was *held*, that if plaintiffs would undertake to rely on the alleged misrepresentation as to the age of the horse alone, there would appear to be no reason for making a change in the place of the trial. *Faragher* v. *Begg* (1909), 14 O. W. R. 571.

Residence of plaintiff — *Statement of claim.*] — Rule 529 provides that (*a*) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried; (*b*) where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county:—*Held*, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in Rule 529 (*b*). *Edsall* v. *Wray*, 20 C. L. T. 389, 19 P. R. 245.

Statement of claim—Naming place of trial other than the proper one under Rule 529 (b) — Irregularity — Waiver by pleading — Motion to change venue under Rule 529 (d) — Time for making — Necessity for defined issues — Practice — Costs. *Cummings* v. *Berlin*, 8 O. W. R. 552.

Stratford to Berlin — *Onus on plaintiff — Con. Rule 529 (b).*]—Plaintiff laid

venue at Stratford because the Berlin autumn non-jury sittings were fixed too early to enable plaintiff to get ready for trial. The cause of action occurred on 18th April, 1910, but the action was not begun until 9th July. Defendant moved to change venue to Berlin. Master in Chambers granted order, holding that the place of trial should be Berlin, under Con. Rule 529 (*b*); the cause of action having arisen and parties resided in Waterloo county; that the onus was on plaintiff to make out a sufficiently strong case to retain venue at Stratford and that onus had not been satisfied. Costs to defendant in any event. *Schultz* v. *Clemens* (1910), 16 O. W. R. 924, 2 O. W. N. 26.

Toronto to Port Arthur—*Witnesses—Expense.*]—Plaintiff sued for damages for injuries sustained by reason of defendants alleged negligence at Fort William. Plaintiff had since removed to Toronto, where he laid venue. Defendants moved to change venue to Port Arthur.—Master in Chambers *held*, that it did not seem justifiable to interfere with plaintiff's choice of venue, as the number of witnesses at each place were about the same. Motion dismissed with costs in the cause. *Brulott* v. *Grand Trunk Pacific Ry. Co.* (1910), 16 O. W. R. 928, 2 O. W. N. 28.

Toronto to Sault Ste. Marie—Motion for — Portuguese interpreter necessary — None at place proposed for trial—Master in Chambers refused change of venue — No preponderance of convenience. *Campbell* v. *Doherty*, 18 P. R. 243, and *Macdonald* v. *Dawson*, 3 O. W. R. 773, 8 O. L. R. 72, followed. *Seaman* v. *Perry*, 9 O. W. R. 527, 761, specially referred to. *Alves* v. *Kearns Brothers* (1911), 19 O. W. R. 150, 2 O. W. N. 1093.

Transitory action — *Cause of action arising in another county — Preponderance of convenience — Application to change venue.*]—The mere fact that the cause of action arose in another county is not sufficient for a change of venue. There must be obvious preponderance of convenience in favour of the latter county. The onus is on the defendant. *Farquharson* v. *Weeks*, 6 E. L. R. 456.

Venue — *Change—Preponderance of convenience — Cause of action — Residence of parties — Defendants out of the jurisdiction.*]—*Held*, Rule 529, as to naming and changing the place of trial of an action, contains the general provision of clause (a) that the plaintiff shall name the place of trial, as qualified by clause (b), "where the cause of action arose and the parties reside in the same county. the place so to be named shall be the county town of that county." The Court held that the equity of the Rule governed a case in which the cause of action had arisen in a county in which all the parties to it who were within the jurisdiction resided, although there are other parties who reside outside of Ontario. *Saskatchewan Land & Homestead Co.* v. *Leadley*, 25 C. L. T. 227, 5 O. W. R. 449, 9 O. L. R. 556.

Venue improperly laid—Rule 529 (b) —Onus — Reason for retaining venue where laid. *Pigott* v. *Bank of Hamilton*, 7 O. W. R. 802.

Venue previously fixed by Judge — Master in Chambers has no jurisdiction to order change—Must apply to an equal authority.]—*Brennan* v. *Bank of Hamilton* (1911), 18 O. W. R. 841, 2 O. W. N. 894.

Waterloo to Essex—An action brought on 19th Nov., 1910, in County Court of Waterloo, to recover $425 for goods sold and delivered on order of defendant Johnston, who had allowed judgment to be entered against him by default—If defendants agree to terms order granted — Otherwise motion dismissed—Election within a week. *Metal Shingle Co.* v. *Anderson* (1911), 19 O. W. R. 71, 2 O. W. N. 1018.

Witnesses — *Preponderance of material —Vehicle in question — Could be seen by Judge and jury — Costs.*]—Action to recover $300, price of a 'bus sold defendant, shipped from Sault Ste. Marie to Sarnia. Defendant moved to change venue from District Court at Sault Ste. Marie to Co. C. of Lambton Co.—Master in Chambers *held*, that there was no preponderance of material shewn and as the vehicle in question was at Sault Ste. Marie, it could be seen there by the Judge and jury. Motion dismissed. Costs in the cause. *Irwin* v. *McFee* (1910), 16 O. W. R. 972. 2 O. W. N. 72.

Writ of summons — *Indorsement — Elections.*]—Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2). *Segsworth* v. *McKinnon*, 20 C. L. T. 262, 19 P. R. 178.

See CRIMINAL LAW—DISMISSAL OF ACTION — MINES AND MINERALS — PLEADING —PRACTICE — SHIP — TRIAL — WRIT OF SUMMONS.

VERDICT.

See CRIMINAL LAW — JUDGMENT — NEW TRIAL — TRIAL.

VESTED ESTATE.

See WRIT.

VESTED INTEREST.

See SETTLEMENT — WILL.

VESTING ORDER.

See ADMINISTRATION.

VESTRY BOARD.

See CHURCH.

VETERINARY SURGEON.

Professional advice voluntarily given in error—*Consequences of acting on advice—Liability—Honest belief in correctness of advice.*]—The defendant, a veterinary surgeon, advised the plaintiff that two horses belonging to the plaintiff, which were afflicted with nasal gleet, should be shot, and the plaintiff (acting upon the advice) shot them. The defendant was not called in by the plaintiff, but gave the advice gratuitously after seeing the horses. As a fact, nasal gleet is not a contagious disease, nor incurable. The plaintiff sued the defendant for damages measured by the value of the horses, and asserted that the defendant had said that the horses had glanders and should be shot, and that he (the defendant) would see that the plaintiff was paid the proper sum by the Dominion Government: — *Held*, that the onus of establishing this was on the plaintiff, and had not been met; that the defendant's story, that he had given the advice in good faith, gratuitously, and in the honest belief that the best thing to do with horses afflicted with nasal gleet was to shoot them, must be believed; and that, upon that basis, the defendant was not liable.—Assuming that the defendant's statement was false, belief in its truth was a complete defence.—*Derry* v. *Peek*, 14 App. Cas. 337, followed. *Carroll* v. *Bell* (1910), 15 W. L. R. 327, B. C. R.

VEXATIOUS ACTION.

See STAY OF PROCEEDINGS.

VICE REDHIBITOIRE.

See SALE OF GOODS.

VIEW.

See DISCOVERY — EASEMENT — TRIAL.

VIS MAJOR.

See CARRIERS — CONTRACT — MUNICIPAL CORPORATIONS — NEGLIGENCE — SHIP —WATER AND WATERCOURSES — WAY.

VOLUNTARY ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY — COMPANY.

VOLUNTARY ASSOCIATION.

Member—*Fine—Action for — Pleading.*]—A voluntary association may exist and sue and be sued in the name of its members.—The fact that the parties signed a deed of association constitutes them members of that association, and it is not necessary to allege that they had made the necessary application, and were competent to be members of the association.—If a member fails to comply with the rules of an association, and thereby incurs a fine and forfeiture of his membership, the remaining members, suing him for the amount of the stipulated fine, are not obliged to render him any account for the fine demanded. An allegation that the defendant refuses to comply with the conditions of membership is a sufficient *mise en demeure*, in an action for the recovery of a fine. *Arcand* v. *Hamelin*, 2 Que. P. R. 437.

VOLUNTARY CONVEYANCE.

13 Eliz. c. 5—*Solvent vendor—Action by mortgagee.*]—A voluntary conveyance of land is void under 13 Eliz. c. 5, as tending to hinder and delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property, and so rendering him insolvent, thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance, and that without first realizing his security. Judgment in 7 B. C. R. 189, reversed; Gwynne, J., dissenting. *Sun Life Assurance Co.* v. *Elliott*, 21 C. L. T. 154, 31 S. C. R. 91.

See DEED — FRAUDULENT CONVEYANCE—TRUSTS AND TRUSTEES.

VOLUNTARY GIFT.

See GIFT.

VOLUNTARY INCURRING OF RISK.

See MASTER AND SERVANT — NEGLIGENCE.

VOLUNTARY SETTLEMENT.

See TRUSTS AND TRUSTEES.

VOLUNTARY WINDING-UP.

See COMPANY.

VOTERS' LISTS.

See COSTS — CRIMINAL LAW — ELECTIONS —MUNICIPAL CORPORATIONS.

VOTING AND VOTERS.

See ELECTIONS — MINES AND MINERALS — MUNICIPAL CORPORATIONS — PENALTY —SCHOOLS.

WAGER.

See GAMING — PROHIBITION.

WAGER POLICY.

See INSURANCE.

WAGES.

See ADMIRALTY — ATTACHMENT OF DEBTS —BANKRUPTCY AND INSOLVENCY—COMPANY — CONTRACT — COURTS — CRIMINAL LAW — PARENT AND CHILD — PARTIES — SALE OF GOODS — SEAMEN'S ACT — SHIP.

WAIVER.

See APPEAL — ARBITRATION AND AWARD —ASSESSMENT AND TAXES — BILLS AND NOTES—BILLS OF SALE AND CHATTEL MORTGAGES — COMPANY — CONSTITUTIONAL LAW—CONTRACT—COURTS —COVENANT—CRIMINAL LAW — CROWN —DISMISSAL OF ACTION — EASEMENT —ELECTIONS — INSURANCE — INTOXICATING LIQUORS — LANDLORD AND TENANT — LIEN — MASTER AND SERVANT —MINES AND MINERALS — MORTGAGE —MUNICIPAL CORPORATIONS — PATENT FOR INVENTION — PLEADING — PRINCIPAL AND AGENT — PRINCIPAL AND SURETY — SALE OF GOODS — TIMBER —TRIAL — VENDOR AND PURCHASER— VENUE.

WANTON AND FURIOUS DRIVING.

See CRIMINAL LAW.

WAR RISK.

See INSURANCE.

WARDS.

See MUNICIPAL CORPORATIONS.

WAREHOUSEMEN.

Bailment — *Obligation of bailee — Covenant as to special care — Liability for loss from frost.*] — A warehouseman is bound, as a depositary, to apply, in the keeping of goods warehoused with him, the care of a prudent administrator. The proviso, in a warehouse receipt, "but without responsibility for any loss or damage caused . . for want of any special care or precaution," does not relieve him from that obligation. Hence, a warehouseman who receives boxes of lemons during the winter and allows them to freeze, is liable for the loss. *Vipond* v. *Canada Cold Storage Co.*, 35 Que. S. C. 144.

Cold storage of fish — Liability for spoiling — Duty of warehousemen — Examination — Negligence. *Doyle Fish Co. of Toronto* v. *London Cold Storage and Warehousing Co.*, 5 O. W. R. 40.

Negligence — *Damages — New trial.*] —In an action against the owners of a grain elevator for negligence in the care of grain, one of the grounds of negligence found by the jury was, that the grain had been taken into the elevator from the vessel while rain was falling, and the hatches had not been protected:—*Held*, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain during unloading; and a new trial was properly ordered. Judgment in 26 A. R. 389, 19 C. L. T. 266, affirmed. *Dunn* v. *Prescott Elevator Co.*, 30 S. C. R. 620.

River improvements — *Precaution against danger to existing constructions — Responsibility for damages — Vis major.*] —Where works constructed in a river so altered its natural conditions as to create a reservoir in which ice formed in larger quantities than it did prior to such works, and which, during the spring freshets after a severe winter, was driven with such force against the superstructure of a bridge as partly to demolish it, those who constructed the works are responsible for the damages so caused, notwithstanding that they had taken precautions for the protection of the bridge against like troubles, foreseen at the time of the construction of the works and that the formation of ice in increased weight and thickness in the reservoir had resulted from natural climatic conditions during an unusually rigorous winter. Judgment in *Montreal Light, Heat and Power Co.* v. *Archambault*, 16 Que. K. B. 410, affirmed. *Montreal Light, Heat and Power Co.* v. *Attorney-General for Quebec*, 41 S. C. R. 116.

Storage of goods — Advances—Failure to repay — Sale of goods — Purchase by warehousemen — Assent — Acquiescence — Price — Interest — Storage charges. *Palmer* v. *Christie* (Y.T.), 2 W. L. R. 561.

Storage of goods — *Damage by rats —Goods lost or stolen — Dampness.*]—Articles of household furniture were stored under lock and key in a separate compartment of a brick warehouse, but were afterwards removed by the warehousemen, without the

owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boathouse, and part of which was used as a stable: — *Held*, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, the existence of which the warehousemen were aware of, and were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt which relieved them from the responsibility for loss or damage caused by irresistible force, or inevitable accident, or from want of special care or precaution; but they were not liable for damages caused by alleged dampness, in that it might have been due to changing temperature which it did not appear would not have had the same effect in the original place of storage. *Miall* v. *Oliver*, 24 C. L. T. 356, 8 O. L. R. 66, 3 O. W. R. 749.

Unnavigable stream — *Rights of riparian owner.*] — Under the interpretation of the Crown patent herein it was held that the lower not the higher bank of the stream was meant so that the boundary of the lot in question extended to midstream. *Robertson* v. *Watson*, 27 C. P. 579, distinguished. *Williams* v. *Pickard*, 12 O. W. R. 1051.

Water record—*Change of place of diversion — Decision of Gold Commissioner — Appeal to county court Judge — Scheme of development.*]—Application to a gold commissioner to change point of diversion by owners of a water record. On appeal, held that the C. Company having acquired an interior status to the K. Company their rights must be recognised. The hearing before the County Court Judge is a trial *de novo*. The Lieutenant-Governor in Council does not exercise a jurisdiction in conflict with the gold commissioner. *Re East Kootenay and Cranbrook*, 11 W. L. R. 252.

Water rights—*Riparian owners — British Columbia Land Act, 1884, and amendments — Pre-emption of agricultural lands —Water records — Appurtenances—Abandonment of pre-emption — Lapse of water record.*]—Where holders of separate pre-emptions of agricultural lands, under the provisions of the Land Act, 1884, 47 V. c. 16 (B.C.), and the amendment thereof, 49 V. c. 10 (B.C.), with the object of vesting their respective pre-emptions in themselves as partners, surrendered the separate pre-emptions to the Crown, and, on the same day, relocated the same areas as partners, obtaining a pre-emption record thereof in their joint names, the joint water record previously granted to them, as partners, in connection with their separate pre-emptions, cannot be considered to have been abandoned. The effect of the transaction caused the areas to become unoccupied lands of the Crown, within the meaning of the statute, and, upon their re-location, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption. Judgment in *Eastern Townships Bank* v. *Vaughan*, 13 B. C. R. 77, reversed, Patrick, C.J.C., and Duff, J., dissenting. *Vaughan* v. *Eastern Townships Bank*, 41 S. C. R. 286, 10 W. L. R. 165.

Water supply—*Contract between municipality and private company — By-law as to pressure — Fire — Liability of owner to property owner.*]—The defendant company entered into an agreement with the defendant for a water supply with a specified pressure. The buildings of plaintiff, a ratepayer, were burned down owing to defective pressure:—*Held*, that company was liable but town was not. There was no necessity for a warranty action by the town against the company. *Belanger* v. *St. Louis*, 6 E. L. R. 277.

See RAILWAYS AND RAILWAY COMPANIES.

WAREHOUSE RECEIPTS.

Indorsee — *Vendor — Lien—Priorities.*] —The vendor of warehoused goods who does not come within the time allowed by Art. 1998, C. C., has no lien for the price against the holder by indorsement of the warehouse receipt in respect of such goods: Art. 5645, R. S. Q. *Jacobs* v. *Chadwick*, 16 Que. K. B. 118.

Partnership—*Banks and banking—Bank Act — Liability of partners — Promissory notes — Negotiation — Extinguishment of debt — Securities — Release of partner — Covenant not to sue—Reservation of rights.*] —The defendant M. was a partner with the defendant G. in a commission and produce business carried on in the same building as a storage business in which G. was also engaged. It was alleged by the plaintiffs that the defendant F. was a partner in both businesses. The account of the commission and produce business was kept at the plaintiffs' bank. For the purpose of enabling the partnership to purchase the produce in which they dealt, the plaintiffs gave the partnership a line of credit in the form of an overdraft on their account. From time to time the plaintiffs discounted their promissory notes, the proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch, and receipts signed in the name of "The Ottawa Cold Storage and Freezing Company" by G. were given to M. on behalf of the commission and produce business, and were from time to time indorsed over to and hypothecated with the plaintiffs as promissory notes were discounted. The transactions involved in this action were represented by ten warehouse receipts indorsed to the plaintiffs by M., with a memorandum of hypothecation signed by G. and a certificate of valuation by him, and ten promissory notes made on behalf of the commission and produce business to the order of M. and indorsed by him and G. While these notes were current, the businesses ceased, and the plaintiffs took possession, and found that there was a large discrepancy between the goods in store and the amounts specified in the warehouse receipts. Before this action, and while interpleader proceedings in relation to the goods were pending, in which the plaintiffs

desired to obtain the evidence of the defendant F., their solicitors, by their instructions, wrote to F.'s solicitor a letter stating that the plaintiffs had no evidence that F. was a member of the partnership known as "The Ottawa Cold Storage and Freezing Company," which was liable to the plaintiffs upon certain promissory notes, and that the plaintiffs had authorised the writers to undertake that the plaintiffs would not attempt to hold F. liable for the notes, or any of them, as a partner in the company: —*Held*, upon the evidence, that there was no ground for differing from the conclusion of the trial Judge that the defendant F. was a partner in both branches of the business.—2. That in the solicitors' letter there was a sufficient reservation of the plaintiffs' rights against the partnership and those who were undoubtedly members of it to prevent the letter from being treated as having any greater effect than a covenant not to sue; the language afforded a strong presumption that the parties were dealing with the liability of the other two; and the surrounding circumstances with reference to which it must be construed, led to the same conclusion; and therefore the debt as security for which the warehouse receipts were given to the plaintiffs was not extinguished, and the plaintiffs were entitled to the benefit of the securities, if otherwise valid.—3. That there was a negotiation of a note and an actual advance at the time of the acquisition of each warehouse receipt; although on most occasions when a discount was effected the account was overdrawn, that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. *Halstead* v. *Bank of Hamilton*, 27 Que. 435, 24 A. R. 152, 28 S. C. R. 235, distinguished.—4. That the firm by which the warehouse receipts were given was not the firm to which they were given, M. being a member of the latter and not of the former; and G., in signing the warehouse receipts on behalf of the storage business, was not giving receipts "as of his own property," within the meaning of s. 2 (*d*) of the Bank Act. Since the Judicature Act, there exists no reason why if two different firms have a common partner an action should not be maintained by one against the other.—5. That, on the evidence, the plaintiffs had shewn that the goods were not in the warehouse when possession was taken. Judgment of Meredith, J., reversed. *Ontario Bank* v. *O'Reilly*, 12 O. L. R. 420, 8 O. W. R. 187.

See BANKS AND BANKING — COMPANY — NEGLIGENCE — SALE OF GOODS.

WARRANT.

See CRIMINAL LAW—INTOXICATING LIQUORS —JUSTICE OF THE PEACE.

WARRANT FOR NEW ELECTION.

See MUNICIPAL ELECTIONS.

WARRANT OF ARREST.

See CORONER — CRIMINAL LAW.

WARRANT OF ATTORNEY.

See JUDGMENT.

WARRANT OF COMMITMENT.

See COURTS — CRIMINAL LAW — INTOXICATING LIQUORS — JUDGMENT DEBTOR.

WARRANT OF EXTRADITION.

See EXTRADITION.

WARRANT OF POSSESSION.

See RAILWAY.

WARRANTY.

Action—*Failure of principal demand — Costs.*]—An action in warranty by a defendant against his warrantor in a case of *garantie simple*, brought before adjudication on the principal demand, which is afterwards declared unfounded, will be dismissed with costs. *Chevalier* v. *Catholic Mutual Benefit Association*, 29 Que. S. C. 399.

Action en bornage — *Encroachment — Revendication.*]—An action *en bornage* in which the plaintiff complains of an encroachment by the defendant and seeks a declaration that he is the owner of a part of the lands of which his possession is disturbed, is in the nature of a revendication, and therefore recourse *en garantie* is open to the defendant. Cf. *Blackburn* v. *Blackburn*, 11 Que. L. R. 170, *Chicoutimi* v. *Lavoie*, 30 Que. S. C. 148.

Action en garantie—*Pleading—Plea of defendant — Tort — Liability in warranty —Municipal corporation — Defective sidewalk.*]—In an action of warranty by the corporation of the city of Montreal for damages in respect of injuries caused by a defective sidewalk, the defendant may confine his plea to the action of warranty, alleging that he is not liable for the damages claimed, and that he kept his sidewalk in good condition according to the by-laws of the city. —*Per* Taschereau, C. J.:—In delicts and quasi-delicts there is no obligation of warranty. *Montreal* v. *Churchwardens of Parish of Ste. Agnes de Montreal*, 10 Que. P. R. 242.

Action en garantie — *Pleading ill-founded defence — Costs — Dismissal of principal action — Non-repair of highway — Remedy over of municipal corporation.*] —One who is sued in warranty by the corporation of the city of Montreal for damages caused by the defective state of a pave-

ment cannot plead that he had kept the pavement in good condition and that the accident happened by the fault of the person injured—which would be reasons for the dismissal of the principal action, but not of the action in warranty.—If the plea of a defendant in warranty is not well founded in fact and law, he will be ordered to pay the costs of the action in warranty, although the principal action has been dismissed with costs, and the action in warranty comes to an end with it. *Monette* v. *Montreal*, 9 Que. P. R. 377.

Action en garantie — *Pleading ill-founded defence — Want of notice of action to defendant in principal action — Non-repair of highway — Remedy over of municipal corporation.*]—In an action in warranty by the corporation of the city of Montreal for damages caused by default to keep a pavement in repair, the defendant must content himself with pleading to the action in warranty, and allege that he is not responsible for the damages claimed, because he has committed no fault, and has kept his part of the pavement in good condition, conformably to the city by-laws. The defendant in warranty cannot plead that the principal plaintiff has not given to the city corporation the notice of action required by law; no law obliges the city corporation to give such notice to a defendant in warranty, and the latter cannot complain of an irregularity in procedure committed by the principal plaintiff in regard to the principal defendant. *Hoffman* v. *Montreal*, 9 Que. P. R. 383.

Action in warranty—*Right of action—Tort.*]—An action in warranty does not lie unless the person called upon to warrant is bound to the same extent and in the same manner as the plaintiff in warranty.—No action in warranty lies in cases of delict or quasi-delict. *Hull* v. *Gatineau Road Co.*, 7 Que. P. R. 397.

Defective sidewalks—*Costs.*]—If a defendant in warranty's plea is bad in law and in fact, this defendant will be condemned to the costs of the action in warranty, although the principal action has been dismissed with costs and that the action in warranty has also been dismissed at the same time. *Monette* v. *Montreal*, 11 Que. P. R. 177.

Garantie simple—*Remedy of warrantee—Incidental demand — Intervention — Recursory action after judgment in principal action.*]—The warrantee, in a case of simple warranty, cannot demand that his warrantor shall take up *son fait et cause*, and be substituted for him as defendant in the principal action.—The warrantee was the choice of an incidental demand to make the warrantor intervene for the purpose of contesting the action and abiding by the judgment, or, after that has been pronounced, of a recursory action to recover the amount of the judgment and costs. In the first case, as in the second, the warrantor cannot be ordered to pay even the costs of the demand in warranty, unless the principal demand is itself followed by judgment against the warrantee. *Montreal Street Rw. Co.* v. *St. Louis*, 18 Que. K. B. 160, 10 Que. P. R. 133.

Implied warranty—*Liability for flooding — Evidence — Oral testimony — Commencement of proof in writing.*]—D. & Co. occupied, as tenants, the lower flat of a building, and T. the upper flats, of which he leased part to sub-tenants. D. & Co. were in the habit of turning off the water at night as a precaution against floodings. T. thereupon wrote them as follows: "Please do not turn the water off, except on Saturday afternoons and Sundays, and oblige, E. H. T." D. & Co. having complied with this request, a tap was subsequently left open by a sub-tenant of T., causing a flooding and damage. In an action brought by D. & Co. against T.:—*Held*, that the above writing was an implied warranty that T. would be liable for damages following a compliance with the request and caused thereby, or, at all events, was a commencement of proof in writing which rendered admissible parol testimony of an explict verbal warranty to the same effect. *Dawson* v. *Thurston*, 31 Que. S. C. 225.

Implied warranty—*Liability for flooding — Evidence — Oral testimony — Commencement of proof in writing — Damages for injury to goods — Proof of.*]—An undertaking to fulfil the obligation of another is a warranty, and must be express. Consequently, in a letter written by the lessee of an upper storey of a building to the lessee of a lower storey, in these terms, "Please do not turn the water off, except on Saturday afternoons and Sundays, and oblige E. H. T.," is not an engagement to pay the damages suffered by the sub-tenants of the writer of the letter, in consequence of acquiescing in this demand. — The letter amounted only to a simple request for a favour, without any indication that the writer wished to contract, or had contracted, any obligation to the one to whom it was addressed. The letter could not serve as a commencement of proof in writing of any contract whatever. — Damages claimed for injury to goods must be established by direct and specific proof of deterioration and diminution in value. General proof of their original cost, of the fact that they are no longer merchantable, with an offer to abandon them to the defendant, is insufficient. Judgment in *Dawson* v. *Thurston*, 31 Que. S. C. 225, reversed. *Thurston* v. *Dawson*, 17 Que. K. B. 148.

Inscription in law.]—A plaintiff may, on proper occasion, in respect of the allegations of a plea, institute an action in warranty. *Manetti* v. *Notre Dame de Grâces*, 11 Que. P. R. 59.

Joinder of cases—*Principal action and action in warranty.*]—When the defendant in warranty has simply contested the action in warranty and has refused to intervene in the principal suit, and the final judgment has dismissed the principal suit and maintained the action in warranty by condemning the defendant in warranty to the damages claimed by the principal action and to the costs of both actions, the inscription in review by the defendant in warranty must be accompanied with a double deposit, inasmuch as the judgment appealed from decides two distinct and separate rights of action. *Lanctot* v. *de Boeck & Lanctot* v. *Latreille*, 11 Que. P. R. 33.

Principal and agent—*Promissory note —Delicts and quasi-delicts.*]—When a plaintiff in warranty alleges in his declaration that the agent of the defendants in warranty (a company) was authorised by the company as their mandatory to accept and receive a promissory note upon which he is sued by the principal plaintiff, a demurrer based on the fact that there appears no right of warranty, will be dismissed.—An action in warranty exists in respect of delicts and quasi-delicts. *Beaudoin* v. *Charruau*, 8 Que. P. R. 236.

Separate action—*Pleading — Declaration — Relevancy.*]—There is no law of procedure which prevents an action in warranty being separate in fact and number from the action which has provoked it.—(2) It is relevant and legal in an action in warranty to pray that the defendant be condemned in whatever condemnation the plaintiff is subjected to. *Pellerin* v. *Leveillé*, 13 Que. S. C. 311, distinguished. *Saad* v. *Beaudry*, 9 Que. P. R. 248.

Simple warranty.]—In cases of simple warranty as the warrantor cannot take up the defence of the defendant he cannot intervene and contest an action directed against the warrantee. Cf. *Croteau* v. *Arthabaska Water & Power Co., & Boyle*, 30 Que. S. C. 128. *Gingras* v. *Price Bros. & Gauthier*, 36 Que. S. C. 512.

Simple warranty—*Dilatory exception—Bringing in warrantors as parties.*] — The law makes no distinction between a simple warranty and a formal warranty, in so far as a dilatory exception is concerned; a stay will be granted where the defendant has warrantors to bring in as parties. *Lacombe* v. *Duperreault*, 9 Que. P. R. 197.

See ASSESSMENT AND TAXES — BANKS AND BANKING — BUILDINGS — COMPANY — COSTS — CROPS — INSURANCE — LANDLORD AND TENANT—PATENT FOR INVENTION —PLEADING — SALE OF GOODS — VENDOR AND PURCHASER — WAY.

WARRANTY OF AUTHORITY.

See ARCHITECT.

WARRANTY OF TITLE.

See VENDOR AND PURCHASER — WAY.

WASTE.

Charge of annuity—*Life tenant and remainderman — Apportionment — Damages —Security — Timber.*]—A testator seized in fee of land, subject to a mortgage, to secure an annuity for his wife, devised the land to one for life, with remainder over in fee. After his death, the life tenant paid the annuity to the widow. She also sold the timber on the land, and the purchaser having begun to cut the timber, this action was begun by the remainderman to restrain waste. The life tenant contended that she was entitled to be subrogated to the rights of the mortgagee in respect to so much of the annuity as she paid, and that being so subrogated, the land was an insufficient security for her claim, and that she therefore had a right to cut down the timber:—*Held*, following *Yates* v. *Yates*, 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion:—*Held*, also that, on the evidence, the land was adequate security for the claim of the life tenant against it in that regard, and that the purchaser of the timber having purchased in good faith, an injunction could not be granted, but the life tenant was liable for damages in respect of the timber cut. *Whitesell* v. *Reeve*, 23 C. L. T. 107, 5 O. L. R. 352, 1 O. W. R. 516, 2 O. W. R. 160.

Cutting timber—Injury to reversion—Injunction—Damages. *Ryan* v. *Ryan*, 1 O. W. R. 824.

Lease for years by tenant for life—Settled Estates Act—Rights of reversioners on death of life tenant—"Without impeachment of waste" — Repair of buildings — Short Forms Act—Permissive waste—Wear and tear. *Morris* v. *Cairncross*, 7 O. W. R. 834.

Life tenant — Tenant in common—Timber — Account — Statute of Limitations. *Asselstine* v. *Fraser*, 2 O. W. R. 628.

Life tenant — Timber — Remaindermen —Injunction — Payments on mortgage — Annuity—Subrogation. *Whitesell* v. *Reeve*, 5 O. L. R. 352, 2 O. W. R. 160.

Tenant for life — *Repairs — Sale of timber.*] — All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this province. It is laid down in the English authorities that tenant for life cannot cut down trees for repairs, and sell the same, but that he must use the timber itself in making repairs, and that to sell it is waste. Where, however, the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, and for that purpose only, and an injunction was sought to restrain him:—*Held*, that no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs, but that the parties if they wished might have a reference to ascertain to what amount and in what locality the timber should be cut. *Hixon* v. *Reaveley*, 25 C. L. T. 14, 9 O. L. R. 6, 4 O. W. R. 437.

See LANDLORD AND TENANT—PARTITION.

WATER AND WATERCOURSES.

1. Dams, 4489.
2. Ditches and Watercourses Act, 4497.
3. Diversion of Water, 4499.
4. Injury to Neighbours' Lands, 4501.
5. Navigable Waters, 4506.
6. Riparian Rights, 4514.
7. Water Records, 4525.
8. Miscellaneous Cases, 4527.

1. Dams.

Blocking stream by dam — *Riparian rights — Obstruction to mill.*]—An action claiming an injunction to restrain defendants from backing up the waters of the Carlton branch of the Tusket river by means of their dam in such a way as to obstruct the operation of plaintiff's mill, and damages for such obstruction. Judgment $150 for loss of operation and $15 for damages to mill floor. *Crosby* v. *Yarmouth St. Railway Co. & Yarmouth Elec. Co.* (1911), 9 E. L. R. 330, N. S. R.

Consent judgment—Construction. *Moffatt* v. *Canada Lumber Co.*, 2 O. W. R. 571.

Dam on river—*To supply power to town —Flooding plaintiffs' lands—Action for damages—Evidence of cause of flooding—Action and appeal dismissed with costs.*]—Action by plaintiff to recover $5,000 damages for flooding his lands, alleged to have been caused by the erection by defendants of a dam at the Ragged Rapids, on Severn River, for the purpose of supplying and furnishing electric power for lighting and other purposes in the town.—Middleton, J., at the trial dismissed the action with costs.—Divisional Court *held*, that the evidence did not shew beyond reasonable doubt that the dam was the cause of flooding plaintiff's lands. Appeal dismissed with costs. *Doolittle* v. *Town of Orillia* (1911), 18 O. W. R. 673, 2 O. W. N. 896.

Fishing and game rights.]—The lessee of lands under the fish and game laws of Quebec (62 Vict. c. 23 and 24 and 1 Edw. VII. c. 12), having the right "to take and retain exclusive possession of lands leased by him and to prosecute in his own name any illegal possessor," is qualified to take legal proceedings against any one who, by the unlawful erection of a dam across a floatable stream, disturbs his rights of enjoyment, if not to have the dam removed, at least to recover the damages which it has caused. *St. Anne Fish & Game Club* v. *River Ouelle Pulp & Lumber Co.*, 36 Que. S. C. 486.

Floatable stream.] — The owner of a farm crossed by a floatable stream has no right to erect a dam across the stream for the purpose of storing the water and allowing it to run out, as found convenient, by means of flushboards, for the purpose of increasing, when required, the depth of water in a river, into which the stream flows, and upon the banks of which the owner of the land owns and operates a saw mill, which, without this artificial aid, is not sufficiently powerful to draw the logs. A construction of this kind and for the object mentioned in Arts. 5535 *et seq.*, R. S. Q., and in 54 V. (Que.) c. 25, as amended by 4 Edw. VII., c. 14. *St. Anne Fish & Game Club* v. *River Ouelle Pulp & Lumber Co.* (1909), 36 Que. S. C. 486.

Flooding land — *Damages—Summary procedure—Costs of action—Dam—Owners —Tolls—Persons using dam.*] — A certain dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R. S. O. c. 104, and the original defendants had used it for the purpose only of floating logs down the river. The improvement company were added as defendants. The action was for flooding the plaintiffs' lands by such dam:—*Held*, that, although (as decided in *Blair* v. *Chew*, 21 C. L. T. 404), a plaintiff is not bound to proceed summarily upon such a claim, under R. S. O. c. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of it. 2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it, which these defendants had not done. 3. Nor were the defendants assisted by ss. 15 and 16 of R. S. O. c. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence. 4. But s. 1 of R. S. O. c. 142, places the public advantage of allowing lumbermen carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any power; and that, upon this head, although they had not yet made use of the water power otherwise than in constructing a dam, they could claim the depreciation in the commercial value of such water power. *Bannerman* v. *Hamelin*, 10 Que. Q. B. 68.

Flooding lands of riparian owner—Cause of injury—Damages—Release—Statutory powers. *Miller* v. *Beatty*, 7 O. W. R. 605, 8 O. W. R. 326.

Grant of water power—*Dam—Ownership by two persons in common—Agreement —Construction—Rights in regard to water—Surplus water—Injunction — Damages.*] — The plaintiff and defendant owned grist mills on the Grand river, and were each seised in fee of an undivided half of dam No. 5, and both had the right, by agreement between them, to draw water therefrom "for their own purposes." The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others.

For many years the parties and their predecessors had used the water as they required it. The owner of a saw mill above the defendant's grist-mill had, under a lease from the common grantor of plaintiff and defendant, the right to use "surplus waters" stored by the dam and not required by the grist-mills. The right was continued by the separate owners of the grist-mills, and the plaintiff and the defendant, under the agreement referred to, shared equally in the rentals derived from this source. Then the defendant acquired the saw-mill and the trouble began. Anglin, J., was of opinion that each party had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as he required, not exceeding one-half of the whole, and so much of the remaining water which might be properly so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required. "Their own purposes" he construed as meaning any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water. Any water not required by either party for "their own purposes," thus defined, was "surplus water." *Caledonia Milling Co.* v. *Shirra Milling Co.*, 25 C. L. T. 154, 5 O. W. R. 170, 9 O. L. R. 213.

Ice jam—Destruction of bridge — Liability of dam owner. *Montreal Light, Heat, and Power Co.* v. *Archambault*, 3 E. L. R. 285.

Industrial purposes — *Recourse of the owners of flooded lands—Future damage.*]—Recourse by action is open to the owner of an immovable flooded by the construction of a dam in a river for industrial purposes, for only the damages actually suffered and not for those arising from the permanent depreciation of the flooded land. *Bureau* v. *Gale* (1909), 36 Que. S. C. 85.

Injunction — *Damages — C. C. 400, 503; C. S. L. C., c. 51; R. S. Q., ss. 5535, 5536.*]—A riparian proprietor who erects a dam across a stream under the authority of the law, cannot be restrained by injunction from using the water in such manner as may be necessary for the operation of his power house.—The only recourse possessed by those who have been injured by this usage is for damages. *Green* v. *Blackburn* (1910), 16 R. L. n. s. 420.

Injury by—*Statutory right—Action for trespass—Injunction—Arbitration clauses—Remedy by action — Failure of company to proceed under their Act.*]—In an action for trespass on the appellant's land and interference with his water right, the respondents pleaded that they were authorized thereunto by their incorporating Act, 36 V. c. 102 (O.), and that the appellant's remedy (if any) was to proceed by arbitration under the Act:—*Held*, that, according to the true construction of s. 5, the arbitration clauses only come into operation on disagreement as to the amount of purchase money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto; and that, as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action.—An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act.—Judgment in 24 C. L. T. 201, 34 S. C. R. 650, reversed, and judgments in 1 O. W. R. 567, 2 O. W. R. 763, restored, with a variation. *Saunby* v. *London Water Commissioners*, [1906] A. C. 110.

Injury to flow of water — *Riparian owners—Damages — Remedy — Action — Arbitration.*]—In 1876 C., owner of two lots bordering on a river, sold one to the respondents, with all ways, watercourses, etc., "as such purchaser may choose to disturb, impede, and cause to rise by any dams or other artificial means." The vendor reserved his right to damages which might be caused by the construction of dams by the purchaser, such damages to be fixed by arbitration. In 1880 C. sold to the appellants a lot situated 1,500 feet above that of the respondents, opposite to a natural fall, and the appellants constructed a dam there. The respondents having raised their dam, the appellants claimed damages resulting from the penning back of the water, and especially from the fact that the height of their fall was diminished:—*Held*, that in spite of the fact that s. 5535, R. S. Q., provides for the fixing of the amount of such damages by experts, the party injured has the right of recourse directly to the Courts, and that such right was not in this case taken away by the arbitration clause in the act of sale of 1876. 2. That, in spite of the concession by C. to the respondents of the right of utilizing the water power and of constructing dams, the appellants, the assigns of C., could claim not only the damage caused to their lands and buildings, but also that caused to their water dam necessary to facilitate the transmission of their timber down the stream. 5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by s. 15 of R. S. O. c. 194. *Neely* v. *Peter*, 22 C. L. T. 297, 4 O. L. R. 293, 1 O. W. R. 499, affirmed, and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining those defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R. S. O. 1897 c. 194, or otherwise. *Neely* v. *Peter*, 23 C. L. T. 166, 5 O. L. R. 381, 2 O. W. R. 114.

Injury to land — *Assessment of damages—Jurisdiction of equity — Diversion of stream — Riparian owner — Mandatory injunction.*]—A dam erected in 1858 across a natural stream upon land owned by the defendants, and used for the defendants' purposes, was in 1891 altered in respect of its devices for carrying off surplus water by the defendants' immediate predecessors in title, contrary to the protest of the plaintiff, a riparian owner since 1880. In 1900 a portion of the dam was carried away by a freshet, owing, it was alleged by the plain-

tiff, to the insufficiency of the alterations in the dam, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory, and the defendants denied any liability:—*Held*, that the questions involved being the liability of the defendants, and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed, and the plaintiff left to his remedy at law. A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage. A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction adopted in *Jackson* v. *Normanby Brick Co.*, [1899] 1 Ch. 438, approved of. *Saunders* v. *Richards Co.*, 21 C. L. T. 510, 2 N. B. Eq. R. 303.

Injury to land — *Damages—Statutory compensation — Action — Prescription.*]— The statute which permits owners of mills to construct dams upon watercourses, for the purpose of working their mills, creates in their favour a legal servitude over the lands upon which such dams make the waters flow. The exercise of such servitude makes them responsible to the riparian proprietors for the damages which it causes to them. 2. The special mode indicated by Art. 5536, R. S. P. Q., for determining the amount of compensation there mentioned does not take away from the complainant the right of recourse to the ordinary tribunals. 3. The damages caused not being the consequence of a tort, the action to recover such damages is not prescribed in two years. *Larochelle* v. *Price*, 19 Que. S. C. 403.

Injury to lands of riparian owners —Rights as to dam under judgment in previous action — Absence of injury for many years — Exceptional season — Waste gates — "Reasonable expedition" — Failure to shew negligence. *Bradley* v. *Gananoque Water Power Co.*, 2 O. W. R. 716, 3 O. W. R. 913.

Line Fences and Watercourses Act —Award of fence viewers—Appeal — "Adjoining" lands. *Re Bowker and Richards* (B.C.), 1 W. L. R. 194.

Mill privileges — *Dam across stream—Raising height of — Easement — Flooding neighbours' lands—Statute of Limitation — Laches—Injunction — Reference—Log driving—R. S. O. (1897), c. 142, s. 1—Costs.*]— Defendant mill owners, having mill privileges on Crow river, built a new dam across the river. Plaintiffs brought action claiming damages for flooding their several properties, claiming that the new dam was considerably higher than the old dam.—Evidence was received as to the height of both the old and new dam.—Teetzel, J., 16 O. W. R. 846, 1 O. W. N. 1133, found in favour of defendants on the evidence that the new dam was in fact no higher than the old dam, but that the old dam was in a very leaky condition, therefore, the new dam raised the level of the water on the neighbours' lands. Reference ordered to ascertain the damages sustained by plaintiffs. Having regard to the great delay of which all plaintiffs were guilty, and in their failure to establish that defendants raised the height of their dam, injunction was refused. Costs reserved until after report of referee.

Divisional Court affirmed above judgment as to three of the plaintiffs, and reversed the judgment as to the fourth plaintiff. In the latter case the Court ordered that the case should be reopened and the matter disposed of in the least expensive manner possible. If parties agree it may be tried by the referee who disposes of the cases of the other three plaintiffs, if not then the case must go to trial. All costs to be in discretion of trial tribunal. *Cain* v. *Pearce Co. Ltd.* (1911), 18 O. W. R. 595, 2 O. W. N. 887.

Mineral claims—Right to flow of water — Easement or license — Acquiescence —Diversion of water—Injunction — Damages. *Racine* v. *McGinnity* (Y.T.), 1 W. L. R. 265.

Municipal corporation — Dam — Absence of by-law—Finding—Reference—Costs —Trespass. *Lawrence* v. *Owen Sound*, 5 O. L. R. 369, 1 O. W. R. 559, 2 O. W. R. 189.

Natural water course—*Rights of riparian owner—Injury to or invasion of rights of owners below — Action lies though no actual damage sustained.*]—H. had erected a mill in 1815, and about ten years before this action, L. built a mill higher up on the same stream. The natural flow of water at many seasons of the year would not keep up a head of water sufficient to drive the mills, and the defendant was in the daily habit of shutting the gates of his dam and stopping the water for considerable portions of time, when it was prevented from flowing to plaintiff's mill, who shewed a continued interruption of the natural flow of the stream. At the trial the Judge told the jury that the running water of a natural stream was public property which no one had a right to interrupt or detain, that though slight detentions without actual damage might not be actionable yet substantial and continuous interruptions were so, even without actual damage to parties below, because if suffered for 20 years the right to continue them would be acquired, and that if they found defendant had been in the habit of detaining the water whereby its flow to plaintiff's mill was interrupted, the plaintiff would be entitled to nominal damages for the injury to his right—The jury found for plaintiff, damages one shilling, the effect of which finding was that defendant has caused substantial interruption of the natural flow of the water, but that plaintiff has sustained no actual loss thereby. — A new trial was moved for, for misdirection, on the grounds (1) that every riparian owner has a right to erect a dam, and daily to detain the water, for such spaces of time as may be necessary to fill a dam of such size as is reasonably sufficient to drive his mill. (2) That this was at most a mere injury to a right without any actual damage, for which no action lies. —*Held*, Peters, J., that an action would lie without actual damage and that the rule for a new trial must be discharged. *Howatt* v. *Laird & Crew* (1850), 1 P. E. I. 7.

Navigable river—*Interference with flow of water—Action for damages for having to close down mill.*]—An action by plaintiff to recover $360 for damages from being com-

pelled to close down his mill from lowness of water alleged to have been caused by defendants through erection of a dam across the river. At the trial judgment was awarded plaintiff for $390 and costs.—Divisional Court dismissed defendants' appeal with costs. *Isherwood* v. *Ontario & Minnesota Power Co.* (1911), 18 O. W. R. 459, 2 O. W. N. 651.

Navigable stream—*Damming tributary stream of a river to raise the latter during low water—Leases of land for hunting and fishing—Rights of the lessees — Recourse against those disturbing them in their enjoyment.*]—The owner of land traversed by a navigable stream has not the right to build in it a dam to keep back the head waters and let them flow at his will, by means of sluices, to raise at need a river into which it flows, on which the owner has and operates a saw mill, but which without this artificial aid would not be strong enough to drive the mill. A construction of this kind and for this purpose is not covered by Art. 5535 *et seq.* R. S. O., and in the Act 54 V. c. xxv., amended by 4 Edw. VII. c. xiv. The lessee of lands under the game laws of Quebec (62 V. c. xxiii. and xxix., Edw. I., c. xii.) having the right "to take and keep the possession and to bring in his own name all actions against the illegal possessor," is entitled to sue any one who, by illegally constructing a dam in a navigable river, disturbs him in his enjoyment, if not to remove the dam, at any rate for damages suffered through it. *St. Anne's Hunting Club* v. *River Ouelle Pulp Co.* (1909), 36 Que. S. C. 486.

Obstruction to flow of stream — Rights of riparian owner—Interference with power—Evidence. *Ahern* v. *Booth*, 2 O. W. R. 852, 696, 3 O. W. R. 852.

Overflow of water upon neighbouring lands. *Havey* v. *Lefebvre*, 4 E. L. R. 251.

Prescription — *Servitude — Aggravation.*]—The owner of a dam, which has been standing for more than 30 years, cannot oppose a 30 years' prescription to an action brought by a riparian proprietor to recover damages caused by waters backed down by such dam, during the five years preceding the date of the suit, especially when the owner of the dam has during these five years changed and aggravated the exercise of his legal servitude. *Roy* v. *Royal Paper Mills Co.*, 21 Que. S. C. 533.

Raising height of dam — *Nuisance — Measure of damages—New objection raised on appeal — Prescription — R. S. Q., 1888, Arts. 5535, 5536—Arts. 2242, 2261 C. C.*]—The provisions of the statutes respecting the improvement of watercourses in the Province of Quebec, permit the raising of the height of dams erected by proprietors of lands adjoining streams; this right is subject to the liability to make compensation for all damages resulting to other persons from such works. —The mode of ascertainment of such damages by the arbitration of experts provided by article 5536 of the Revised Statutes of Quebec, 1888, does not exclude the right of action to recover compensation in the Courts.—In such cases the measure of damages is the amount of compensation for injuries sustained up to the time of the action; they ought not to be assessed once for all, *en bloc*, but recourse may be reserved in regard to future damages arising from the same cause. —*Per* Idington and Anglin, JJ.—Objections based upon provisions of enabling statutes which have not been set up in the pleadings nor relied upon in the Courts below cannot be entertained upon an appeal to the Supreme Court of Canada. *Hamelin* v. *Bannerman*, 31 S. C. R. 534 followed.—*Per* Anglin, J.—An action, brought in 1908, for recovery of damages in respect of injuries occasioned by improvements executed in 1904, upon works constructed many years before that time, is not subject to the prescription of thirty years; nor can the prescription provided by article 2261 of the Civil Code be applied where the action has been commenced within two years from the time the injuries complained of were sustained. *Gale* v. *Bureau* (1910), 44 S. C. R. 305.

Raising level of watercourse — *Increased danger from ice—Vis major—Climatic conditions.*]—The owner of a mill who builds a dam or raises an existing dam in a river so as to change the level of the water, is responsible for the damage caused by the breaking up of the ice in the spring, the conditions of which are rendered more dangerous by the change.—A defendant in such a case cannot plead by way of exception *vis major* by reason of the exceptional rigour of the winter in which the ice was formed, that being within ordinary contemplation. *Archambault* v. *Montreal Light, Heat, and Power Co.*, 29 Que. S. C. 356.

Riparian proprietors — *Right to dam up the stream—No right to interrupt regular flow.*]—Rights of a riparian proprietor to use of water flowing past his land explained and defined.—Every riparian proprietor has a right to the reasonable use of the water flowing past his land, namely, for his domestic purposes and for his cattle, and this, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has, also, the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. Where a party purchased a piece of land with the right to use the water of a river in Lower Canada subject to a preference in favour of a mill thereafter to be built, and which preference was to be exercised in a particular mode, such purchaser is not bound by its exercise in a different mode, and in favour of a different mill. The purchase of the right to use of a portion of the water of a river cannot prevent a subsequent purchaser from the same vendor of another portion, from diverting the water by virtue of a right which existed prior to the first purchase. There is no difference between the law of Lower Canada and the English law upon these points. *Minor* v. *Gilmour* (1859), C. R. 3, A. C. 230.

Riparian proprietors — *Servitude — Pleading—Petitory or possessory action.*] — The plaintiff had sold to the defendant's grantor a lot bounded by a river, with the right to build a mill there, to construct a dam, and to place such dam upon the property of the vendor on the other side of the river, and to pass and repass over the property of the defendant to communicate between the dam and a bridge. The dam built by the purchaser having been carried away by the waters, the defendant, in spite of the protest of the plaintiff, built a new one up the stream, one end of which rested upon the land of the plaintiff. The latter then began a possessory action against the defendant, claiming an injunction, the demolition of the dam, and $150 damages. The defendant pleaded that he had only exercised the right which the plaintiff had given to his grantor. The plaintiff replied on grounds of law that the defendant was joining a petitory action with a possessory one, and also replied that the defendant's grantor by building the old dam where he built it had fixed the place where the servitude was to be exercised:—*Held*, that the plea of the defendant was bad in law in that it combined the petitory and possessory. 2. That before building the new dam the defendant should have obtained permission from the plaintiff or from the Court. 3. That Arts. 503, C. C., and 5535, R. S. Q., do not authorize a riparian proprietor to build a dam upon the land of another riparian proprietor upon the other side of the river, without the permission of the latter, but are applicable only to the use of the watercourse. *Demers* v. *Beauregard*, 22 Que. S. C. 273.

River — License to dam—Patent—Reservation — Navigation — Crown — Attorney-General — Easement — Plan—Deed — Injunction. *Attorney-General for Ontario* v. *Wynne*, 2 O. W. R. 1132.

Use of watercourses — *Right to build dams—Responsibility for damages.*] — The proprietor of an immovable crossed by a floatable watercourse, has the right to build thereon a dam for the purpose of holding back the head waters and to increase, by allowing the water to escape through sluices, the volume of waters in a river into which such waters flow and upon whose banks such proprietor has and operates a saw-mill. This right arises as well from Art. 5535 *et seq.* R. S. Q. as from 54 Vict. (Que.) c. 25 as amended by 4 Edw. VII. c. 14. It exists, however, subject to the obligation of paying such damages as may follow the exercise of such right. *Rivière Ouelle Pulp & Lumber Co.* v. *Ste. Anne Fish and Game Club*, 19 Que. K. B. 178.

See CRIMINAL LAW—MUNICIPAL CORPORATIONS—RIVERS AND STREAMS.

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2. DITCHES AND WATERCOURSES ACT.

Award — *Engineer—Appointment—Revocation—Notice—Jurisdiction — Estoppel — Appeal.*] — The defendants' municipal council appointed R. their engineer, in manner provided by the Ditches and Watercourses Act, R. S. O. c. 285, s. 4 (1), in April, 1895, and he accepted the office and acted and continued in it. In 1898 they, without any notice to R., and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint S. as such engineer. In both appointments the form of by-law prescribed by the Act was used; the latter by-law in no way referred to the former or to R.:—*Held*, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid:—*Held*, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and it was the act of the township clerk which called in S. instead of R.; the plaintiffs did not know who was the engineer; they had heard that S. had been appointed, but neither of them knew that R.'s appointment had not been revoked by by-law of which he had had notice. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now. *Turtle* v. *Township of Euphemia*, 20 C. L. T. 71, 31 O. R. 404.

Construction of culvert — Flooding land — Ditches and Watercourses Act — Award — Appeal to County Court Judge — Finality—"Sufficient outlet." *Chapman* v. *McEwen*, 6 O. W. R. 164.

Construction of ditch—Deepening — Jurisdiction of engineer. *Lamphier* v. *Stafford*, 1 O. W. R. 329.

Drains — *Increasing flow of natural stream—Outlet—Engineer's award — Parties—Joinder of defendants — Joint tort-feasors—Damages—Injunction.*]—The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands, although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who, by proceedings under the Ditches and Watercourses Act, obtain an outlet to the stream; and they are liable to a person injured by the increased amount of water. A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and, if the outlet chosen by the engineer is not in fact a proper outlet, his award is no protection to the persons acting under it as against a person not a party to it. An action to recover damages for flooding his land was brought by a riparian owner against a number of persons who were respectively parties to the construction of several drains under the Ditches and Watercourses Act, the allegation being that by means of the drains the flow of water had been unlawfully increased to the plaintiff's injury. Evidence was given as to the quantum of the plaintiff's damage, and judgment was given against all the defendants, for the whole amount:—*Held*, that, while the defendants who were parties respectively to the construction of each drain

were jointly liable for any damage attributable to that drain, the different sets of defendants were not joint tort-feasors, and had been improperly joined as defendants; that a joint assessment of damages was improper; and that, there being no evidence of the proportion of damage attributable to each set of defendants, only nominal damages and an injunction could be awarded. *McGillivray* v. *Township of Lochiel*, 24 C. L. T. 346, 8 O. L. R. 446, 4 O. W. R. 193.

Municipal corporations — "*Owner*" —*Highways.*]—A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, of highways under its jurisdiction, and as such may initiate proceedings under that Act. Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor on the ground that his land has been injuriously affected by the drain. *In re McLellan and Township of Chinguacousy*, 20 C. L. T. 302, 27 A. R. 355.

Railway.]—An award under the Ditches and Watercourses Act directed that a drain should be built through the land of private owners as far as a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, and then by the railway company along the highway, or across the highway and through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff: *Held*, that there was no jurisdiction under the Ditches and Watercourses Act, as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor. *McCrimmon* v. *Township of Yarmouth*, 21 C. L. T. 19, 27 A. R. 636.

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3. Diversion of Water.

Action claiming damages for the diversion of water from plaintiff's mills — Damages — Deed — Construction. *Fenerty* v. *Halifax* (N.S. 1910), 9 E. L. R. 105.

Change in course of stream—Accretion — Reliction — Easement — Possessory title. *Massey-Harris Co.* v. *Elliott*, 1 O. W. R. 65.

Dam — Diversion of waters — Riparian proprietor—Order of Judge—Notice. *McCready* v. *Gananoque Water Power Co.*, 1 O. W. R. 438.

Ditches — Injury to land by flooding—Liability of municipality—Damages. *Chatwin* v. *Rural Municipality of Rosedale* (Man.), 6 W. L. R. 474.

Existence of defined watercourse——Question of fact — Nuisance—Diversion of water—Obstruction. *Graham* v. *Lister*, 9 W. L. R. 589.

Powers of waterworks company—*Approval by Lieutenant-Governor in Council — Condition precedent — Damages—Injunction — Acquiescence — Laches.*]—By s. 9 of the Sandon Waterworks and Light Company Act (B. C., 1896, c. 62), the company were authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in council might allow, with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in council. The company got their plans and sites approved, and proceeded with the construction of a tank and a flume on the plaintiffs' lands for the purpose of diverting water:—*Held*, that the authority of the Lieutenant-Governor in council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that the plaintiffs were entitled to damages and a mandatory injunction. Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right; to amount to laches raising equities against the person on whose land the erection was placed, there must have been some equivocal conduct on his part inducing the expenditure by the person erecting it. Judgment of Irving, J., 24 C. L. T. 39, reversed. *Byron N. White Co.* v. *Sandon Waterworks & Light Co.*, 10 B. C. R. 361.

Proces-verbal — *Servitude—Artificial watercourse—Municipal corporations — Parties.*]—A *procès-verbal* establishing an artificial watercourse to bring water from a higher land to a lower, which would not flow there naturally, is illegal and will be annulled.—2. In an action to annul such a *procès-verbal*, it is not necessary to make a county council which, sitting in appeal, had amended the said *procès-verbal*, a party to the suit. *Brouillet* v. *Parish of St. Severin*, 22 Que. S. C. 159.

Right to divert stream to prejudice of other riparian owners.]—The right of the Seigneur in Lower Canada to the water of an unnavigable river flowing through his fief does not entitle one of several co-seigneurs to divert the waters for his exclusive use, which had been accustomed for eleven years to supply the mills of another of his co-seigneurs. Judgment of the Court of Appeal for Lower Canada, affirming judgment of the Court of King's Bench for the District of Three Rivers set aside. *St. Louis* v. *St. Louis* (1841), C. R. 1 A. C. 148.

Surface water—Diversion to neighbouring land—Trespass—Specific act—Damages —Injunction—Costs. *McConachie* v. *Galbraith*, 2 O. W. R. 1048.

4. Injury to Neighbours' Lands.

Adjoining proprietors of pulp mills —*Cross-wall — Tail-race — Rights not extinguished — No alteration of tenement — Enjoyment of easement — License — Damages.*] — An action between pulp manufacturers carrying on business in the village of Thorold, on adjoining properties in reference to their respective water rights. The plaintiff had a stone wall for 25 years and the defendants took down the wall, and the action was brought for trespass and for a decree that the defendants had no right to use the tail-race on the plaintiff's property. The defendants denied claims and counterclaimed, asking an injunction to restrain plaintiff's use of the tail-race. Britton, J., *held*, that the building of the wall did not extinguish any rights of the defendants, there being no alteration in the condition of the dominant tenement. That the work done and alterations made by the defendants were reasonably necessary for the enjoyment of their easement. That no damages were proved. Action dismissed with costs and counterclaim dismissed with costs. *Davy* v. *Foley* (1911), 19 O. W. R. 195, 2 O. W. N. 1028.

Crown domain—*Banks of navigable and floatable rivers—Borders of islands—Trespass and trouble de possession—Action en complainte.*]—The banks of navigable and floatable rivers include the borders of islands in the same, as dependencies of the Crown domain. Hence an act done on an island at the water's edge, within the space that would form the bank river along the bed of the river, is no trespass or *trouble de possession* to the owner of the island, and gives him no right to sue *en complainte*.—2. The bed of non-tidal rivers extends to the highest water-mark reaches from natural periodical causes—*crue habituelle*. — 3. The servitude for the public utility of a foot-road or towpath along the banks of navigable or floatable rivers exists on the shores of their islands. *Clément* v. *Bourassa*, 33 Que. S. C. 365.

Depression in highway — *Filling up with earth—Permission of municipality — Diversion of water upon house and land adjacent to highway — Easement — School board—Acts of agent—Instruction to contractors—Joint liability of board and contractors — Damages.*] — The plaintiff, who was the owner of a corner lot in a town and of a house thereon, sued a school board and two individuals for damages caused by the individual defendants, who were contractors with the board for the excavation of the basement of a new school building, placing (with the consent of the mayor of the town) some of the earth taken from this excavation upon the highway to the north-east of the plaintiff's house, in a depression on the surface of the soil theretofore existing, which the plaintiff alleged was a natural watercourse, whereby water, which would otherwise have escaped by means of this watercourse, was gathered and turned back upon the plaintiff's land so as to fill the cellar in his house and seriously damage it:—*Held*, that, although the depression was not a watercourse, the defendants had placed, not even on their own lands, but on the land of another (apparently, indeed, with that other's consent, but that made no difference), an artificial mound of earth which collected water from much of the surrounding land and turned it back upon the plaintiff's land to his damage, and were liable therefor to the plaintiff. *Hurdman* v. *North Eastern Ry. Co.*, 3 C. P. D. 168, followed. It was not a case of an easement, because most of the water came, not from the plaintiff's land, but from elsewhere.—*Ostrom* v. *Sills*, 24 A. R. 526, distinguished.—One G. had been appointed by the board overseer of the excavation, and had instructed the two individual defendants to place the earth where it was in fact placed:—*Held*, that G. was acting within the scope of his general authority as an agent of the board, and the board were bound by what he did, and liable to the plaintiff, as well as the contractors, who were not independent contractors.—Reference directed to damages, and principle upon which damages should be assessed, pointed out. *Renwick* v. *Vermillion Centre S. D. No. 1446 Trustees* (1910), 15 W. L. R. 244.

Discharging water on neighbour's land—*Remedy—Landlord or tenant — Servitude.*]—Where a lessee of the defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatory of the defendants, the lower part of the leased land, with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—*Held*, that the plaintiff's remedy was against the lessee, and that an order *négatoire* against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary. Judgment of Court of King's Bench, Quebec, 11 Que. K. B. 173, reversed. *Kieffer* v. *Le Séminaire de Quebec*, [1903] A. C. 85.

Ditches—*Lower lands—Easement — Servitude — Rural lands — Municipal code — Action négatoire.*]—The owner of a lower-lying farm is bound, by virtue of Art. 501, C. C., to receive the water overflowing from the ditches of the neighbouring higher-lying farm, the necessary ditching not being included in the exception contained in that article, "*sans que la main de l'homme y ait contribué.*" Difficulties of this nature, between the owners of rural lands, are of the administrative competence, and must be regulated according to the provisions of the Municipal Code. They afford no ground for the action *négatoire*. *Lapointe* v. *Tellier*, 32 Que. S. C. 529.

Flow of water — *Guarantee—Exception to delay.*]—In an action to relieve from a servitude as to the flow of water, the defendant who denies the right of a neighbour upstream has no right to a formal guarantee from him. Therefore, he cannot under this pretext, stay, by exception to the time of action brought, the progress of the principal action. Cf. *Gauthier* v. *Darche*, 1 L. C. J. 236, and *Gosselin* v. *Martel*, 27 S. C. R. 364; *Raumilhac* v. *Dennis* (1909), 36 Que. S. C. 516.

Fouling of stream—*Obstructing flow of water — Nuisance — Damages — Injunction —Suspended for time—R. S. O. (1897), c. 133, s. 35.*]—Plaintiff, the owner of a lum-

ber mill on Constant Creek, in the township of Grafton, brought action against defendants, owners of a mill above plaintiff's, on same creek, to recover damages for injuries done to plaintiff by defendants in fouling the stream and obstructing the flow of water to plaintiff's mill, by throwing refuse in said creek and otherwise injuring the plaintiff.—Latchford, J., gave plaintiff judgment for $200 and costs, and granted injunction restraining defendants from further discharging refuse into the stream, to the injury of plaintiff. Operation of injunction suspended for four months to enable defendants to so alter their mill that no additional damage shall be done. *Hunter* v. *Richards* (1911), 18 O. W. R. 813, 2 O. W. N. 855.

Hydraulic works on river—*Injury to lands by ice — Liability — Vis major — Climatic conditions.*] — The owner of hydraulic works established upon a river, and the lessee who carries them on, are jointly and separately responsible for damages caused by the breaking up of ice formed, retained, and heaped up by such works. The defendants cannot in such an action plead *vis major*, by reason of the exceptional rigour of the winter in which the damage was done, that being in accordance with the ordinary conditions. *Montreal Light, Heat & Power Co.* v. *Archambault*, 16 Que. K. B. 410.

Injunction — *Nuisance — Construction or road — Flooding neighbouring land — Accumulation and discharge of water—Damages — Injunction — Scope of — Culverts — Municipal corporation.*] — A farmer consented to water, which came through a culvert, being carried off by means of a drain which he dug himself, across one corner of his farm. There was no agreement in writing, nor was there any expenditure of public money on the drain, and there was no consideration given for the use of the drain:—*Held*, there was only a license to use the drain and such license was revocable, and that the plaintiff was also entitled to an injunction. Damages of $100 were also allowed. The cause was a recurring one which would ripen into an easement by prescription if permitted to continue long enough to become such. *Taylor* v. *Collingwood*, 6 O. W. R. 261, 10 O. L. R. 182.

Municipal corporation—Sewage works—Construction of dam and ditch—Overflow of private lands — Injury to crops — Liability — Cause of injury — Finding of referee — Natural or artificial watercourse—Leave and license — Acquiescence — Evidence. *Passmore* v. *Hamilton*, 6 O. W. R. 847, 8 O. W. R. 82.

Municipal cororation — *Water supply—Erection of dams — Overflowing private property — Trespass — Damages — Authorisation by statute — Compensation — Remedy — Action — Pleading.*]—The plaintiff, in the first count of his declaration, alleged that he was in possession of a lot adjoining Ludgate lake in the parish of Lancaster, and that the defendants penned back the waters of the lake, thereby overflowing and flooding his land, destroying the trees and herbage on it, and otherwise injuring it, and depriving him of its use. By 59 V. c. 64 (N.B.), the defendants were authorised to utilize the water of the lake for the benefit, not only of the residents of Carleton, but for the use of the residents of Lancaster, and by 61 V. c. 52 (N.B.), the defendants were given additional powers in reference to this water supply to meet certain public requirements. The pleas alleged that by certain Acts of the Legislature (without naming them), the defendants were authorised to take, hold, and convey the waters of Ludgate lake and the water that might flow into the same to, into, and through that part of the city of St. John called Carleton, and also to erect and maintain dams to raise and maintain the waters therein, and also to lay pipes necessary for the furnishing and supplying of water for that part of the city. The pleas then went on to recite the provisions of 61 V. c. 52, and aver that the defendants published the notice required by s. 6, and that they used the water and took the land as authorised by that Act, and these were the trespasses complained of; that the plaintiff was entitled to compensation, but only to such compensation as might be given him by the tribunal created for the purpose by the Act itself:—*Held*, on demurrer, that the second, third, and fourth pleas to the first count were bad, and no answer to that count, because it did not appear that the trespasses complained of were committed by virtue of legislative authority for which compensation must be had by recourse to the special remedy provided. — The second and third counts of the declaration alleged, as causes of action, damages resulting from acts alleged to have been done under and by virtue of certain Acts of the legislature which entitled the plaintiff to compensation from the defendant: — *Held*, on demurrer, that these counts were bad, as the damages for which compensation was claimed arose from lawful acts done by the defendants by virtue of legislative authority, for the recovery of which recourse must be had to the special remedy provided. *Rose* v. *City of St. John*, 37 N. B. R. 58.

Overflow of river — Injury to adjacent lands — Bridge constructed by township corporation—Effect of, in damming water back — Extraordinary freshets — Employment of competent engineers — Non-liability of corporation. *Pinkerton* v. *Grennock*, 8 O. W. R. 967.

Overflow on land — *Injury to crop — Faulty construction of ditches — Blocking of culverts—Rainfall — Act of God—Damages — Costs.*] — The plaintiff, the owner of the north-east quarter of section 16, sued for damages for injury caused to his land and crop by water carried to and gathered on his premises, owing, as he alleged, to the faulty construction of two ditches and the blocking of two culverts by the defendants:—*Held*, upon the evidence, as to the south ditch, that the marsh had no real outlet at its south-east end south of the ditch—so that the water which flowed on to H.'s and then to the plaintiff's quarter from the south, came from the overflow of this south ditch; and that, although the main runways into which the marsh flowed at its north-west outlet stretched out northerly, there were minor ones running in a north-easterly direction which must have carried consider-

able water, in the autumn of 1907, to the north-western portion of the plaintiff's land. —*Held*, as to the north ditch, dug by the defendants along the road allowance immediately north of the plaintiff's land, that it was not shewn that any water came from it on to the plaintiff's land:—*Held*, as to the east culvert, that it was not necessary for the plaintiff to make that part of his case; and as to the west culvert, that the plaintiff had not established any duty on the part of the defendants to keep it open. —The defendants were liable for the water that came from the south ditch and gathered in the direction of the north-east portion of the plaintiff's land, but not for that which gathered on the west side.—The rainfall was a severe one, but not so much as to bring it within the term "act of God."—Special damages assessed at $200 and general damages at $25; costs of a County Court action. *Rose* v. *Ochre River* (1910), 15 W. L. R. 200.

Right to use watercourses — *Art. 5535 et seq., R. S. Q.—Real servitude—Dominant estate and servient estate — Conditional servitude — Payment of damages caused—Action to prohibit and to destroy the works — Real actions, against whom directed—The respective competence of the Superior and the Circuit Court—Value of the works whose demolition is demanded — Presumption of value—Recourse open in favour of the occupiers of the servient tenements.*] —The right to use watercourses given by Art. 5535 *et seq.*, R. S. Q., is a right to a real servitude. The tenement over which there is the user, the mill, etc., to which the water goes, is the dominant tenement, and the tenements subject in consequence of weirs and other works and to flooding are the subject tenements. This servitude is conditional, that is to say, that the owner of the dominant tenement can only enjoy it on condition of paying the owners of the servient tenements the damage caused. Failure to make terms with these owners gives rise to real action in the nature of an abatement, to have the works made for the advantage of the dominant tenement destroyed, and to have their tenements freed from the servitude. This action is directed against the actual owner of the dominant tenement whether the unpaid damages have been caused before or since he purchased. The Superior Court at the county town is competent to try this action whatever may be the amount of the damages claimed, when the value of the works whose demolition is asked, exceeds one hundred dollars, and in absence of proof to the contrary, there is a presumption that they exceed one hundred dollars. Recourse to the above mentioned action is open to the occupier of the servient tenements. *Ducharme* v. *Houle*, 18 Que. K. B. 219.

Riparian rights—Action claiming damages for erecting obstructions on a stream and for overflowing plaintiffs' land and counterclaim for trespass and assault—Counterclaim — Trespass and assault — Evidence. *Lorraine* v. *Norrie* (N. S. 1911), 9 E. L. R. 278.

User of water—*Injury to lands—Damages — Remedy — Jurisdiction.*] — Art. 5536, R. S. Q., prescribing a special mode of ascertaining the damages caused by persons who exploit watercourses, leaves untouched the remedy by virtue of Art. 1053, C. C., for those who are injured by it, and the ordinary jurisdiction of the civil Courts. *Leclerc* v. *Dufault*, 16 Que. K. B. 138.

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5. Navigable Waters.

Dam—*Riparian proprietors—Public right —Mistrial—New trial.*]—The owner of the *alveus* of a navigable river and of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property. Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage. The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants, in driving their logs down the river, injured the plaintiff's dam, the onus is upon them to shew that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury: per Barker, J. *Per* Tuck, C.J., McLeod and Gregory, J.J., that where the clear weight of evidence is against the plaintiff's claim, and important questions involved have not received due consideration on the trial, the case should be sent down for a new trial. *Per* Hanington, Landry, and Barker, J.J., that if there is evidence to justify the jury in finding for the plaintiff on the material point in dispute, the verdict should not be disturbed, even though the case was not tried out with due regard to other important points. *Roy* v. *Fraser*, 36 N. B. R. 113.

Desjardins canal — *Stretching electric wires across — Motion for injunction restraining—No interference with navigation—Public Works of Canada—Jurisdiction of Ontario Legislature—Canal incorporated by 7 Geo. IV. c. 18—Vested in municipality under 31 Vict. c. 12—Ontario Railway Act (1906), s. 51 (4).*]—Middleton, J., *held*, that Ont. Electric Light Act gave the defendants the right to stretch electric wires across the Desjardins Canal, so long as they do not interfere with navigation; that the Ontario Railway and Municipal Board has no power over the crossing of canals; that the Dominion Railway Board has no jurisdiction over the company; that the Canal Co. is placed in the same position as the municipality in *Wandsworth* v. *United Tel. Co.*, 13 Q. B. D. 904. *Dundas* v. *Hamilton Cataract Co.* (1911), 18 O. W. R. 168, 2 O. W. N. 517.

Floatable or non-floatable—"*Drive*" — "*Raft*" — *Ownership of bed of non-floatable stream — Riparian owners.*] — Rivers upon which drives or rafts may be floated are floatable within the meaning of Art. 400, C. C., and are part of the public domain; rivers in which floating cannot be done, except in the case of scattered logs, are not floatable and are within the private domain. — By a "drive" is understood bundles of wood of moderate length held together by ties and thrown as a single body

to float in a river.—By "raft" is meant large timber or logs held together by poles and ties forming what is called in the popular language a "cage."—The bed of non-floatable rivers belongs up to the middle to the riparian proprietors, and those who are on the two sides opposite to each other have the property in the whole bed of the stream lying between their lands. Therefore, a disturbance of their possession gives rise in their favour to an action of trespass. *Tanguay* v. *Canadian Electric Lighting Co.*, 16 Que. K. B. 48.

Floatable river—*Boom—Logs from up river — Retention — Freshet salvage — Vis major — Quantum meruit — Riparian rights.*]—P. owned a saw-mill on the bank of a floatable river, and placed a boom across the stream to hold logs floated down to the mill. T. had a boom further up-stream, in which he had stored pulp-wood. An unusual freshet broke T.'s boom, and brought a quantity of his pulp-wood down with the current into P.'s boom, where it was caught and held until removed some time afterwards by T.'s men, without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s logs had been held therein:—*Held*, reserving the judgment in 14 Que. K. B. 513, that, as P. had no right of property in the river where he had placed the boom in which T.'s wood had been caught, those waters remained *publici juris*, notwithstanding the construction of the barrier; that T.'s wood came to the boom and remained there in a lawful manner; that the service rendered in stopping the pulp-wood was involuntary and accidental; and that P. could recover nothing therefor.—*Per* Fitzpatrick, C.J., that there is no difference between the laws of the province of Quebec and those of England in respect to the rights of riparian owners to the water of floatable streams flowing past their lands. *Miner* v. *Gilmour*, 12 Moo. P. C. 131, referred to. *Tanguay* v. *Price*, 26 C. L. T. 851, 37 S. C. R. 657.

Floatable river—*Obstruction by dam—Removable by force — Justification — Absence of convenient opening — Statutes.*] — The plaintiff's dam across the river Soutamattee was, up to the time of the spring freshet of 1904, provided with a slide constructed in conformity with the requirements of R. S. O. 1897, c. 140, and was in good repair, but part of the slide was carried away and part was damaged and broken by that freshet, which was an unusual one:—*Held*, upon the evidence, that the injury to the slide could not have been guarded against by the plaintiff, and was the result of *vis major*; that it was not reasonably practical for the plaintiffs to have repaired the slide before the defendants' drive of logs and timber coming down the river arrived at the dam; and that the sluice way did not constitute a convenient opening for the passage of the drive:—*Held*, therefore, that the defendants were in law justified in blowing up the slide and part of the dam in order to remove the obstruction which they offered to the passage of the drive. *Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188, followed. *Caldwell* v. *McLaren*, 9 App. Cas. 392, referred to. *Ward* v. *Grenville*, 32 S. C. R. 510, distinguished. History of the Ontario legislation respecting mills and mill dams and rivers and streams. *James* v. *Rathbun Co.*, 11 O. L. R. 271, 6 O. W. R. 1005.

Floatable river—*Ownership of bed of non-floatable river — Riparian owners — Trespass.*] — A river is floatable within the meaning of Art. 400, C. C., when rafts of timber can be carried over it; a river which can only carry timber in logs is not floatable.—The bed of a non-floatable river belongs up to the middle to the riparian owners, and those who are on the two sides opposite have the property in the whole bed between their lands. They have consequently a right to bring an action for trespass against those who disturb their possession of the bed. *Canadian Electric Lighting Co.* v. *Tanguay*, 28 Que. S. C. 157.

Floatable river — *Tolls — Improvements — Mixing of logs — Proof of ownership — Onus.*] — A floatable river is a public highway which all persons have a right to use for floating logs without liability to indemnify riparian proprietors or others who have constructed works of improvement thereon. The right of the latter to collect tolls from those who use the river is one conferred by statute, and arises only in the cases provided for therein.—When logs belonging to two owners are floated together down a stream and become mixed, either one who admits to have appropriated a part of those of the other will be held to a strict account for any missing beyond the quantity admitted, and the onus of proving their loss in some other manner will rest on him. *Tourville Lumber Co.* v. *Dansereau*, 29 Que. S. C. 126.

Floatable river — Use for rafts and timber — Grant of land on each side — Erection of dam by grantees and use of water — Subsequent grant of bed of river to others — *Scire facias* to revoke second patent. *Attorney-General for Quebec* v. *McMenamy*, 3 E. L. R. 179.

Floatable stream—Obstruction by dam—Removal to allow timber drive to pass—Paramount right— Statutory apron—"Such dam or other structure" — Construction of statutes — History of legislation — Convenient opening — Sluiceway — Counterclaim — Negligence—Costs. *James* v. *Rathbun Co.*, 6 O. W. R. 1005, 11 O. L. R. 271.

Floatable stream — *Timber driving — Carrying away of bridge—Negligence—Damages.*]—The owner of logs who floats them down a stream, suitable only for floating logs at random and not in rafts, across which a bridge has been constructed by a fisherman, in virtue of a license of the Lieutenant-Governor (Art. 863 C.M.), the councils of the municipalities not having concurred in granting same (Arts. 861, 862, C.M.), is bound to so properly order, guide, and oversee the floatation of such logs as not to injure this bridge, which offers every necessary facility for the floating of such logs; and if, by the negligence of the owner of such logs, in not properly guiding them and not having for this purpose a sufficient number of men, they carry away the bridge, the owner of the logs

will be liable for the value thereof. *Vézina* v. *Drummond Lumber Co.*, 26 Que. S. C. 492.

Floatable streams — *Rights of timber dealers — Damages — Independent contractors.*]—Lumberers, grantees of the right to cut timber, etc., have the right to float the timber which they get out, in the rivers and watercourses of the province, on condition of paying the damages which they may cause; and they cannot escape liability by having the floating of their timber done by independent contractors. *Ouiatchouan Hunting & Fishing Club* v. *Ouiatchouan Pulp Co.*, 31 Que. S. C. 133.

Floatable waters — *Improvements — Joint user — Easement — Estoppel.*] — In a petitory action by the plaintiffs for a declaration of title to a parcel of land on the bank of a floatable river, with certain water powers appurtenant, and the dams, mill-race, and privileges thereto belonging, free and clear from any servitude or right of co-ownership, it appeared that the proprietor of the land adjoining the plaintiffs' on the lower side had acquired it for manufacturing purposes, and for a number of years had taken his water power through a flume constructed on the river bank in continuation of the plaintiffs' mill-race, which brought the water from the dam to the plaintiffs' mills, and that, in several deeds and written agreements, there had been acknowledgments of the right of owners of the lower lands to use this water subject to the charge of defraying an equal share of the expense of keeping up the constructions incidental to the utilisation of the water power, and that both proprietors had, for a number of years, contributed equally towards such expenses: — *Held*, that, whether the rights so recognised constituted a servitude or a right of co-ownership in the lands upon which the constructions had been erected, the plaintiffs had no exclusive right to the enjoyment thereof as against the owner of the lands, although they were absolute owners of the strip of land on which the construction had been made. *Lafrance* v. *Lafontaine*, 19 C. L. T. 376, 30 S. C. R. 20.

Foreshore — *Obstruction — Rights of riparian owner — Access to river — Plan of subdivision — Registration — Order cancelling — Exception of part — Effect of — Road allowance — Blocking up — Injunction.*]— The plaintiff's predecessors in title to certain lands fronting on the Fraser river, in 1903, registered a plan of subdivision thereof, shewing a 33-foot road parallel to the river bank, some little distance therefrom, and to the south of this road a number of lots with various road allowances. The strip shewn on the plan between the road and the river was not subdivided. The defendant bought lot 6, facing on the road, to the west and south of which lot, as shewn on the plan, appeared an allowance marked "road," running from the river road to another road. In April, 1907, the registration of the plan was by order of the Court cancelled, on the application of the then owner of the lands shewn thereon, "except in so far as it affects lot 6." The plaintiff having certificates of indefeasible title to the strip and to the land to the west of lot 6, sought to restrain the defendant from trespassing thereon:—*Held*, assuming that the plaintiff owned only to high-water mark, that the acts of the defendant in obstructing the foreshore were acts which the Court would restrain at the instance of a riparian owner, such as the plaintiff. The rights of the defendant, as one of the public, to navigate or fish in the river, did not include the right to obstruct the plaintiff's access from all parts of his land to the river, or the right to cross the plaintiff's land above high-water mark in order to reach the river.—*Held*, also, that the effect of the order cancelling the registration of the plan (and the exception therein) was that the road running to the west and south of lot 6 continued to be a road; but the plaintiff, as the owner of the land to the west and south of this road, had a right to seek the aid of the Court to prevent that road being blocked up.—*Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662, and *Harvey* v. *British Columbia Boat Co.*, 14 B. C. R. 121, 9 W. L. R. 415, followed. *Rorison* v. *Kolosoff* (1910), 13 W. L. R. 629.

Hamilton bay—Grant of wharf on one side of slip — Derogation from grant — Use of slip so as to prevent access to wharf — Evidence of mode of user at time of grant — Admissibility — Injunction. *Hamilton Steamboat Co.* v. *Mackay*, 7 O. W. R. 465, 10 O. W. R. 295.

Lake — *Erection of bridge—Obstruction to navigation — Nuisance — Particular injury — Damages.*]—The plaintiff occupied land at the head of a lake, which was a navigable tidal sheet of water, having an outlet into the ocean. The defendants, in accordance with a contract with the provincial government, constructed a new bridge at this outlet, which lessened the size of the passage and impeded the use of the lake by vessels, although the highway could thereafter be more beneficially used by the general public:—*Held*, that the latter circumstance should not be considered where individuals lost the benefits of navigation, and especially where a particular injury was caused by the change. *Myrer* v. *Clish*, *Myrer* v. *McDonald*, 40 N. S. R. 1.

Land bordering on river — *Crown grant — Description — Construction — Ownership ad medium filum — Navigable or unnavigable stream — Alluvion — Bed of stream.*]—Lot 5 in the front concession of the township of Howard, was described in the Crown patent of the grant thereof issued on the 8th July, 1799, by metes and bounds as follows: "Beginning at a post marked 4/5 on the bank of the river Thames; then south 45 degrees east 68 chains; then north-easterly parallel to the said river 30 chains; then north 45 degrees west to the said river; then along the bank with the stream to the place of beginning:" —*Held*, Magee, J., *dubitante*, that upon the true construction of the grant, and having regard to the provisions of s. 31 of the Surveys Act, R. S. O. 1897 c. 181, the

river formed the northerly boundary, and the lot did not extend *usque ad filum aquæ*. *Robertson* v. *Watson*, 27 C. P. 579, 599, followed. — *Held*, also, that the question whether the river at and above and below the *locus in quo* was navigable or unnavigable, need not be determined, in view of the decision of the Court of Appeal in *Keewatin Power Co.* v. *Kenora*, 11 O. W. R. 266, 16 O. L. R. 184.—The plaintiff claimed as part of lot 5 a bar or deposit of gravel and sand below the bank of the river. This sand-bar, as to vegetation, retained the characteristics of a bed of a stream; for the greater part of the year it was entirely covered with water, and during the remainder was frequently under water, while at times of freshets the water covered it to a depth of 25 or 30 feet, and sometimes overflowed the bank, which was of at least that height.—*Held*, that the bar had not become land formed by alluvion, but was still part of the bed of the river. *Hindson* v. *Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1, followed. *Williams* v. *Pickard*, 15 O. L. R. 655, 11 O. W. R. 475; reversed, 12 O. W. R. 1051, 17 O. L. R. 1051.

Obstructions to navigation — *Crown lands — Letters patent of grant — Evidence — Collateral circumstances leading to grant — Title to land — Riparian rights — 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 tide it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. —*Bell* v. *Corp. of Quebec*, 5 App. Cas. 84, followed.—Evidence of the circumstances and correspondence leading to grant by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing 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.—The judgment appealed from, 14 Que. K. B. 115, was reversed, and the judgment of the Superior Court, 25 Que. S. C. 104, was restored. *Steadman* v. *Robertson*, 18 N. B. R. 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 for Quebec* v. *Fraser*, *Attorney-General for Quebec* v. *Adams*, 26 C. L. T. 849, 37 S. C. R. 577.

Possession—*Title.*]—By the law of the province of Quebec, 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. The land in dispute formed part of the bed of a stream called the Brewery creek, which was originally a narrow inlet from the Ottawa river, dry during the summer time in certain parts:—*Held*, affirming the judgment appealed from (*see* 24 Que. S. C. 59), that, as the Brewery creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa river into it could not have the effect of altering the natural character of the creek. 2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not. 3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives 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 described in the grant. *Hull* v. *Scott*, 24 C. L. T. 264; *Attorney-General for Quebec and Hull* v. *Scott*, 34 S. C. R. 603.

Riparian owners—*Rights of Crown — High and low water marks.*]—When land is bounded by a navigable river, the waters of which are non-tidal, it extends to the lowest mark reached by the gradual diminution of the water during the summer months. Hence the Crown has no power to grant as beach lots, land lying between the highest and lowest water-marks along such rivers, the same being the property of the riparian owners. — The Crown may legally grant to any person other than the riparian owner, lots contiguous to his land in the bed of a navigable river. *Chauret* v. *Pilon*, 31 Que. S. C. 165.

River — *Barren rock submerged at high tide — Rights of riparian owner — Public domain.*]—A rock in the river St. Lawrence, so situated that it is nearly always submerged at high tide, and which has no sign of vegetation—vegetation being the mark of cultivable lands, and constituting an element in appropriation and a sign of private property—forms part of the public domain, and the riparian owner has no right to claim the exclusive property in it.—A petitory action brought by the riparian proprietor, in such circumstances, to evict a fisherman who has built thereon a cabin for fishing purposes, is not well founded, and will be dismissed. *Turgeon* v. *Guay*, 33 Que. S. C. 168.

River—*Floatability—Minister of Crown — Admission — Third party — Mis-en-cause.*]—The principles of the old French law govern the question of the navigability or floatability of rivers in the province of Quebec. 2. Navigable and floatable rivers form part of the public domain of the province, and cannot be alienated except by an express grant from the Crown. 3. It is otherwise with rivers which are unnavigable or unfloatable; they belong to the riparian owners unless there is an express reservation to the contrary. 4. A river may be declared navigable and floatable as to part only. 5. The admission of a minister of the Crown in an answer to a question or an address in the legislature cannot bind the Crown, and proof may be given that such an admission has been made by mistake. 6. A party has a right to bring before the Court a third party interested, in order to have it declared that the latter is subject with the former to the judgment upon an intervention. *Procureur-General* v. *Fraser*, 25 Que. S. C. 104.

River—*Public domain—Right of user—Riparian owners — Improvements — Indemnity — Tolls — Dam — Logs floated on river — Liability for loss — Demand — Delivery.*]—1. Navigable and floatable rivers form part of the public domain, and everybody has the right to use them as a means of transportation, without indemnifying the riparian owners for work done by them to improve the courses of the rivers. The right of these latter to exact tolls is conferred by a special statute, and only arises in special cases, and in the manner therein provided.—2. When the logs of two lumbermen are floated in a river and become mixed, the one who knows he is appropriating a portion belonging to the other, without taking count of the quantity, is responsible up to the value of the logs lost.—3. The owner of a dam in a river, whereby he retains his logs, is responsible for the damage caused by the retention he makes of the logs of others; and it is not necessary for the latter to make a demand upon him for delivery. Judgment in 29 Que. S. C. 126, varied. *Tourville Lumber Co.* v. *Dansereau*, 34 Que. S. C. 516.

River — *Riparian owners — Rights of Crown — High and low water marks—Trespass — Boundaries.*] — The bed of a non-tidal navigable river, whose volume of water rises or falls according to seasons, extends to the highest water mark it reaches without flooding, and belongs to the Crown. The grant, therefore, by the latter of a lot below such high water mark is valid as against the riparian owner.—2. An action *en complainte* for trespass on an immovable, against the owner of a contiguous one, may be brought, though no boundaries have been settled between them, when there is no doubt as to the acts of trespass having taken place well within the plaintiff's property. The settlement of boundaries is not a condition precedent in such a case. Judgment in 31 Que. S. C. 165 reversed. *Chaurest* v. *Pilon*, 17 Que. K. B. 283, 5 E. L. R. 234.

Stream—*Question of fact—Crown grant—Reservation — Prescription — Acquiescence.*]—It does not follow that, because a river is navigable and floatable, all its branches or channels must be considered so. The navigability of a stream cannot be established by any rule of law; it is a question of fact. 2. The grant of land from the Crown includes the bed of a non-navigable creek running through it, and no specific grant of the bed of the creek is necessary. Moreover, in this case, the reservation of gold and silver mines in favour of the Crown, contained in the grant, indicated that everything outside of this reservation was granted. 3. Although there is no prescription against the Crown, yet the conduct of the constituted authorities in allowing a creek to be used by the patentees, and their successors and assigns, openly, publicly, peaceably, and uninterruptedly for 96 years, is evidence of acquiescence in their pretensions. Judgment in 24 Que. S. C. 59 affirmed. *Hull* v. *Scott*, 13 Que. K. B. 164. Affirmed 24 C. L. T. 264, and S. C. *sub nom. Attorney-General for Quebec & Hull* v. *Scott*, 34 S. C. R. 603.

Tidal and navigable river — Fisherman — Licensee under Fisheries Act—Destruction of net by passing steamer — Obstruction of channel — Rights of navigation —Failure to establish wanton act. *Molnsley* v. *Gilley* (B.C.), 7 W. L. R. 22.

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6. Riparian Rights.

Accretion—*Right to, as "Alluvion"—Formation.*]—On the 27th March, 1894, a considerable mass of earth, which had crumbled away at St. Alban, was carried by the river Ste. Anne to its mouth. The mass of earth grounded in a shallow at the mouth of this river, which was navigable, and dried up a part of its bed, which remained dry for a distance of 2,280 feet in a straight line, dividing the old bank of the river (the property of the plaintiff) from the new bank thereof:—*Held*, that this accretion did not constitute an "alluvion;" that the addition of land to the bank of a navigable river belongs to the adjoining owner only where it is formed by imperceptible degrees; and the only exception to this rule is in the case where a considerable and noticeable part of a field on a river bank is carried suddenly towards a lower field or on the opposite bank; but, even in this case, the new land will belong to the riparian owner at that point only if the former owner does not reclaim it within the time the law allows. *Germain* v. *Price*, 27 Que. S. C. 101, 188.

Accretion to shore — Boathouse and dwelling erected on crib filled with stone and cement — After time boathouse became surrounded by accretion to shore — Action by owner of shore to recover possession — Dismissed without prejudice to other rights of plaintiff. *Point Abino* v. *Michener* (1910), 17 O. W. R. 98, 2 O. W. N. 122.

Artificial watercourse—*Canal banks—Trespass — Possessory action — Bornage—Title to land.*]—The possessory action lies only in favour of persons in exclusive possession *à titre de propriétaire.*—The ownership of a canal serving as a tail-race for a water-mill naturally involves the ownership of the banks of the canal and the right to make use thereof for the purpose of maintaining the tail-race in efficient condition.—In the present case, the bank of the canal had fallen in at a place adjoining lands belonging to D., and the projection thus formed had been, for some years, occupied by him. A. made an entry for the purpose of removing this obstruction, and re-building a retaining wall to support the bank. In a possessory action by D.:—*Held*, that, as the original boundary had become obliterated, the decision of the question of possession should be postponed until the limits of the canal bank had been re-established. *Parent* v. *Quebec North Shore Turnpike Road Trustees*, 31 S. C. R. 556, followed. *Delisle* v. *Arcand*, 37 S. C. R. 668.

Dumping rocks into river—Impeding flow of water — Rights of riparian proprietors — Sensible injury — Injunction. *West Kootenay Power and Light Co.* v. *Nelson* (B.C.), 2 W. L. R. 66.

Encroachment of water on land — *Riparian owner — Preservation by erections*

—*Property in land and erections.*] — A parcel of land threatened with overflow by water and reclaimed therefrom by the erection of quays, etc., remains, as well as the works and erections, the property of the riparian owner who has made them, or for whom they have been made by others. *Price* v. *Chicoutimi Pulp Co.*, 30 Que. S. C. 293.

Erection obstructing access to foreshore — *Injunction.*] — Complainant, as riparian owner, complained that defendant was erecting a breastwork on his foreshore cutting off access therefrom to the river and obtained an injunction to restrain defendant from going on with the building. On motion to dissolve it appeared that complainant was very slightly if at all inconvenienced, that it was doubtful if the foreshore was really his and that defendant had spent a considerable sum of money on the work:—*Held*, (Peters, M.R.) that in deciding cases of this nature the respective convenience or inconvenience to the parties should be considered. 2. That this injunction should be dissolved with leave to complainant to move for another and with leave to amend his bill, so as to support a prayer for the removal of the breastwork. *Garret* v. *Squarebriggs* (1880), 2 P. E. I. R. 351.

Existence of defined watercourse — *Diversion of watercourses.*] — Action for damages to plaintiff's land. The B. C. Full Court in dismissing an appeal, holds that defendant is not liable where there being an intermittent danger of overflow of water she guards against its recurrence by raising an obstruction to protect her property. The evidence did not shew that there was a defined natural watercourse. *Graham* v. *Lister*, 9 W. L. R. 589.

Expropriation — *Trespass — Torts — Diversion of natural flow — Injurious affection — Damages — Execution of statutory powers — Arbitration — Injunction—Mandamus — 59 V. c. 44 (N.S.) — Construction.*]—A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor, and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.—The powers conferred upon the town council of the town of North Sydney, N.S., by the Nova Scotia statute 59 V. c. 44, for the purpose of obtaining a water supply, give them no rights in respect to the diversion of watercourses, except subject to the provision of s. 4 of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks.—*Saunby* v. *Water Commissioners of London*, [1906] A. C. 110, followed. *Leahy* v. *North Sydney*, 26 C. L. T. 526, 37 S. C. R. 464.

Expropriation of lands of riparian owners—Development of water power by municipality — Lease from Crown of bed of watercourse — Compensation to owners — Basis of — Value of lands — Interest of riparian owners in bed of stream and water power — Parties — Attorney-General — Non-navigable stream lying between and connecting navigable waters — Impediments to navigation by falls — Title to lands—Crown patent — Construction — Ownership *ad medium filum* — English Rules as to non-tidal waters — Application to Ontario — Injury to dam — Compensation for—Costs. *Keewatin Power Co.* v. *Kenora, Hudson's Bay Co.* v. *Kenora*, 8 O. W. R. 369.

Expropriation of lands of riparian owners — *Navigable rivers — Non-navigability of portions — Doctrine of ad medium filum aquæ — Right of the Crown to bed of river — Arbitration and award — Directions to arbitrators.*]—The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the *alveus* of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of lands bordering thereon to the bed of such waters, *ad medium filum aquæ;* whereas in the province of Ontario such public rights in all rivers navigable in fact have been deemed always existent in the Crown, *ex jure naturæ*, so that the title in the bed thereof remained in the Crown after it had made grants of lands bordering upon the banks of such rivers, the doctrine of *ad medium filum aquæ* not applying thereto.—Where a river is navigable in its general character, natural interruptions to navigation at some parts of it, which can be readily overcome, do not prevent it from being deemed a navigable river at such parts. —The Winnipeg river, which flows from the Lake of the Woods to Lake Winnipeg, is a navigable river, and although there are interruptions to navigation in it, they can be readily overcome by means of canals, or other artificial means. The channel just below the town of Kenora, which contains one of these interruptions, is properly part of the river, and must be deemed navigable in the sense mentioned, so that the bed thereof remains vested in the Crown, and nothing in the Crown grants to the plaintiffs of lands bordering upon such branch, nor in their rights as riparian proprietors, interferes with the title of the Crown to the bed, or gives to the plaintiffs any title thereto or interest therein, *ad medium filum aquæ*.—The basis upon which damages were to be assessed to the plaintiffs as owners of lands on the banks of a navigable river are set out in the report, the actions ultimately becoming actions to settle the rights of the parties, and to obtain directions to the arbitrators in expropriation proceedings. *Keewatin Power Co.* v. *Kenora, Hudson's Bay Co.* v. *Kenora*, 8 O. W. R. 369, 13 O. L. R. 237.

Floatable river — *Timber driving—Obstruction — Mandatory injunction—Costs—Injunction for apprehended injury — Damages.*]—The defendant, the owner of a sawmill on a floatable river, erected booms in connection therewith, which, with logs of the defendant, impeded the passage of logs of the plaintiff. The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted:—*Held*, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the

taking out and service of the injunction order. An injunction to perpetually restrain the defendant from closing or obstructing the river refused. The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw-mill. The Court refused to assess the plaintiff's damages, as he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased. *Watson* v. *Patterson*, 23 C. L. T. 268, 2 N. B. Eq. R. 488.

Flood—*Change in course of stream.*]—When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel. *York* v. *Rolls*, 20 C. L. T. 60, 27 A. R. 72.

Flooding lands — *Driving saw logs—Action.*]—Action by the owner of lands on both sides of a stream used by the defendants for the purpose of driving saw logs, for damages for penning back the water on his land by means of a dam, including the road allowance reserved along the banks of the stream in question, and for an injunction to remove the obstruction. The defence raised was that the defendants were not liable by reason of the reservation in the grant from the Crown of the road allowance and by reason of the provisions of s. 1 of c. 142, R. S. O. 1897, an Act for protecting the public interest in rivers, streams and creeks:—*Held*, that the plaintiff was in such possession of the road allowance along the banks of the stream as entitled him to recover damages for flooding the same; that the defendants were liable for all damages caused by the dam complained of; and that c. 142, R. S. O. 1897, does not prevent a plaintiff recovering for unnecessary damage or for damages accruing after spring and fall freshets; and awarded damages accordingly and an order for removal of the dam, the defendants admitting they had done with it.—*Held*, also, that there is nothing in c. 85, R. S. O. 1897, compelling a defendant to proceed under it if he chooses his ordinary remedy of action. *Blair* v. *Chew*, 21 C. L. T. 404.

Impeding flow of water—*Interference with bed of stream — Right of action — Riparian proprietor — Onus.*]—Having regard to Lord Blackburn's examination of *Bickett* v. *Morris* in *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, at p. 852 *et seq.*, and the remarks of Fitzgibbon and Barry, L.JJ., in *Belfast Ropeworks Co.* v. *Boyd*, 21 L. R. Ir. 560, the law is not that any sensible interference with the bed of a stream is *per se* actionable, but that there must be either actual damage, or a reasonable possibility of damage, to give a good cause of action; and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the case:—*Held*, further, that in this particular case the defendants had discharged the onus, having regard to the evidence taken since the trial by leave of the full Court. *West Kootenay Power and Light Co.* v. *Nelson*, 12 B. C. R. 34, 3 W. L. R. 239.

Improvements on stream—*Injury to other lands — Demolition of works — Damages.*]—The right given to a proprietor to improve a watercourse running along his land by means of necessary works, as dams, dykes, piers, booms, etc., does not entitle him to abut or rest such works on the land of another without his consent. When, therefore, such works are erected in such a way as to injure the owner of the land on which they abut or rest, or to interfere with his enjoyment of it, the latter will have an action to have them removed or demolished, as well as for damages. *Bryson* v. *Davidson*, 31 Que. S. C. 291.

Injunction — *Penning back water — Riparian rights.*]—An injunction will lie for injury to right of riparian owner, without actual damage being sustained so as to preserve the right, but in interfering in such a case the Court will consider not only the strict legal rights of the parties, but all the surrounding circumstances, the injury the strict enforcement of the right would cause the defendant, etc. An injunction had been granted some years before, restraining the defendant from penning back the water for his mill, which was above plaintiff's on the same stream, between the hours of 4 a.m. and 11 p.m., each day. It now appearing that to allow defendant to pen back the water between the hours of 10 p.m. and 6 a.m. would not injure plaintiff's right, the Court ordered the injunction to be dissolved so far as it related to penning back the water between these hours, but that with respect to all other times it should be made perpetual. *Howatt* v. *Laird* (1857), 1 P. E. I. R. 157.

Injunction — *Riparian owner—Right to natural watercourse not extinguished by unity of possession — Injunction not granted in all cases where a plaintiff would succeed in an action at law — Not merely a legal right but actual injury must be shewn — Public convenience — Laches or acquiescence in encroachment — Injunction dissolved in part.*] — The plaintiff owned mills on the lower part of the stream, the defendant owned mills higher up and penned back the water. Plaintiff had already recovered nominal damages in the Supreme Court (*Howatt* v. *Laird*, 1 P. E. I. R. 7), for the injury to his right. The Bill alleges that since that judgment the defendants have, at different times, penned back the water so as to impede the working of plaintiff's mill. An injunction was granted *ex parte* to restrain the defendant from so penning back the stream and a motion was now made to dissolve it. There were two mills on the lower dam, one of which was formerly owned by the owner of the upper mill. It was argued that this unity of possession having existed extinguished the original right of the lower mill to the natural flow of the water, but the two principal questions on which the case turned were:—Whether the riparian owner can daily interrupt the natural flow of the stream and detain the water for such times as may be necessary to drive his mill, without subjecting himself to an action by a lower riparian owner for an injury to his right, although such interruption cause no actual

damage to the lower owner.—Whether after the lower owner has established his right in a Court of Law, this Court (when no actual damage is sustained) should interfere to restrain the upper owner from continuing the interruption:—*Held*, Peters, M.R., that the unity of possession had not extinguished the right to the natural flow.—That the riparian owner by interrupting and detaining the water would render himself liable to an action by the lower owner, without actual damage to the latter, as decided by the Supreme Court in the action at law between the same parties (1 P. E. I. R. 7).—That right of plaintiff to interference of the Court, rests not merely on his shewing a bare legal right, or on his having obtained a verdict establishing it, but on his also shewing an interruption of that right attended with such actual loss or inconvenience to him as on equitable ground should be prevented and that plaintiff's laches and public convenience should be considered. Injunction dissolved in part. *Howatt* v. *Laird* (1851), 1 P. E. I. R. 21.

Land bordering on navigable lake—Rights of riparian owner — Access over shoal water to deeper water — Removal of sand or gravel from bed of lake at edge of water — Trespass — Diminution of soil—Recession of shore line — Special injury—Injunction — Damages. *Stover* v. *Lavoia*, 8 O. W. R. 398, 9 O. W. R. 117.

Land bordering on navigable river—Rights of riparian owner — Removal of sand from bed of river — Effect of—Nuisance — Ownership of soil in bed of river—Trespass — Injunction — Rights of navigation. *Patton* v. *Pioneer Navigation and Sand Co.*, 7 W. L. R. 744.

Littoral proprietors — *Lake front — Removal of sand and gravel — Injury to plaintiffs' land — Injunction.*]—The plaintiffs owned a lot running down to the shore of Lake Ontario, which shore consisted of sand and gravel and was of varying width, and the bank of which was a clay loam from 10 to 15 feet high. Notwithstanding the protection afforded by the shore, over 40 acres of land had been washed away since the Crown grant was made in 1799. The plaintiffs sought an injunction to restrain the defendant from removing gravel opposite to their land, as tending to render it more liable to encroachment by the waters of the lake:—*Held*, that, notwithstanding that the metes and bounds in the Crown grant were expressed to begin "on the shore of Lake Ontario," the plaintiffs' land extended only to the line of the water at present low water mark, and not to what was that line in 1799, but that, as littoral proprietors, they were entitled to the injunction. *Servos* v. *Stewart*, 10 O. W. R. 528, 15 O. L. R. 216.

Logs floated over stream—*Rivers and Streams Act — District Court Judge—Order to fix tolls — Past user of stream — Mandamus — Appeal — Res judicata.*]—By R. S. O. 1897 c. 142, s. 13, the owner of improvements in a river or stream used for floating down logs, may obtain from a District Court Judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of *mandamus* to compel the Judge to make such an order:—*Held*, affirming the judgment of the Court of Appeal, 16 O. L. R. 21, 9 O. W. R. 99, 193, 10 O. W. R. 711, Davies, J., *dubitante*, and Idington, J., that such an order had effect only in case of logs floated down the river or stream after it was made. —Per Idington, J., that, as s. 15 gives the applicant for the order an appeal from the Judge's refusal to make it, *mandamus* will not lie.—*Per* Duff, J., that the *mandamus* could issue if the Judge had jurisdiction to make the order, though he refused to do so in the belief that a prior decision of a Divisional Court established *res judicata* as to his power. *Re Beck Manufacturing Co. & Valin & Ontario Lumber Co.*, 40 S. C. R. 523.

Marsh lands — *Rights of one owner against adjoining owner — Obstruction of access to shore — Mandamus to compel removal.*] — Plaintiff, the owner of certain water lots on Ashbridge's Bay, brought action for a mandamus to compel defendants to amend a plan of theirs shewing certain works they intended to perform, and which in pursuance of said plan they had carried out and performed and had placed obstructions, it was alleged, which had deprived plaintiff of his riparian rights, and to compel defendants to remove the obstructions placed in front of plaintiff's said lands, and an injunction to restrain defendants from performing the work in such a way as to interfere with plaintiff's riparian rights.—Magee, J., dismissed plaintiff's action with costs.—Divisional Court *held*, that plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor: That plaintiff's case failed in fact and in law and the appeal should be dismissed with costs.—*Beatty* v. *Davis*, 20 O. R. 373, distinguished.—*Ross* v. *Portsmouth*, 17 C. P. 195, 202, approved. — Review of Michigan authorities. History of Toronto Harbour and Ashbridge's Bay. *Merritt* v. *Toronto* (1911), 18 O. W. R. 613, 2 O. W. N. 817, O. L. R.

Mill-race — *Boundaries—Banks — Riparian proprietors — Title — Prescription —Acts of ownership.*]—There is a legal presumption that the property in a hydraulic mill and its mill-race includes the banks of the latter. Therefore, a neighbouring proprietor, whose title extends to the mill-race, is not by such title owner as far as the water, but only as far as the bank. The above presumption is not rebutted unless by reason of a contrary title in precise and formal terms, or by reason of a prescription acquired by an adverse possession clearly defined. Isolated acts or acts tolerated as being done in a neighbourly way, for example, mowing the grass as far as the water, will not suffice. *Arcand* v. *Delisle*, 16 Que. K. B. 99.

Possessory action—*Trouble de possession — Right of action — Actio negatoria servitutis — Trespass — Interference with watercourse — Agreement as to user — Expiration of privilege by non-user — Tacit renewal — Cancellation of agreement — Recourse for damages.*]—A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of

the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurring nature.—Davies and Idington, JJ., dissenting, were of opinion that, in the circumstances of the case, a possessory action would lie.—P. brought an action *au possessoire* against the company for interference with his rights in a stream, for damages, and for an injunction against the commission or continuance of the acts complained of. On service of process, the company ceased these acts, admitted the rights and title of P., alleged that they had so acted in the belief that a verbal agreement made with P. some years previously gave them permission to do so, that the agreement had never been cancelled, but was renewed from year to year, and that, although the privilege had not been exercised by them during the two years immediately preceding the alleged trespass in 1904, it was then still subsisting and in force:—*Held*, reversing the judgment appealed from, Davies and Idington, JJ., dissenting, that, as there had been no formal cancellation of the verbal agreement or withdrawal of the permission thereby given, it had to be regarded, notwithstanding non-user, as having been tacitly renewed, and that it was still in force at the time of the acts complained of, and that P. could not recover in the action as brought. —Fitzpatrick, C.J.C., on his view of the evidence, dissented from the holding that the agreement had been tacitly renewed for the year 1904, in which the alleged trespass was committed. *Chicoutimi Pulp Co.* v. *Price*, 27 C. L. T. 656, 39 S. C. R. 81.

Railway—Diversion of water—Sale—Injury to owner below — Injunction — Declaration of right — Damages. *Maughn* v. *Grand Trunk Ry. Co.*, 4 O. W. R. 287.

Right to flow — Artificial waterway — Prescription — Interruption — Defence — Amendment. *Harrington* v. *Spring Creek Cheese Mfg. Co.*, 2 O. W. R. 143.

Right to flow of stream—*Easement—Severance — Conveyance in gross.*] — The right to the use of the flow of water, in its natural course, is not an easement, but is inseparably connected with, and inherent in, the property in the land. It is parcel of the inheritance and passes with it.—The rights of a riparian owner or occupant, with respect to the water of a stream, cannot be severed and conveyed in gross, so as to enable a third party to sustain an action in relation thereto. *McCann* v. *Pidgeon*, 40 N. S. R. 356.

Right to supply of water—Contract by owner of waterworks with riparian proprietor — Evidence — Injunction. *Harrison & Sons Co.* v. *Owen Sound*, 3 O. W. R. 745.

River—*Riparian owner—Use of water—Prescriptive title — Mill dam — Interruption — Company — Statutory powers — Remedies — Injunction — Ex post facto legislation — Construction.*] — A riparian owner has a right to have the water flow to his land in its natural channel without material diminution in its volume or sensible change in its quality; and to use it for all ordinary and domestic purposes; he has also a right to the reasonable use of it for commercial or other extraordinary purposes incident to the enjoyment of his property, provided he does not cause material injury or annoyance to other riparian owners.—A prescriptive title to the uninterrupted use of the water of a river will not be obtained by a riparian owner who has made no use of the water different from that to which he was entitled as a riparian owner.—The defendants, an electric lighting company, owning lands on both sides of a river, and having power by their Act of incorporation to build and maintain dams on the river, erected a dam thereon in connection with their power house. The plaintiff was the owner of a water grist and carding mill, situate lower down on the same river. The defendants ran their machinery at night time, and in the morning it was their practice, without having regard to the length of time required for the purpose, to store the water until the dam was again full. In consequence the plaintiff was deprived of water, and his mills were forced to shut down for a long number of days at a time:—*Held*, that the defendant's use of the water was unreasonable, and should be restrained.—(2) That the statutory powers conferred upon the defendants to build the dam for the purposes of their business did not authorise them to make an unreasonabe use of the water, to the injury of the plaintiff, in the absence of proof, the onus of establishing which was upon the defendants, that their business could not be carried on except with that result.—(3) That a provision in the defendants' Act, that they should be liable to pay damages to any owner of property injured by the construction of their dams or works, did not apply to damages resulting from an unreasonable use of the water; that the loss sustained by the plaintiff in the enjoyment of his property was continuous and substantial; and that, under the circumstances, he was entitled to relief by injunction.—The defendants were empowered by Act to build a dam upon complying with certain formalities, including the filing of a plan thereof with and obtaining approval of the same by the Governor in council. A plan was filed with the Governor in council, but, owing to misapprehension, its approval was not obtained. The dam having been built, an Act was passed approving of the dam and providing that the approval should have the same force and effect as if given by order in council of the date of the filing of the plan:—*Held*, that the Act, as *ex post facto* legislation, was not to be construed as legalising the dam. *Brown* v. *Bathurst Electric and Water Power Co.*, 4 E. L. R. 28, 3 N. B. Eq. 543.

Rivers and streams — *Crown domain —Title to land — "Flottage" — Driving loose logs — Public servitude — Riparian ownership — Action possessoire.*] — 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 Art. 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.—Judgment appealed from, 16 Que. K. B. 48, affirmed, Girouard and Idington, JJ., dissenting. *Tanguay* v. *Canadian Electric Light Co.*, 40 S. C. R. 1, 4 E. L. R. 438.

Rivers and streams—*Floating logs — Damage to riparian owners — Procedure.*]— The Nova Scotia statute R. S. N. S. 1900 c. 95, s. 17, gives to persons engaged in the transmission of saw logs and timber down rivers and streams the reasonable use of and access to the same for their business, and relieves them from liability for any but actual damage thereby, unless caused by their own wilful act: — *Held*, affirming the judgment appealed from, 36 N. S. R. 40, that such persons are liable for all actual damage caused in transmitting logs, even without negligence, and the owner of the logs is not relieved from liability though they were transmitted by other persons under contract with him. On motion for a new trial one of the grounds was misdirection in the charge to the jury. The trial Judge reported to the full Court that he did not make the direction on which this objection to his charge was based, and gave a correct report of what he said:—*Held*, that this was not an objectionable course for the Judge to pursue, and in any case it was a matter for the Court appealed from, whose ruling was not subject to review. Judgment in 36 N. S. R. 40 affirmed. *Dickie* v. *Campbell*, 24 C. L. T. 50, 34 S. C. R. 265.

Rivers and streams—*Nontidal rivers— Grant of lands bordering on—Title to bed of river ad medium filum aquæ — Common law doctrine — R. S. O. 1897 c. 111, s. 1.*]— The common law of England relative to property and civil rights—as introduced into this province in 1792, now enacted in R. S. O. 1897 c. 111, s. 1.—except in so far as repealed by Imperial legislation having force in this province, or by provincial enactments, is the rule for the decision of the same. Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas, if non-tidal, whether navigable or not, the title in the bed *ad medium filum aquæ* is presumed *primâ facie* to be in the riparian proprietor. — Where, therefore, lands were granted by the Crown, bounded by the Winnipeg river, a non-tidal river, the title to the bed of the river *ad medium filum aquæ* was held to have passed to the riparian owners by virtue of the grant to them, there being nothing in the grants, particulars of which are set out in the case, to rebut the presumption.—Judgment of Anglin, J., 13 O. L. R. 237, 8 O. W. R. 369, varied. *Keewatin Power Co.* v *Kenora, Hudson's Bay Co.* v. *Kenora*, 16 O. L. R. 184, 11 O. W. R. 266.

Trespass to land — *Conveying timber and lumber on stream.*]—The plaintiff was the owner of land bounded on one side by a stream, above tidewater and not navigable. The defendant was a lumberman, and, in order to assist his operations in driving logs down stream, erected a permanent dam, one end of which rested on the plaintiff's land. To an action by the plaintiff for damages the defendant pleaded *inter alia* that the entry complained of was a reasonable use of the land and was a use authorised by R. S. N. S. 1900, c. 95, "of the conveying of timber and lumber on rivers and the removal of obstructions therefrom," and amending Acts:—*Held*, that the erection of the dam was clearly a trespass and could not be justified under c. 95, or under the Acts of 1902 c. 33, no commissioner having been appointed for the stream in question or for the river into which it ran; that s. 15 of c. 95, which gives the right to construct dams necessary to facilitate the floating of logs down streams during freshets, is subject to the provisions of s. 6, which requires the assent of the owner of land entered upon to be obtained, and can only be construed to apply to temporary erections, and not to permanent erections, such as the one in question; that s. 17 of c. 95, as amended, only gives the right to enter for the purpose of driving or removing logs and not for the purpose of making erections; and that, as the plaintiff had failed to prove any substantial damage, there should be judgment in his favour for $5 damages and costs. *Deal* v. *Cook*, 23 C. L. T. 70.

Unnavigable pond—*Fishing rights.*]— The plaintiffs, with three others, are the owners, under grants from the Crown prior to Confederation, of certain lots of land which extend to, or are partly covered by, an enclosed sheet of water known as "Brome Pond." There was no reservation by the Crown of the bed of the pond or of the fishing rights connected with the water. The plaintiffs sought to recover damages from a person who had fished in the pond:—*Held*, that the riparian owners of a non-navigable water or pond, the bed of which was granted by the Crown to them or their auteurs before Confederation, have the exclusive right of fishing therein. 2. Where land granted by the Crown before Confederation to a number of proprietors extends into and includes the bed of a pond, the fishing rights of the whole pond do not belong to all in common, but the rights of each are limited to the water covering the portion of the bed to which each is entitled by his deed. *Tetreault* v. *Lewis*, 19 Que. S. C. 257.

Use of water by—*Dams—Retention of water — Liability to owners lower down.*]— Running water is a thing common to those whose lands it borders or crosses, and, according to the provisions of Art. 503, C. C., they may use it for their own purposes in its passage, but in such a manner as not to hinder the exercise of the same right by other riparian proprietors. Therefore, the owner of works up-stream who retains the water for certain periods, by means of dams, so as to render its flow intermittent, exceeds the limits of his right, and is liable to the riparian proprietors down-stream for the damage which he causes them, as provided in ss. 5535 and 5536, R. S. Q. *Brome Lake Electric Power Co.* v. *Sherwood*, 14 Que. K. B. 507.

Use of water by—*Injury to others — Ascertainment of damages — Condition precedent — Pleading.*]—Art. 5536, R. S. Q., in prescribing the mode of ascertaining the damages for injuries caused by those who exploit watercourses opposite their lands, makes the remedy of those who suffer injury subject to a condition precedent which they are bound to fulfil. Neglect to comply therewith affords a defence to an action, which the defendant must expressly plead, and which the Court will not supply of its own motion. *Leclair* v. *Dufault*, 28 Que. S. C. 14.

User of water of stream—Interim injunction — Modification — Terms. *Eddy* v. *Booth*, 6 O. W. R. 1001.

Using water for manufacturing purposes — *Injunction.*] — Action to determine the rights of the parties with respect to the use of the waters of a stream. *Bras D'Or Lime Co.* v. *Dominion Iron & Steel Co.* (1911), 9 E. L. R. 348, N. S. R.

Water lots — Interference with navigation — Injunction — Balance of convenience. *Huntley* v. *Jeffers*, 1 E. L. R. 385, 434.

Water rights — *Pollution of water — Proof of damage — Special use authorised by statute.*]—The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage. — Generally speaking, one not a riparian owner is not entitled to complain of the pollution of the river, and a grant or license from a riparian owner to use the water does not entitle the grantee or licensee to complain of its pollution by another riparian owner.—Where the plaintiffs were authorised by Act to take a specified quantity of water per day from a lake for, among other purposes, the domestic use of their citizens, it was held that they were entitled to enjoin the pollution of the lake by a riparian owner. *St. John* v. *Barker*, 3 N. B. Eq. 358.

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7. WATER RECORDS.

Applications for—*Mining companies—Gold Commissioner — Land Commissioner—Water notice — Posting — Evidence.*] — Where an application for a record of water for mining purposes is pending before a Gold Commissioner, an application for a record of the same water for domestic, mechanical, and industrial purposes should not be adjudicated upon by an Assistant Commissioner of Lands and Works without express notice to the applicants before the Gold Commissioner. A water notice posted on a board usually used for such notices, in a hall leading to the rooms occupied by the Commissioner and his staff, is posted in the office of the Commissioner within the meaning of s. 9 of the Water Clauses Consolidated Act. Where an application is not contested, the Commissioner need not take evidence, but where it is contested he should have the evidence taken in shorthand. *In re Water Clauses Consolidation Act, War Eagle Mining Co.* v. *British Columbia Southern Rw. Co.*, 22 C. L. T. 247, 8 B. C. R. 374.

Diversion of waters of river—Authorisation by water records or grants—Prior rights in waters — Water Clauses Consolidation Act, 1897 — Water Privileges Act, 1892—Private Acts affecting plaintiffs—Riparian owners — English law relating to riparian rights — Introduction into British Columbia — Appropriation of waters — Lands acquired by contract—Construction of statutes — Expropriating statutes — Retroactivity—Effect of general Acts on earlier special Acts — Municipal corporations — Water companies — Counterclaim—Declaratory judgment. *Esquimalt Waterworks Co.* v. *Victoria* (B.C.), 5 W. L. R. 173.

Joint application for — *Purpose for which water required—Duty of Gold Commissioner.*]—Mine owners, in a notice for application to the Gold Commissioner for water records, stated, as one of the purposes for which the water was required, a purpose not authorised by s. 10 of the Water Clauses Consolidation Act, *i.e.*, "domestic and fire purposes." At the hearing before the Gold Commissioner the applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application:—*Held*, on appeal, that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers; and the matter should be referred back for rehearing.—*Held*, also, that water records, under Part II. of the Water Clauses Consolidation Act, may be held jointly.—*Quære*, whether a supply of water for fire purposes would be necessary as being directly connected with the working of a mine or incidental thereto. *Centre Star Mining Co.* v. *British Columbia Southern Rw. Co.*, 21 C. L. T. 491, 8 B. C. R. 214.

Pending applications — *Duty of officer.*]—Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final results of the prior application before another official is known. *In re Water Clauses Consolidation Act, War Eagle Mining Co.* v. *British Columbia Southern Rw. Co.*, 8 B. C. R. 381.

Validity of — *Ditch—Continuation into United States.*]—The fact that a ditch constructed in intended compliance with the provisions of s. 41 of the Land Act (C. S. B. C. 1888), runs partly through United States territory, does not of itself prevent the ditch from being a good ditch within the meaning of the Act:—*Held*, also, applying *Martley* v. *Carson*, 20 S. C. R. 634, that the plaintiff's water record was valid. *Covert* v. *Pettijohn*, 22 C. L. T. 308, 9 B. C. R. 118.

Water rights — *Jurisdiction of Gold Commissioner — Change of point of diversion — Water Clauses Consolidation Act, 1897, ss. 27, 36, 84—Prohibition.*] — The defendants, who held a record for 25,000 inches of water out of the St. Mary's river, granted on the 8th May, 1906, applied, under s. 27 of the Water Clauses Consolidation Act, 1897, to the Assistant Commissioner at Cranbrook, to change the point of

diversion. This was opposed by the plaintiffs, who held a record, granted on the 20th October, 1906, for 5,000 inches of water out of the St. Mary's river at the new point of diversion, applied for by the defendants. The Commissioner decided that he had jurisdiction under s. 27, but, upon it appearing that the defendants had taken certain proceedings under s. 84 *et seq.*, to have their undertaking approved by the Lieutenant-Governor in council, the Commissioner ruled that his jurisdiction was avoided by these proceedings. They appealed under s. 36, and afterwards withdrew, and they also withdrew their application to the Lieutenant-Governor in council, and secured an appointment from the Gold Commissioner to proceed again with the application for a change of point of diversion. On motion by the plaintiffs for prohibition:—*Held*, that the Commissioner had jurisdiction to entertain the application. *Cranbrook Power Co.* v. *East Kootenay Power Co.*, 13 B. C. R. 275.

Water rights—*Riparian owners—Effect on water record of abandonment of pre-emption.*]—V. and M. held separate pre-emption records, and, as partners, a joint water record, dated January, 1888. In October, 1889, they formally abandoned their separate pre-emptions and relocated the same area as partners, obtaining in due course a pre-emption record to it in their joint names. The water record was left unchanged, standing in the names of V. and M.:—*Held*, that when V. and M. abandoned their pre-emptions, the water record obtained in connection therewith lapsed. *Eastern Townships Bank* v. *Vaughan*, 13 B. C. R. 77.

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8. Miscellaneous Cases.

Bed of non-floatable river — *Crown patent — Scire facias — Attack on later patent — Acts of possession — Prescription — Fraud — Tender of price — Riparian proprietor — Presumption — Right to bed of stream — Description in patent — Negotiability or floatability.*] — The plaintiff in an action of *scire facias*, begun by him as grantee, by prior letters patent, of property (in this case the bed of a non-floatable river) granted by the letters patent which he attacks, cannot rely upon acts of possession which he has exercised before the issue of the letters patent, when such acts have not given him a prescriptive right to the property in question and add nothing to his own title.—2. The remedy by *scire facias*, the object of which is the cancellation of letters patent obtained by fraud or issued in error, is open to a grantee by prior letters patent for the purpose of attacking those issued to a third person, even when the latter acted without fraud, and the Crown issued the letters with knowledge of the respective contentions of the parties.—3. A plaintiff who sues by way of *scire facias* for cancellation of letters patent issued to a third person, is not obliged to tender with his action the price or the consideration upon which they were granted.—4. The presumption that the property in land bordering on an unnavigable or non-floatable river extends up to the middle of its bed (*ad medium filum aquæ*) is rebutted when it is manifest from the description in the title deeds that it stops at the bank. Therefore, the riparian proprietor on the two opposite sides of such a river has not the right of property in the bed of the river, when his title deeds expressly limit his lands to the banks.—5. A river is navigable or floatable, if navigation or floatation thereon are practicable up and down for a space of time considerable enough to make it a means of transport or a public way. The particular circumstances which render the use of it little or not at all profitable, such as artificial obstacles, banks, dams, etc., which hinder the use of it, do not take away the character of navigability or floatability. *Gouin* v. *McManamy*, 32 Que. S. C. 19.

Construction of aqueduct—*Powers of municipal corporation — Interference with private aqueduct — Rights acquired by possession — Damages — Injunction.*] — A municipal corporation who pass a by-law and contract for the construction of an aqueduct must take into consideration the rights acquired by one who has already constructed a similar aqueduct within the limits of the corporation, and has exploited it publicly for 15 years, without objection, although not authorised by by-law to do so. The corporation cannot, for the purposes of the new aqueduct, order the owner of the old one, by resolution, to remove his pipes within 40 hours, nor permit their contractor to destroy them. The owner of the old aqueduct, in the above conditions, has a right of action for damages against the corporation and contractor who cut and removed his pipes, as well as a remedy by injunction to restrain them from interfering with his possession. *Warwick* v. *Baril*, 14 Que. K. B. 467.

Ditch—*Servitude—Expropriation — Indemnity—Damages.*] — The owner of lower land is obliged, under Art. 501, C. C., to receive waters brought upon his land by a line ditch constructed by the owner of higher land for the benefit of his land, such necessary work not falling under the exception in the article created by the words "without the hand of man having contributed thereto."—2. Indemnity paid to an owner of land expropriated for the construction of a railway is not to be regarded as including damages caused by the obstruction to the flow of water. *Grand Trunk Rw. Co.* v. *Langlois*, 14 Que. K. B. 173.

Easement—Right of way — Repairs — Dominant and servient tenements — Water —Right to flow of — Injunction — Infant —Guardian—Authority. *Burrell* v. *Lott*, 3 O. W. R. 115.

Foreshore of harbour — *Grant from Provincial Government.*]—In an action for damages for trespass the evidence shewed that the *locus* was a water lot in Sydney harbour, and that the plaintiff's title thereto was derived under a grant from the Crown as represented by the Government of the province of Nova Scotia: — *Held*, following *Holman* v. *Green*, 6 S. C. R. 707, that the grant under which the plaintiff claimed was inoperative and void, and that the plaintiff could not recover. *Kennelly* v. *Dominion Coal Co.*, 24 C. L. T. 93, 36 N. S. R. 495.

Government ditch—Contracts — Overflowing land — Justification — Negligence. *Sisty* v. *Larkin*, 2 O. W. R. 639.

Improvements on streams — *Logs floated over stream—"Reasonable tolls"—Action for—R. S. O. c. 142—Restriction to future tolls—Previous binding decision.*] — The right to demand reasonable tolls upon logs floating over improvements on a stream proceeds entirely upon ss. 11 and 13 of R. S. O. 1897, c. 142, and such tolls are only chargeable upon logs going down after an order under the later section has been made and not those going down before such order was made. *Beck Manufacturing Co.* v. *Ontario Lumber Co.*, 6 O. W. R. 54, 1 O. L. R. 193.

Lake front — *Accretion of alluvial deposit.*]—The executors of C. claimed the land lying between defendant's admitted property and a lake. Some title deeds of defendant and his predecessors in title stated that his property ran to the lake, others made no mention of the lake. Defendant also claimed the disputed land by accretion, but in one of the title deeds to defendant's father, C. gave him the refusal to purchase the property in dispute.—*Held*, that plaintiffs were entitled to the land in question. *Toronto* v. *Delaney*, 12 O. W. R. 1116.

Lands bordering on river — *Crown grant — Description — Construction — Ownership ad medium filum — Alluvion — Bed of stream.*]—A lot in the front concession of a township on the south side of the river Thames was granted by Crown patent. "with all the woods and waters thereon lying and being," by the following metes and bounds: "Beginning at a post marked 4-5 on the bank of the river Thames, thence south 45 degrees east 68 chains, then northeasterly parallel to the said river 30 chains, then along the bank with the stream to the place of beginning": — *Held*, Meredith, J.A., dissenting, reversing the decision of a Divisional Court, 15 O. L. R. 655, 11 O. W. R. 475, that the northerly boundary went to the centre of the stream. *Williams* v. *Pickard*, 17 O. L. R. 1051; 12 O. W. R. 1051.

Land washed away by navigable river—*Reclamation — Private domain — Grant by Crown as part of bed of river—Action en bornage — Onus.*]—Land bounded by a navigable river and gradually washed away by the waters of it does not cease to be part of the private domain nor fall into the public domain until it has been definitely overflowed and become part of the bed of the river. Where the soil is preserved from overflow or reclaimed by means of works executed by the owner or by third persons, the land of which it forms part remains in the private domain, and a grant which the Crown assumes to make of it by letters patent as a part of the public domain is void. The onus is on the grantee of the Crown to shew that the land has passed into the public domain. In default of such proof, he cannot by virtue of his grant maintain an action *en bornage* against the owner of a contiguous lot. *Chicoutimi Pulp Co.* v. *Racine*, 30 Que. S. C. 194.

Lessees of watercourse—*Right to flow of water—Title—"Proprietors' Committee."*] —The plaintiffs claimed to be lessees in possession of a watercourse running through a pond in the vicinity of the town of L., and, as such, entitled to the flow of brook and the use of a dam at the pond to regulate the flow of water in connection with the working of a grist-mill situated upon a lot of land owned by the plaintiffs further down the stream. The plaintiffs' claim was based upon a resolution passed at a meeting of the "proprietors' committee" of the township of L. in 1895. There was no evidence to shew who the persons were who called themselves the "proprietors' committee" at that time, nor how, or when, or by what authority the "proprietors' committee" was appointed. The township grant, which bore date the 26th November, 1764, under which both parties claimed, shewed that the township contained 200 rights or shares of 500 acres each, of which only 157 appeared to have been granted at the time. It appeared from the grant that before it was issued, a division was made but none was proved, and it was impossible to say whether the land covered by the brook passed under the grant, or was included in the ungranted shares or rights. Evidence was given, however, to shew that, from the first, the grantees had assumed to control the management of the brook, and that from time to time they had passed resolutions for that purpose; but no authority was shewn for these proceedings, and it did not appear that the grantees had any:— *Held*, assuming that the original grantees had authority to so deal with the brook and pond, that, in the absence of evidence that their rights were transferred to the persons who, in 1895, assumed to exercise such authority, no right or title to the brook, pond, or dam passed to the plaintiffs, as lessees or otherwise, and they must fail in their action. *Moore* v. *Ritchie*, 33 N. S. R. 216.

Logs floated over stream — Tolls — Summary order fixing — Past tolls — *Mandamus* — County Court Judge — Refusal to entertain application to fix tolls. *Re Beck Manufacturing Co.*, 3 O. W. R. 333, 9 O. W. R. 99, 193, 10 O. W. R. 711.

Placer mining—Water rights—Ditches —Diversion of water—Water regulations — Injunction — Damages — Costs. *De Blegier* v. *Larsen* (Y.T.), 6 W. L. R. 837.

Regulation of streams—*Action to annul — Difficulty of execution from lapse of time — By-law to amend procès-verbal — Mode of apportioning work — Resolution of council ordering apportionment—Grounds of nullity.*]—A *procès-verbal* to regulate several streams, that appear formally to comply with the law, and has been in existence for a period of thirty-six years, will not be set aside on the ground that it has become impracticable or difficult of execution through the insufficient description of the lands affected, of the streams themselves, of the work to be done, nor because it regulates six streams for each of which, it is alleged, a distinct and separate *procès-verbal* should have been made. A by-law, purporting to amend the above *procès-verbal*, that apportions the work among the contributories proportionately to the extent of their lands, declaring that no

other apportionment is required, is null and void. A resolution of a municipal council ordering the apportionment of the work to be done on two only of six streams regulated by a *procès-verbal*, will not, for that reason, be set aside, nor on the ground that apportionment could be made only of work of repair or rebuilding (Art. 816a, M. C.), nor on the ground that it is in effect an amendment of the *procès-verbal*, inasmuch as it casts the burthen of the work on different lands (because differently described) from those in the *procès-verbal*. *Vaillancourt* v. *St. Joseph Du Lac*, 19 Que. K. B. 102.

Rights of floatable logs.] — In the Province of Quebec the privilege of floating timber down watercourses, in common with others, is not a predial servitude, nor does it confer an exclusive right of property in respect of which a possessory action would lie. *Price Bros.* v. *Tanguay* (1909), 42 S. C. R. 133.

Rivers and Streams Act—*Tolls—Order fixing—Condition precedent to right of action—Remedy.*]—Section 13 of the Rivers and Streams Act, R. S. O. 1897, c. 142, confers exclusive jurisdiction to fix tolls payable for floating saw-logs over constructions and improvements made by others in rivers, streams, and creeks, upon the different tribunals mentioned in it; and it is incumbent upon any persons seeking to levy such tolls to produce as a condition precedent to recovery an order or judgment by one of such tribunals fixing them.—*Per* Osler and Garrow, JJ.A.—It is not necessary that the tolls should be fixed before the logs are floated.—*Aliter, per* Meredith, J.A.—*Per* Garrow, J.A. —An action will lie for such tolls, after the same have been duly fixed, and parties are not confined to the remedy by distress given by s. 19. *Beck Manufacturing Co.* v. *Ontario Lumber Co.*, 12 O. L. R. 163, 8 O. W. R. 35.

See 3 O. W. R. 333.

Supply of water — *Deed—Covenant—Easement—Servitude—Personal obligation.*] —A covenant in a deed by which P. acquired the right to erect a wind-mill pump on his neighbour's land to supply water to his premises by a pipe, "that he agrees to permit F., another neighbour, to take water for the use of his premises from the pump, and for that purpose to connect a pipe with the one to be laid by P.," does not establish a servitude in favour of F.'s premises. The latter are not described so as to be made a dominant tenement, and there is no servient tenement on which the charge is imposed. The covenant only gives rise to a personal obligation by P. to F.; and the subsequent owners, *à titre particulier*, of F.'s premises have no rights of servitude that can be enforced against P. *Christin* v. *Péloquin*, 28 Que. S. C. 299.

Timber—*Saw Logs Driving Act—R. S. O. (1887) c. 121—Arbitration and award.*] —Cockburn & Sons, in driving logs down Bear Creek, District of Nipissing, found them stopped by a drive in front belonging to the Imperial Lumber Company, which had reached their destination and were held in the stream until they could be transported to the mill by means of a jack ladder. The logs of C. & Sons were detained so long that they could not be driven further that season, which caused considerable damage, and an arbitration was agreed on under the Saw Logs Driving Act, C. & Sons claiming damages for detention, and the company cross-claiming in respect to jams detaining another drive behind that of C. & Sons. The arbitrator disallowed the company's claim, and awarded C. & Sons some $1,100 for unnecessary and unreasonable detention. In an action on the award the company pleaded that the arbitrator had given compensation for delay caused by the mere fact that their drive was ahead of the other, and the Court of Appeal so held and gave judgment in their favour on the ground that C. & Sons' only remedy was by breaking the jam:—*Held*, reversing the judgment, 26 A. R. 19, 19 C. L. T. 61, that C. & Sons had also a remedy by arbitration under the Act; that the company had not made before the arbitrator the claim raised by the plea; and that they had failed to establish such plea on the trial. *Cockburn* v. *Imperial Lumber Co.*, 19 C. L. T. 374, 30 S. C. R. 80.

Water rights—*Decision of Gold Commissioner—Appeal from—Evidence on—Petition—Trial.*]—A County Court Judge refused to hear new evidence on an appeal before him under s. 36 of the Water Clauses Consolidation Act, which provides that the appeal should be in the form of a petition setting forth the facts and law relied on, which petition, along with an affidavit verifying it, should be filed and served, and to which the respondents should file and serve their answer: — *Held*, that the fact that there was to be a petition and an answer contemplated the raising of issues, and that the appeal should be a trial *de novo*. *Ross* v. *Thompson*, 23 C. L. T. 342.

Water rights—*Water Clauses Consolidation Act, B. C.—Jurisdiction of Gold Commissioner—Statutes.*]—Under s. 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the city of Rossland, which purchased the waterworks system of the company, to the waters of Stoney Creek, are paramount but not exclusive, and the Gold Commissioner has jurisdiction to adjudicate on an application under s. 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the city. *Centre Star Mining Co.* v. *City of Rossland*, 9 B. C. R. 403.

See INJUNCTION—JUSTICE OF THE PEACE —MUNICIPAL CORPORATIONS—NEGLIGENCE—TIMBER—WAY.

WATER CLAUSES CONSOLIDATION ACT.

See APPEAL, MINES AND MINERALS, RAILWAYS—WATER AND WATERCOURSES.

WATER PRIVILEGES ACT.

See WATER AND WATERCOURSES.

WATER RATES.

See MUNICIPAL CORPORATIONS.

WATER RECORD.

See WATER AND WATERCOURSES.

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See WATER AND WATERCOURSES.

WATERWORKS.

See ASSESSMENT AND TAXES — MUNICIPAL CORPORATIONS.

WAY.

1. BOUNDARY LINES, 4533.
2. DEDICATION OF HIGHWAYS, 4535.
3. EXTENSION, 4550.
4. MAINTENANCE OF HIGHWAYS, 4550.
5. NON-REPAIR OF HIGHWAY, 4554.
6. OBSTRUCTION OF HIGHWAY, 4580.
7. OPENING AND CLOSING OF HIGHWAYS, 4588.
8. TOLL-ROAD, 4596.
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10. PRIVATE WAY, 4602.

See CROWN — EASEMENT — LIMITATION OF ACTIONS — MUNICIPAL CORPORATIONS—NEGLIGENCE — RAILWAYS AND RAILWAY COMPANIES — WATER AND WATERCOURSES.

1. BOUNDARY LINES.

County boundary line road—Deviation — Adoption of road already constructed —Municipal Act, s. 654 — Construction—Award — Jurisdiction of arbitrators—Absence of necessary preliminaries — Counsel attending before arbitrators under protest. *Re Normanby and Carrick*, 8 O. W. R. 908.

County road—*Boundary between local municipalities.*]—Where one side of a road runs along the boundary line between two local municipalities, although such road is wholly situate in one of them, it is a county road, under the provisions of Art. 755, paragraph 2, of the Municipal Code. *Walsh* v. *St. Anicet*, 25 Que. S. C. 319.

Deviations — *Substitute for boundary line between counties — Declaration — Mandamus.*]—The question was whether a "deviation" road came within s. 617 (1) of the Municipal Act, 1903, (3 Edw. VII. c. 19), so as to be regarded as a boundary line between counties. The deviation in question was rendered necessary owing to a sharp bend in the river Madawaska, where the boundaries between the township of Fitzroy in the county of Carleton, the township of McNabb in the county of Renfrew, and the township of Pakenham in the county of Lanark, meet:—*Held*, by Court of Appeal, Justice Osler dissenting, that the deviation road was to be regarded as a boundary between Pakenham and McNabb, and between Fitzroy and McNabb, but not between Fitzroy and Pakenham. The history and the meaning of the boundary line road legislation discussed. *Fitzroy* v. *Carleton*, 25 C. L. T. 292, 5 O. W. R. 615, 9 O. L. R. 686.

Ditches — *Width of road — Presumption — Municipal corporation — Possession — Pavement.*] — Where a road is bounded by ditches, there is no presumption that the space between the ditch and the fence of an owner of land fronting on the road forms part of it. Therefore, the remedy by an action for restoration against an owner who has built between his fence and the road-ditch is not open to the municipal corporation in whose territory the road lies, unless it can establish possession of the land for a year. The existence of a pavement at the place in question does not constitute a proof of possession by the corporation or the public, where it appears that it has been constructed by the owner of the land or his grantors in order to give more easy access for his customers to his shop. *Corp. of St. François Xavier de Brompton* v. *Salois*, 34 Que. S. C. 238.

Public highway between townships —*Survey — Road allowance — Evidence—Departure from instructions and plan.*]—The township of Lochiel forms part of the original township of Lancaster laid out and partly surveyed about the year 1784 or 1785, as composed of 17 concessions. Subsequently an 18th concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the township of Lochiel. During the year 1798, the township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partly surveyed by a deputy provincial surveyor named Fortune, who returned his plan and field notes without the double lines generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury, in 1816, a deputy provincial surveyor named McDonald planted posts on the ground, but also returned plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury, and, in the Lancaster boundary, the rectangular form was broken:—*Held*, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken.—*Held*, also, that, even if the work

subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet, having regard to the decisions in *Tanner* v. *Bissell*, 21 U. C. R. 553, and *Boley* v. *McLean*, 41 U. C. R. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey. Judgment in 1 O. W. R. 64, 1 O. W. R. 664, affirmed. *Lochiel* v. *East Hawkesbury*, 24 C. L. T. 261; *East Hawkesbury* v. *Lochiel*, 34 S. C. R. 513.

Repair — *Municipality — Strip between ditch and fence.*]—A municipal road consists of all the land comprised between the fences which bound it, provided that the width is not more than that prescribed by statute; and therefore the owner of land bordering on a road, when he is not obliged to keep the road in repair, cannot be called upon in respect of work done in the strip of land between the ditch and the fence, which is part of the road. *Corp. of St. Constant* v. *Miron*, 25 Que. S. C. 316.

Substitute for boundary line between counties — Deviations — Declaration — *Mandamus*. *Fitzroy* v. *Carleton*, 3 O. W. R. 280.

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2. Dedication of Highways.

Absence of acceptance by the municipality of the streets, and evidence of a user of the streets by the public or of evidence of the sale of lands in the subdivision, prevent the streets shewn on the plan from becoming highways. *Marsan* v. *G. T. P. Rw. Co.* (1909), 2 Alta. L. R. 43; 10 W. L. R. 465; 9 Can. Ry. Cas. 341.

Acceptance — Acquiescence — Tax deed —Description — Estoppel. *Piper* v. *Paipoonge*, 6 O. W. R. 287.

Acceptance — *Acquiescence — Time — Statutes.*]—The respondent and another in 1873 bought land in a town, divided it into lots, separated by a certain number of streets, to which they gave names by which the streets continued to be known, and had a plan made and sent to the Crown Lands Commissioner, who transmitted a copy of it to the registrar in order that it might form part of the official cadastre. The streets were afterwards opened by order of the respondent, ditched, fenced, and partly paved. The respondent also acquired a neighboring piece of land in order to extend these streets to meet neighbouring streets, which was done. He sold lots facing on these streets and in conveying covenanted to leave these streets open in perpetuity:—*Held*, that by these acts the streets were dedicated to the public as public streets.—2. Dedication may result from a unilateral declaration of the owner, and need not be the subject of a regular contract.—3. This dedication was accepted by the public by the user of these streets for fifteen years. It was not necessary that the traffic over them should be the same throughout; it was of little importance that the streets had got into a bad state, the fences and pavements disappeared, and the streets themselves used as pasturage, as long as they remained visible and marked out upon the ground.—4. The acceptance of the dedication resulted also from the fact that the municipal authority had included the streets in their homologated plan, declared final and obligatory by the terms of the charter, and the more so because the respondent, who was then a municipal councillor, had taken part in these proceedings without claiming any right of property in the streets, and that the municipal authority had paved them and put in sewers and water pipes.—5. This dedication and acceptance were not affected by the fact that the officers of the corporation had, by error and without the authority of the corporation, levied some taxes from the respondent upon a small part of these streets, the corporation having brought the amount into Court with their pleading.—6 *Semble*, that the provision of 18 V. c. 100, Art. 40, s. 9, as to possession during ten years of streets by a municipal corporation, should be restricted to roads existing before the 1st July, 1855. *Westmount* v. *Warminton*, 9 Que. Q. B. 101.

Acceptance—*Altering level — Injury to land — Liability — Damages — Plans — Interest.*]—When the owners of the soil of a private street have offered to give this street for nothing to the city corporation, and the latter has accepted this offer, as well by resolution of its committee and of its council as by works, such as the construction of a sewer and sidewalk, lighting and levelling the soil of the street, executed by the corporation upon the street, and when the street has been opened for public travel, such street becomes a public street, even in the absence of a contract or of its inscription as such in the city registers.—Even if the street was a private street, the city corporation becomes responsible for an overflow of water from which the plaintiff has suffered, when the corporation has altered the condition of the street by raising the level near the property of the plaintiff, and by filling up a ravine by which water formerly flowed away without difficulty, in such a way as to expose the property of the plaintiff to an overflow, especially when the evidence shews that the sewer and the culvert which the city corporation has placed in the street are insufficient in the case of a heavy rain to receive the surface water.—In this case, it being necessary for the purpose of the action and on account of the particular condition of the *locus in quo*, to have a plan made by an expert and a statement of the damages suffered, the plaintiff is entitled to recover as part of his damages the fees of such expert.—Interest upon the amount awarded for damages runs from the date of the judicial demand. *Scanlan* v. *Montreal*, 17 Que. S. C. 363.

Acceptance — *Deposit of map—Acts of municipal corporation — Title by prescription — Character of possession — Obstruction of highway by building — Crown — Victoria Official Map Act, 1893 — Victoria Special Powers Act, 1907 — Construction —Compensation — Arbitrator — Mandamus*

—*Injunction — Declaratory judgment — Costs.*]—The defendants were the owners of a block of land in the city of Victoria, fronting on Lime street. About 23 years before action the defendants' predecessor in title built a lean-to on the south side of his building, stretching over a portion of Lime street, and this had been maintained ever since by him and the defendants. The territory which included Lime street was not taken into the city until 1892, and prior to that it was under the direct control of the Crown. In 1861 the "Nagle map" was deposited in the land registry office, under the provisions of s. 54 of c. 3 of the British Columbia Statutes of 1860, which enabled the registered owner of an absolute fee to subdivide his land for the purpose of selling the same in allotments, and deposit a map of the same, provided such map should exhibit all roads, streets, etc., set apart for public use. The lots owned by the defendants on Lime street were shewn upon this map. The southerly portion of Lime street had been used by the public to a limited extent to gain access to a railway, but the road was not graded nor was any public money expended upon it before being taken into the city limits; since then its use had been about the same as formerly; it was still ungraded; but the plaintiffs in 1894 constructed a surface drain along the street, and in 1895 erected and had since maintained poles on the street, carrying city electric light and fire alarm wires:—*Held*, that there was a dedication of the street by the depositing of the Nagle map, and an acceptance by the acts of the plaintiffs, if an acceptance was necessary in view of the fact that the defendants' lots were originally purchased under the Nagle map, which furnished the original description by which they were known, and in view of the provisions of the Victoria Official Map Act, 1893. — *Held*, also, that the defendants' claim to a title by prescription failed for want of time (20 years), as well as for want of possession of the necessary charter. The plaintiffs acquired a title only in 1892, before which the title was in the Crown, against whom a possession of 60 years would have to be shewn. The defendants' possession was of a very small portion of Lime street, was not an exclusive possession, and did not appear to have been under a claim of right — it might have been a mere indulgence. In order to acquire a title by prescription the possession must be an adverse one of such a character as to presuppose a grant. — *Held*, also, that, in face of the provisions of the Victoria Official Map Act, 1893, and the "Ralph map," deposited with the Registrar-General in 1894, shewing upon it Lime street, with the same boundaries that were shewn by the Nagle map, the defendants could not contend that they had any right to the use and occupation of Lime street.—Section 21 of that Act provided for a board of three arbitrators to fix, in case of disagreement, the amount of any compensation payable by the plaintiffs; and the plaintiffs asked in this action for a *mandamus* to compel the defendants to appoint an arbitrator under that section. By section 3 of the Victoria Special Powers Act, 1907, the legislature validated the Ralph map as an official map, and provided that ss. 13, 14, 15 and 21 of the former Act should apply to such map, and be binding on all persons affected thereby. But s. 3 went on to provide for the appointment of a sole arbitrator between the corporation and all persons affected.—*Held*, that the Act of 1907 substituted a sole arbitrator for the board of three arbitrators, and, a sole arbitrator having been appointed, there was no necessity for a *mandamus* in this action.—*Held*, also, that until the arbitrator had made his award and the plaintiffs had paid the defendants the compensation fixed, if any, the plaintiffs were not entitled to an injunction and *mandamus* in respect of the removal of the defendants' lean-to.—*Held*, however, that, as the defendants went to trial on the issues as to whether Lime street was a public highway and whether the plaintiffs' rights were barred by the Statute of Limitations, and all the evidence as directed to those issues, on which the defendants failed, they were not entitled to the costs of the action.—*Quære*, whether, in view of the principle enunciated in *London and North Western Rw. Co.* v. *Donellan*, [1898] 2 Q. B. 7, the Court had jurisdiction to deal with any of the matters in question before arbitration.—But, as the defendants had not raised that point, *held*, that the plaintiffs should have a declaration that the portion of Lime street lying between Mary and Catherine street was a public highway; this declaration not to hamper the proceedings or judgment of the arbitrator.—No order as to costs. *Victoria* v. *Silver Spring Brewery* (1910), 14 W. L. R. 626.

Acceptance by public — *User.*]—An action was brought by the corporation of the city of Toronto against the Grand Trunk Railway Company to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained their right of way. It appeared on the hearing that in 1850 the trustees of the general hospital conveyed land adjoining the street, describing it in the deed as the western boundary of allowance for road, and in another conveyance made in 1853 they mentioned in the description a street running south along said lot, being the street in question. Subsequent conveyances of the same land prior to 1857 also recognised the allowance for a road:—*Held*, Idington, J., dissenting, that the said conveyances were acts of dedication of the street as a public highway.—The first deed executed by the hospital trustees and a plan produced at the hearing shewed that the street extended across the railway track and down to the river Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.—*Held*, Idington, J., dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.—Judgment of the Court of Appeal in *Toronto* v. *Grand Trunk Rw. Co.*, 4 O. W. R. 491, reversing judgment of MacMahon, J., 2 O. W. R. 3, affirmed. *Grand Trunk Rw. Co.* v. *Toronto*, 26 C. L. T. 248, 37 S. C. R. 210.

Acquisition by municipality—*User—Opening — Fences.*] — Besides the modes

prescribed by the Municipal Code, municipalities may acquire lands for public roads; (1) by dedication or abandonment by the owner of the land with the object of opening and establishing a public road; (2) by user and public and continuous possession of such land as a road by the public during thirty years; (3) by the opening and user as such by the public of the whole road, without contestation of the right, for the space of ten years or more, according to the provisions of 18 V. c. 100, s. 40, s.-s. 9 (Q.) 2. Fences erected by the ancient proprietors fencing off a public road are recognised according to Quebec usages and presumed to have been established by such proprietors with the object of separating their properties from the road, and that in the interests of good administration and also with a view of protecting the crops and the property itself generally, and such fences will serve and aid considerably in determining the question of dedication. *Jones* v. *Asbestos*, 19 Que. S. C. 168.

Appeal—*Right of way — Dedication to public, and to private persons—Evidence.*] —In 1851 P. laid out a street, and in 1853 conveyed a building lot to defendant, and in 1854 laid off several new streets in the same block. Defendant removed a fence placed by plaintiff, a lessee of P.'s, across one of the new streets, and it was for doing so the action was brought. It was urged that the acts of P. amounted to a dedication of the public, and that, at all events, defendant had a right of way, as P.'s acts, as between him and his grantees, amounted to a dedication of a right of way to him:—*Held*, Peters, J., that there was no dedication to the public; also that, as defendant's deed was given before the street was laid off, there was no implied agreement between P. and defendant to grant him the right of way. *Callaghan* v. *Hobkirk* (1860), 1 P. E. I. R. 178.

Conditions in Crown grant — *Access to beach — Plan of subdivision—Destination by owner — Limitation of user—Long usage by public — Acquisitive prescription —Recitals in deeds — Cadastral plans, references, and notices — Evidence—Presumptions.*] — A strip of land, extending from a public road to the river St. Lawrence, formed part of a beach lot granted by the Crown, in 1854, on condition that, in case of subdivision into building lots, "a sufficient number of cross-streets shall be left open so as to afford easy communication between the public highroad, in rear of said beach lot, and low water mark in front thereof." Prior to 1865 the lot was subdivided, and on the plan of subdivision the strip of land was shewn as a lane or passage. Reference to this lane or passage was made in a deed of sale executed by the owner in 1865, and the cadastral plan of the municipality, made in 1879, for registration purposes shewed it as a public road. In 1881, in connection with the registration of charges on the land, the owner made a statutory declaration and gave a notice to the registrar of deeds as required by the "Cadastral Act," describing the strip of land in question as "a road 20 feet wide." It was also shewn that, during more than thirty years prior to the action, the strip of land had been used as a lane or passage by the general public:—*Held*, affirming the judgment appealed from, 17 Que. K. B. 60, Idington, J., dissenting, that these circumstances constituted complete, clear, and unequivocal evidence of the intention of the owners of the beach lot to dedicate the strip of land in question for the purposes of a public highway; that no formal acceptance of such dedication by the corporation of the municipality was necessary to render such dedication effective in favour of the general public; and that, even if there had originally been any limitation reserved as to the use thereof by a special class of persons only, it had become a public highway by reason of long user as such.—Although no right of ownership can be effected by cadastral plans, they must, in view of their publicity, be considered as having some probative effect in respect to persons having interests in the lands described therein. *Rhodes* v. *Perusse*, 41 S. C. R. 264, 6 E. L. R. 158.

Conduct — *Implication — Intention — Sale of lots — Description — Plan.*] — Dedication of land to the use of the public, as a road, is distinguished from conveyance by the fact that the latter is express and by title, and the former is implied in acts, which must, however, clearly disclose the intention of the owner. When such acts appear to be in execution of a condition under which the owner has acquired the whole property, they will bear out the inference more readily than if performed by an absolute owner, free to deal with his property as he chooses. Hence, the grantee under letters patent from the Crown of a beach lot, upon the condition that, if it be laid out for building lots, a sufficient number of cross-streets will be left open, etc., who (a) sells a lot bounded on a given side to a lane or passage of 20 feet, with the right of way over it to the purchaser in common with the neighbouring proprietors; (b) describes this 20-foot strip as a road, in a notice of renewal of registration, though he renews his registration simultaneously as to the land itself of which the strip is a part, and (c) sells half a dozen lots by the number given on a plan which has no numbering of the strip, and with the actual mention of the continuation of it as being a reserved road, will be held to have dedicated the strip to the use of the public as a road. — 2. When land is granted on the condition that if it be laid out for building lots, a road or roads will be left open, etc., the obligation arises as soon as any building lots are laid out and sold for which the roads may be required, and not only after the whole land granted has been so laid out and sold. *Rhodes* v. *Pérusse*, 17 Que. K. B. 60.

Evidence — By-law — Dedication — Statute labour — Municipal corporation. *Andrews* v. *Pakenham*, 4 O. W. R. 6.

Evidence — *Purchase of land by municipal corporation — Land becoming vested in Crown — Subsequent purchaser for value without notice — By-law—Registry laws.*] —When land is purchased by and conveyed to a municipality under the Municipal Act for a road, and thereafter dedicated and

used as a public highway, it becomes vested in the Crown by virtue of s. 622 of the Act, and a subsequent purchaser, although he bought without notice of the prior conveyance or of the existence of the road, and registered his deed before the registration of the deed to the municipality, acquires no title to the road as against the Crown, notwithstanding s. 68 of the Registry Act, R. S. M. 1902 c. 150, which does not apply to the Crown, and notwithstanding the failure of the municipality to register the by-law establishing the road, as required by s. 699 of the Municipal Act. — Such purchaser, therefore, has no title to complain of the registration of the deed to the municipality as a cloud on his title. *Pulkrabek* v. *Rural Municipality of Russell*, 8 W. L. R. 8, 18 Man. L. R. 26.

Failure to prove—*Private way—Profit à prendre — Seaweed — Custom — Prescription.*]—In an action for trespass the defendant alleged that he was going to the shore to gather seaweed, that there was a public way to the shore, and that because the plaintiff's fence was across the way he threw it down. The defendant also claimed a private way acquired by grant or prescription. The trial Judge found that there was no public way, and that the plaintiff had failed to establish a private way:—*Held*, that where the road in question was a mere cart road, not a thoroughfare, and there was not a public terminus at each end, and there was no statute labour performed on the road, strong evidence would be required to shew a dedication.—Seaweed deposited by the sea above high water mark, constitutes a *profit à prendre*, and the right to take it and pile it on the land of another could not become established, either by custom or prescription, in favour of the inhabitants of a district. *Ogilvie* v. *Crowell*, 40 N. S. R. 501.

Gift of land to municipality—*Conditions of gift — Non-fulfilment — Revocation —Action — Tender of money expended.*]—In an action for revocation of a gift of lands to a municipality for the purpose of opening certain streets, on the ground of the failure of the municipality to fulfil the obligations mentioned in the deed of gift, the defendants cannot demand the dismissal of the action because the plaintiff has not accompanied his action with a tender of the amount of disbursements made by the defendants upon these streets. *Lionais* v. *Lorimier*, 10 Que. P. R. 266.

Highway—Plan — Prescription — User —Railway — Estoppel. *Toronto* v. *Grand Trunk Rw. Co.*, 2 O. W. R. 3, 4 O. W. R. 491.

Highway laid out by private person —*Assumption for public user — Expenditure on sidewalk.*]—A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment had been duly made to the persons who built it:—*Held*, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII. c. 19 (O.). The purpose of s. 598 is to declare that certain classes of roads are public highways; and it has no bearing on the question whether an actual highway laid out by a private person has been assumed for public user. *Holland* v. *Township of York*, 24 C. L. T. 290, 7 O. L. R. 533, 3 O. W. R. 287.

Lease to municipality — Contract — Construction — Express restrictions—Exclusion of others — Forfeiture — Injunction. *University of Toronto* v. *Toronto*, 5 O. W. R. 504.

Maintenance — *Cost of work—Action to recover from land-owner — Work done by inspector — Evidence of inspector — Account — Report — Authorisation — Percentage.*]—It is the imperative duty of a municipal corporation and its officers to put its roads in good order without delay. 2. The testimony of the inspector who has done the work is a sufficient proof, if not contradicted, that the work has been executed, that the sum claimed is the value of it, that the formalities required have been followed, and that the defendant in an action to recover the cost of the work is the person bound by law to pay such cost. 3. It was not necessary to give the defendant in this case a municipal notice, she residing in England, nor to give notice to her agent, who resided at Quebec, inasmuch as no writing had been deposited at the office of the municipal council giving the address of the defendant or of her agent. 4. A road crossing the defendant's lots and other lots in the 4th range of Gosford having been for a great many years open and free to the public as a road in front of such lots, and being governed by a *procés-verbal* which declared such road to be the road in front of such lots and to be at the charge, as to its maintenance, summer and winter, of every land-owner in the 4th range whose land abutted thereon, should be maintained by the defendant as regards the part which crossed her lots, and there was no ground for an act of apportionment to execute such part of *procés-verbal*, for there were no works to apportion. 5. Even if there was need of any act of apportionment, in default of such an act, Art. 824, M. C., would apply until such act was made. 6. The inspector of roads himself did the work which the defendant should have done; he rendered an account for it without adding the statutory 20 per cent.; and he did the work without first having made the report required to the council and without the authorisation of the council. Later the plaintiff corporation paid the inspector the amount of his account without the 20 per cent.:—*Held*, that the corporation had a right to pay the amount of the account; in paying it, they paid the defendant's debt. (b) The corporation had an action against the defendant to recover what they had paid. (c) But they had not the right to recover the 20 per cent. from the defendant. (d) The corporation would have no right in their own behalf to the 20 per cent. except in cases falling under Arts.

399, 400, and 401, M. C. *Corp. de St. Raymond* v. *Prior*, 21 Que. S. C. 172.

Ownership of part not used—*Servitude — Litigious rights — Warranty.*] — The plaintiff, by petitory action, claimed the ownership of a strip of land, under the deed of purchase in 1897. It appeared that a street in the village of Hochelaga was opened in 1874 or 1875, and the width proposed was 100 feet. In 1884 the village of Hochelaga was annexed to the city of Montreal, and the city reduced the width of the proposed street from 100 feet to 60 feet, leaving a strip 40 feet wide which was not used, as originally contemplated, for street purposes. The question was, in whom did the ownership of the strip vest. The plaintiff relied upon her title by purchase from the parties who held the title prior to the proposed widening. The defendant called in her vendors, the Banque Jacques Cartier, in warranty, and also pleaded possession for over ten years. The defendant further pleaded to the action, alleging ownership; that the strip in question had formed part of Ontario street for more than ten years; that when the width of the street was, in 1887, reduced to 60 feet, the excess, 40 feet, reverted to her as the adjoining proprietor, and that the defendant had ever since been in possession. To the action in warranty the defendants in warranty pleaded that, when they bought the property subsequently sold to the principal defendant, it was bounded in front by the proposed street, and that the subsequent action of the city in reducing the width to sixty feet could not make them liable to an action in warranty:—*Held* (in the principal action):—1. That when the width of the street was reduced, the possession of the forty feet deducted reverted to the parties who owned the land before the improvement was projected, viz., in this case, the plaintiff's auteurs, and that the title on which the plaintiff rested existed at the date of the sale by the bank to the defendant. 2. The special laws and usages applicable to the dedication of streets can only be resorted to where it is proved that the owner has, in fact, voluntarily and gratuitously abandoned his property to the public use. Otherwise, the principle that no servitude can be established without a title governs. 3. The plea of litigious rights cannot avail the defendant unless the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it, be tendered with such plea (Art. 1582, C. C.). 4. The defendants in warranty, having sold the land in question to the principal defendant, *sous les garanties de droit*, as fronting on the street, whereas, at date of the sale, a strip of forty feet wide intervened, were liable for the damages thereby occasioned to the principal defendant. *Gauthier* v. *Monarque*, 19 Que. S. C. 93.

Plan—*Crown — Obstruction — Nuisance —Injunction.*] — The defendants, claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on claims of himself and his assigns, registered an old trail; the original squatter subsequently, in expectation of the Crown recognising the claims of himself and his assigns, registered a plan of the entire land, wherein was shewn a highway approximately conforming to the lines of the old trail, but so that the building in question projected into the highway shewn on the plan. The Crown did, afterwards, grant a patent to the original squatter for the entire land, excepting the portions shewn on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others, respectively:—*Held*, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the public the highway as shewn thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shewn on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the nuisance. — *Held*, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance. *Edmonton* v. *Brown*, 1 Terr. L. R. 454, 23 S. C. R. 308, 27 S. C. R. 510n

Plan — Evidence — Title — Onus —Statutes — Lien for improvements—Municipal corporation. *Watson* v. *Kincardine*, 11 O. W. R. 669.

Plan—*Municipal corporations—Expenditure.*]—The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of sub-division of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down, and one owner fenced his land so as to leave twenty feet of the lot open to the public, but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway:—*Held*, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after the expenditure of public money upon it and its user by the public, retract the dedication of the twenty-foot strip. Judgment of Boyd, C., 31 O. R. 499, 20 C. L. T. 101, affirmed. *Pedlow* v. *Renfrew*, 20 C. L. T. 451, 27 A. R. 611.

Plan—*Opening and laying out — Sidewalks — User — Selling lots — Acceptance by public and municipality.*] — Dedication of a road in a municipality as a public street or road is sufficiently established by the following facts:—1, registration by the proprietor of a sub-division plan, and deposit of book of reference, on which the road is indicated and described as a street or road; 2, the opening and laying out of the land by the proprietor as a street, and the placing of sidewalks thereon; 3, the free and uninterrupted use of the street by the public for more than ten years; 4, ex-

ploiting of the adjacent land by the proprietor and selling lots as bounded by a public street; 5, use of the street by the public as the only direct access to the railway station; 6, acceptance of the dedication by the public and the municipality — the uninterrupted use of the street being a sufficient acceptance. *Shorey* v. *Cook*, 26 Que. S. C. 203.

Plan—*Other acts—Servitude—Violation.*]—The proprietors of certain land prepared an official subdivision plan of the property, divding it into lots and tracing a street thereon. They registered this plan as the official plan, and sold lots described as fronting on the street indicated on the plan. They also constructed a sidewalk along the street, and permitted the public to pass freely without objection. They also petitioned the municipal council to annex the property in accordance with the plan, which petition was granted:—*Held*, that there was a valid dedication of the property as a public street. 2, In any case, the acts above mentioned constituted at least a servitude of right of way over and through the property, in favour of the purchasers of lots described as fronting on such street, and the erection of platforms thereon was an illegal obstruction, and a violation of the servitude. *Geoffrion* v. *Montreal Park and Island Rw. Co.*, 20 Que. S. C. 559.

Plan—*Registration before incorporation.*]—A plan shewing the *locus in quo* as a street was made and filed before, but practically contemporaneously with, the locality being set apart as an incorporated village, the former being on the 3rd June, 1873, the latter on the 25th June, 1873. Lots were first sold under the plan in 1876. Subsequent legislation, which was retroactive, declared that allowances for roads laid out in cities, towns, and villages, fronting upon which lots had been sold, should be public highways:—*Held*, that the road in question was a public highway and subject to the jurisdiction of the municipality. *McGregor* v. *Watford*, 13 O. L. R. 10, 8 O. W. R. 479.

Plan.] — The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shewn a strip 33 feet in width, running along one side of the lot. The plaintiff alleged that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction. On the evidence, the Court found for the plaintiff and gave judgment accordingly. *Daly* v. *Robertson*, 1 Terr. L. R. 427.

Plan of survey—*Lots sold according to plan — Establishment of highways — Estoppel — Obstruction — Injunction.*]—Action for a declaration that certain streets laid down upon a plan of a subdivision of the township of Hay, which was duly registered, were public highways, and to restrain defendant Bissonnette from occupying or obstructing the same. At trial Clute, J. (14 O. W. R. 279), *held*, that there should be judgment for plaintiffs declaring that the said highways were public, and that the defendant be restrained from occupying or obstructing the same, and be ordered to go out of possession and to remove all obstructions therefrom. An appeal to the Divisional Court was dismissed with costs. *Hay* v. *Bissonnette* (1909), 14 O. W. R. 1231, 1 O. W. N. 287.

Presumption — *User—Closing up road—Municipal corporation.*]—A road originally opened as a private road on private property will not be presumed to have become a public road in the possession of the municipality in which it lies, merely because the owner has allowed the public the use of it for 6 years without objection. The municipal corporation cannot therefore proceed *en complainte* against the owner who closes the road. *Onslow* v. *McGough*, 30 Que. S. C. 256.

Private person—*Necessity for writing—Plan — Registration — Priorities — Rights of creditors.*]—The indication of a proposed street upon the official homologated plan of a city is not equivalent to the writing required by Art. 551, C. C., for the creation of a servitude *par destination du père de famille*; such dedication must be by writing and not otherwise. 2. The homologation of such plan does not give a title to the property; such title can be acquired only by expropriation, compulsory or voluntary. 3. A servitude created *par destination du père de famille* is effective as against third persons only by registration indicating the lands subject to the servitude, in conformity with Art. 2168, C. C., and is not valid as against claims previously registered. 4. In this case the claim of the petitioner was already registered at the time of the creation of the pretended servitude, and the city of Montreal not having carried out its project for the extension of Hutchinson street, the petitioner had a right to require that the land should be sold in insolvency proceedings to satisfy his claim. *In re Thomson, Hatton, and Lafond*, 19 Que. S. C. 329.

Province of Quebec — *Foreshore — Grant by Crown — Jus publicum — User—Prescriptive right.*] — The question for decision is whether a small strip of land in Levis is a public highway. The Supreme Court of Canada holds that the evidence shewed an intention to dedicate it to the public. It need not be accepted by the municipal corporation, the dedication being to the public. *Rhodes* v. *Perusse*, 6 E. L. R. 158.

Public highway — Private way — Removal of obstruction — Injunction—Mandatory order — Parties — Attorney-General—Consent. *Scott* v. *Barron*, 2 O. W. R. 124.

Public user — *Crown lands — Acquiescence of locatee and equitable owner—Subsequent grant without reservation of way—Rights of public — Continuous user for 70 years.*]—In 1834 an order of the Quarter Sessions was made for the opening of a highway from the township of Percy through several lots in the township of Seymour. One of the lots had been recently occupied under a location ticket by the ancestor of the plaintiff, but the title to it was still in the Crown. The road described in the order

of the Sessions was never opened, but another road, following the same general direction, was opened across this lot and the others, in 1835 or 1836, and from the time it was opened was regularly travelled and used as a highway. The title to the lot in question remained in the Crown until 1904, when the plaintiff, claiming as successor in title to the original locatee, obtained a patent for it, in which no reservation or mention of any road was made. It was quite plain that the plaintiff and his predecessors had acquiesced in the user of the road, but it was contended that there was no dedication by the Crown, and that the acts of the locatee before the patent were not binding upon him after its issue. Street, J.:—"From the time the road was laid out, between 60 and 70 years ago, it has been a recognised, well travelled public highway, connecting locally important centres, fenced off from the farm in question, improved from time to time by statute labour and public money, and treated by the plaintiff and his predecessors in the equitable title to the farm as being an undoubted public highway. In these circumstances, there is evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a Sessions order was made for the establishing of a highway, but never acted upon, and abandoned at once, is no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication." *Fraser* v. *Diamond*, 25 C. L. T. 218, 5 O. W. R. 436, 10 O. L. R. 90.

Survey — Plan — Evidence — Title — Onus — Statutes — Lien for improvements — Municipal corporation — Rights of public. *Watson* v. *Kincardine*, 13 O. W. R. 327.

Title.] — Plaintiff failing to shew that party to whom he claimed had title to certain lands, and evidence shewing dedication by that party to public use, although prior to incorporation of the town in which these lands were situated, an appeal was dismissed. *Watson* v. *Kincardine*, 13 O. W. R. 327.

Trail—*Crown land — User — Squatter's right—Patent — Reservation — Arbitration and award—Estoppel—Trial — Judge's findings—Appeal—Inferences of fact.*] — The Edmonton settlement was surveyed by the Dominion government in 1882. At that time there were numbers of persons in occupation of different parcels of the land forming the settlement. McD. was in occupation of the parcel shewn on the government plan of survey as river lot 8, and had been so for some years previously. McD.'s rights as a "squatter" under the Dominion Lands Act, R. S. C. 1886 c. 54, s. 33, were recognized by the government, and he was given a right to purchase the lot outright at $1 an acre. He exercised this right, and a patent was eventually issued to him, on the 30th September, 1889. It appeared that at the date of the survey there were two well defined trails crossing the lot, and that both had been used as public roads for a period of more than 20 years previous to the attempted closing by McD.'s successor in title of the trail in question in this action—the southerly trail of the two above mentioned. *Per* Scott, J.:—The fact that the patentee before the issue of patent never interfered with the user by the public of the trails crossing the lot, or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no legal right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent. The patent contained the following words: "Reserving thereout the public road or trail one chain in width crossing the said lot:"—Scott, J., *held* that this reservation was not void for uncertainty, but that the defendants, upon whom the onus of proof lay, had failed to shew that the trail in question was that one of the two trails which was intended by the reservation. In the year 1894 the defendant municipality expropriated a part of river lot 8. McD. was then the owner of the portion expropriated. The plaintiff represented McD. on the arbitration proceedings. Upon the arbitration it was material that the arbitrators in order to arrive at the amount of the compensation should ascertain whether the trail in question was a highway. His counsel contended that it was a highway. The award found that it was a highway. Scott, J., held that the plaintiff was estopped from denying that the trail in question was a highway. On appeal, Richardson and Wetmore, JJ., *held*, that, taking into account all the facts, and applying the principles laid down in *Turner* v. *Walsh*, 6 App. Cas. 636, a dedication of the trail in question ought to be presumed, and on this ground agreed in dismissing the appeal. Rouleau, J., dissented, and was of opinion that the appeal should be allowed. Section 59 of the Judicature Ordinance, 1893, provides, amongst other things, that the Court on appeal "shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require:"—*Per* Wetmore, J.:—The exercise of these powers is discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence, if the weight of testimony is manifestly in favour of the finding. Where such is the case, however, the legislature intends that the Court shall dispose of the case without sending it back for a new trial. *Heiminck* v. *Edmonton*, 2 Terr. L. R. 462. (Reversed, 28 S. C. R. 501.)

Trespass — Road—Survey — By-law — Notices—Presumption — Public user — Expenditure of public money — Statute labour —Acquiescence by owners—Temporary closing — Fences — Injunction — Declaration. *Elmsley South* v. *Miller*, 6 O. W. R. 726.

User—*Plan — Deed — Estoppel — Evidence.*]—In an action for obstructing a highway there was conflicting evidence as to its location and user by the public. In support of the defendants' title a lease and an assignment thereof were produced, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be. Neither the lease nor the assignment made any reference to the plans. The defendants' evidence shewed the highway as actually used in a location differing

from that shewn by the plans. The jury found in favour of the defendants, both as to location and user. The trial Judge held that, as the deeds and plans must be read together, the defendants were estopped from disputing the location of the highway, and, disregarding the findings of the jury as to its location and user, ordered a verdict to be entered for the plaintiffs:—*Held*, that the verdict was properly so entered. *Woodstock Woollen Mills Co.* v. *Moore*, 34 N. B. R. 475. Reversed *Moore* v. *Woodstock, &c., Co.*, 19 C. L. T. 301, 29 S. C. R. 627.

User by public — *Action — Parties—Attorney-General — Municipal corporation—Ownership in fee.*]—In an action for a declaration that a portion of the River road lying between Burgar and Dorothy streets, in the town of Welland, was not a highway, but the private property of the plaintiffs, it appeared that the road had been continuously travelled by the public since the district was first settled, and that in 1855 B., the plaintiffs' predecessor in title, as owner of the lands adjoining this portion of the road, agreed with the municipal corporation, the township in which these properties were then situate, to dedicate to the public as highways and to open up for traffic Burgar and Dorothy streets, and, in consideration of his doing so, the corporation agreed to close up and convey to him the portion of the River road in question. For this purpose a by-law was passed, admitted by the defendants to be legal and sufficient, and a conveyance to B. was duly executed, which, as admitted, vested the fee in him:—*Held*, that if a highway now existed, it must be by virtue of an express or implied dedication by the owner since 1855; and, as such private dedication would vest in the municipality not merely the surface, but the soil and freehold of the highway, it was unnecessary for the purposes of the present action that the Attorney-General should be added as a party.—The by-law enacted that B. should have the right to close up the road as soon as Burgar and Dorothy streets should be opened for public use and travel. Until 1873 or 1874 Burgar street was unfit for use as a public highway, and the public continued to use the River road, and even after Burgar street was opened and used the user of the portion of the River road in question continued, and no attempt was made at any time to close it; the public continuously used it without objection, and public money was spent upon it from time to time:—*Held*, following *Mytton* v. *Duck*, 26 U. C. R. 61, that, even if the user for the first 18 years should not be taken into account, because of the special clause in the by-law of 1855, there had been, since the right to close became absolute, 32 or 33 years of uninterrupted user before the bringing of this action, sufficient to establish conclusively a dedication. *Macoomb* v. *Welland*, 12 O. L. R. 362, 7 O. W. R. 876.

Divisional Court reversed above judgment of Anglin, J., holding that the evidence did not establish dedication, and that the plaintiffs were entitled to succeed.—*Held*, also, that the Attorney-General was not a necessary party. *Macoomb* v. *Welland*, 9 O. W. R. 143, 13 O. L. R. 335.

See CROWN — MINES AND MINERALS — NUISANCE—RAILWAY,

3. EXTENSION.

Expense of widening street—*Contribution of land-owners—Apportionment.*] — *Held*, reversing the judgment in 15 Que. S. C. 43, that 57 V. c. 76 (Q.) having enacted that the cost of the expropriation for the widening of Notre-Dame street, in the city of Montreal, should be paid in the proportion of five-eighths by the city of Montreal and of three-eighths by the owners of property abutting on the street, the commissioners should apportion the amount equally upon the two sides of the street, and should not take into account the benefit to the owners by the widening in such a way as to increase the contribution of one side of the street. *Bélanger* v. *Montreal*, 9 Que. Q. B. 142.

Expropriation — *Compensation.*]—The city of Montreal had made and adopted a plan indicating a strip of land belonging to the appellant which was needed for the widening of a street. The respondent asked the city to expropriate in conformity with the plan, and moved back his fence to the new line. The city began expropriation proceedings, and, without waiting longer, the inspector, with the assent of the street commissioner, took possession of the strip in question, laid down the pavement according to the new line, and incorporated the strip into the street. The expropriation proceedings were afterwards abandoned in consequence of a subsequent statute which allowed the city to abandon such proceedings, saving the owners' recourse for damages:—*Held*, that, under the circumstances, the respondent could claim from the city the value of the land of which possession had thus been taken. *Montreal* v. *Hogan*, 8 Que. Q. B. 534.

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4. MAINTENANCE OF HIGHWAYS.

Bridge — *Maintenance — Collapse when traction engine passing over it—Engine used for threshing—R. S. O. 1897, c. 242, s. 10—Amending Acts, 3 Edw. VII. c. 7, s. 43, and 4 Edw. VII., c. 10, s. 60—Municipal Act, 1903, s. 606 — Ordinary traffic—Interpretation of statutes—Imperative or directory — Condition precedent.*]—Action for damages for negligence on part of defendants in maintaining a bridge over a river which broke down when plaintiff's traction engine, used for threshing purposes, was crossing, letting the engine down to the water and injuring it. The traction engine weighed about 7 tons:—*Held*, that under the second amending Act above it is a condition precedent for the one in charge of the engine to lay down planks on the bridge before crossing, as required in the proviso in said last mentioned Act, and as plaintiff had not done this, action dismissed. *Pattison* v. *Wainfleet* (1902), 1 O. W. R. 407, discussed. Judgment of Anglin, J., and a Divisional Court reversed. *Goodison* v. *McNab* (1909), 14 O. W. R. 25, 19 O. L. R. 188.

Bridges between municipalities.] — When a bridge is situated between two local municipalities, both of which are in the same county, it is a local bridge and is under the control of the county council. Consequently, the Board of Delegates ex-

ceeded its powers by approving of a report which placed the bridge under the care of one of such municipalities. A county council can approve of a report fixing the respective contribution to the up-keep of a bridge situated between several municipalities within the county, and may put the expense of building and of looking after such a bridge upon three of such municipalities, although there has existed for 30 years another report, approved by the Board of Delegates, declaring the bridge to be a local bridge and entrusting it to one municipality alone, without having the former report set aside by the Courts, if the former Board of Delegates were without jurisdiction and acted *ultra vires*. M. C. 754, 755, 757, 758, 759, 760, 810, 810a, 851, 858, 878. *Beauharnois* v. *Senecal*, 16 R. L. n. s. 122.

Collapse when traction engine passing over—Engine used for threshing—Act to authorise and regulate the use of traction engines on highways, R. S. Q. 1897 c. 242, s. 10—Amending Acts, 3 Edw. VII. c. 7, s. 43, and 4 Edw. VII. c. 10, s. 60—Municipal Act, 1903 s. 606—"Ordinary traffic"—Liability of municipality—Negligence—Interpretation of statutes—Imperative or directory—Use of planks to strengthen bridge—Condition precedent—Liability of owner of engine for injury to bridge. *Goodison Thresher Co.* v. *McNab*, 14 Q. W. R. 25.

County Councils cannot order that a road respecting which a *procès-verbal* is made, be maintained by each municipality through which it passes. *Beaudet* v. *Leclercville* (1910), 38 Que. S. C. 77.

County road—*Cost of repairs—Owners of lands.*]—A county road being under the control of the county municipality, the local municipality in which it lies has no power to repair it and no right to recover the cost of such repairs from persons in default.—The owner of a lot under 30 arpents in depth is not liable for the maintenance in repair of more than one front road. *Corporation of Parish of Ste. Marthe* v. *Leblanc*, 31 Que. S. C. 193.

County road—*Liability of county corporation — Procès-verbal and sentence of homologation.*]—Where a *procès-verbal* provides that the maintenance of a road shall be at the charge of a group of ratepayers of a local municipality, and the sentence of homologation at the same time declares it a county road, under the direction of the county corporation, the latter will be obliged to carry out the provisions of the *procès-verbal*, and levy the cost of such maintenance directly from the ratepayers in the manner provided by Art. 941, C. M., without having recourse to the intervention of the local municipality in which the road is situated. *County of St. John* v. *Corp. of St. Jacques-Le-Mineur*, 14 Que. K. B. 343.

County road — *Local municipalities — Maintenance.*]—A road situated partly in one municipality and partly in another is a county road, even when it extends only a few feet into one of the municipalities.—The county council cannot declare such a road to be local and put it in the charge of the municipality in which the greater part lies, especially when it has not divided the road so as to put under the control of each municipality the part lying therein. *Rocan* v. *Corporation de St. Vincent de Paul*, 16 Que. S. C. 379.

Location of road — *Statute — Rights under.*]—The town of Longueuil was obliged, by the terms of its charter, to open and maintain during the winter a road upon the river St. Lawrence to communicate with the city of Montreal, the cost thereof to be borne one-half by the city, three-eighths by the county, and one-eighth by the town:—*Held*, that the town alone had the right to localize the road and fix the terminus of it in the city of Montreal. *Longueuil* v. *Montreal*, 16 Que. S. C. 351.

Lots and ranges—*Liability of ratepayers—Depth of lots.*]—1. There is nothing in the statutes providing that a range shall only be 30 arpents deep. All that the law enacts is that a ratepayer is not bound to keep in repair in respect of the same land, to a depth of 30 arpents, more than one front road, and that too in a case in which the front road is not regulated by a *procès-verbal* or a by-law.—2. The law does not limit the extent of the land nor the number of lots which are comprised in a range. It simply says that where lots adjoin each other and border on the same line, the lots of the second range shall border on the same line; and the fact that the depth of one range is more considerable than that of others does not constitute a sufficient reason to justify the Court in relieving the ratepayers from the maintenance of the road. *Goulet* v. *Corporation de Ste. Anne*, 35 Que. S. C. 289.

Municipal corporations charged with maintenance of a road cannot make any exceptions other than those mentioned in Art. 535 M. C., therefore a road built by the government and handed over to a municipality must be maintained under the conditions existing when it was built, viz., the frontage proprietors must, for due indemnity received, keep the fences bordering on the road in good condition in perpetuity. *Carden* v. *St. Michel* (1909), 38 Que. S. C. 42.

Notice of meeting of ratepayers — *Uncertainty as to place — Procès-verbal — Homologation—Ratepayers — Oppression — Quashing.*]—A public notice by a special superintendent of a meeting of interested ratepayers, under Art. 796, M. C., that it will be held upon the ground in the said road, the length of the latter being 4 or 5 miles, is void for uncertainty of place.—A *procès-verbal* and report deposited for homologation by a special superintendent must shew on their face that all the formalities required by law were duly complied with. A *procès-verbal* will be declared void after homologation when the report does not shew that the notice for convening the meeting of the interested ratepayers was given and published 7 clear days before the day appointed therefor.—A *procès-verbal* which imposes the maintenance of a front road on the owners of parcels of land of 30 arpents or less in width, who already have one to maintain, is null and void.—A *procès-verbal* which imposes the maintenance of a front road on the ratepayers, so that the portion of each is longer than twice the width of his land, is null and void. — A *procès-verbal* which lays the maintenance of a road on

ratepayers who have little or no use for it, and which is necessary and almost essential to other ratepayers of a different range of the municipality, as an outlet, and who are not made to contribute to it, is unjust and oppressive, and the Court will quash it as such at the suit of the parties interested. *Beauchemin* v. *Roxton*, 31 Que. S. C. 86.

Owner in default—*Works done by the municipality for him — Damages arising therefrom.*]—The owner failing to maintain the road in front of his property has no recourse against the municipality for slight damages caused to his land by the works he finds himself forced to do in its place. *Salois* v. *St. Francois du Lac* (1909), 36 Que. S. C. 69.

Powers of municipal councils — *Amendment of procès-verbaux by by-law—Fences and ditches — Maintenance of two roads at expense of same locality—Remedy of land owner—Intervention of Court.*]—1. The appointment of a special superintendent and visiting the places in question are not required for the passing of by-laws which amend *procès-verbaux*.—2. Art. 774, C. M., bearing upon the fencing and ditching of roads in front, is for the purpose of cases where it is not otherwise provided for, and municipal councils have the power to depart from it by by-law or *procès-verbal*.—3.—A by-law which has the effect, when establishing a road in front, of charging more than one road upon owners of land of more than 30 arpents deep, is not void on that account. These owners may require the new road to be maintained as a route, as regards the part with which they are charged, and, in default of a declaration to this effect, they are only bound to do work upon the road nearest their place of abode: Art. 825, C. M. —4. The Courts should intervene to restrain the exercise of the discretionary powers of municipal councils only in the case of injustice or manifest illegality. *Blanchard* v. *Corporation of the Parish of St. David*, 35 Que. S. C. 277.

Powers of special superintendent — *Municipal by-law—Uncertainty.*]—A special superintendent has no powers other than those which have been conferred upon him by the council, and everything which he does going beyond the instructions of the council is void.—A by-law which enacts that a road shall be laid out, and maintained in future, at the expense of certain contributories, without saying in what manner it shall be so opened and laid out, is too vague and will be declared illegal. *Piché* v. *Portneuf*, 17 Que. S. C. 131.

Road opened to public across land proposed to be divided into lots and leading to a railway station—*Maintenance of such road before allotment of lots—M. C. 763, 822, 824, 829.*]—A road opened by adjoining proprietors across land proposed to be divided into lots, and leading to a railway station, and open to public for over ten years, and which Courts have declared to be a front road, is a road under control of the corporation. Such road can no longer be closed, and the corporation is bound to see to its maintenance as a front road, and pending the dividing up of the land into lots, the maintenance of such road falls upon the proprietors fronting thereon. *Pt. Claire* v. *Cooke* (1906), 16 Que. R. de J. 324.

Street railways — Negligence—Contributory negligence — Municipal corporation. *Marsh* v. *Hamilton*, 2 O. W. R. 480.

Township—*Appeal to county council—Petition for mandamus—Action—Pleading—Amendment—Costs.*]—A petition for a writ of *mandamus* to force a township corporation to open a road and expend annually a certain sum of money thereon in accordance with a resolution of the county council is sufficient in law, although it does not state that any public notice of the appeal to the county council was given, where it does not appear that the respondent had acquiesced in the appeal to the county council, and had been represented for that purpose and heard on the merits thereof.—If a municipal corporation has seven years to open and complete a road, and is bound to expend thereon a certain sum annually, an action may be taken to compel it to do so after one year.—In such case it is not necessary for the plaintiff to allege that the sum would be sufficient, if expended, to pay any indemnity which might be payable for land damages in connection with the road.—If a party moves to amend his pleading after an inscription in law has been made, and the party inscribing persists in his inscription, for reasons not covered by the amendment and afterwards held to be unfounded, no costs will be granted either on the inscription in law or on the motion to amend. *Young* v. *Hereford*, 2 Que. P. R. 481.

Township corporation—Bridge — Notice of accident — Damages. *McInnes* v. *Egremont*, 2 O. W. R. 382, 5 O. L. R. 713.

Village roads are front roads and county council cannot by *procès-verbal*, order their maintenance. *Beaudet* v. *Leclercville* (1910), 38 Que. S. C. 77.

See MUNICIPAL CORPORATIONS.

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5. NON-REPAIR OF HIGHWAY.

Accumulation of ice — Negligence of owner of building—Climatic changes — Injury to pedestrian—Liability. *Malsolm* v. *Brantford Street Rw. Co.*, 4 O. W. R. 249.

Accumulation of snow — Liability of township corporation. *Hogg* v. *Brooke*, 1 O. W. R. 568, 2 O. W. R. 139.

Action against municipal corporation—*Pleading—Costs.*]—A municipal corporation sued for injury arising from the bad condition of their roads, and who plead that their roads were kept in good repair, will, nevertheless, be ordered to pay their own costs if the evidence shews that such roads were in bad condition, although the plaintiff's action is dismissed on another ground. *Lauzon* v. *Corporation du Canton la Minerve*, 9 Que. P. R. 255.

Action by ratepayers to compel township to repair certain highway dismissed with costs. *Boullete* v. *North Tilbury* (1910), 1 O. W. N. 623.

Acts of wrong-doers — *Relief over.*]—A highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road in order to afford a passage across it:—*Held*, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants. *Holland* v. *York*, 24 C. L. T. 290, 7 O. L. R. 533, 3 O. W. R. 287.

Approach to railway crossing — *Fence—Municipal corporation.*]—By s. 611 of the Municipal Act, R. S. O. 1897 c. 223, first introduced in 1896, no liability is now imposed on a municipal corporation by reason of want of repair of railway crossings through there being too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Dominion Railway Act, 51 V. c. 29, imposed on the railway company. Where, therefore, under s. 186, the approach to a railway crossing must not be more than one foot rise or fall for every twenty feet of the horizontal length of such approach, unless a good and sufficient fence shall be made by the railway company on each side thereof, and in this case the grade line was four feet without any fences, the municipal corporation was held relieved from liability to a person who was injured. *Holden* v. *Yarmouth*, 23 C. L. T. 181, 5 O. L. R. 579, 1 O. W. R. 557, 2 O. W. R. 130.

Bridge—*Absence of railing — Negligence by municipality—Notice of accident — Requirements of—Mistake in date—Damages.*]—Actions for damages sustained by plaintiff, who was crossing a bridge in the defendants' township during a thunderstorm between 9 and 10 o'clock at night on the 6th May, 1902, when a sudden flash of lightning caused his horse to swerve, and the horse's foot went into a gap in the logs of which the bridge was constructed, close to the edge of the bridge, and, there being no railing at the side of the bridge, they all fell over into the water, which was within 18 inches of the bottom of the bridge, and the plaintiff sustained injury. On the 26th May the plaintiff gave notice to the defendants of the accident as having occurred on the 7th May, instead of on the 6th May, describing the circumstances and stating it was during a thunderstorm, and also that he had rescued his horse by the aid of a certain neighbour, whom he named:—*Held*, that the cause of the accident as a matter of law and fact was the negligence of the defendants in not providing the bridge with a proper railing, and that the thunderstorm was one of those ordinary dangers which ought to have been provided against, and that the notice given to the defendants was sufficient within s.-s. 3 of s. 606 of the Municipal Act, and the defendants were liable, and the damages ($200) were not excessive. *McInnes* v. *Egremont*, 23 C. L. T. 193, 5 O. L. R. 713, 2 O. W. R. 382.

Bridge—Injury to infant playing—Notice to public that bridge not safe. *Farrell* v. *Grand Trunk Rw. Co.*, 2 O. W. R. 85.

Bridge—*Threshing engine—Traction engine.*]—An engine used for the purpose of operating a thresher or grain separator, is not a "traction engine" within the meaning of R. S. O. 1897 c. 242; and a municipality is bound to keep its bridges in such a condition that they will bear the weight of such an engine. *Pattison* v. *Wainfleet*, 22 C. L. T. 364.

Bridge across ditch—Defective condition—Misfeasance — Nuisance—Injury to person. *Rogrs* v. *Petrolia*, 2 O. W. R. 709.

Bridge carried away by flood — *Negligence of municipality to replace—Special damage to land-owner — Continuing cause of action — Damages — Mandamus — Remedy by indictment — Costs.*] — 1. A private individual who suffers special damage caused by the neglect of a municipal council to replace a bridge on a public highway that had been carried away by a flood, is entitled to recover for such damages in an action against the municipality under s. 667 of the Municipal Act, R. S. M. 1902 c. 116. *Iveson* v. *Moore*, 1 Ld. Raym. 495, followed. —2. A *mandamus* to replace the bridge should not be granted in such a case, as there is another adequate remedy, viz., to proceed by indictment, but the refusal of the *mandamus* should be without prejudice to the plaintiff's right so to proceed.—3. Under s.-s. (b) of above section the plaintiff's claim for damages should be limited to such as he had suffered since one month prior to the service of his notice of action on the municipality.—4. The cause of action being a continuing one, the damages should, under Rule 566 of the King's Bench Act, be assessed up to the date of the delivery of the judgment.—5. It is proper to bring such an action in the Court of King's Bench, even if the damages allowed should be within the jurisdiction of a County Court, and the plaintiff should have full costs. *Noble* v. *Turtle Mountain*, 15 Man. L. R. 514, 2 W. L. R. 144.

Cause of injury—Finding of trial Judge —Appeal. *Anderson* v. *Toronto*, 4 O. W. R. 485.

Chemins de tolerance—*Non-repair — Liability of municipality.*]—Rural municipal corporations are responsible for accidents caused to persons by the bad condition of roads of sufferance, become municipal roads by the terms of Art. 749 of the Municipal Code. *Lalongé dit Gascon* v. *Parish of St. Vincent de Paul*, 27 Que. S. C. 218.

Children playing in street — *Lord Campbell's Act — Damages.*]—Children are entitled to play upon highways where there is no prohibitory local law, and where their presence is not prejudicial to the ordinary user for traffic and passage, and municipal corporations are bound to keep them in repair, and are responsible for damages sustained by any person by reason of default in so doing. Constitution and characteristics of highways and streets in England and Canada compared. In an action under Lord Campbell's Act by a parent for the death

of his child by the negligence of the defendant, it is not necessary to shew that any pecuniary benefit has been actually received; but such a reasonable and well founded expectation of pecuniary benefit as can be estimated in money, and so become the subject of damages, is sufficient. Judgment in 31 O. R. 180, 19 C. L. T. 390, reversed. *Ricketts* v. *Markdale*, 20 C. L. T. 115, 31 O. R. 610.

City of Calgary — *Special charter — Municipal Ordinance — Nonfeasance— Duty to repair.*]—The provisions of the Municipal Ordinances in force in 1893 or subsequently, relating to the repair of sidewalks, etc., are not applicable to the city of Calgary, although not expressly declared inapplicable by the special Ordinance incorporating the city which was passed in that year.—Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair. *Clark* v. *Calgary*, 5 W. L. R. 292, 6 W. L. R. 622, 6 Terr. L. R. 309.

Condition of sidewalk during construction work. *Belleisle* v. *Town of Hawkesbury*, 4 O. W. R. 271.

Contributory negligence — Knowledge of non-repair—Reasonable care. *Galloway* v. *Sarnia*, 3 O. W. R. 361.

County Corporation—Railway company —Relief over — Proximate cause. *Summers* v. *York*, 2 O. W. R. 381, 1 O. W. R. 137.

Dangerous condition—Wall and ditch —Injury to person — Misfeasance — Want of guard — Contributory negligence — Liability of municipality. *Dickson* v. *Haldimand*, 2 O. W. R. 969.

Death — Action by widow—Negligence of municipal corporation — Dangerous condition of highway — Proximate cause—Contributory negligence — Damages. *Boyle* v. *Guelph*, 3 O. W. R. 322, 4 O. W. R. 220.

Death caused by—Municipal corporation —Negligence — Proximate cause — Contributory negligence. *Gaby* v. *Toronto*, 1 O. W. R. 440, 606, 635, 711.

Defect in roadway — Weather conditions — Exceptional circumstances. *Cochrane* v. *Hamilton*, 3 O. W. R. 739.

Ditch dug in highway — Neglect to guard — Municipal corporation —Independent contractors — Liability for negligence — Misfeasance — Nonfeasance — Horses falling into ditch — Contributory negligence of drivers — Right of owner of horses to recover — Bailor and bailee. *McGillivray* v. *Moose Jaw* (N.W.P.), 6 W. L. R. 108.

Excavation—Want of guard—Construction of public works — Liability of contractors — Municipal corporation — Negligence — Dangerous place — Absence of warning — Contributory negligence. *Vassar* v. *Brown*, *Finn* v. *Brown*, 3 O. W. R. 6, 4 O. W. R. 490.

Failure of municipality to remove snow—*Negligence — Agreement with street railway company — Breach — Liability.*]—A railway company acquired a street railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran, as provided by s. 10 of 50 V. c. 33 (N.B.), and also the obligation of removing the snow and ice as provided by s. 10 of 55 V. c. 29. In 1895, 58 V. c. 72 was passed, s. 6 of which authorised the company to agree with the city of St. John to pay an annual sum to be agreed upon as a consideration for taking care, etc., of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorised to do:—*Held*, in an action for damages for injury to the plaintiff caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that s. 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual; and a nonsuit should be entered. *McCrea* v. *St. John*, 36 N. B. R. 144.

Ice and snow—Municipal corporation—Gross negligence. *Mann* v. *St. Thomas*, 1 O. W. R. 480.

Injury to horse—Liability of municipality — Dangerous condition of county road by reason of accumulation of snow and ice — Pitch holes and ridges — Damages. *Gallagher* v. *Lennox & Addington*, 13 O. W. R. 227.

Injury to horses — *Municipal Act, s. 667 — Adoption of road by municipality — Work done on another part — Obstruction —Notice.*]—If work is performed on a public road by a municipality to facilitate travel between points on both sides of the place where the work is done, so as to provide a completed road between such points for the use of the public, the municipality is liable, under s. 667 of the Municipal Act, R. S. M. 1902 c. 116, in case an accident happens by reason of non-repair of the road at any place between those points, although no work has been done at or near that particular place.—2. When an obstruction in the shape of a barbed wire fence has been allowed to remain across part of a highway for more than three months at that season of the year during which road repairs would naturally be made, notice of its existence should be imputed to the municipality, notwithstanding the absence of direct evidence of notice. *Couch* v. *Louise*, 5 W. L. R. 482, 16 Man. L. R. 656.

Injury to pedestrian — *Liability of municipal corporation.*] — Action for damages for injuries received by falling on highway alleged to be out of repair. Defendants having knowledge of this non-repair, which was the direct result of their sewer works, they were held liable. *Sangster* v. *Goderich*, 13 O. W. R. 419.

Injury to pedestrian—Defect in sidewalk — Liability of municipality — Negligence — Contributory negligence — Damages. *McKay* v. *Port Dover*, 6 O. W. R. 878.

Injury to pedestrian — Negligence — Street crossing in town — Unexpected rise — Defect. *Dodds* v. *Aurora*, 6 O. W. R. 510.

Injury to pedestrian — *Notice of accident — Omission to give — Excuse — Liability of municipal corporation — Depression in pavement.*]—In an action brought by the plaintiff against the corporation of a city for damages for injuries sustained by reason of alleged want of repair of one of its streets, such non-repair consisting in one of the granolithic blocks, where it joined another block, having sunk from three-quarters to half an inch, thereby causing the other block to be above it to that extent, but which had been worn down at its edge about one-quarter of an inch, and had been in this condition from eight to ten years, there was no evidence of any prior mishap or complaint made regarding it, and, though the city officials did not regard it as dangerous, they admitted that it would be better to have it bevelled down:—*Held*, that there was no actionable negligence on the defendants' part.—The notice of the accident required to be given within seven days thereafter, under s. 606 (3) of the Municipal Act, 1903, 3 Edw. VII. c. 19, is not dispensed with by reason merely of the defendants not being prejudiced by the omission to give it. There must be some reasonable excuse therefor; the plaintiff's illness, the result of the accident, must render him mentally or physically incapable of doing so. *Anderson* v. *Toronto*, 15 O. L. R. 643, 11 O. W. R. 337.

Injury to pedestrian—*Sidewalk—Non-repair — Negligence — Supervision — Notice.*]—Action for damages for injuries from a fall upon a sidewalk that was out of repair. The street in question was somewhat frequented by workmen, but it was not a very important street of Bracebridge, and those who frequented it did not consider it in a dangerous state; no complaint was made at any time, and the break in the plank where the plaintiff stumbled had not existed longer than 6 days. The plaintiff had passed over the walk in the morning and had noticed the broken plank, which caused an angular depression of not more than two inches; at this spot she fell in the evening. There was evidence of a weekly supervision of the sidewalks of the town. "Taking it then," says the Chancellor, "that this condition of disrepair existed 6 days before on the particular street, and was not actually noticed by any of the officials of the municipality, and that no notice or complaint as to its state was lodged with them, can it, as a matter of law, be inferred that the corporation had notice of the breakage, and delayed to make repairs for an unreasonable time? In *Rice* v. *Whitby*, 25 A. R. 191, 200, it is laid down that where there is no actual notice, the inferring of such notice after the lapse of a reasonable time, dating from the origin of the defect, is proper and permissible; but the question as to the length of time sufficient to raise such inference depends altogether on the circumstances of the case and varies accordingly." And he held that notice was not in this case to be attributed to the town corporation. *McNiroy* v. *Bracebridge*, 25 C. L. T. 398, 6 O. W. R. 75, 10 O. L. R. 360.

Injury to pedestrian — *Vancouver Incorporation Act — Right of action — Court of appeal — Comity of Judges — Decisions of full Court.*] — The Court being evenly divided in opinion, an appeal by the defendants from a judgment upon the findings of a jury in favour of the plaintiff in an action for damages for injuries sustained from a defective sidewalk, was dismissed: — *Held*, *per* Macdonald, C.J.A., and Galliher, J.A., that an action based upon non-repair or nonfeasance was maintainable; from the language of a clause in the defendants' Act of incorporation providing that every public street and highway should be kept in repair by the corporation, it was intended that a person injured by a breach of the duty imposed should have an action.—Irving and Martin, JJ.A., were of the contrary opinion; and were also of opinion that the Court of Appeal should follow the decisions of the full Court of British Columbia when it was the appellate Court for the province. *McPhalen* v. *Vancouver* (1910), 14 W. L. R. 424.

Injury to person—*Liability of municipality — Nonfeasance — Misfeasance — Negligence — Nuisance — Damages — No statutory liability for non-repair.*]—While plaintiff was driving over a culvert one of his horse's feet went through the crust of the road into the culvert beneath and he and his wife were injured:—*Held*, that in the absence of any statutory enactment in British Columbia the defendants are not liable for maintaining a nuisance, as it is only where the nuisance is caused by misfeasance that a municipality is liable. *Rylands* v. *Fletcher* doctrine not applicable. *Cooksley* v. *New Westminster* (B.C.), 10 W. L. R. 106.

Injury to person—Liability of municipality — Notice — Misfeasance — Hole in highway caused by works undertaken by corporation. *Sangster* v. *Goderich*, 13 O. W. R. 419.

Injury to person—Portion of roadway occupied by street railway — Liability of railway company — Misfeasance — By-law of municipality. *Van Cleaf* v. *Hamilton Street Rw. Co.*, 5 O. W. R. 278, 628.

Injury to person — *Right of action against municipal corporation — Action for penalty — Action for damages — Independent actions — Plea of action pending — Notice of action — Pleading.*]—The penal action and that for damages mentioned in Art. 793 of the Municipal Code are remedies distinct and independent of each other; the fact of a plaintiff having instituted against a municipal corporation a penal action for neglect to keep a highway in repair is not a bar to an action for damages caused by the non-repair.—2. In such an action for damages it is not necessary to al-

lege that the notice required by Art. 793 of the Municipal Code has been given; and if it were necessary, the absence of the allegation of notice could only be pleaded by exception to the form.—3. Where the plaintiff proves, upon exception to the form, that he gave such notice, the defendants cannot set up the want of the allegation in their defence to the merits. *Pageau* v. *St. Ambroise*, 10 Que. P. R. 208.

Injury to person—*Sidewalk—Negligence —Municipality — Municipal Act, R. S. M. 1902 c. 116, s. 667 — Winnipeg charter, s. 722.*]—The plaintiff was injured in consequence of stepping on the end of a loose plank in a comparatively new sidewalk in a city, and so being thrown down. There was evidence that the plank had been loose for two or three weeks before the accident, but none to shew that any of the city's servants or officials had knowledge of it, and many persons, including an inspector of sidewalks in the employment of the city, had walked over it without noticing that there was any defect there:—*Held*, that the defendants were not liable, as negligence on their part was not proved. *Iveson* v. *Winnipeg*, 16 Man. L. R. 352, distinguished. *Forrest* v. *Winnipeg*, 18 Man. L. R. 440, 10 W. L. R. 307.

Injury to person driving — Municipal corporation — Real cause of injury — Reasonable state of repair of country road. *Turner* v. *Eustis*, 7 O. W. R. 238.

Injury to person driving—Snow on highway — Alterative route — Contributory negligence — Identification of person injured with driver of vehicle. *Wallace* v. *Ottawa & Gloucester Road Co.*, 6 O. W. R. 652.

Injury to persons driving—*Logs piled on highway — Municipal corporation — Negligence — Notice.*]—On the side of a road allowance in front of a saw mill large quantities of logs, bark, and rubbish were allowed to be piled and to be left there. The plaintiffs were driving with their horse and buggy along the allowance; while passing the place in question, the horse became frightened and swerved from the beaten track in the direction of the pile, and, in attempting to turn back again to the road, the front wheel of the buggy came in contact with a log lying about about two or three feet from the travelled way, whereby the buggy was overturned, and the plaintiffs thrown out and injured:—*Held*, that the defendants were liable therefor. *Kelly* v. *Whitchurch*, *Baker* v. *Whitchurch*, 11 O. L. R. 155, 6 O. W. R. 839, 12 O. L. R. 83, 7 O. W. R. 279.

Injury to traveller *by defective condition of sidewalk — Original fault of construction — Misfeasance or nonfeasance — Liability of municipal corporation — Vancouver Incorporation Act and amendments.*] —Action for damages for injuries received by plaintiff through defendants' negligence in respect of the condition of a grating let into the sidewalk:—*Held*, misfeasance and defendants liable. Under s. 219 of above Act the defendant city is liable for non-repair. Judgment for plaintiff. *MacPherson* v. *Vancouver*, 11 W. L. R. 501.

Injury to traveller—*Liability of municipal corporation — Misfeasance or nonfeasance — Nuisance — Statutory duty to repair.*]—Action to recover damages for injuries sustained by plaintiff through a culvert upon a highway being out of repair. An appeal allowed and judgment given for plaintiff. The maintenance of the culvert in disrepair is misfeasance. *Cooksley* v. *New Westminster*, 11 W. L. R. 476.

Injury to waggon and contents — *Obligation of municipality — Climatic conditions — Ice and snow — Injury to waggon and contents — Imprudence of driver.*]—The obligation of municipalities to keep the streets and roads in a passable state of repair is subject to consideration as to climatic conditions, and implies the reciprocal obligation of the public to use the streets with prudence. Therefore, a carter who in broad daylight in traversing a street in Montreal with a heavy load, upon a steep down grade covered with ice, and who, when his dray has already commenced to slip, aggravates the movement by turning his horses in the wrong direction, is solely responsible for the accident which results from it, and has no recourse against the city corporation. *Gougeon* v. *Montreal*, 34 Que. S. C. 324.

Injury to watchman — Negligence — Contributory negligence — Breach of duty —Knowledge of non-repair — Reasonable care — Appeal on questions of fact. *Galloway* v. *Sarnia*, 5 O. W. R. 458.

Knowledge of municipal corporation — *Causa causans* — Findings of trial Judge — Appeal — Excessive damages. *Luton* v. *Yarmouth*, 1 O. W. R. 40.

Knowledge of municipal corporation—Negligence — Damages. *McGarr* v. *Prescott*, 4 O. L. R. 280, 1 O. W. R. 53, 439.

Liability for accident — *Vis major — Drought.*]—An extraordinary drought does not make a case of *vis major* so as to free those who are charged with the maintenance of a road from liability for accidents caused by its bad condition. *Picard* v. *Syndics des Chemins à Barriere de la Rive Nord à Quebec*, 31 Que. S. C. 258.

Liability for death arising from defective approach to bridge — *Notice of claim — Time within which to be given — Form of notice — Signature by solicitor.*] —C. attempted to cross a bridge that had been purchased, rebuilt, and kept in repair by the defendants, with a traction engine weighing 9 tons. The spans of the bridge at the approach broke under the weight of the moving engine, which fell to the ground, carrying with it C., who was killed. After the accident it was found that one of the joists had rotted nearly through. Within a month after the occurrence, C.'s widow obtained letters of administration to her husband's estate and served defendants with a notice of action under s. 667 of the Municipal Act, R. S. M. 1902, c. 116:—*Held*, following *Manley* v. *St. Helens*, 2 H. & N. 840, and *Lucas* v. *Moore*, 3 A. R. 602, that the duty to repair cast on the city required

the city to keep the bridge of such strength as would make it safe for such heavy traffic as was known to the city officials to be carried on over it and to keep increasing that strength in order to make safe the increasingly heavy traffic from year to year. To carry out the intent of the statute, words must be read into the section: The words "after the happening of the alleged negligence" should be construed to read "after the happening of the injury or damages resulting from the alleged negligence." The notice given in this case was given within the time required, and was sufficient in form. The act does not say that the notice must be signed by the claimant personally or that it shall be signed at all. Signature by a solicitor for the claimant is quite sufficient. *Curle* v. *Brandon*, 24 C. L. T. 279.

Liability of municipal corporation —*Injury to person partly due to accident —Liability for quasi-tort — Apportionment of damages.*]—Municipal corporations are responsible for injuries caused by the bad condition of roads which they are bound to keep in repair.—2. When an inevitable accident and a *quasi-tort* combine to cause an injury, the remedy of the victim or of his representatives is none the less open against the author of the *quasi-tort;* but the Court in ascertaining the damages should take into account the combination of causes, as in the case of common fault. *Parker* v. *Corp. du Canton de Hatley*, 33 Que. S. C. 520.

Liability of municipal corporation — Nonfeasance — Limitation of actions. *Minns* v. *Omemee*, 1 O. W. R. 90, 362.

Liability of municipal corporation — *Proximate cause of injury—Precautions.*] —It is not sufficient for a plaintiff, claiming damages from a municipal corporation on account of injuries received in an accident upon a road under the control of the corporation, to prove that the road was in a bad condition; he must prove that the bad condition of the road was the direct and immediate cause of the accident, and that he could not have avoided it by taking the precautions which would be expected from a prudent man. *Beaulieu* v. *Corp. of St. Urbain Premier*, 22 Que. S. C. 208.

Loose iron lid of catch-basin in sidewalk — Absence of defect in construction — Negligence — Notice — Inference —Municipal corporation. *Hobin* v. *Ottawa*, 8 O. W. R. 101, 589.

Loss of horse—Negligence of municipal corporation — Contributory negligence — Proximate cause of damage — Findings of Judge — Appeal. *Armstrong* v. *Euphemia*, 7 O. W. R. 152.

Mandamus does not lie to compel a municipal corporation to repair a part of one of its streets, more particularly if it appears that repairs to the street have been begun, if no wrong is shewn calling for immediate redress, and if other and adequate remedies exist to cure such wrong as is complained of. *Farly* v. *Montreal* (1910), 39 Que. S. C. 13.

Municipal corporation—*Action against —Third party — Garantie.*]—The city of Montreal, being sued for damages caused by an accident upon the highway, may, by dilatory exception, demand a stay of proceedings in order that it may bring in *engarantie* a person who is bound by law to keep the highway in repair. *Montreal* v. *Roberts*, 8 Que. P. R. 148.

Municipal corporation—*Action against for injury to person — Defences — Difficulty of repair — Contributory negligence*]. —A municipal corporation is responsible for an accident caused by the bad condition of a public road which it is obliged to keep in repair. The corporation cannot escape liability by alleging the difficulty of maintenance at the spot where the accident took place, the imprudence of the person who is the victim of the accident in using a vehicle and horse not suitable for the road, and his neglect to drive with care. *Benoit* v. *Corp. de St. Stanislas de Kostka*, 31 Que. S. C. 355.

Municipal corporation — Carriageway — Footway — Finding of fact — Interference on appeal. *Belling* v. *Hamilton*, 3 O. L. R. 318, 1 O. W. R. 124.

Municipal corporation — Diversion of road — Removal of bridge — Neglect to warn — Contributory negligence. *Johnston* v. *Point Edward*, 2 O. W. R. 687.

Municipal corporation—Gas company — Relief over. *McIntyre* v. *Lindsay*, 4 O. L. R. 448, 1 O. W. R. 492.

Municipal corporation — *Liability for death arising from defective approach to bridge — Misfeasance — Notice of action — "Happening of the alleged negligence" — Action by administratrix — Expectation of pecuniary benefit.*]—Where a heavy traction engine broke through rotten timbers in the approach of a bridge on one of the highways of the defendants, on which work had been done and improvements made by them, and over which such engines had for two years previous been accustomed to pass, to the knowledge of the defendants' officials, and no attempt had been made to stop such traffic or warn those in charge of it of any danger, the bridge in question being one of the strongest across the river in many miles: —*Held*, that the defendants were liable for damages under s. 667 of the Municipal Act, R. S. M. 1902 c. 116, but that they could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joists in the approach, in consequence of which it had rotted more than the others on account of water lodging in the hole; that the notice of action required by the Act need not be signed by the claimant personally, or shew that she was claiming in the capacity of personal representative of the deceased; that the words "happening of the alleged negligence," in the section referred to, should either be construed to read, "happening of the injury or damages resulting from the alleged negligence," or it should be held that the negligence continued to "happen" up

to the time that the damages resulted from it, otherwise no notice of the action or claim could be given, in compliance with the statute, in any case where the negligence had existed for more than a month before the injury resulted from it; and that the plaintiff could recover nothing on behalf of a son of deceased, who, in the circumstances and position of his father, could have had no reasonable expectation of pecuniary benefit from the continuance of the life, nor on behalf of a nephew or an adopted child, as they do not come within the provisions of R. S. M. 1902 c. 31, or any other enabling Act. *Curle* v. *Brandon*, 24 C. L. T. 279, 15 Man. L. R. 122 1 W. L. R. 76.

Municipal corporation — Negligence—Bridge — Traction engine. *Pattison* v. *Wainfleet*, 1 O. W. R. 407.

Municipal corporation — *Negligence—Condition of sidewalk during construction work — Plaintiff's knowledge.*] — The defendants were taking up an old board sidewalk and putting down a new one on one of their streets, and had completed the work up to a point somewhere in front of the plaintiff's shop, when the men were taken away to perform some urgent work in another part of the town, and were away part of a Saturday and the whole of the following Monday. The plaintiff, who was aware of what was being done and the uncompleted state in which the work was left, drove up in a cart with goods for his shop, and in alighting slipped off the unfinished end of the sidewalk and was injured:—*Held*, that the defendants, as far as they had constructed the walk, did so in a proper manner and were complying with a statute in improving the condition of the street; that they were not negligent; that the walk was not, at the time the accident happened, unsafe for persons lawfully using it or going upon it; that it was not dangerous or a trap to persons having ordinary eyesight; that there was no duty on the defendants to put up barriers to prevent persons walking across it; that, as the plaintiff knew about its condition, a printed notice was not required; that the accident was a mere misadventure; and the plaintiff could not recover. *Belleisle* v. *Hawkesbury*, 25 C. L. T. 16, 8 O. L. R. 694, 4 O. W. R. 271.

Municipal corporation — *Negligence — Injury to person — Proximate cause — Obstacle in road — Warning — Liability.*] —Where a road is so constructed or altered as to present at one part two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous place, it is the duty of those in charge of the road to indicate in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided, and, if it cannot otherwise be done, to put up such an obstruction as will turn the traveller from the wrong track. The barrier in this case was a mere stick of wood laid across the road, and it was held by the Divisional Court that it was insufficient for the purpose, and that the defendants were liable for injuries to the plaintiff, although there was a "concurring cause of injury," in the horse driven by the plaintiff's father becoming unmanageable because of the unhitching of a trace, owing, however, to no fault or negligence of the driver. *Thomas* v. *North Norwich*, 25 C. L. T. 398, 6 O. W. R. 13, 9 O. L. R. 666.

Municipal corporation — *Negligence—Injury to person — Subsidence of roadway —Indications on surface — Faulty construction — Omission to inspect — Notice of accident — Reasonable excuse for want of.*] —The question of what is reasonable excuse for failure to give the notice of accident required by the Municipal Act as a preliminary to an action against a municipal corporation for non-repair of a highway, upon which there was a difference of opinion among four of the Judges of the High Court, but the remarks made by Mr. Justice Osler were certainly unfavourable to the plaintiff's excuse being regarded as reasonable—"the plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act." The case in the Court of Appeal was decided in favour of the defendants upon the ground that there was no actionable negligence on their part. While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe laid 12 feet below the surface. The negligence alleged was the disregard of alleged surface indications of mischief below and negligence in the original construction of the sewer or the absence of subsequent examination and inspection, and the Court found that these allegations were negatived by the evidence. *Lambert* v. *Corp. of Lowestoft*, [1901] 1 K. B. 590, was referred to as much in point. *O'Connor* v. *Hamilton*, 25 C. L. T. 458, 6 O. W. R. 227, 10 O. L. R. 529.

Municipal corporation — *Negligence—Injury to traveller — Steep and narrow road — Want of rail-guards — Contributory negligence — Defect in harness of horses driven by plaintiff's mother—Absence of knowledge of plaintiff — Damages.*] — Meredith, J., *held* that the failure of the defendants to place guard-rails on the sides of a road at a place where it was narrow—from 11 to 17 feet wide—with banks sloping down on both sides, was a breach of the defendants' statutory duty to keep the road in repair, and that they were liable to the plaintiff on account of injuries which she received in an accident which would not have occurred had there been guard-rails at the place. There was some question as to contributory negligence, and the learned Judge held that the driver of the vehicle, the plaintiff's mother, was negligent, and that if she had sued she could not have recovered, but that the mother's negligence was not to be attributed to the daughter, who was the guest of her mother, and had no knowledge of the facts constituting the mother's negligence. *Plant* v. *Normanby and Minto*, 25 C. L. T. 398, 6 O. W. R. 31, 10 O. L. R. 16.

Necessity for guard-rail—Negligence —Liability of municipal corporations —

Damages. *Campbell* v. *Brooke and Metcalfe*, 8 O. W. R. 292.

Negligence — Laying gas pipes — Excavation — Injury to personal property — Recovery against municipal corporation — Recourse in warranty — Costs. *Montreal* v. *Montreal Light, Heat, and Power Co.*, 3 E. L. R. 484.

Negligence of municipal corporation — *Injury to pedestrian—Notice of accident — Omission to give — Reasonable excuse — Absence of prejudice.*]—On one of the streets of the city there was a hole in the sidewalk about 20 feet long, caused by the stone flags having fallen in, the bottom being covered with broken stones, iron, and other *débris;* while along the side of the curb, bricks to the height of eight feet had been piled, at one end of which a lamp had been placed; but the place where the cavity was, was in total darkness. The plaintiff, who was not very familiar with the city, was walking after dark along the street, when he fell into the hole, and was so seriously injured that he had to be taken to the hospital, where he remained over three weeks, during two of which he was obliged to remain in bed, his condition being such that he was mentally incapable of giving to the city the notice of the accident within the seven days prescribed by s. 606 (3) of the Municipal Act, 3 Edw. VII. c. 19 (O.). It appeared that the city was not prejudiced by the want of notice: — *Held*, that the street was out of repair, so as to render the city liable to the plaintiff; and that, under the circumstances, the plaintiff had shewn sufficient excuse for not giving the notice. *O'Connor* v. *Hamilton*, 10 O. L. R. 536, distinguished. *Morrison* v. *Toronto*, 12 O. L. R. 333, 7 O. W. R. 547, 607.

Negligence of municipal corporation—Liability for loss of horse—Contractors for corporation work — Relief over against — Costs. *Taylor* v. *Portage la Prairie* (Man.), 4 W. L. R. 404.

Notice of accident — *Joint liability — Waiver.*]—The notice of the accident and the cause thereof required by s. 606 (3) of the Municipal Act, R. S. O. c. 223, must now, by 62 V. c. 25, s. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert* v. *Township of Matilda*, 26 A. R. 1, not now applicable. Where notice in writing was given to one township municipality of two sued as jointly liable, but not to the other, it appeared that the reeve of the latter had been verbally notified by the plaintiff, and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognise his claim because it was considered that the loss arose from the fault of the plaintiff, and all this within thirty days after the accident: — *Held*, that there was no waiver. *Jones* v. *Stephenson*, 20 C. L. T. 452, 32 O. R. 226.

Notice of accident — *Reasonable excuse for want of — Knowledge of corporation — Prejudice — Appeal from ruling of trial Judge.*]—In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is subject to appeal. The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident:—*Held, Meredith, J.*, dissenting, reversing the judgment of Meredith, C.J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of Meredith, C.J., that the defendants had not thereby been prejudiced in their defence. *Armstrong* v. *Canada Atlantic Ry. Co.*, 2 O. L. R. 219, 4 O. L. R. 590, applied and followed. *O'Connor* v. *Hamilton*, 24 C. L. T. 370, 8 O. L. R. 391, 3 O. W. R. 918.

Notice of accident—3 Edw. VII. c. 18, s. 130, s.-s. 5 — Failure to give notice — Reasonable excuse. *Biggart* v. *Clinton*, 3 O. W. R. 625.

Notice of action — *Pleading—Defence to action — Municipal corporation—Third party — Garantie — Separate contestation —Costs.*]—The corporation of the city of Montreal, defendants in an action for damages for neglect to maintain and repair a pavement, may, in a plea to the merits, allege that the notice of action required by their charter has not been served within the time prescribed.—2. Where the land-owner whose duty it is to maintain and repair the pavement is brought in *en garantie* by the city corporation, and makes a separate contestation, he will be required to pay his own costs, even where the plaintiff fails in the action, the plaintiff not being obliged to pay for two contestations, where one would suffice. *Bray* v. *Montreal*, 9 Que. P. R. 167.

Notice of non-repair — *Duration of time — Negligence.*]—Where the evidence shews that a sidewalk in a municipality had been in a bad and dangerous condition for a period of time anterior to the accident sufficient to allow the municipal authorities to put it in a safe and proper state, the facts establish negligence on their part, for the consequences of which the corporation is responsible. *Gaffney* v. *Montreal*, 16 Que. S. C. 260.

Notice to municipal corporation — 3 Edw. VII. c. 18, s. 130, s.-s. 5 — Failure to give notice — Reasonable excuse. *Biggart* v. *Clinton*, 2 O. W. R. 1092.

Objects placed on highway—Neglect of municipality to remove — Frightening

horse — Liability — Character of horse—Contributory negligence. *Hemphill* v. *Haldimand*, 3 O. W. R. 605, 4 O. W. R. 163.

Obstruction — *Trap-door — Continuing nuisance created by another.*]—The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner, and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt:—*Held*, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable. *Ewing* v. *Hewitt*, 20 C. L. T. 202, 27 A. R. 296.

Open and unguarded trench—Injury to person — Nonfeasance — Statutory limitation of action — Time — Liability of municipal corporation. *Cook* v. *Collingwood*, 2 O. W. R. 966.

Open excavation unguarded — Injury to person crossing highway — Liability of municipal corporation — Negligence—Lawful obstruction — Substituted crossing provided — Injury due to negligence of person injured. *Burns* v. *Toronto*, 10 O. W. R. 723.

Opening in street — *Injury to person—Municipal corporation — Nonfeasance—Limitation of actions — Negligence of licensee.*] — Section 606 of the Municipal Act, R. S. O. 1897 c. 223, which requires an action against a municipal corporation for neglect to keep the streets in repair to be brought within three months, applies to an action against a corporation for an injury occasioned by the failure properly to guard an opening made, with the corporation's permission, in the sidewalk adjoining certain premises for access to the cellar thereof; at all events it was never intended that the granting of such permission, authorised by s. 639 of the Act, should render the corporation liable for the acts and omissions of its licensee, except subject to the requirements of s. 606. Judgment of Boyd, C., 21 C. L. T. 561, 2 O. L. R. 579, affirmed. *Minns* v. *Omemee*, 8 O. L. R. 508.

Person crossing street railway track—Negligence of street railway company — Excessive speed of car — Failure to give warning — Proximate cause — Contributory negligence — Evidence — Improper admission of — Trial without jury — No substantial miscarriage — Damages — Reduction. *Marsh* v. *Hamilton*, 3 O. W. R. 525.

Personal injury to pedestrian—*Negligence of municipal corporation — Notice of action — Requisites — Municipal Act, R. S. M. 1902 c. 116, s. 667.*]—Under s. 722 of the Winnipeg charter, which is the same in effect as s. 667 of the Municipal Act, R. S. M. 1902 c. 116, the corporation will be liable in damages for injury sustained by a person in consequence of a fall caused by stepping on and so breaking down a rotten plank in a sidewalk laid down by the corporation on a public highway, the said sidewalk being very old and decayed underneath, it being shewn that the defect, although not apparent, would have been detected if there had been a proper and adequate system of inspection employed.—The notice of the action given by the plaintiff, pursuant to s.-s. (*b*) of the same section, stated that she claimed from the defendants $1,000 damages with respect to the matters therein set out, and that she would commence an action in the Court of King's Bench to recover that sum for injuries sustained by her through the omission and default of the defendants to keep in repair a public sidewalk on the east side of Main street between Polson and Bannerman avenues in said city. The accident happened at a point between Polson avenue and Atlantic avenue, which is between Polson and Bannerman avenues. It was given within a month from the date of the injury, but did not state such date or the nature of the injury or how it had occurred, or the place more specifically than as above. The trial Judge gave plaintiff a verdict for $3,000 damages:—*Held*, that the statute, which only requires "notice of any such claim or action," should receive a liberal construction, and requirements, not specifically stated and not necessarily implied, should not be read into it, and that the notice given was sufficient.—*Curle* v. *Brandon*, 15 Man. L. R. 122, *Jones* v. *Bird*, 5 B. & Ald. 857, *Martins* v. *Upscher*, 3 Q. B. 662, and *Bond* v. *Conmee*, 16 A. R. 398, followed. *Clarkson* v. *Musgrave*, 9 Que. B. D. 386, and *St. John* v. *Christie*, 21 S. C. R. 1, distinguished.—*Held*, also, that, as the plaintiff's injuries had resulted much more seriously after the notice was given than she anticipated, she was not precluded by the terms of the notice from claiming and recovering in the action a larger amount than $1,000. *Iveson* v. *Winnipeg*, 5 W. L. R. 118, 16 Man. L. R. 352.

Pitch holes and ridges — *Injury to horse.*]—Defendants with knowledge of their servants having allowed pitch holes and ice ridges to be formed and to remain on a well travelled highway, were held liable in damages for injuries to plaintiff's horse. *Gallagher* v. *Lennox*, 13 O. W. R. 227.

Prescription—*Former action — Reservation.*]—The plaintiff sued a city corporation in the Circuit Court claiming $50 as damages for injuries sustained by a fall, and obtained a judgment for $30, without recourse for future damages, this action not admitting of any such reservation. Afterwards, alleging that the injury which she had sustained was incurable and rendered her incapable of working, which she did not know at the time of her first action, the plaintiff proceeded again against the corporation for $1,000 damages. This action was begun more than six months after the accident, and was not preceded by a notice given within thirty days after the accident:—*Held*, that, under these circumstances, the action was barred by the six months' prescription. *Chartrand* v. *Montreal*, 17 Que. S. C. 143.

Proximate cause — Repair of road—Obstacle — Warning — Liability. *Thomas* v. *North Norwich*, 4 O. W. R. 517.

Proximate cause — *Snow—Township corporation — Notice — Pathmaster — Statute labour.*]—The plaintiff in travelling on a highway under the control of the defendant corporation, with a team of horses and waggon, came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a farm fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard. But a thaw was in progress which had commenced three days before, and when those in the waggon sought to use the track the horses broke through and the waggon was in danger of being upset. The plaintiff got out and in assisting the horses was injured by one of them:—*Held*, that, under the circumstances, it was the duty of the defendants to have opened a way through the drift sufficient to enable vehicles such as the waggon in which the plaintiff was travelling to have passed in safety along this highway; that the defendants had notice that the highway was out of repair; that the non-repair was the proximate cause of the injury; and that the plaintiff was entitled to recover. — *Semble*, that it was the duty of the pathmaster to use statute labour to make a safe track. Judgment of a Divisional Court (2 O. W. R. 139) reversing judgment of Falconbridge, C.J. (1 O. W. R. 568), affirmed. *Hogg* v. *Brooks*, 24 C. L. T. 171, 7 O. L. R. 273, 3 O. W. R. 120.

Public highway—*What constitutes.*]—A winter road, open to everybody, over which a great number of persons pass and which has nothing about it to indicate that it is a private road, is a public road, and the corporation of the municipality in which it is situated are liable for injuries caused by non-repair. *Duchesne* v. *Corp. of Beauport*, 23 Que. S. C. 80.

Repair — *Mandamus — By-law — Closing road.*]—A petition for a writ of *mandamus* to oblige a municipal council to repair a winter road will not be granted, if previous to the presentation of this petition, the municipal council had determined to close that road, and an effective by-law to that effect had been passed. *Desjardins* v. *Ste. Rose*, 9 Que. P. R. 257.

Right of action.] — The provisions of The Municipal Ordinances in force in 1893 or subsequently relating to the repair of sidewalks, etc., are not applicable to the City of Calgary, although not expressly declared inapplicable by the special Ordinance incorporating the city which was passed in that year. Although a duty to repair streets may be expressly imposed upon a municipality, no action lies against it for damages for injuries resulting from non-repair. *Clark* v. *Calgary* (1907), 6 Terr. L. R. 309.

Road allowance — *Road opened up in lieu thereof — No compensation to owners, but original road allowance taken by them —Subsequent intention to abandon road so laid out and open up original allowance — Necessity for compensation — Notice of intention to open up allowance — Sufficiency —Municipal corporations.*] — On a survey made in 1791, a road allowance was set out along the front of certain lots, which ran down to a lake. The road allowance, however, was not opened up, or used as a road, but some time prior to 1850 a road running along the lake shore, the land therefor being taken from these lots, was, as a matter of convenience, opened up and used in lieu of the original road allowance, and continued to be so used ever since, the township doing work and expending money thereon. No compensation was paid to the owners; but they took over and enclosed the road allowance as part of their lands and occupied it for a period of some sixty years. In consequence of the waters of the lake encroaching on the lake roadway, it had, from time to time, to be moved back, these owners giving the lands for the purpose without any compensation. In 1908, by reason of the expense occasioned in keeping this road in repair, through the encroachment, the township council determined to open up the original road allowance, and served a notice on the owners of the lots stating that a by-law would be introduced for this purpose on a named day, but without making any offer of compensation:—*Held*, that the notice was sufficient; for, even if the time of the meeting should have been stated in the notice, as it appeared that the applicants had either attended the meeting or were represented by counsel, and were heard before the by-law was passed, they were now precluded from objecting thereto.—*Held*, however, that, as no compensation was paid for the lands originally taken for the lake shore road, or from time to time therefor as the road was encroached upon, and the applicants were legally in possession of the lands constituting the original road allowance, such lands could not be taken away from them, for the purpose of opening up the road, without their being awarded compensation, as provided for in s. 641 of the Municipal Act, 3 Edw. VII. c. 19 (O.); and the by-law for the opening up of the road was therefore quashed. *Lister* v. *Clinton*, 18 O. L. R. 197, 13 O. W. R. 582.

Road company—*Contract with electric railway company — Leave to operate tramway — Condition of keeping road in repair —Failure to perform — Lien on tramway.*] —A road company whose duty it was to maintain a public road agreed with an electric railway company that the latter should be allowed to construct and operate a tramway upon the road, upon condition of doing the work necessary for the maintenance and repair of the road:—*Held*, that the road company had acquired no lien upon the tramway for the cost of such work, which they were obliged to do themselves by reason of the insolvency of the electric railway company. *Morse* v. *Levis County Ry. Co.*, 30 Que. S. C. 353.

Roadway—*Defect in—Findings of trial Judge.*]—The plaintiff, in crossing at night on foot a busy street in the city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage way. There was a hole or de-

pression in the asphalt pavement from one and a half to one and seven-eighths inches deep at its nearest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff:—*Held*, Falconbridge, C.J., dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of Court. *Boss* v. *Litton*, 5 C. & P. 407, explained and distinguished. — *Semble, per* Street, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it. *Belling* v. *Hamilton*, 22 C. L. T. 110, 3 O. L. R. 318, 1 O. W. R. 124.

Roadway—*Obstruction — Injury to traveller — Contributory negligence.*]—Action for damages for injuries caused through the alleged negligence of a municipal corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night, the plaintiff's horse stumbled and fell, throwing the plaintiff from the vehicle, and causing the injury complained of:—*Held*, affirming the judgment in 33 N. S. R. 291, that there had been no negligence on the part of the defendants; that the obstruction was not serious or unusual; and that the accident occurred through want of proper care by the plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. *Messenger* v. *Bridgetown*, 31 S. C. R. 379.

Roadway—*Obstruction — Telephone pole —Negligence — Proximate cause — Third party — Costs.*]—A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole, lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running way, and that their violent, uncontrollable speed was the proximate cause of the accident. The defendants, the city corporation, were ordered to pay the costs of the telephone company, the third parties, it being shewn that the company placed the pole where it was, lawfully and by the authority of the corporation. Decisions in 18 C. L. T. 310, 29 O. R. 518, 19 C. L. T. 382, 26 A. R. 521 reversed. *Atkinson* v. *Chatham*, 21 C. L. T. 135; *S. C., sub. nom. Bell Telephone Co.* v. *Chatham*, 31 S. C. R. 61.

Roadway—*Vis major — Action — Security for costs — Deposit — Preliminary exception.*]—The failure by a plaintiff who is not a ratepayer to deposit $10 as security for costs of an action against a municipal corporation, in accordance with Art. 793, M. C., must be raised by preliminary exception and not by plea to the merits. 2. In regard to the deposit required by Art. 793, M. C., there is no distinction between actions for penalties and actions for damages. 3. A municipal corporation is bound to keep roads at all times in good order, and can only be relieved by proving force *majeure*. *Young* v. *Stanstead*, 21 Que. S. C. 148.

Sale of area — *Invalidity of by-law— Notice to owner of abutting land — Condition precedent — Status of plaintiff to attack by-law — Land purchased according to registered plan — Municipal Ordinance, s. 101 — Regina city charter, s. 307 — No application to quash by-law — Action — Declaration of invalidity.*]—A plan was recorded in the land titles office, shewing blocks and lots, streets and lanes. The defendant city acquired block 197, excepting one lot, which was subsequently acquired by plaintiffs, and other land, and being desirous of creating a number of warehouse sites, the city closed the streets and lanes leading to said block, and passed a validating by-law. No notice of the by-law was given the registered owner of the lot subsequently acquired by plaintiffs. After passing the by-law, they proceeded to sell said block and portion of the streets and lines so closed. Buildings were erected which obstructed the way to plaintiffs' lot. Plaintiffs brought action to have it declared that the streets and lanes closed were public highways, and to have the obstructions removed:—*Held*, that until notice was given to the owners of all land abutting upon any street or lane which it was proposed to close under the provisions of s. 5 of c. 28 of the Ordinances of 1903, the defendant city had no power to pass the by-law; and the by-law being passed without notice, the provisions of s. 101 of the Municipal Ordinance (c. 70, C. O., 1898), s. 193, City Act, c. 16 of 1908, could not validate such by-law. *Gesman* v. *Regina* (1909), 2 Sask. L. R. 50, 10 W. L. R. 136.

Sidewalk — Defect in — Injury to pedestrian — Supervision — Notice to municipal corporation — Notice of accident — Sufficiency. *Breault* v. *Lindsay*, 10 O. W. R. 890.

Sidewalk—*Defect in—Notice of defect— Damages — Quantum.*]—Where a sidewalk on one of the principal streets of a town, on which there was considerable traffic, had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them:—*Held*, that its condition was such as to impose on the corporation a constant care and supervision over it; so that when one of the boards was proved to have been missing for a week, leaving a hole some six or eight inches deep, into which a person fell and was injured, notice to the corporation of such defect in the sidewalk must be assumed, and liability for the damage occasioned by the accident imposed on them. The

damages assessed at the trial, $1,500, were reduced to $900, the Court being of the opinion that the latter was the more reasonable amount, having regard to the injuries sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date. *McGarr* v. *Prescott*, 22 C. L. T. 281, 4 O. L. R. 280, 1 O. W. R. 54, 439.

Sidewalk—*Excavation — Municipal corporation — Gas company — Joint liability —Negligence — Relief over.*]—A municipal corporation having placed a barrier round a portion of a sidewalk in course of repair, the plaintiff, at night, passing around the barrier, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No light was put up by the corporation or company:—*Held*, that both were liable to the plaintiff, the corporation for non-repair and not warning the public, and the company under their special contract with the corporation and under R. S. O. 1897 c. 199, s. 26; but that the corporation should have judgment over against the company. *McIntyre* v. *Lindsay*, 22 C. L. T. 292, 4 O. L. R. 448.

Sidewalk—*Excavation insufficiently protected — Municipal corporation — Negligence.*]—The defendant company made an excavation across a sidewalk on a public street, in the city of Halifax, for the purpose of laying cables underground. The excavation was protected after working hours by a number of barrels, with planks laid across the tops from one to another. Plaintiff, while passing along the sidewalk, after dark, in the absence of the watchman, fell into a portion of the excavation, from which the barricade had been removed after it had been placed in position, and was severely injured. The evidence given on the trial of an action for negligence shewed that the barrier erected was of a frail and insufficient character, and that the place was insufficiently lighted, and that if it had not been for the want of care on the part of defendant in these particulars, the accident would not have happened:—*Held*, that plaintiff was entitled to a verdict. *Cox* v. *Nova Scotia Telephone Co.*, 35 N. S. R. 148.

Sidewalk — Injury to pedestrian — Liability of municipality — Negligence — Contributory negligence — Damages. *McKay* v. *Port Dover*, 7 O. W. R. 292, 758.

Sidewalk — Injury to pedestrian — Liability of municipality — Negligence — Notice of action — Sufficiency — Damages—*Quantum.* *Ivison* v. *Winnipeg* (Man.), 4 W. L. R. 53.

Sidewalk—*Injury to pedestrian—Negligence of municipal corporations—Notice.*]—Sources of recurring and repeated danger on a street are to be watched and guarded against by a municipality.—Where a contractor for taking down a building had laid planks on a sidewalk, which were fastened at both ends with iron straps to keep them together, which straps were raised from time to time by teams and waggons passing over the planks, leaving a space between the straps and the planks, into which a passerby put her foot and was thrown to the ground and injured:—*Held*, that when the normal condition of a sidewalk is disturbed, it is the primary duty of a municipality to see that in its altered state it is kept in proper repair, and in a busy and much frequented place in excellent repair; and that when the source of danger has existed in a crowded street of a city for two weeks or even somewhat less, notice of the want of repair and of dangerous condition will be attributed to the authorities.—In this case the corporation was held liable notwithstanding there was evidence of repair by nailing down the straps when discovered to be loose. Judgment of Britton, J., affirmed. *Gignec* v. *Toronto*, 11 O. L. R. 611, 7 O. W. R. 696.

Sidewalk — Injury to pedestrian by fall on — Dangerous condition by reason of snow and ice — Evidence as to period of condition — Rapid climatic changes — Liability of municipal corporations—Gross negligence. *Lynn* v. *Hamilton*, 10 O. W. R. 329.

Sidewalk — Injury to person — Negligence of municipal corporation — Notice of defect — Evidence. *Kew* v. *London*, 9 O. W. R. 224.

Sidewalk — *Loose plank—Injury to pedestrian — Liability of city corporation — Winnipeg Charter, s. 722 — Negligence—Notice — Reasonable precautions — Inspection.*]—Action for damages for injuries sustained by plaintiff, a boy of 13, by a fall on a sidewalk, a plank being loose:—*Held*, on the evidence, that sufficient notice of its being loose had not been brought home to defendants. Reasonable precautions had been taken and inspection made. The condition of the sidewalk was not conspicuous and there was no negligence on the part of defendants. Action dismissed. *Forrest* v. *Winnipeg*, 10 W. L. R. 307.

Sidewalk—Negligence — Want of drainage — Formation of ice. *Rockwell* v. *Bridgewater*, 2 E. L. R. 378.

Sidewalk — *Opening in — Injury to pedestrian — Want of guard — Municipal corporation — Non-feasance — Limitation of actions — Trap-door — Master and servant.*]—Two servants of the defendant G. were engaged in their master's business in unloading and storing a cask of beer in the cellar of his house by means of opening a trap-door in the sidewalk in front of the house. This was at night, and the trapdoor being left open, and no light or guard being provided, the plaintiff fell into the opening and was injured:—*Held*, that this negligence of the servants was attributable to the master who was liable for the injury. No act of negligence was proved against the village corporation, nor was there evidence upon which notice to the corporation might be attributed; the construction of an opening in the sidewalk is authorised by the Municipal Act, s. 639, and no fault was alleged in its construction or maintenance; the corporation had no knowledge of the opening being left after dark without protection, and it was not shewn that they had

means of guarding against it.—*Semble*, that, under these circumstances, the corporation were not liable. *Homewood* v. *Hamilton*, 1 O. L. R. 266, considered. But, supposing the corporation liable, it could only be for nonfeasance, and not for misfeasance, and three months after the damages had been sustained. *Minns* v. *Omemee*, 21 C. L. T. 561, 2 O. L. R. 579.

Sidewalk—*Opening in — Injury to pedestrian — Want of guard — Municipal corporation — Relief over.*] — The plaintiff, whose eyesight was defective, was walking in a city street, when, stepping towards a doorway leading into a tavern, he stubbed his toe against the step or door-sill, and, stumbling back, fell into an area in the sidewalk used by the tavern-keeper, by the permission of the municipality, for the purpose of putting beer into his cellar, and then open and being used for such purpose. A keg had been placed at each of the outside corners of the opening to warn passers-by:—*Held*, that the municipality were liable for negligence in leaving the opening without an adequate guard; that contributory negligence could not be imputed to the plaintiff; and that the tavern-keeper was liable over to the defendants. *Homewood* v. *Hamilton*, 21 C. L. T. 206, 1 O. L. R. 266.

Sidewalk—*Snow and ice — Liability of municipality.*] — The obligation devolving upon a city corporation to keep the sidewalks of the city in a safe condition is temporarily suspended where the climatic conditions—such as a heavy rainfall accompanied by high temperature, followed by strong wind, sudden frost and low temperature—are such that the city could not, by the exercise of reasonable diligence, have remedied the condition of the sidewalk in question before the accident happened. 2. The fact that the sidewalk in question, which was in front of vacant lots, had not been properly attended to throughout the winter, does not affect the decision of such case, the city not being responsible for damages in consequence of negligence which does not apply to the particular circumstances when the damages were incurred. *D'Estimonville* v. *Montreal*, 18 Que. S. C. 470.

Sidewalk—Snow and ice—Municipal corporation — Gross negligence. *Stevens* v. *Chatham*, 1 O. W. R. 199.

Sidewalk—*Snow and ice—Municipal corporations — Negligence — Maintenance of streets—"Gross negligence."*]—About 10.30 on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shewn that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city corporation had scattered sand on the crossing, but the high wind prevailing at the time had probably blown it away:—*Held*, affirming the judgment of the Court of Appeal, 27 A. R. 410, 20 C. L. T. 300, that the facts in evidence were not sufficient to shew that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R. S. O. 1897 c. 223, s. 606 (2). *Ince* v. *Toronto*, 21 C. L. T. 365, 31 S. C. R. 323.

Sidewalk — *Voluntary subscription — Statute labour.*]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it, nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk, and there had been opportunity and time to repair it. *Madill* v. *Caledon*, 22 C. L. T. 175, 3 O. L. R. 66, 555, 1 O. W. R. 299.

Snow — *Notice. Hogg* v. *Township of Brooke*, 2 O. W. R. 139.

Snow and ice—*"Gross negligence."*] — "Gross negligence," in s. 606 (2) of the Municipal Act, R. S. O. c. 223, means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time. If the sidewalk has been constructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence. Where there was a sudden change in temperature about six in the morning, and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning. *Ince* v. *Toronto*, 20 C. L. T. 300, 27 A. R. 410.

Snow and ice — Gross negligence. *Mahoney* v. *Ottawa*, 3 O. W. R. 695.

Snow and ice — Injury to pedestrian—Liability of municipal corporation — Notice —Gross negligence — Damages. *Merritt* v. *Ottawa*, 12 O. W. R. 561.

Snow and ice — Injury to pedestrian—Preponderance of evidence — Condition of sidewalk — Failure to light street of town — Nonfeasance. *Evans* v. *Huntsville*, 3 O. W. R. 108.

Snow and ice—*Injury to person—Liability of municipality—Vis major—Pleading.*] —The defence of irresistible force (*force majeure*) to an action of damages for tort must be specially pleaded.—2. The icy condition of a road, when it does not appear that it was due to a sudden change of temperature, and that there had been no time to mend it, does not constitute *force majeure* which will avail to relieve a municipality from liability for accidents. *Lachance* v. *Corporation Nôtre-Dame* v. *Québec*, 32 Que. S. C. 481.

Snow and ice — *Negligence—Notice — Contributory negligence.*] — To render a municipal corporation liable for the bad condition of a sidewalk, it is necessary that the condition should have existed for a sufficient time to warrant the presumption that the corporation knew of it, especially when it is a sidewalk usually kept in good order, upon which ice has formed in a short time after a sudden thaw.—A person who sees before him a sidewalk covered with sheer ice, and neglects to turn aside a few steps in order not to lose time, cannot complain if he falls. *Gunlack* v. *Montreal*, 17 Que. S. C. R. 294.

Snow and ice — *Negligence—Notice of accident—Sufficiency of.*]—This was an action to recover damages for injuries alleged to have been sustained by the plaintiff owing to his slipping on a quantity of snow and ice in a street in the town of St. Mary's, which the defendants were alleged to have negligently allowed to accumulate. The statutory notice required by R. S. O. c. 223, s. 606, s.-s. 3, given on behalf of the plaintiff, described it as having taken place opposite to a certain shop, whereas, in fact, it took place opposite a different shop, about twenty feet farther on the same side of the street:—*Held*, that the notice was sufficient, as it gave information enough to enable the corporation to investigate, and that is all that can be called for. *McQuillan* v. *St. Mary's*, 20 C. L. T. 42, 31 O. R. 401.

Snow and ice—Notice to municipal corporation — Gross negligence — Damages. *Ludgate* v. *Ottawa*, 8 O. W. R. 257, 865.

Snow and ice—*Reasonable precautions.*] —A town corporation is liable in damages only for such accidents on streets as arise from its neglect and want of care; and where it is established that the corporation had adopted all reasonable and necessary precautions to maintain the sidewalks in good order and condition, and that the accident complained of occurred partly through the imprudence of the injured person and partly through extreme and uncontrollable climatic conditions, the corporation will be relieved from responsibility. *Olive* v. *Westmount*, 16 Que. S. C. 426.

Snow and ice.]—The Municipal Ordinance gives municipalities in the Territories jurisdiction over roads, casts upon them the duty of maintaining them, authorizes them to abate nuisances, and affords them means for raising money for corporate purposes: — *Held*, therefore, that where a municipality had constructed a sidewalk upon one of the roads within its limits, upon which snow and ice had accumulated, which it had not removed within a reasonable time, in consequence of which the plaintiff slipped and fell and was injured, the municipality was liable. *Cuzner* v. *Calgary*, 1 Terr. L. R. 162.

Uneven surface—*Liability — Objection —Waiver.*]—Action for damages for injury to a horse claimed to have been occasioned by non-repair of a highway. The non-repair consisted in the continued existence of a series of hollows, styled pitch holes, produced by traffic in the snow-covered surface of a travelled road; the holes were in almost uninterrupted succession, at intervals of only a few feet, varying in depth from one to four feet below the level of the travelled snow-road. The descent and ascent of the pitch holes were so steep and their depth so great as to make travel, especially with loads, extremely difficult and even unsafe. A small expenditure of municipal moneys would have so mitigated the evil as to render the travel safe:—*Held*, that under s. 618 of the Municipal Act, R. S. M. c. 100, the defendants were liable for the damages. *Cascell* v. *St. Mary's Road Co.*, 28 U. C. R. 247, and *Walker* v. *Halifax*, 16 N. S. R. 371, Cass. Dig. 175, followed.—*Held*, also, following *Proctor* v. *Parker*, 12 Man. L. R. 529, that, by not raising the objection at the trial, the defendants had waived strict proof of the facts which, under s. 619, would render them liable to keep the road in repair. *Kennedy* v. *Rural Municipality of Portage la Prairie*, 20 C. L. T. 26, 12 Man. L. R. 634.

Unguarded excavation — *Negligence—Contributory negligence—Findings of jury.*] —The plaintiffs sought to recover damages from the defendant town corporation for injuries sustained in falling into a ditch or trench which had been dug across one of the streets of the town by a contractor under the town authorities in connection with the construction of a system of drainage. The evidence shewed that the plaintiffs drove out of town in the morning before the trench was dug, and were returning after dark, when they were thrown into the trench, which, in the meantime, had been dug across the greater part of the street, and had been left unguarded and insufficiently lighted. The jury found, in answer to questions submitted to them, that the town corporation were guilty of negligence in not properly guarding the excavation, but that the driver of the carriage could have avoided the accident by the exercise of reasonable care:— *Held*, on an equal division of the Court, that the judgment entered on the findings, in the defendants' favour, must be affirmed. *Weir* v. *Amherst*, 38 N. S. R. 477.

See APPEAL—NOTICE OF ACTION — PARTIES—STREET RAILWAYS—WARRANTY.

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6. OBSTRUCTION OF HIGHWAYS.

Blocking highways — *Contrary to lease from city — Interference with business — Damages.*]—Action for damages in connection with closing up of portions of streets near defendants' brewery. The portions so closed had been leased to the Canadian Pacific Railway Co., the agreement between the City of Montreal and the latter company respecting same having been sanctioned by the Legislature. This sanction does not create for defendants any new ground of damages allowed, calculated on delay defendants put to in teaming to and from the premises in question. *Montreal* v. *Montreal*, 6 E. L. R. 198.

Boathouse on public street — *Action suspended 3 months to enable defendant to remove.*]—The action was for a declaration that the lands in question were a part of public highway of the Village of Lakefield, and that defendant was not entitled to oc-

cupy or obstruct same, and that defendant should be ordered to go out of possession of same, and to remove all obstructions therefrom. At trial judgment was given for plaintiffs, as prayed. Divisional Court *held*, that the injunction should be suspended for three months to enable defendant to remove his boathouse. With that variation, judgment at trial affirmed with costs. *Lakefield* v. *Brown* (1910), 15 O. W. R. 656.

Building materials—*Injury to bicyclist —Negligence of municipal corporation — Contributory negligence—Notice of claim—Letter to chairman of board of works—Relief over against landowner.*]—The plaintiff's claim was for damages caused by falling from his bicycle into a deep unguarded excavation in a lot owned by the defendant L. on the corner of a public street and a lane in the city of Winnipeg. He was riding down an inclined part of the highway towards and close to a portion of it which was only about 30 feet wide, and which was obstructed for half its width by a pile of building materials in the possession of and maintained there by L. and, observing that the remainder of the roadway was at the moment occupied by a team with a loaded waggon, he attempted to stop by back-pedalling. But the claim then came off the sprocket wheel, and, being unable to check his speed, he tried to turn into a lane on the hither side of the obstructions. His speed was too great, however, and he ran into the excavation at the edge of the lane, being seriously injured. It appeared that the proper city officials had notice of the obstructions being on the street for a considerable time previously, and that they had requested L. to remove them. It was contended on behalf of the defendants that the plaintiff had been guilty of contributory negligence, as he was aware of the condition of the street and of the chance that it might be wholly blocked at any time, and should not have run the risk of the chain slipping off whilst going down the incline. He was, however, an experienced bicycle rider, and had used the same wheel for several years without the chain having ever come off:—*Held*, that he was not guilty of contributory negligence in the matter, and that the defendants were liable to him in damages.—The defendants also set up that notice of the claim had not been served on the city clerk as required by s. 722 of the Winnipeg charter, 1 & 2 Edw. VII. c. 77. The notice relied on was a letter which the plaintiff delivered personally to the chairman of the board of works, and which contained full particulars of the accident and of the injuries received, and asked for payment of $350. This letter reached the city clerk within the time required by that section:—*Held*, that the statute was sufficiently complied with to enable the plaintiff to recover.—*Held*, also, that the defendants were entitled, under s. 728 of the charter, to relief over against L. for the amount of the plaintiff's judgment and all their costs in the action. *Barnes* v. *Ward*, 9 C. B. 392, and *Dalton* v. *Angus*, 6 App. Cas. 829, followed. *Mitchell* v. *Winnipeg*, 6 W. L. R. 31, 7 W. L. R. 120, 17 Man. L. R. 166.

By-law of township council — Conveyance of land to private person—Action against—Inconvenience to plaintiffs—Inconvenience to public—Parties—Attorney-General. *Logan* v. *Logan*, 3 O. W. R. 558.

Conviction—*Old trail — Hudson's Bay company—Transfer to Territories—Crown—Expropriation—Compensation — Petition of right.*]—When a statute authorizes the expropriation of private land, the owner is not entitled to compensation, unless the statute so provides. Even where compensation is payable by the statute, the party expropriating may (unless the statute otherwise provides) enter upon the land for the purposes expressed by the statute, without being liable to an action for damages; the owner must take such proceedings as may exist for obtaining compensation—in the case of expropriation by the Crown by petition of right in the Exchequer Court. Where land, which was part of the lands reserved to the Hudson's Bay Company, was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act, and cultivated and enclosed it, thus preventing the use of an old trail, which, subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories:—Held, that the purchaser was rightly convicted of obstructing a public highway. *Regina* v. *Nimmons*, 1 Terr. L. R. 415.

Damage to business of boarding-house keeper—*Permission of city engineer to obstruct for building purposes — Effect of.*]—Action by boarding-house keeper for damages caused by defendants "obstructing the sidewalk and road in front of plaintiff's residence, so that the boarders not having convenient access to the house left for more convenient and agreeable quarters:"—*Held*, that there was no evidence that these boarders would have remained with plaintiff, nor had it been shewn that plaintiff had suffered damage in any degree attributable to the operations of the defendants. The defendants' contractor was using the sidewalk with permission of the city engineer, while the street railway company were relaying their tracks. This caused temporary obstruction in front of plaintiff's residence. It makes no difference that the city engineer had given verbal permission instead of written permission for the erection of the hoarding adjoining plaintiff's property. *Coulstring* v. *Nova Scotia*, 7 E. L. R. 113.

Dwelling house — *Survey — Lowering grade—Compensation.*] — A survey of the town of Cornwall was confirmed by 47 V. c. 50 (O.). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop . . . had been before the 1st January, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop or building to remove the same off such street until the rebuilding of such dwelling house, shop, or building, or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house or shop." The survey shewed that a certain dwelling encroached four feet upon the street. This verandah was made of wood,

rested on stone pillars, had its own roof, and was firmly attached to the house: — *Held*, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed, within the above proviso:—*Held*, therefore, that the position of the dwelling-house and verandah did not bar the owner from applying for compensation under the Municipal Act for damages sustained by reason of the corporation having lowered the grade of the street in front to an extent interfering with his access. *Williams* v. *Cornwall*, 20 C. L. T. 457, 32 O. R. 457.

Injury to traveller — Deviation from travelled way—Nuisance — Misfeasance — Responsibility of township corporation — Toll road — Removal of tolls—County by-law—Validating statute—Toll Roads Act—Electric railway tracks laid on portion of highway—Track raised above level—Dangerous place—Absence of light—Contributory negligence—Primary responsibility of municipality for fault of electric railway company—Statutes — Death of traveller, whether resulting from injury—Damages—Fatal Accidents Act—Amendment — Liability over of electric railway company. *Pow* v. *West Oxford*, 11 O. W. R. 115, 13 O. W. R. 162.

Injury to traveller — *Electric railway tracks on highway.*]—The administratrix of one P. sought to recover damages for his death by being thrown out of his carriage while travelling on a highway in defendant township, the said highway being alleged to be out of repair. The Court of Appeal held that the township, not the county nor the defendant electric company, was liable for the non-repair. *Pow* v. *West Oxford*, 13 O. W. R. 162.

Injury to traveller—*Knowledge of danger—Negligence — Municipal corporation — Misfeasance or nonfeasance.*] — The mere fact that the plaintiff knew that a heap of dirt was standing upon a highway is not sufficient to disentitle him to recover damages from a municipal corporation for personal injuries sustained by him owing to the heap having been negligently left there unguarded.—*Gordon* v. *Belleville*, 15 O. R. 26, and *Copeland* v. *Blenheim*, 9 O. R. 19, followed.—It was argued that the municipal corporation, in discharging their duty of cleaning the highway, had a right to cause the dirt to be raked into a heap, and that leaving it there unguarded was mere nonfeasance:—*Held*, that the doing of a lawful act in such a way as to endanger the safety of the public was misfeasance—the whole was one act and an unlawful act.—*Rowe* v. *Corporation of Leeds and Grenville*, 13 C. P. 515, *Dickson* v. *Haldimand*, 2 O. W. R. 269, 3 O. W. R. 52, and *Bull* v. *Mayor, etc., of Shoreditch*, 18 Times L. R. 171, 19 Times L. R. 64, followed. *Keech* v. *Smith's Falls*, 11 O. W. R. 309, 15 O. L. R. 300.

Municipal corporation — *By-law — Power to close roads.*] — The roads mentioned in s.-s. 127 of s. 50 of the Municipal Clauses Act, which may be closed by by-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries. *Styles* v. *Victoria*, 8 B. C. R. 406.

Municipal corporation — *Misfeasance —Liability for wrongful acts of committee of council—Injury to traveller—Damages.*] —The municipal council of a township, having decided to construct a ditch along a highway, under the provisions of the Ditches and Watercourses Act, appointed three of their number a committee to meet on the highway, and there to let the contract for the work by public competition. This the committee did, and, in order to indicate where the ditch was to be constructed, they drove stakes in the highway, one being near the centre of the travelled portion. The contract was let, and the stakes were left in position, projecting about six inches above the ground, and unprotected by barrier, light, or otherwise. One of the plaintiffs, in walking upon the highway, struck her foot against one of the stakes, and was thrown to the ground, and injured:—*Held*, that the injury was caused by misfeasance, and that the municipal corporation were liable for the acts of the committee, who were acting within the scope of their authority.—Damages were assessed for the plaintiff who was injured at $1,500 and for her husband at $500. *Biggar* v. *Crowland*, 8 O. W. R. 819, 13 O. L. R. 164.

Negligence — *Damages.*] — A milk-stand built on a highway by an adjoining proprietor, and projecting slightly over the travelled way, is such an obstruction as to constitute want of repair within the meaning of the Municipal Act, and when such an obstruction exists for three years, and the municipal corporation having jurisdiction over the road in question take no steps to have it removed, they are liable in damages for an accident caused by it. *Castor* v. *Uxbridge*, 39 U. C. R. 113, considered and approved. Quantum of damages for death of a child discussed. *Huffman* v. *Bayham, Tanner* v. *Bayham*, 19 C. L. T. 383, 26 A. R. 514.

Non-feasance—*Municipal corporation—Knowledge—Pleading.*]—The declaration alleged that the defendants wrongfully and negligently allowed a sidewalk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of:—*Held*, that, as the declaration did not allege that the defendants had knowledge of the obstruction, it disclosed a mere nonfeasance, and was bad on demurrer. *Rolsten* v. *St. John*, 36 N. B. R. 574.

Nuisance—*Prevention of access to property—Right of action—Individual injury—Injunction—Removal.*] — The right of ingress from and egress to a public highway parting a person's land is a private right, differing not only in degree but in kind from the right of the public to pass and repass along such highway; and any disturbance of the private right may be enjoined in an action by the land owner alone. *Harvey* v. *British Columbia Boat and Engine Co.*, 14 B. C. R. 121, 9 W. L. R. 415.

Obstruction by committee of council of township—Stakes in highway to mark course of ditch—Misfeasance—Liability of corporation for acts of committee—Injury to pedestrian on highway—Damages. *Biggar* v. *Crowland*, 8 O. W. R. 819.

Plan of survey—*Lots sold according to plan—Establishment of highways—Estoppel—Obstruction—Injunction.*]—Action for a declaration that certain streets laid down upon a plan, of a sub-division of the township of Hay, which was duly registered, were public highways, and to restrain defendant, Bisonnette, from occupying or obstructing the same.—Clute, J., *held* (14 O. W. R. 279), that there should be judgment for plaintiffs declaring that the said highways were public, and that the defendant be restrained from occupying or obstructing the same, and to be ordered to go out of possession and to remove all obstructions therefrom.—Divisional Court (14 O. W. R. 1231, 1 O. W. N. 287), affirmed above judgment.—Court of Appeal dismissed an appeal therefrom with costs. *Hay* v. *Bisonnette* (1910), 17 O. W. R. 321, 2 O. W. N. 189.

Proof of abandonment—*Obstruction—Action to compel removal—Owner of abutting land.*]—The appellant removed a fence and took possession of a strip of land which originally had been detached from his property, but which for many years had formed part of a public highway, and had served to give the respondent access to his property. The respondent brought suit asking that the appellant be ordered to cease his disturbance, and replace the fence as it was:—*Held*, (affirming the judgment in 20 Que. S. C. 26, but omitting one *considérant*), that it was incumbent on the appellant, in order to make good his pretension that the strip in question had ceased to be a public road, to prove that by some act of duly constituted and competent authority qualified to act on behalf of the public, the road had been closed or abolished and the rights of the public thereto renounced, or, at least, such a total cessation of use by the public of the road as a public road, and such a conversion thereof to other uses, acquiesced in by competent authority, as would constitute a total abandonment by the public and such competent authority, of all rights thereto as a public road. 2. A person owning land abutting on such road, and who is deprived of the direct access which he previously had thereto, suffers special damage by the closing and obstruction of the road, and has in consequence a right of action in his own name to compel the removal of the obstruction. *Meloche* v. *Davidson*, 11 Que. K. B. 302.

Railways—*Fences — Municipal corporation—By-law—Railway Act of Canada — Railway Committee of Privy Council — Injunction — Removal of obstruction—Jurisdiction.*]—The allowance for a road made by a Crown surveyor, is a highway, within the meaning of s. 599 of the Municipal Act, and, although not an open public road, used and travelled upon by the public, it is a highway within the meaning of the Railway Act of Canada, 51 V. c. 29. 2. Although the road allowance had not been cleared and opened up for public travel and had not been used as a public road, it is not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council may direct their officers to open the road, and such direction will be sufficient. 3. The right of a railway company under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway is subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality. 4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (g) of the Railway Act not applying. 5. That the Court had jurisdiction to grant the relief sought. *Fenelon Falls* v. *Victoria Rw. Co.*, 29 Gr. 4, and *City of Toronto* v. *Lorsch*, 24 O. R. 227, followed. 6. That the highway, being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences. *Gloucester* v. *Canada Atlantic Rw. Co.*, 22 C. L. T. 63, 284, 3 O. L. R. 85, 4 O. L. R. 262, 1 O. W. R. 18, 63, 485.

Raised crossing—*Injury to person driving—Misfeasance — Liability of municipal corporation — Negligence — Contributory negligence.*]—The plaintiff in driving along a highway in a town, in order to pass a vehicle in front of him, turned somewhat to the side of the roadway, but was still upon the part of the highway designed for vehicles, when he encountered an obstacle and was thrown out of his waggon and injured. The obstacle was a wooden crossing, raised at the side of the street to a height of 12 inches above the level of the roadway:—*Held*, that it was an obstruction in the highway; that leaving it there was misfeasance; and that the defendants, the town corporation, were liable at common law for the plaintiff's injuries:—*Held*, also, that the plaintiff was not guilty of contributory negligence. *Williams* v. *North Battleford* (1910), 14 W. L. R. 684.

Restricting width of street.]—A servitude of a right of way created, in the deed of sale of an immovable, by these words, "and, in addition, to a right of way in the proposed Napoleon Street, until it is opened"—the proposed street in front of the property sold being traced on the cadastral plan as having a width of thirty-six feet, must be construed as extending over the whole width. Hence, the building of a fence in the street and thereby restricting the ground upon which the servitude can be exercised will give rise, in favour of the dominant proprietor, to an action in recognition of servitude to stop the disturbance. *Labonte* v. *Carrier* (1910), 20 Que. K. B. 280.

Right of municipality — *Restoration of land and fences.*]—The right of property of a municipal corporation in a public road is a conditional right, which exists only so long as the road is used as such; after the closing of the road, the land comprised in

it is restored to the property from which it was detached, and the fences to those who made them. *Corporation of Beauce* v. *Patenaude*, 25 Que. S. C. 326.

Sidewalk — "*Trap*" — *Negligence of municipal corporation—Damages—Aggravation.*]—In performing a contract for a town, contractors placed temporarily across a sidewalk a two-inch plank, the whole edge of which was exposed. There was no light there at night. A girl one night struck her foot against the edge of the plank, fell, and was injured:—*Held*, that the plank was a "trap."—*Semble*, that even if it were shewn that the injury was aggravated by unskilful surgical treatment, the damages would be deemed to follow proximately from the negligence of the town. *Small* v. *Westville*, 40 N. S. R. 226.

Telegraph pole — *Brace—Injury to traveller—Liability of telegraph company.*] — The defendants, a telegraph company, used a line of telegraph formerly owned by another company, who by their charter had power to "set up posts . . . but the company shall use the power . . . in such manner as not to interfere with the free use by the public of such road." The defendants placed a brace against one of their poles, and the foot of the brace extended 5 feet towards the centre of the highway, the road being narrow at this point. In the spring of the year this road is bad, and the track travelled in summer is usually abandoned by those travelling in carriages, the ground nearer this pole being better, and it being impracticable to go to the other side of the road. The plaintiff, in driving his carriage in the month of April along this road, kept in or near the travelled track. When the horse's head was about opposite the pole, the horse's feet sank in the mud. The horse, to recover himself, sprang toward the pole side, the left forward wheel came in contact with this brace, and the waggon was broken, and the plaintiff was injured:—*Held*, that the erection of the brace in that narrow place was not authorized by the Act of Parliament; it interfered with the free use by the public of the highway. The boggy road, and the departure in the spring from the travelled track, were matters for the consideration of the defendants when they erected the brace. The position of the brace was the proximate cause of the waggon being overturned. *Wells* v. *Western Union Telegraph Co.*, 40 N. S. R. 81.

Telephone company — *Indemnity.*] — Under its Acts of incorporation the Bell Telephone Company is authorised, with the consent of the municipal council interested, and under the supervision of the engineer of the municipality, or of such other officer as the municipal council may appoint, to erect and maintain poles along the sides of any street, but so as not to interfere with the public right of travelling on and using the street. Under an agreement with the municipal council of the defendants, the company erected a line of poles in one of the streets of the city, one pole being placed in the travelled portion of the street. The defendants had no engineer, and did not appoint any officer to supervise the erection of the poles, but there was some evidence that the work had been done under the supervision of an officer of the defendants known as the "street surveyor," who discharged the duties usually discharged by an engineer of a municipality. The pole was allowed to remain in the street for several years, and the plaintiffs were injured by coming into collision with it, while lawfully using the street:—*Held*, affirming the judgment of Ferguson, J., 29 O. R. 518, 18 C. L. T. 310, that the pole was an illegal obstruction in the highway, which was therefore out of repair within the meaning of the Municipal Act, and that the defendants, having neglected to remove it, were liable in damages.—*Held*, also, reversing the judgment on this point, that the pole had not been erected under the supervision of the proper officer, and that the defendants were entitled to indemnity from the Bell Telephone company. *Atkinson* v *Chatham*, 19 C. L. T. 382, 26 A. R. 521.

Toll road—*Action negatoire—Conclusions injonctives.*] — An action *négatoire* with *conclusions injonctives* which are the essential accompaniment of it, is an action at common law, and may properly be brought by commissioners of toll roads against any person who causes obstructions upon the roads of which they have the control. *Montreal Toll Roads Commissioners* v. *Montreal Water and Power Co.*, 8 Que. P. R. 38.

Verandah — *Municipal by-law—Injunction.*]—In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but, as it had been in existence for a great many years, and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised. *Caldwell* v. *Galt*, 20 C. L. T. 203, 27 A. R. 162.

See CRIMINAL LAW — NOTICE OF ACTION —MANDAMUS—MOTORING.

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7. OPENING AND CLOSING OF HIGHWAYS.

Appeal from Mayor's Court of Charlottetown—*Encroachment on streets—City council under s. 50 of Act of Incorporation have not power to open new streets, etc., except by authority of Governor in Council —Old boundaries.*]—The 4th section of the city by-laws enacted that the city surveyor should not allow any erection facing on a street to project beyond the line of houses already built, or upon what has heretofore been considered and used as a street, and that when in doubt he should be guided by a plan made by Surveyor-General Wright. On that plan defendant's fence was represented as encroaching fourteen feet on Sydney street. The old fence was lately removed and a new one built on the same site, but the fourteen feet had been fenced and held by defendant before and ever since

the plan was made. The Act of Incorporation, 18 V. c. 34, s. 50, under which the by-law was made, gives the city council exclusive power to open, lay out, etc., the streets and to prevent encroachments, but adds a proviso that nothing therein contained should be construed as to authorise the opening of roads, etc., through private property without complying with the provisions of any Act or Acts then in force for awarding damages to any person injured thereby. It was contended that this section gave the city council supreme power to widen or open streets, and to remove buildings, fences, etc., also that section 4 of the city by-laws, established Wright's plan as conclusive evidence of the position of the streets, and that anything represented on that plan as an encroachment must be held to be so; also that the lot of which defendant contended the ground in question formed part exceeded the quantity which, according to the deed or grant thereof, it ought to contain, and that his lot should be limited to the quantity described in his grant:—*Held*, Peters, J., that section 50 of the Act did not give the city council supreme power as contended.—That under that section the city council must apply to the Governor in Council for power to open new streets or to widen the present streets.—That the fence was not an encroachment notwithstanding the plan.—That disputes respecting old boundaries are not to be decided so much by what would be the metes and bounds contained in the deed, as by what would be the metes and bounds actually laid down by the surveyor acting for the grantor. *Pleadwell* v. *Brenan* (1857) 1 P. E. I. R. 147.

By-law—*Closing of portion by municipal corporation — Original road allowance — Right of way over portions of road closed —Another convenient way — Action for damages — Arbitration — Municipal Act (1903), ss. 629, 637, 660.*] — Municipal corporation closed a portion of a public highway by by-law. Plaintiffs brought action claiming damages, and asked to have the by-law declared invalid or in the alternative to have it declared that one of the plaintiffs was entitled to a right of way over the north half of the portion of the highway so closed.—Sutherland, J., dismissed plaintiff's action with costs, holding that the evidence was inadequate to establish that the highway in question was an original allowance for a road, therefore s. 660 (2) of the Municipal Act did not apply, and that it could not be said that the closing of that portion of the highway left plaintiffs without another convenient road to their lands, and that their remedy was under the arbitration proceeding initiated by plaintiffs. *Hanley* v. *Brantford* (1910), 16 O. W. R. 812, 1 O. W. N. 1121.

Compensation for land taken—*Arbitration — Motion for judgment to enforce award—Leave to appeal refused.*]—Clute, J., gave plaintiff judgment enforcing an award and an order of mandamus requiring municipality to proceed with the opening of the road set out in their by-law No. 1042.—Riddell, J., refused leave to appeal. *Usher* v. *North Toronto* (1911), 18 O. W. R. 808, 2 O. W. N. 851.

Contract between municipal corporations to open and maintain highway — *Contract not under corporate seal — Breach — Mandamus — Damages.*]—Plaintiff township claimed that defendant township entered into an agreement with plaintiffs to open, build and maintain a public road in continuation of a road to be built by plaintiffs; the plaintiffs relying on said agreement, built their portion of said road, but defendants refused to build their portion, and plaintiffs claimed a mandatory order to compel defendants to build their portion, and damages for breach of said agreement. Defendants pleaded, *inter alia*, that such agreement was not under their corporate seal, and therefore not binding on them. At trial MacMahon, J., dismissed the action on above ground. Court of Appeal dismissed plaintiffs' appeal therefrom with costs, but defendants to repay plaintiffs $100 received from them. Judgment of MacMahon, J. 14 O. W. R. 122, affirmed. *East Gwillimbury* v. *King* (1910), 15 O. W. R. 601, 20 O. L. R. 510.

Conveyance of part of road allowance—Title to land—Statute of Limitations —Appurtenance — Former action — *Res adjudicata* — Estoppel — Deed — Municipal corporation — By-law — Ejectment —Declaration of title. *Pirie & Stone* v. *Parry Sound Lumber* Co., 11 O. W. R. 11, 13 O. W. R. 319.

Damage resulting to plaintiff's hotel by closing highway — *Compensation allowed by arbitrators—Con. Mun. Act, s. 447.*]—Defendant council closed a portion of a public highway leading to plaintiff's hotel. Her hotel did not abut nor front upon the highway closed. — Mulock, C.J.Ex.D., *held* (15 O. W. R. 733, 1 O. W. N. 609) that its proximity to such highway enhanced its value and the closing of such highway depreciated its value. Plaintiff awarded $500 damages.—*Re McCauley and Toronto*, 18 O. R. 416, specially referred to.—Court of Appeal dismissed defendants' appeal with costs. —*Shragge* v. *Winnipeg* (1910), 15 W. L. R. 96, 20 Man. L. R. 1, and *Rex* v. *McCarthy* (1904), 34 S. C. R. 570, distinguished. *Taylor* v. *Belle River* (1910), 17 O. W. R. 816, 2 O. W. N. 387.

Damages caused to property holder.] —The closing of one end of a street may result in direct and real damages to a property fronting on it; and the owner of the property has the right to recover the damages he has suffered from the municipal corporation which ordered the street to be closed although the corporation acted in the public interest and in pursuance of the provisions of its charter. *Beaulac* v. *Three Rivers* (1911), 17 R. de J. 198.

Damages to adjacent owners — *Nature of the damages recoverable.*]—Municipalities in exercising the right streets or public roads, are responsible to owners adjacent thereto for damages caused by the greater difficulty in reaching their lands. When the damage consists in the additional expense and the change of approach without cutting it off altogether, the owner can recover only that additional expense so far as it has occurred. He cannot exact a

lump sum for the depreciation of his property, as this cannot be determined on account of contingencies. *Montreal* v. *Montreal Brewing Co.*, 18 Que. K. B. 404.

Depreciation of property — Lease by municipality — Interference with business —Damages. *Montreal* v. *Montreal Brewing Co.* (Que.), 6 E. L. R. 198.

Highway Act, 14 Vict. c. 1, s. 16— *Information — Demurrer.*]—An information for preventing the opening of a road directed to be laid out by the Governor in Council, under 14 V. c. 1, s. 16, must allege that the road ran through defendant's land. *Att.-Gen. for P. E. I.* v. *Westaway* (1856), 1 P. E. I. R. 114.

Injury to abutting lands — *Municipal corporation — Damages.*] — Municipalities exercising the right of closing streets or public ways are liable for damages for the injury done to the property abutting thereon by making access thereto more difficult. *Montreal Brewing Co.* v. *Montreal*, 30 Que S. C. 280.

Jurisdiction of municipal council— *Closing part of highway extending into other municipalities — Consolidated Municipal Act, 1903, s. 637 — "Wholly within the jurisdiction of the council."*]—By s. 637 of the Consolidated Municipal Act, 1903, the council of every county, township, city, town and village may pass by-laws, (1) for . . . stopping up roads . . . wholly within the jurisdiction of the council:"— *Held*, that the word "wholly" is used with reference not to the locality of the road, but to the jurisdiction of the council over it; and the council of a municipality has jurisdiction to pass a by-law closing part of a continuous highway passing through that municipality and extending into other municipalities. *In re Falle and Tilsonburg*, 23 C. P. 167, followed. *Hewison* v. *Pembroke*, 6 O. R. 170, commented on. *Re Taylor and Belle River*, 18 O. L. R. 330, 13 O. W. R. 778.

Local improvement — *Construction of roadway — By-law — Work not done as provided for — Different kind of road — Action by ratepayer—Injunction—Remedy.*] —The defendants proposed to construct a macadam roadway upon a certain street, to be paid for by the ratepayers whose property would be benefited thereby, according to the local improvement plan. There was no petition against the proposal; a by-law was passed; the work commenced, and was proceeding when the plaintiffs, suing on behalf of themselves and the other ratepayers affected, brought this action for a mandatory injunction, alleging that the defendants were not building a macadam road nor performing the work in accordance with the report referred to in the by-law, but were doing the work in a defective and unworkmanlike manner:—*Held*, Martin, J.A., dissenting, that this disclosed a cause of action, for the defendants were, assuming the truth of the allegation, doing something directly contrary to statute.—This does not involve assent to the proposition that a ratepayer can oversee the work and interfere whenever the quality does not suit him.—*Quære*, as to the plaintiffs' proper remedy.—Judgment of Irving, J., dismissing the action summarily, reversed. *Arbuthnot* v. *Victoria* (1910), 14 W. L. R. 440.

Persons entitled to compensation— *Lands injuriously affected by closing of streets—Determination by council — Appeal to Judge as persona designata—Time fixed by statute—"Within 10 days after the passage of the by-law."*]—By sec. 15 of the amendment to the Winnipeg charter, passed in 1904, repealing sec. 708, and substituting a new section therefor, the plaintiffs were authorised to close up certain streets and lanes in the city, and to determine what persons or classes of persons were injuriously affected by the exercise of these powers and entitled to compensation; and the section provided that no other persons or classes of persons should be so entitled unless such determination should be amended on appeal to a Judge of the Court of King's Bench; and also that any person dissatisfied with the determination of the council, as to the persons or classes of persons injuriously affected, might appeal therefrom to a Judge of the Court of King's Bench; "in which case he shall, within 10 days after the passage of the by-law, apply to a Judge . . . The Judge . . . may change, add to, or diminish the persons . . . or may dismiss such appeal, and, according to the result of such an appeal, may award costs for or against the plaintiffs. . . . The decision of such Judge shall be final and conclusive, and shall not be appealed against or moved against by any party." On the 30th September, 1907, a by-law was passed by the plaintiffs' council, reciting an agreement entered into between the plaintiffs and a railway company, ratifying and confirming it, closing the streets and lanes referred to, and prescribing the persons entitled to compensation therefor. This by-law was then signed and sealed, but it was provided in it that it was to come into force on the execution of a certain supplementary agreement, which was not executed until the 20th July, 1908; and on that day another by-law was passed by the plaintiffs' council ratifying and confirming the former by-law and declaring it to be in force. Within 10 days from the passing of this last by-law an application was made by the defendants, by summons dated the 24th July, 1908, to a Judge of the Court of King's Bench, by way of appeal from the determination of the council as expressed in the first by-law, and, upon the application, the Judge, on the 8th October, 1908, made an order adding the defendants' names to the list of persons injuriously affected. On the 9th November, 1910, the defendants served upon the plaintiffs a notice that they had appointed an arbitrator to assess their compensation; and the plaintiffs, in this action, sought an injunction restraining the defendants from further proceeding and for a declaration that the order of the Judge was made without jurisdiction and was null and void:—*Held*, that, though the order of the Judge was, by the terms of the statute, final and conclusive, the plaintiffs were not deprived of all remedy; if the Judge had not jurisdiction, he could not confer jurisdiction upon himself by an erroneous decision to that effect; and the plaintiffs were entitled to have the question determined in this action.—*Held*,

also, that in making the order the Judge acted as *persona designata*, and the Court in this action was not bound by his determination that he had jurisdiction. — *Held*, also, that the 10 days began to run from the date on which the by-law was finally passed by the council and signed and sealed, which was on the 30th September, 1907; it was then a valid by-law, though it was to take effect in the future, upon the happening of a contingent event; upon the happening of that event, it came into force automatically. The order was, therefore, made without jurisdiction and was a nullity, and the plaintiffs were entitled to an injunction.—The words "passage of the by-law" are simple English words, and the Court should not give them any other than their plain meaning, unless coerced to do so by some very serious injustice or hardship which would arise from a literal interpretation. The only inconvenience or injustice suggested here as a result of a literal interpretation of the Act was that persons desiring to appeal might be compelled to do so before it was known whether or not the by-law would ever come into force, and thus become involved in costs of proceedings which might be wholly abortive; but the Act gave the Judge full power over costs; and that was not such an operation of the statute as should drive the Court to the conclusion that there must have been some "clerical mistake" in the language of the Act.—*Ex p. Rashleigh*, 2 Ch. D. 9, followed. *Winnipeg* v. *Brock* (1910), 16 W. L. R. 45, Man. L. R.

Powers of county councils—*Opening of a by-road situated partly in one local municipality and partly in another local municipality.*]—A county council has the right to have drawn and to homologate a *procès-verbal*—or minute—for the opening of a by-road which lies partly in one local municipality and partly in another local municipality. *Giguere* v. *Beauce* (1910), 19 Que. K. B. 353.

Procès-verbal— *Homologation—Time.*] —Where by a definitive judgment of the Circuit Court, a *procès-verbal* for the opening of a road has been declared regular, and its homologation granted, this homologation does not lapse by efflux of time, especially where most of the bridges have been completed, a part of the road built, and the material for the construction of the whole road purchased. *Bigras* v. *Laval*, 7 Que. P. R. 419.

Procès-verbal — *M. C. 6, 125, 794, 796, 798, 810a, 811, 826; C. C. 528, 529, 530, 531.*]—Petition for opening of a new by-road from one range to another may be presented to municipal council by one or more interested parties.—Opening of a new by-road cannot be considered to be a private undertaking, when such by-road is demanded in public interest, for purpose of avoiding steep hills, almost impassable during certain periods of the year, and for purpose of facilitating communication with the village or chief place in locality.—Oath to be taken by a superintendent before he enters upon the discharge of his duties may be subscribed before the mayor of the place where it is declared.—Delay within which a superintendent must make his report is apparently provided in interests of such superintendent; the omission to fix such delay in resolution of council appointing a superintendent is not fatal.—A municipal council may, in its discretion, give superintendent further delay, when he requests it, or confirm filing of such report by receiving it during or after delay first fixed. —A municipal council may, at any time, amend a report and distribute the work to be done upon or the cost of a road in such a way as to do justice to all; and it is for the parties interested to demand such amendment, either at time of its homologation, or afterwards according to provisions of Art. 811, M. C.—In opening of a by-road and distribution of work, the council may exercise its discretion, and has power to correct any injustice done, provided it is legally brought to its attention, and the Courts should not exercise their superintending powers unless there is abuse of authority or irremediable justice.—It is only in absence of a *procès-verbal* or of a resolution in council that the work of maintaining by-roads leading from one range to another in repair is performed by the proprietors or occupants of taxable property in the range to which such by-roads lead from any older range.—In case of a decision upon merits of a *procès-verbal*, costs are within discretion of municipal council. —A superintendent is not bound to indicate in his *procès-verbal* what the law is respecting clearance of land.—Petitioners in present case could not raise this question; proprietors adjoining by-road could alone do so.—*Procès-verbal* in present case is not nugatory by reason of any illegality or irregularity. *Bernier* v. *St. Marcel* (1909), 16 Que. R. de J. 294.

Procès-verbal — *Municipal corporation —Powers of — Prescription — Pleading— Statute — Retroactivity — Part performance — Irregularities of procedure.*] — A *procès-verbal* for the opening of a municipal road, made and homologated before the statute 59 V. c. 27 (Q.), remains in force until it is abrogated by a subsequent *procès-verbal* or by-law. A municipal council has therefore the power by resolution to order the performance of work specified in such a *procès-verbal* which has been allowed to remain in abeyance for a period of over forty years.—2. A *procès-verbal* cannot remain in force for a part and become inoperative for another part under 60 V. c. 27, s. 7 (Q.). When therefore it is made and homologated for the opening of two roads, one a front road and the other a by-road, and its provisions are carried out in respect of the latter, it is in force as a whole and does not become prescribed in respect of the front road.—3. Prescription of a *procès-verbal* under the statute must be expressly pleaded by the party who seeks to avail himself of it.—4. The above statute has no retrospective operation and applies only to *procès-verbaux* made after it came into force.—5. The rule of Art. 825, M. C., that no one is bound to maintain more than one front road on the same lot of thirty arpents' depth, affords no ground of annulment of a *procès-verbal*, but only of application to the municipal authorities to shift the burden in conformity with it.—6. Irregularities of procedure are not sufficient grounds

for an action to set aside municipal proceedings but of appeal or petition to quash provided in the Municipal Code for the purpose.—*Theriault* v. *Corp. of St. Alexandre*, 8 Rev. de Jur. 527, approved. *Corp. of Ste. Justine de Newton* v. *Leroux*, 15 Que. K. B. 159.

Proces-verbal for the opening and maintaining of a road is null and void for all, or any one, of the following omissions or informalities: When the resolution of the council appointing the special superintendent does not prescribe a delay for making it, Art. 794, M. C. Cf. *O'Shaughnessy* v. *Corp. of Ste. Clotilde de Horton*, 11 Que. L. R. 152. When the special superintendent has not been sworn before making it, Art. 796 and 187 M. C. When the special superintendent omits to give notice of the time and place of public meeting of the interested ratepayers, Art. 79 M. C. When no notice is given of the time and place at which the council is to make the examination of the *proces-verbal*, Art. 806 M. C. *Proces-verbal* that imposes on a ratepayer the obligation of erecting and maintaining fences on a third front road, when he has already two such roads to maintain, at a distance of less than thirty arpents from that in question, is illegal, unjust and oppressive and gives him a right of action in the Superior Court, to have it quashed. *Meredith* v. *Corp. of South Part of Township of Onslow* (1909), 36 Que. S. C. 243.

Road allowance — *Sale — Powers of Lieutenant-Governor — Crown.*]—By 60 & 61 V. c. 28 (D), s. 20, the Lieutenant-Governor of the North-West Territories in council is empowered to close up "any road allowance or trail which has been transferred to the Territories:"—*Held*, that the words "which has been transferred," etc. qualify "trail" only, and not "road allowance;" and therefore the Lieutenant-Governor in council has power to close any road allowance.—*Held*, also, that the power to "deal with" the land composing a road allowance when "closed," "as he sees fit," enables him to transfer and convey a title without any authorisation from the Crown other than is contained in s. 20. *In re Sale of Road Allowance*, 20 C. L. T. 146.

Sale of area—*Invalidity of by-law — Notice to owner of abutting land — Condition precedent — Saskatchewan Municipal Ordinance, 101 — Regina City Charter, s. 307.*]—Action for a declaration that a street and lanes in Regina, as set out on a plan which the city council purported to close by a by-law, are public highways, and to have obstructions removed. — *Held*, that under above s. 101, the by-law is invalid, no notice of intention to pass it having been given to the then owner of the lot now owned by plaintiff.—*Held*, further, that action is maintainable notwithstanding above s. 307. *Gesman* v. *Regina*, 10 W. L. R. 136.

Title to land—*Res judicata.*]—A previous action by these defendants against one L., with respect to certain lands, had been dismissed because these defendants could not make title. Plaintiffs herein, who had purchased from L. adjoining land, claimed the judgment in former action was a finding in their favour in this action:—*Held*, it was not and that the council had power to convey under s. 426 of the Municipal Act, 1873. *Pirie* v. *Parry Sound*, 13 O. W. R. 319.

See MUNICIPAL CORPORATIONS.

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8. TOLL-ROAD.

Avoiding by private way—*Damages.*] — A person whose land abuts upon a toll road upon one side, and upon the other side upon a public road upon which no right of toll exists, may open upon his land a road communicating with the latter road, and thus avoid passing over the toll road and paying toll, and the commissioners of the road cannot claim from him, as damages, the tolls which he would have had to pay if his vehicles had passed over the toll road. *Commissioners of Roads at the Barriers of Montreal* v. *Penniston*, 23 Que. S. C. 40.

Breach of law — *Passing without paying — Privity of contract respecting collection of tolls — Municipal contract and municipal by-law — Interpretation of statutes and of contracts.*]—The passing of a toll-gate after the keeper's refusal because of the non-payment of toll is a forcible passing and a criminal offence.—The privilege, enjoyed by a turnpike company, to collect tolls from travellers may be contractually abandoned, but the same exemptions should apply impartially to every one, and a clause in the contract which would necessarily give greater privileges to some of the public and not to all, is illegal.—Turnpike companies are subject to, and bound to observe, the by-laws and regulations of the municipalities in whose territory they carry on their operations.—Ambiguous terms in a contract or statute granting exclusive rights to a turnpike company should be interpreted in favour of the public and against the company.—In the present case, the agreement entered into between the city of Quebec and the turnpike company conceded to the defendant the right to pass the toll-bars without paying and in exercising his right he committed no offence. *North Shore Turnpike Co.* v. *Renaud* (1911), 17 R. de J. 238.

Evasion of tolls — *Tort — Damages — Closing of private roads.*] — When a turnpike trust is authorised by statute to levy tolls for the use of its roads, and, for that purpose, to place toll-gates on them, and it is made an offence, punishable by fine, for owners of contiguous lands to open roads thereon, to be used so that the payment of tolls may be evaded, such offenders are liable to the trust, as tort-feasors, for the amount of tolls lost.—2. The Court has no power, in such a case, to order the closing of the roads so opened. *Montreal Turnpike Trust* v. *Westmount Land Co.*, 34 Que. S. C. 5.

Running through two counties and several minor municipalities — *Road owned by individual — Disrepair — Report by inspector of toll roads—Statutory duties — Forfeiture of rights — 3 Edw. VII, c. 4, s. 3 (1).*] — Action for a declaration

of forfeiture by defendants of a toll road: — *Held*, that evidence that road in good repair will not be received, as it is for inspector of toll roads to decide as to that. The inspector is not bound to take evidence as to disrepair. After he reports he is not *functus officio*. It is not necessary for county council to decline to pass a by-law taking over the road. Estoppel does not arise. Plaintiffs entitled to forfeiture of portion within their limits although owned by an individual. *South Dumfries* v. *Clark* (1909), 14 O. W. R. 158.

Syndics — *Control—Notice—Repair and maintenance.*]—The statute 4 V. c. 17 leaves it to the discretion of the syndics of tollroads to take the control of the roads there mentioned, or of sections or parts thereof; and it is only after they have assumed such control, giving the notice there required in the manner there pointed out, that the road authorities cease to be bound to maintain and repair such roads.—Without a previous taking possession in the manner provided by the statute, or by force of the execution of a judgment ordering them to do so, the syndics cannot be bound to repair and maintain a road of which they have not assumed the control. *Roy* v. *Les Syndics des Chemins à Barrières de la Rive Nord*, 16 Que. S. C. 615.

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9. Other Cases Respecting Highways.

Bridge — *Cost charged against parties benefited, although span of bridge less than eight feet—Order varied by local council—Order re-enacted by county council—Action to quash.*]—Notwithstanding article 773 M. C., which provides that bridges of less than eight feet span form part of the municipal roads upon which they are situated, a report for the upkeep of a water course by the parties benefited, may order that the cost of the new bridges required by the widening, which the report calls for, shall be met by them, and this even when the bridges are of less than eight feet span. Hence, if the report is amended by the local council to the effect that such bridges are to be paid for by the persons liable for the work upon the road, the county council, to which an appeal has been taken, does not violate the above mentioned article by setting aside the order of the local council, and an action to quash the decision of the County Council will be dismissed. *Cote* v. *Nicolet* (1911), 39 Que. S. C. 421.

Bridge—*Crossing by engines—Condition precedent—R. S. O. (1897), c. 242—3 Edw. VII. c. 7, s. 43—4 Edw. VII. c. 10, s. 60.*]—R. S. O. (1897), c. 242, as amended by 3 Edw. VII., c. 7, s. 43, and 4 Edw. VII. c. 10, s. 60, provides as follows:—"10. (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.—(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R. S. O. 1887, c. 200, s. 10.—(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the sub-sections of this section to lay down on such bridge or culvert plank of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge or culvert as aforesaid, 3 Edw. VII., c. 7, s. 43, 4 Edw. VII., c. 10, s. 60."—*Held*, affirming the judgment of the Court of Appeal, 19 O. L. R. 188, Fitzpatrick, C.J., and Girouard, J., dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same; and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.—*Held*, also, Fitzpatrick, C.J., and Girouard, J., dissenting that planks required by s.-s. 3 over a bridge or culvert were not intended merely to protect the surface from injury by reason of inequalities in the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way.—Appeal dismissed with costs. *Goodison Thresher Co.* v. *McNab* (1910), 31 C. L. T. 392, 44 S. C. R. 187.

By-road which crosses obliquely and divides a lot bounded by a front road, does not become a front road for the rear portion of such lot which has passed into possession of another proprietor. *Carden* v. *St. Michel* (1909), 38 Que. S. C. 42.

Destruction of highway — *Stream breaking through dams — Bridge over stream stopping flow of water — Duty of municipality to repair — Reasonable cost—Damages — Mandamus — Indictment — Injunction.*]—Where the destruction of a highway is caused by the gradual encroachment of the sea or a lake, arising from natural causes, the water occupying the former location of the highway, and whereby there is a change of ownership in the land encroached upon, it becoming vested in the Crown, and available for purposes of navigation, there is no liability on the part of the municipality by virtue of its duty to keep highways in repair, to replace the highway; but, if the element of ownership does not arise, a duty to repair may exist where the destruction is of such a character, taking into consideration the cost of repair, that the restoration of the highway may not unreasonably be regarded as coming within the bounds of such duty.—In a creek, in the town of Dundas, a couple of dams built some 60 years ago had broken away, whereby large quantities of stones, sand, and other *débris* were carried down and deposited in the channel adjacent to the plaintiff's land, the accumulation being added to by a bridge across the creek, built by a railway company, which choked the flow of water,

the effect being that a portion of the highway in front of the plaintiff's land, and which was the only mode of ingress and egress to and from it, was washed away, rendering it difficult for two vehicles to pass each other. By removing the check to the flow of the water, caused by the bridge, and by the expenditure of $150, a roadway 30 feet wide could be furnished, while at a cost of $800 a permanent and satisfactory roadway could be provided:—*Held*, no question of ownership arising, and taking into consideration the cost of repair, that the destruction of the highway was not of such a character as would relieve the municipality from their obligation to repair; and that they were liable to the plaintiff for the special damage he had sustained by reason of their neglect.—A *mandamus* will not be granted in such a case.—If the relief was sought by the plaintiff as one of the public, the remedy would be by indictment.—An injunction was also refused, it not appearing that the municipality had interfered with the flow of water.—Judgment of Street, J., 10 O. L. R. 300, reversed. *Cummnigs* v. *Dundas*, 9 O. W. R. 107, 13 O. L. R. 384.

Encroachment by building — *Evidence.*]—In an action brought to compel the removal of a porch as an encroachment on the street line, reliance should not be placed on such data as conjectures from the length of side lines on the street line elsewhere.—*Halifax* v. *Reeves*, 23 S. C. R. 342, referred to. *Attorney-General* v. *Nagle*, 40 N. S. R. 165.

Encroachment by building — R. S. N. S. c. 78, s. 15 — Commissioner of streets —Application to, to define street line—Evidence — Injunction — Fences. *Attorney-General* v. *Zink*, 40 N. S. R. 633.

Insufficient lighting—*Injury to person — Liability of municipality.*]—A municipal corporation is responsible for an accident happening in one of its streets in consequence of insufficient lighting. *Montreal* v. *Ryan*, 17 Que. K. B. 143.

Ornamental trees — *Destruction of, by street railway company under statute — Rights of owners—Injunction—Construction of statutes.*]—The plaintiffs were owners of land, and as such claimed ownership by virtue of s. 688 of the Municipal Act, Manitoba, of all shade trees, shrubs, and saplings growing on the road opposite to their lands; the defendants cut down and destroyed a number of the trees, and, as the plaintiffs asserted, intended to cut down the remainder. The plaintiffs claimed an injunction and damages. The defendants were incorporated by an Act of the Manitoba Legislature, 1 & 2 Edw. VII. c. 71, and authorized to construct an electric railway along such parts of the highways in the municipality of Assiniboia as might be required, provided the permission of the municipality was first obtained. An agreement was entered into between the company and the municipality authorizing the company to proceed with the construction. A plan of the roadbed, including the portion opposite the plaintiffs' land, was approved by the council:—*Held*, that the plaintiffs had such an interest in the trees in question and in the eight feet of the highway adjoining their land, as would entitle them to maintain an action to prevent destruction of the trees and encroachment upon the eight-foot strip by an unauthorized person. Where a statutory right has been conferred, the legislature will not be deemed to have taken away that right by a later statute, unless the plain language of the statute shews the intention so to do. It did not appear that the intention of the legislature in the present case was to put an end to the plaintiff's rights summarily, but rather to give to the railway company the right of way and power to construct; the disposal of the plaintiffs' rights forming the subject of another consideration and of other provisions contained in the Acts embodied in and forming part of the special Act. The plaintiffs' rights formed a subject of compensation which might be dealt with in the manner provided by the Manitoba Railway Act and the Manitoba Expropriation Act embodied in the Railway Act. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 C. L. T. 380, 15 Man. L. R. 7.

Patentees to mining rights — *Owners of surface rights — Roadway from mines — Right to search for minerals on town streets — Survey — Dedication — Sales of town lots — Priority of claim.*] — Plaintiffs' actions were brought to restrain defendants from interfering with a certain roadway and the use thereof by plaintiffs, and that the town of Cobalt be restrained from interfering with plaintiffs' employees in searching for minerals upon the streets of the town of Cobalt, or upon any of the lots in said town. Plaintiffs claim title to the mines, minerals and mining rights in and upon and under mining claim J.B. 6, situate within the present corporate limits of Cobalt, the user of a certain roadway and the right to mine on the surface of said lands under letters patent. The private defendants claim title to certain lots laid out on the surface of J. B. 6, except the minerals, etc., and that they are entitled to have the surface of their lands undisturbed, and the town claims title to its streets and also claims that if plaintiffs have the right to mine on the streets they must exercise such rights subject to the statute 7 Edw. VII. c. 18, ss. 23 and 24. The actions were tried before the Chancellor, who *held* that the plaintiffs were entitled to the use and possession of the surface of the private defendants' lots for the purpose of mining operations, and that they were also entitled to mine on the streets in question, subject, however, to the enactment mentioned, but their claim to use the roadway in question was dismissed.—Court of Appeal dismissed defendants' appeal. Plaintiffs' cross appeal allowed in part both with costs to plaintiff. Judgment of Sir John Boyd, C., 13 O. W. R. 333, varied. *Coniagas Mines* v. *Cobalt & Jamieson Meat Co.; Coniagas Mines, Ltd.* v. *Jacobson & Blais* (1910), 15 O. W. R. 761, 20 O. L. R. 622.

Registered plan — Vacant space — Reservation — Intention — Vendor and purchaser — Land Titles Act — Highway —Lane — Open space. *Re Scottish Ontario Investment Co. and Bayley*, 12 O. W. R. 130.

Removal of sand from street laid out on plans — No dedication or acceptance as highways—Mortgage—Foreclosure—Extinguishment of mortgagors' rights — Resolution of council — By-law. *Birney* v. *Scarlett*, 2 O. W. R. 300, 3 O. W. R. 136.

Respecting rights of pedestrians and vehicles — *Automobile accident — Custom of the road — C. C. 1053.*]—When conditions are equal, pedestrians and drivers of vehicles have equal rights upon streets or highways; both must use prudence and care in the exercise of their respective rights.—In the present case, the pedestrian having a prior right of passage, the utmost care was required from the driver of the vehicle.—A moving vehicle should be stopped if an accident can thereby be avoided.—Independently of proof made on the question, this Court is bound to take judicial notice of the custom of the province which requires vehicles to keep to the right. *Gagnon* v. *Robitaile*, 16 R. L. n. s. 235.

Road allowance — *Evidence of ownership.*]—The plaintiff claimed that a certain road should be 99 feet wide while the defendant contended its width should be 66 feet. The defendant made title through the Hudson Bay Company, and it appeared that prior to the transfer of Rupert's Land to the Crown this road or trail, then of the width of 66 feet, had been used. The Surveyor-General of Canada had instructed that this road be surveyed of a width of 99 feet, which was approved of by order in council and the road was vested in the province:—*Held*, that the approval by the Dominion could not interfere with the right of the defendant. *St. Vital* v. *Mager*, 9 W. L. R. 161.

Road allowance — Issue as to width—Evidence — Government surveys — Orders in council — Crown patents — Reservation—Travelled trails — User — Dedication—Trespass — Municipal corporation—Damages — Injunction. *Heath* v. *Portage la Prairie*, 9 W. L. R. 512.

Turnpike roads — *Tolls on.*] — When turnpike trustees enter into an agreement with a city corporation to surrender to it the management of a part of one of their roads that becomes thereby free from tolls, and reserve the right of erecting on it a toll-gate to receive tolls from those who use the remaining part of the road, there is no evasion of such tolls by one who reaches the part of the road made free, by a private road, without using the part subject to tolls. *Hope* v. *Montreal Turnpike Trust* (1910), 20 Que. K. B. 139.

Width of highways in Manitoba—*Crown patent — Reservation of travelled road — Subsequent survey increasing width of road.*]—The Crown patent under which the plaintiff held the land in question reserved all travelled roads crossing the same "existing as such on the 15th day of July, 1870, which by and under the laws of Assiniboia were or may be held to be legally public highways," and the evidence shewed that the road in question had never extended south of a fence which the plaintiff had built along the south side of the road, and he had been in undisturbed occupancy and enjoyment of the land south of the fence up to the time the defendants had removed it. The defendants, however, relied on a survey of the road in question made in 1886 by D., a surveyor, alleged to have acted under instructions from the Dominion government, of which instructions no proof was given. It appeared that D. had, by his field notes, made the road 99 feet wide on the plan prepared by him, but it was not shewn by whom he was sent to make the survey or what authority he had to make it. It also appeared that the provincial government had, by order in council dated in 1899, approved of a report referring to the surveying and transferring to the province of certain thoroughfares or trails, and amongst them the road in question as surveyed by D. in 1886, and that the Dominion government had, by order in council dated in 1900, approved the above report and directed the said trail to be transferred to and vested in the province of Manitoba:—*Held*, following *Pockett* v. *Poole*, 11 Man. L. R. 508, that the survey in question was not orignally legal and binding and was not made so by the Dominion order in council passed 14 years thereafter, and that the Dominion government, after granting the patents for the lands, could not afterwards interfere with the private rights of persons holding under them. *Heath* v. *Portage la Prairie*, 18 Man. L. R. 693, 9 W. L. R. 512, 11 W. L. R. 99.

See MUNICIPAL CORPORATIONS — NEGLIGENCE — PARTIES — RAILWAY — STREET RAILWAYS.

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10. PRIVATE WAY.

Action to establish—*Way of necessity —Acquired by prescription — Between two farms—Easement at an end, if ever existed —Action dismissed.*]—Plaintiff brought action to establish a right of way between two farms, either as a way of necessity or as acquired by prescription. — Middleton, J., *held*, that if the claim to an easement of necessity ever existed it was now at an end and plaintiff's claim based upon prescription also failed. Action dismissed with costs. *McCullough* v. *McCullough* (1910), 17 O. W. R. 639, 2 O. W. N. 331.

Agreement — Specific performance—Injunction — Obstruction — Easement — Tenant for life — Uncertainty — Acquiescence — Part performance — Costs. *Farnham* v. *Bradshaw*, 3 O. W. R. 77.

Building—Mandatory injunction. *Scott* v. *Barron*, 1 O. W. R. 558.

Claim to right of way—Evidence — Dedication — Prescription — Trespass — Injunction — Damages — Grant — "Assignee." *Doran* v. *McLean*, 3 O. W. R. 662.

Construction of deed — *Easement appurtenant — Use of common lane — Overhanging fire-escape — Encroachment on space over lane — Trespass — Right of action.*]—A grant of the right to use a lane

in rear of city lots "in common with others," as an easement appurtenant to the lots conveyed, entitles the purchaser to make any reasonable use, consistent with the common user, not only of the surface but also of the space over the lane. The construction of a fire-escape, three feet wide, with its lower end 17 feet above the ground (in compliance with municipal regulations), is not an unreasonable use nor inconsistent with the use of the lane in common by others; consequently, its removal should not be decreed at the suit of the owner of the land across which the lane has been opened. Judgments in 31 Que. S. C. 405, 2 E. L. R. 20, 17 Que. K. B. 112, 4 E. L. R. 228, affirmed; Maclennan, J., dissenting. *Meighen* v. *Pacaud*, 40 S. C. R. 188, 5 E. L. R. 202.

Conveyance of right of way — *Possession — Right of cultivation — Deed — Rectification.*]—A conveyance of a right of way to a power and light company for a pole line and any other purpose which it may use it for, and the sole and absolute possession of the right of way, does not divest the grantor of his right to cultivate the right of way in such a manner as will not interfere with the company's poles or pole line. A claim for rectification of the conveyance was dismissed. *Tarry* v. *West Kootenay Power and Light Co.*, 11 B. C. R. 229, 1 W. L. R. 186.

Deed of grant — Construction — "A good and sufficient roadway not less than 10 feet in width" — Termini and location —Loss of right by abandonment — Extinguishment by merger — Obstruction — Action for removal — Damages — Mandatory order — Costs. *Brocklebank* v. *Colwill*, 8 O. W. R. 231.

Easement — *Boundaries.*]—As plaintiff could not prove any right gained as an easement or otherwise, and defendant's boundary fence being within his metes and bounds according to plan and his description, action for declaration for right of way dismissed. *Young* v. *Belyea*, 13 O. W. R. 423.

Easement—*Extinguishment by unity of possession — Revival on severance — Implied reservation — Land Titles Act.*] — Unity of ownership extinguishes all pre-existing easements, such as private right of way over one part of the land for the accommodation of another part, and nothing in s. 26 or 45, or in any other provisions of the Land Titles Act, R. S. O. 1897 c. 138, affects the matter.—The owner of a certain property, upon which was a saw mill, in 1887 built a grist mill upon another part of the same property. In 1888 he conveyed the part of the property on which the grist mill was, and in 1891 he also conveyed the rest of the property, with the saw mill, to the same grantees. In 1894 the saw mill property was conveyed to the defendants' predecessors in title, and in 1895 the grist mill property was conveyed to the plaintiff's predecessor in title. Throughout all this time access to the grist mill had been obtained by a more or less defined way running through the saw mill property, and so continued until 1906, when the defendants obstructed it. The plaintiff brought this action for an injunction restraining the obstruction and for damages. In none of the conveyances or transfers was there any mention made of the way now in question, by way of grant, reservation, or otherwise:—*Held*, affirming the decision of a Divisional Court, 15 O. L. R. 67, 10 O. W. R. 630, that the action must be dismissed, upon the above principle. *McClellan* v. *Powassan Lumber Co.*, 12 O. W. R. 473, 17 O. L. R. 32.

Easement — Implied grant — Intention. *Styles* v. *Towers*, 1 O. W. R. 523.

Easement — *Prescription — Joint right of neighbours — Disturbance — Remedy — Trespass — Possessory rights — Property rights.*]—The land upon which a way is established between two tenements is susceptible of becoming by prescription the joint property of the two owners. Therefore, one of the two being disturbed in the legal possession which he has had for a year and a day, has a remedy in trespass against the author of the disturbance. The Court which adjudicates upon his claim must avoid dealing with his right of property and at the same time his right of possession in pronouncing upon the rights of property of the parties. *Morel* v. *Dorval*, 16 Que. K. B. 448.

Easement — Prescription — Lost grant —Permissive use — Evidence — Trespass. *Smith* v. *MacGillivray*, 5 E. L. R. 561.

Easement—Prescription — Plea of right —C. L. P. Act, s. 95 — Evidence of user by public. *McAulay* v. *McDonald*, 4 E. L. R. 486.

Easement — Prescription — Presumption of lost grant — Evidence — Interruption — Inconsistent user by others — *Jus publicum*. *Adams* v. *Fairweather*, 7 O. W. R. 785, 8 O. W. R. 886.

Easement — *Prescription — Railway— —Station grounds — Implied grant—Powers of company — Benefit — Superfluous lands —Necessity.*]—The defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years: *Held*, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid. The user on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway, 12 V. c. 196 (C.). In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament was made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (d) the power of a railway company to sell and dispose of land and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were auth-

orised to acquire for the purpose:—*Held*, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right. Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises:—*Held*, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet. Judgment of Boyd, C., 1 O. W. R. 695, reversed: Osler, J.A., dissenting. *Grand Trunk Rw. Co.* v. *Vallicar*, 24 C. L. T. 207, 7 O. L. R. 364, 3 O. W. R. 98.

Easement — Prescription — User by consent and not as of right — Leave and license — Costs. *Albertson* v. *Harpell*, 11 O. W. R. 56.

Easement — Prescription — User for 20 years — Evidence — Want of knowledge —Right of way in common with owner of servient tenement — Notice — Registry Act. *Cardno* v. *Cooper*, 12 O. W. R. 75.

Easement — Prescription — User for 40 years — Interruption — Evidence — Statute of Limitations — Fresh evidence on appeal. *Avery* v. *Fortune*, 11 O. W. R. 784.

Easement — *Way of necessity — Parol grant — Prescription — Constructive notice.*]—The defendant asserted a right to cross the plaintiff's land in going from his farm to the travelled road. The plaintiff's predecessor in title, as part of an agreement for an exchange of lands with the defendant, had promised verbally to allow the latter to cross the parcel in question, and the defendant had exercised the right for four or five years. After that, the user ceased for six or seven years and until about 1886, when the defendant began to use the trail for heavy loads, but in 1892 the defendant himself built a fence, without any gate, across the trail. There was no evidence to shew that the plaintiff had any notice of the verbal agreement when he bought:—*Held*, that the intermittent use of a convenient old trail was not sufficient to affect the plaintiff with constructive notice of the alleged agreement. 2. That the defendant was not entitled to use the trail as a way of necessity, although there were natural obstacles to his reaching the highway by any other road. 3. That there was no such continuous enjoyment of the way as is necessary to establish an easement by prescription under 2 & 3 Wm. IV. c. 71, s. 2. *Carr* v. *Foster*, 3 Q. B. 581, and *Hollins* v. *Verney*, 13 Q. B. D. 308, followed. 4. That the evidence was not sufficient to establish a definite agreement for a perpetual right of way or to warrant the interference of a Court of equity by way of specific performance, as the agreement was made when the country was sparsely settled and the road allowances were not expected to be speedily made passable, and the passage across the intervening land not owned by either party might have been shut off at any time. *Huddleston* v. *Love*, 21 C. L. T. 447, 13 Man. L. R. 432.

Enclave — *Servitude — Parties to action.*]—The plaintiff, who was the owner of a farm lot abutting upon the rear of the defendant's property, and without communication with any highway, complained that he had been prevented from exercising the legal servitude of passage to which the defendant's property was subject in favour of the plaintiff's. He asked that the servitude be located, and prayed that it be located on the defendant's farm road:—*Held*, that the legal servitude of passage in favour of the owner of a property *enclavée* over the neighbour's property, to gain access to a highway, exists upon the shortest line which communicates from the nearest highway to any part of the property *enclavée*, unless upon this line serious obstacles exist which would render the cost of constructing and using the road very onerous, in which case the servitude would lie over the shortest road which would avoid such obstacles. 2. No part of the property *enclavée* can be counted in computing the distance to a highway, which distance would be measured from any point of the property *enclavée* to the nearest highway. 3. Even where a servitude of passage is held to exist, the person whose land is subject to it is not obliged to permit the person exercising it common use with himself of his farm road,—the situation of the servitude depending upon the natural conditions of the several properties, and not upon the works which the surrounding proprietors may make. 4. In case of doubt as to the locating of the servitude, the plaintiff ought to make the various persons interested parties, so that the location of the servitude may be ascertained by experts. It is not the duty of the defendant to bring these parties into the cause. *Boyer* v. *Perras*, 17 Que. S. C. 522.

Encroachment on water lot — *A special case — Prescription.*]—Plaintiff and defendants owned adjoining water lots to channel, the public had been accustomed for some years to travel on the ice over plaintiff's lot, defendants had erected a wharf which had encroached on plaintiff's lot and plaintiff brought ejectment for land so encroached upon.—Defendants set up the user by the public as giving them an easement over defendant's lot. Defendants also claimed right to hold that portion of land encroached upon by their wharf, by prescription:—*Held*, (Peters, J.). That there was no easement as claimed by defendants. —That defendants had not acquired a title to the land by prescription. *Carvell* v. *Charlottetown* (1876), 2 P. E. I. R. 115.

Failure of vendor to reserve a way.] —The sale of a part, not contiguous to the servient land, of the land to which is due a right of way, without reserving another way in favour of the remaining part of the vendor's property for the purpose of permitting of the exercise of the way first created, extinguishes the right as to the part so sold,

and Art. 556 C. C. is without application. *Gosselin* v. *Charpentier*, 19 Que. K. B. 18.

Gate closed by lock.]—The proprietor of the servient land of a right of way can do nothing which tends to diminish the use of the way or to render its exercise more inconvenient. Consequently, he cannot obstruct the passage-way with a gate closed by a lock and key, if it results in more inconvenience. The Court, adjudicating upon the conclusions of a confessory action instituted by the owner of the land in favour of which the way is established, may fix the hours during which the gate may be locked. *Rioux* v. *Nesbitt*, 19 Que. K. B. 75.

Grant of right — Exception — Reservation — Evidence — Onus — Prescription. *Reid* v. *Goodwin*, 6 O. W. R. 944.

Lane — *Closing up — Registering plan —Amendment and alterations — Application for — Title of applicants — Registry Act — Construction of — Evidence.*]—The effect of s. 110 of the Registry Act, R. S. O. 1897 c. 136, whereby, after a plan has been registered and a sale or sales made thereunder, the plan is binding upon the persons so registering it, is that it is not irrevocably so, but it may be amended or altered on a proper case being made out. Notice of any proposed amendment or alteration must be given to all purchasers thereunder, who are entitled to oppose the amendment or alteration. Such application may be made not only by the person registering the plan, but also by a purchaser or any one claiming under him; but when it is sought to close a lane laid out on a plan the soil of which remains in the person registering it, a purchaser seeking to close the lane must shew that he represents the title of the person who registers.—Where, therefore, an application was made by a purchaser of lands laid out on a plan situated in a city to close a private lane laid out thereon, and the applicants failed to shew that they had acquired the title to the soil in the lane, the application was refused. *In re Hamilton Terminal Rw. Co. and Whipple*, 9 O. W. R. 463, 14 O. L. R. 117.

Lane — *Dedication and acceptance by city — Sidewalk thereon out of repair — Person using walk injured — Liability of former owner — Finding of jury.*] — Defendant was owner of certain property. About 40 years ago he laid it out in building lots, reserving a lane leading from public highway. This lane has ever since been open. The city laid gas and water thereon many years ago and never assessed it to anyone. Since then defendant built a sidewalk thereon and plaintiff was injured by the same being out of repair. He brought action claiming damages for injuries sustained. At trial Latchford, J., dismissed the action on the ground that the lane had been dedicated to and accepted by the city. Divisional Court affirmed above decision and dismissed plaintiff's appeal with costs. *Rushton* v. *Galley* (1910), 16 O. W. R. 12, 21 O. L. R. 135.

Leave to appeal to Court of Appeal from above judgment refused, 16 O. W. R. 256, 1 O. W. N. 972.

Lane—Reserved in deed—Right of owner of land to fence in sides of lane—Leaving gates for owner of right of way—Inconvenience would be enormous—In winter large quantities of snow would have to be removed —Falconbridge, C.J.K.B., *held*, that plaintiff had failed to establish right to fence—Motion for declaration of right dismissed with costs. *Ross* v. *McLaren* (1911), 18 O. W. R. 818, 2 O. W. N. 861.

Affirmed by D. C. 19 O. W. R. 460, 2 O. W. N. 1156.

Lane—*Right of user by several in common — Servitude — Building — Fire escape.*]—The owner of a shop or store adjoining a lane, of which he has the use in common with others, has the right, for the exercise of this servitude, under Art. 553, C. C., to erect a fire escape giving access from the building to the lane in case of fire, provided he places it so as not to interfere with those who have the same right of servitude as himself. *Meighen* v. *Pacaud*, 31 Que. S. C. 405, 3 E. L. R. 20, 4 E. L. R. 228.

Lane—*Strip of land adjoining used as part of — User as one of the public—Easement.*]—To constitute a legal possession of land, not only must there be a corporeal detention, or that *quasi* detention which, according to the nature of the right, is equivalent thereto, but also the intention to act as owner of the land; no legal possession is acquired by the exercise of a supposed right as one of the public.—The rear portions of the plaintiff's and the defendant's lands abutted on a public lane, a strip of land between the fence erected on the defendant's land and the boundary of the lane being unenclosed. The plaintiff, for over 20 years, believing this strip to be a part of the lane, had been accustomed to drive over it to get to his stable, doing so in the exercise of a supposed right as one of the public, and not as an easement to his land: —*Held*, that he had not acquired any right to use the strip. *Adams* v. *Fairweather*, 7 O. W. R. 785, 8 O. W. R. 886, 13 O. L. R. 490.

Lane in city — *Surveys Act, R. S. O. 1897, c. 181, s. 39 — Trespass — Tracks laid and cars run by street railway company — Engineer's consent.*]—A 14-foot lane is not a road, street or commons under s. 39 of above Act. The city engineer was mistaken in considering this lane a public one. Damages allowed plaintiff for defendants laying their street car tracks on such lane. *Bret* v. *Toronto Rw. Co.* (1909), 13 O. W. R. 552. Appeal permitted directly to Court of Appeal, an interest in real estate being in question and plaintiff not being prejudiced or delayed. Doubtful if Supreme Court of Canada would have jurisdiction. *Bret* v. *Toronto Rw. Co.* (1909), 13 O. W. R. 604. Appeal dismissed (1909), 14 O. W. R. 74.

Obstruction — *Grant—Conditions.*] — The parties were owners of adjoining lots bounded in the rear by a lane. Their common grantor had divided his land into eight lots, leaving the lane in the rear of them. He had afterwards sold lots 1, 2, 3, 4 to the immediate grantor of the defendant and

lot 5 to the immediate grantor of the plaintiffs, "with the right of way over this lane in common with every person to whom J. W. has granted or shall afterwards grant the right of way over the said lane, without obstructing it at any time, nor depositing filth or snow, and in case of its being deposited, to remove such filth or snow so that the said lane may be clean." On the side of the defendant's land the lane had no opening into the public highway, but on the plaintiffs' side it opened on a public street. The defendant built a stable upon the lane in rear of his land, and the plaintiffs asked that it should be removed:—*Held*, that, in virtue of their title, the plaintiffs had a right of way over the whole extent of the lane, and not only over the part which they could use as a means of access to the public highway, and the defendant could not obstruct the lane in rear of their property, although, on that side, the lane had no means of exit. Removal ordered. *Germain* v. *Pigeon*, 16 Que. S. C. 235.

Passage — *Closing.*]—The owner of an urban property subject to right of passage thereover, may enclose it by means of a gate with panels in one of which there is a small gate locking with a key, and a key is sent to the owner of the dominant tenement. *Rioux* v. *Nesbitt* (1909), 36 Que. S. C. 160.

Passage-way between houses — Easement — Prescription — Leave and license—Fences — Boundary — Injunction — Costs. *Stewart* v. *Rogers*, 6 O. W. R. 195.

Prescription — User for 40 years—Interruption — Evidence — Fresh evidence on appeal — Costs. *Avery* v. *Fortune*, 8 O. W. R. 952.

Private street—*Registration of plan—Sale according to plan — Reservation of streets — Servitude — Easement — Maintenance.*]—The sale of an immovable described as "lot 5 of the subdivision of lot 212 of the *cadastre*," etc., with the use in common with all persons having a right thereto of the streets bounding the lot, when the plan of subdivision previously deposited for registration by the vendor contains the indication of a strip of land destined to serve as a street, is sufficient to constitute a servitude of passage, and give to the purchaser the remedy of an action *confessoire* against the person who subsequently acquires the strip which forms the servient tenement.—It is the owner of the dominant tenemeat who must do the work necessary for the establishment and maintenance of the way over the servient tenement. The obligation of the owner of the latter is to submit to the servitude and nothing more. *Lamontagne* v. *Leclerc*, 30 Que. S. C. 418.

Railway on.]—A right of way ceases to exist when the construction of a railway line upon the servient land renders the exercise of the right impossible. *Gasselin & Charpentier*, 19 Que. K. B. 18.

Right of way — Easement — User — Statute of Limitations — Declaratory judgment — Injunction. *Bartle* v. *Pearce*, 4 O. W. R. 444.

Right of way—Evidence—Dedication—Way of necessity — Trespass — Injunction — Damages. *Doran* v. *McLean*, 2 O. W. R. 788.

Right of way—*Severed farm — User—Right to place gates at termini — Deed.*]—The plaintiff, being the owner of a part of a farm which was subject to a right of way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns, as a lane or roadway 33 feet wide across so long as needed or required in passing to and from the other lands now owned by (the grantor), brought his action for a declaration of his right to place gates at the termini of the right of way:—*Held*, that he was so entitled; Osler and Maclennan, JJ.A., dissenting. Judgment of Falconbridge, C.J., 2 O. W. R. 258, reversed. *Siple* v *Blow*, 24 C. L. T. 392, 8 O. L. R. 547, 3 O. W. R. 855.

Right of way—*Termini—Possession—Prescription.*]—When the document of title constituting a right of way does not fix its situation in precise and formal terms, length of possession (33 years in such case) determines it. *Thuot* v. *Ménard*, 16 Que. K. B. 174.

Right of way appurtenant to land—*Prescription — Enjoyment for 40 years—Interruptions — Life estate — Pleading.*]—In an action by the plaintiff for trespass to land, of which the plaintiff was the admitted owner, the defendant justified under an alleged right of way appurtenant to land owned by his father, J. W., which J. W. and the defendant were farming jointly at the time the alleged trespasses were committed. The evidence shewed that J. W. became the owner of and went into possession of his land in 1855, at which time A., the plaintiff's predecessor in title, was owner of and in possession of the servient tenement. That in April, 1856, J. W., with the knowledge and assent of A., made use of the way claimed, being informed by A. that he had the right to do so, and that the way had been given by the previous owner, P. A., for the benefit of the lots owned by J. W. That there had been a user, at various times in each year, as required, from 1856 down to 1890, the time of action brought, without any interference by plaintiff, or others, until 1896, when, and in 1897, 1898, and 1899, the plaintiff obstructed the way, and sought to prevent the defendant from using it. That the obstructions placed by the plaintiff were in each instance, removed, or protested against, by the defendant. Evidence was given on the part of the plaintiff to shew that a gate had been maintained across the way, and that the user was permissive, but the trial Judge found that the gate was maintained with the defendant's permission, and that its purpose was to avoid the expense of fencing, and to prevent cattle straying at certain seasons of the year. As to the character of the way, the evidence shewed that it was a well defined road, with deep wheel tracks over its entire length, except for a few feet close to the gate, where the ground was hard and stony. Also, that the road had been in the same condition throughout

the whole period during which it had been used:—*Held*, that the defendant was entitled to the way claimed.—*Held*, also, (following *Symons* v. *Leaker*, 15 Que. B. D. 629), that the period from 1871 to 1895, during which a life estate was outstanding in the plaintiff's mother, was not to be excluded in computing the period of forty years referred to in R. S. N. S. 1900 c. 167, s. 36, although it should be excluded in computing the shorter period of twenty years. *Semble*, that the tenancy for life, being a matter in respect to which the defendant would not ordinarily have knowledge, and the plaintiff would, should have been replied by the latter.—*Held*, also, that the occasional attempts at interruption by the plaintiff in 1897, 1898, and 1899, not acquiesced in by the defendant, were not sufficient to defeat the operation of the statute. *Eisenhauer* v. *Whynacht*, 35 N. S. R. 295.

Right of way in gross—*Easement—Permissive or adverse user—Prescription.*]—In an action for trespass the defendant pleaded a right of way in gross, claiming the right to land at the shore and use the way in question:—*Held*, that, in order to succeed in his defence, the defendant must shew that he used the landing and way "as of right," and that, even if during portions of each year the defendant's user was such as would in time give him an easement, the fact that, at another portion of the year, the user became permissive, rendered unavailing the previous adverse user.—*Semble*, that a right such as was claimed could not be gained by prescription. *Hayes* v. *Hayes*, 40 N. S. R. 320.

Servitude — *Extinguishment by union of tenements—Title—Sale of servient tenement—Revival of servitude—Description of way — Submission to arbitration — Civil Code.*]—1. Where the purchaser of two properties, over one of which there is a servitude for the benefit of the other, extinguished by their reunion in the same hand, executes a deed of sale of the first subject to a servitude such as is constituted by the original title deed to which it refers, this deed of sale becomes in its turn a title deed, which revives the servitude.—2. The situation of a servitude of passage which is not fixed in the title deed constituting it is sufficiently determined by the description which is given of it, accompanied by a plan, in an agreement by the owners of the two properties to submit to an arbitrator the decision of the difficulties between them regarding this servitude.—3. Before, as after, the promulgation of the Civil Code, apparent servitudes are not purged by a sheriff's sale of the servient tenement. Judgment in 32 Que. S. C. 289 reversed. *Simard* v. *Thompson*, 18 Que. K. B. 24. Affirmed by the Supreme Court of Canada. *Thompson* v. *Simard*, 41 S. C. R. 217.

Servitude — *Right of way — Obstructions by owner of servient tenement—Possessory action — Trouble de droit.*] — Obstructions, refuse, and filth placed or thrown in a passage-way by the owner of the servient tenement, without any intention to assert an adverse right to that of the owner of the dominant tenement, do not amount to a disturbance (*trouble de droit*) affording a legal ground for a possessory action. *Roumilhac* v. *Dennis*, 35 Que. S. C. 186.

Servitude of passage—*Interpretation of deed.*]—In an action for the removal of the fence and for disturbance, upon the proper interpretation of the deed, the purchaser had the right to exercise his right of passage over the full width—forty feet—of what was to become the location of the proposed street. *Labonte* v. *Carrier* (1910), 17 R. de J. 181.

Servitudes—*Titles and acts of recognition—Right of way — Clauses and recitals in deeds—Commencement of proof in writing.*]—The acts of recognition mentioned in Art. 550, C. C., are not governed by, nor subject to, the requirements of Art. 1213, C. C. Hence, a title to a right of way may be recognised in a deed by the owner of the servient tenement, without giving even the substance of the clause of the contract establishing it. Acts of recognition, however, must be of the servitude as existing upon the property claimed to be the servient tenement. Therefore, a clause in a deed of sale, by the owner, of one of two contiguous lots, "subject to charges, etc., mentioned in a certain deed between L. and B. *respecting the common passage existing between the said lot of ground, now one ceded and the one remaining*," etc., does not amount to an act of recognition as contemplated in Art. 550, C. C., of a title creating a right of way on either of the two lots, as a servient tenement, for the benefit of the other, as the dominant one.—2. Nor is a recital in a reference to an arbitrator for a decision of the point whether a sale by the sheriff did or did not extinguish a right of way, that "whereas W. B., etc., was possessed of a lot of ground, etc., subject to a servitude, namely, a right of passage, etc.," an act of recognition of a title to the servitude.—3. The above clause and recital are, however, a commencement of proof in writing which permits the adduction of oral evidence to establish that the owners of one lot used the passage-way on the other, in common with and as freely as its owner. *Simard* v. *Thompson*, 32 Que. S. C. 289.

Sufferance — *Floatable river—Improvements—Riparian proprietors — Damages — Malice—Threat.*]—A way of sufferance is not a public road, and the owner may forbid the use of it to any one he pleases. 2. A floatable river is part of the public domain, and the riparian proprietors cannot hinder the doing of work thereon for the purpose of facilitating the floating of logs. 3. The exercise of a right within permitted limits cannot serve as a basis of an action for damages; and the forbidding of a certain thing, accompanied by a threat of instituting proceedings, in case it is done, in order to cause one's right to be recognized, implies no malice which can afford ground for an action for damages. *Pierce* v. *McConville*, 12 Que. K. B. 163.

Temporary road — Railway — Deed of grant — Construction — Farm crossings — Entrance gates — Agreement to provide — Right of way. *Toronto, Hamilton & Buffalo Rw. Co.* v. *Hanley*, 6 O. W. R. 921.

Trespass — Boundary — User — Evidence—Costs. *Bickell* v. *Woodley*, 10 O. W. R. 7, 515.

Trespass to land—Plea of right of way under lots grant—Presumption from twenty

years' user—Owner of dominant tenement a tenant for years—Demurrer to plea. *McKinnon* v. *Clark*, 5 E. L. R. 102.

Turnpike roads trustees — *Public road—Private road — Tolls — City of Montreal — Agreement.*] — A person who uses a private road paralleling and turning into a public road at a point beyond a toll-gate, maintained by the trustees of such public road, is not bound to pay at such toll-gate. An agreement entered into between the city of Montreal and turnpike roads trustees respecting the remand of a toll-gate from the public road is one in the public interest, and every one, whether a resident within the city limits or not, may reap the benefit of such agreement. *Hope* v. *Montreal Turnpike Trust*, 16 R. L. n. s. 229 (reversed on appeal to the C. K. B.).

User — *Prescription — Abandonment.*] —L. and H., who owned and occupied a farm in common, agreed upon a division of the property between them, and called in a surveyor for that purpose, who ran a line, upon which a fence was erected and by which the parties continued to hold. At the time of the division there was a road upon the property which had been used as a means of obtaining access to the public road, and which both parties continued to use. After a time H. constructed a road on his part of the property, which gave him a more convenient mode of access to the public road when going in certain directions, but he continued from time to time, as necessary, to use the former road. After the death of H., L. erected a fence for the purpose of preventing the defendants, who claimed under H., from making use of the portion of the old road which passed through his land, and upon the defendants taking down the fence brought an action for damages for the removal of the fence and an injunction to prevent the defendants from passing over his land. The evidence shewed a continuous user of the way for a period of about 30 years, and the plaintiff failed to shew any abandonment or interruption of the user:—*Held*, that the plaintiff could not succeed in his action; also, that the construction by H. of the new road over his own land and its use as mentioned was not an abandonment of his right to use the former way. *Horne* v. *Horne*, 38 N. S. R. 404.

User — *Prescription — Deed — Reservation — Lost grant—Easement.*]—To establish a right of way the facts must shew a *bona fide* user of the disputed way for some intelligent and definite purpose and for a period or at time clearly stated.—*Glover* v. *Coleman*, L. R. 10 C. P. 108, and *Carr* v. *Foster*, 3 Q. B. 581, distinguished.—An implied reservation cannot be read into an absolute grant. Facts insufficient to warrant presumption of lost grant.—*Quære*, whether temporary non-user will prevent the acquisition of an easement. *Ternan* v. *Flinn*, 40 N. S. R. 167; *O'Mara* v. *Eden*, *ib.* 172*n*.

User for many years.]—Plaintiff had used and travelled for many years a well defined road across defendant's land, leading to a concession road. Defendant placed a gate across one end of the road. Plaintiff brought action to have it declared a public highway and to restrain defendant from placing obstructions thereon: — *Held*, that plaintiff had failed to establish that the road was a public highway, but had established a right as against owners of the land over which the road passed. Declaration granted that plaintiff, his heirs and assigns, are entitled to free and uninterrupted use of the road and that defendant should remove the gate. *White* v. *Keegan* (1910), 15 O. W. R. 172.

Way — *Private — Right to means of communication with public thoroughfares — Necessary accessories of an immovable existing at the time of its sale—Enclosed land —Responsibility — C. C. 540, 543.*]—The land acquired by the predecessor in title of the plaintiff from defendant's father, included all its accessories and whatever was at the time destined for its use in perpetuity. Consequently, the exercise of the right of way along the road used, at the time of the sale and since, as a means of communication from the land sold to the public highways, not only by the predecessor in title of the plaintiff but also by the plaintiff himself since the purchase of the land, cannot be looked upon simply as the result of toleration on the part of defendant's father nor on the former's part, his universal legatee, but it must be considered as the exercise of a right to an accessory of the property to which it is attached in perpetuity. In effect, without such road, the land in question would be completely enclosed and the defendant, as his father himself would have been, would be oblized to give such means of egress or of right of way, even without any compensation therefor.—It is true that according to the provisions of Art. 549 C. C. no servitude can be established without a title, and that possession, even immemorial, is sufficient for that purpose, nevertheless, this principle of law does not apply to legal servitudes among which Arts. 540 *et seq.* C. C. have placed the servitude of a right of way in favour of the proprietor of enclosed land.—In the present case, plaintiff's action against the defendant, its object being to have him remove obstructions which he, contrary to his obligations, had placed in the road or right of way in question, to the plaintiff's prejudice, must be maintained. *Latour* v. *Guevrement* (1910), 16 R. de J. 270.

What is necessary to acquire by prescription? — *Evidence.*]—Divisional Court, *held*, that in order to acquire a right of way over the lands of another by prescription, the user must be open, notorious, visible, uninterrupted, and undisputed, exercised under a claim of right adverse to the owner, acquiesced in by him and must have then existed for 20 years; that there can be no prescriptive right to pass over another's land in a general manner, and where a right of way by prescription is claimed, a certain and well defined line of travel must be shewn. —*Bushey* v. *Sanliff* (1895), 86 Hun. N. Y. 384.—*Wimbledon, etc.*, v. *Dixon* (1875), 1 Ch. D. 362, at p. 369, and *Avery* v. *Fortune* (1908), 11 O. W. R. 784, followed. *McLachlin* v. *Schlievert* (1911), 18 O. W. R. 457, 2 O. W. N. 649.

See CEMETERY — EASEMENT — DEED — MINES AND MINERALS—VENDOR AND PURCHASER—TIMBER.

WEIGHTS AND MEASURES.

Threshers Lien Ordinance—Computation of amount of grain threshed—Automatic weigher—Evidence—Burden of proof—Custom. *Gilby* v. *Johnston*, 7 W. L. R. 493.

See CARRIERS—CONTRACT—EASEMENT—LIEN—MUNICIPAL CORPORATIONS—SALE OF GOODS—TIMBER.

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WILL.

1. ADMINISTRATION AND DISTRIBUTION OF ESTATES, 4615.
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1. ADMINISTRATION AND DISTRIBUTION OF ESTATES.

Accumulation of income during minority.]—A testator gave to each of his children, on attaining the age of twenty-five years, an equal share of the income of the whole of his residuary estate, but until each child had attained the age of twenty-five years what would have been his or her share of the income was to accumulate and form part of the testator's general estate:—*Held*, that the accumulations so directed were intended to be for the benefit of the general estate and not for the exclusive benefit of a particular child. Judgments of the Court of Appeal for Ontario and Riddell, J., affirmed, with a variation. *Fulford* v. *Hardy*, C. R. [1909] A. C. 255.

Accumulation of revenues.]—Where the trustees under a will, to whom the entire estate is bequeathed in trust, are directed by the testator to apply certain amounts for specified purposes until a division of the estate shall be made at a time prescribed by the will, it is their right and duty to retain and accumulate the surplus revenues of the estate although not specially instructed by the testator to do so. The fact that the estate is much larger at the date of the testator's death than it was when the will was made, is an extraneous circumstance which cannot be taken into account by the Court in the interpretation of a will, so as to change its meaning from that fairly deducible from the contents of the entire instrument itself. *Ogilvie* v. *Ogilvie*, 21 Que. S. C. 130.

Action to set aside — *Administrator pendente lite* — *Foreign Court* — *Possession.*]—A person who has been appointed by a French Court provisional administrator pending a suit to set aside a will, the estate being situated in France, cannot claim, against a sequestrator appointed by a Court of the Province of Quebec, possession of the property of the estate situated in that Province.—The Courts of the Province of Quebec have full power to decide as to the provisional possession of real and personal property situated in this Province of a person who died abroad, and their decisions are absolute in this country.—Art. 80, C. P. C., does not apply to the provisional administrator or sequestrator of the property of an estate pending a suit to set aside a will, inasmuch as he does not represent, in any sense, the deceased. *Lavoignat* v. *MacKay*, 17 Que. S. C. 378.

Annuities — *Purchase of* — *Assets of estate.*]—Motion under Rule 938 for directions to executors of a will as to the distribution of the estate among the residuary legatees and as to providing for the payment of annuities bequeathed by the will:—*Held*, that the parties interested in the residue were entitled to have sums set apart to answer the annuities from time to time, as sufficient assets should be in the hands of the executors, or to have sums applied in the purchase of Government annuities in the same way from time to time, as should seem most expedient to the Master if the parties (including the annuitants) differed. *In re McIntyre*, 21 C. L. T. 380.

Annuity — *Ademption* — *Evidence.*]—A testator gave by his will to each of two daughters an anuuity for life of $6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—*Held*, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced *pro tanto*.—*Held*, also, however, that the evidence of intention was admissible and was conclusive. Judgment of Ferguson, J., 1 O. L. R. 364,

21 C. L. T. 187, affirmed. *Tuckett-Lawry v. Lamoureaux*, 22 C. L. T. 174, 3 O. L. R. 577, 1 O. W. R. 295.

Annuity—Change of land—Life tenant and remaindermen—Apportionment — Division of money in Court—Account—Sums charged against life tenant. *Reece v. Whitesell*, 6 O. W. R. 566.

Bequest to charity — Misnomer — *Cy près* doctrine — Division among charities. *Re Graham*, 4 O. W. R. 90.

Bequest to charity—Object "Diocesan institution" — Local or parochial institutions. *Re Gilmour*, 3 O. W. R. 541.

Bequest to charity—*Religious order—Refusal of ecclesiastical authority—Discretion of executors—Cy près application—Attorney-General—Costs.*]—Judgment in *Attorney-General v. Power*, 35 N. S. R. 526, varied by declaring the direction in the will at present impracticable, and adjudging that the unapplied income of the residue should, from a date named, be applied semi-annually by the defendants to the promotion and support, in the city of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church, and in such manner and in such proportions as the executors, in their discretion, might think proper, in accordance with the terms of the will and the powers thereby conferred upon them; reserving further directions, with leave to apply to the Court below, costs of all parties out of the estate. *Power v. Attorney-General for Nova Scotia*, 35 N. S. R. 182.

Blanks in will—*Charitable gift—Trust for benevolent purposes—Uncertainty—Failure of trust.*]—A testator by will provided for a bequest of money to the defendants, to be paid yearly or at such times as his executor should think advisable, but omitted to fill in the amount. In the same paragraph of the will it was then declared that, when "Home Missions" were considered more needy, an amount might be given to them, or to any such good and benevolent Christian objects as the executor should consider most deserving. The will then directed the executor to sell a part of the testator's real and personal estate, "and the proceeds to be placed, so as to be conveniently drawn to assist in aiding good and worthy objects:" —*Held*, that the gift of an unnamed amount of money to the defendants was void, and that the gift in the rest of the will was not a gift to charitable, but to benevolent, uses, and failed for uncertainty. *Brewster v. Foreign Mission Board of Baptist Convention of Maritime Provinces*, 21 C. L. T. 131, 2 N. B. Eq. R. 172.

Charge on land — Declaratory judgment — Reformation of deed — Removal of executor — Administration — Receiver — Annuity — Security. *Patching v. Ruthven*, 11 O. W. R. 700.

Charitable bequest—*Religious order—Refusal of ecclesiastical authority—Application of bequest cy-près—Attorney-General.*]—A will contained a direction that the executors should apply a portion of the income "in the introduction and support of the Jesuit Fathers" in the city of H. The same clause of the will gave the executors a discretion, "notwithstanding anything in this clause hereinbefore expressed," to apply the income in the promotion and support in the city of H. "of such charitable institutions and religious orders in connection with the Roman Catholic church as my said executors shall think proper." The testator died in 1881. The Archbishop of H. made unsuccessful efforts from 1883 to 1889 to induce the Jesuits to establish a college in H. A few years later another religious order was introduced. In 1897 the Jesuits were willing to come to H., but the Archbishop refused his assent. This action was brought by the Attorney-General, on the relation of the Archbishop, against the executors, for a declaration and directions: — *Held*, that the refusal of the Archbishop to give his assent to the introduction of the Jesuits rendered that mode of applying the residue impossible. As to matters within his ecclesiastical jurisdiction, he was the sole judge. He was not precluded from taking these proceedings as relator. The executors were ordered to formulate at once a scheme for the application of the income for the benefit of some charitable or religious order. In default of their doing so, the Court would take upon itself to formulate such a scheme as would best agree with the testator's wishes as expressed in the will. *Attorney-General v. Power*, 22 C. L. T. 397. Affirmed on appeal by the Supreme Court of Nova Scotia. *Attorney-General v. Power*, 35 N. S. R. 526.

Claim for services—*Rendered testator during his lifetime.*]—Action against executors for alleged services and expenses in connection therewith, rendered deceased during his lifetime: — *Held*, that plaintiff's claim was incredible in the light of the facts disclosed. *Sullivan v. National Trust* (1909), 14 O. W. R. 444.

Conditions and trusts — *Breach by grantee — Action by cestui que trust for declaration of trust or charge.*] — Action for a declaration that defendant holds lands subject to a charge in favour of plaintiff. A father executed a document giving all his property, real and personal, to two sons, subject to charges to five other children. This document was under seal, and was at once recorded:—*Held*, that it was a deed, not a will. Declaration made as prayed, other children to be added as plaintiffs if they consent, otherwise to be added as defendants. Application for sale to be made later. *Pratt v. Balcom*, 7 E. L. R. 236.

Conveyance to secure advances.] — One W. Q. conveyed real estate to the defendant C. in 1891. This conveyance was absolute on its face, but was really by way of mortgage to secure a certain sum of money in which W. Q. was indebted to C. for goods supplied from C.'s store. W. Q. was also indebted to the plaintiff N., and the latter obtained judgment against him for the sum of $239.50, a memorial of which was filed December 3rd, 1896. After the conveyance from W. Q. to C. had been made, the latter continued to supply goods to W. Q., and W. Q. worked for him and made cash payments to him, which amounts were credited by C. against his account. W. Q. died in 1902 intestate, leaving a

widow and several children. In 1903 C. conveyed the premises to W. Q.'s son, A. Q., who, at the same time, gave C. a mortgage on them. In 1905 C. sold the premises under a power of sale contained in the mortgage to one A. S., who immediately reconveyed them to C. This suit was originally to set aside the conveyance from W. Q. to C. on the ground of fraud, but the bill was amended, and it was by agreement treated as a redemption suit, the sole question of fact being what was the amount necessary to be paid C. in order to redeem the property:—*Held*, that where a mortgagor is seeking to discharge himself from liability by payment, the onus of proof is upon him.—*Held*, that where a conveyance, absolute on its face, but subject to certain verbal agreements as to reconveyance, is taken by a creditor to secure advances, instead of ordinary form of mortgage in which the terms of agreement would have been set out, the onus of proof, in case any dispute arises, is on the creditor to show the exact sum for which the conveyance is to stand as security.—*Held*, that where there were several debts, in the absence of any appropriation by the debtor at the time of payment, the creditor had the right to appropriate the payment to any of the debts he chose, and this right could be exercised at any time, and need not be shown by any specific act or declaration, but might be inferred from facts and circumstances.—*Held*, that the parties wishing a sale, there will be an order for sale in case the plaintiff fails to redeem, instead of the bill standing dismissed with costs, as is usual. *Nixon* v. *Currey* (1908), 4 N. B. Eq. 153.

Declaration of invalidity — Action for administration of estate — Payment of legacies — Appointment of new trustee. *Cullen* v. *McNeil*, 4 E. L. R. 135.

Devise—*Minority of devisee—Application of rents — Accumulation — Allowance for maintenance.*] — By his will testator bequeathed to his grandson D. his farm, implements, etc., but by a codicil provided that, until D. attained the age of 21 years, the executors should keep, control, and manage the farm, and expend the net revenue arising therefrom in the improvement and cultivation of the land, without accounting to D. or anyone else for such revenue. D. applied, through his next friend, to have an annual allowance made to him for his support and education:—*Held*, that, the testator having directed the surplus revenue to be used in the improvement of the farm, that disposition could not be legally interfered with and the money diverted to another purpose. *Re Waddell, Lynch* v. *Waddell*, 35 N. S. R. 435.

Direction to executor to pay funeral expenses of relative — Payment by executor of relative — Claim against estate — Administration order — Applicant — Beneficiary — Assignee of claim — Costs — Originating notice. *Re Atchison, Atchison* v. *Hunter*, 2 O. W. R. 856, 1145.

Direction to pay debts out of estate — Specific devise of personalty — Residuary devise of money and securities. *Re Anderson*, 1 O. W. R. 217.

Direction to set sum apart and pay income of life tenant.] — A testator directed his executors to set apart and invest $50,000 out of his estate and pay the income semi-annually to his wife during her lifetime, with power to appoint, and in default of appointment, over. He then gave the residue equally amongst his children. The estate consisted of income producing securities to the value of $30,000, and a large amount of unproductive land:—*Held*, that the executors were bound to reserve sufficient productive assets for the preservation of the lands and payment of necessary expenses; and that the widow was entitled to the income of the balance from the expiration of a year from the testator's death, and to have such balance set apart towards the fund of $50,000, ultimately to be made up to that sum as the lands were sold according to the following rule:—As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the date of the expiration of one year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital and added to the sum theretofore set apart towards the $50,000, and the residue to be treated as income and paid over to the widow. *In re Morley*, [1895] 2 Ch. 738, applied. *In re Cameron*, 21 C. L. T. 593, 2 O. L. R. 756.

Executors — Legacy duty — Discretion — Residue — Crediting legacy on mortgage — Predecease of legatee — Lapse. *Re Holland*, 1 O. W. R. 73, 3 O. L. R. 406.

Executors — *Power to carry on business of testator — Sale of business — Lease of premises.*]—Where under a will no express power was given to carry on the deceased's business—a brewery business — an order sanctioning the carrying on of the same by the personal representatives was refused, but it was held that they had a discretionary power either to sell the chattel property with a lease of the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, and an agreement for sale, if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority. *In re Brain*, 25 C. L. T. 44, 9 O. L. R. 1, 4 O. W. R. 263.

Executors — Power to mortgage or sell land — Directions of will. *Re Crawford*, 1 O. W. R. 470, 4 O. L. R. 313.

Executors — Power to sell lands — Power to exchange — Vendor and purchaser. *Re Confederation Life Association & Clarkson*, 2 O. W. R. 943, 6 O. L. R. 603.

Expectation of remuneration by will for services. *In re Ansley, Ex p. Chesley*, 3 E. L. R. 234.

Gift of income — *Insufficiency—Sale or mortgage of land.*]—A testator by his will gave to his wife the income derivable from his real and personal estate, and directed

that, if this was not sufficient to supply her wants, the executors might for such purpose draw upon any of his property:—*Held*, that to supply such wants the executors were empowered to sell or mortgage the real estate. *Re Crawford*, 4 O. L. R. 313, 1 O. W. R. 479.

Gifts of issue—*Lapse—Gifts to a class—Executors—Shares in company—Purchase by executor.*]—Section 36 of the Wills Act, R. S. O. c. 128, which provides that gifts to issue who leave issue on the testator's death, shall not lapse, applies only to cases of strict lapse, and not to the case of a gift to a class, such as a residuary bequest "equally among my children share and share alike." A testator died possessed of shares in a company. Afterwards, upon a fresh allotment of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares, and selling her right to others:—*Held*, that she was entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up. *In re Sinclair—Clark* v. *Sinclair*, 21 C. L. T. 501, 2 O. L. R. 349.

Implied revocation of earlier will—*Consideration of circumstances and construction.*]—When a testator has successively made two wills, containing different provisions, but susceptible nevertheless of being carried out at the same time, unless the second will contains a clause expressly revoking the first, the Court may, in view of the circumstances and the interpretation of the provisions of the second will according to the presumed wish of the testator, decide that the provisions of the second will are incompatible with the first, and in consequence that the first will is revoked by the second. *Nelson* v. *Vileneuve*, 25 Que. S. C. 328.

Intestacy — *P. E. I. Statute of Distributions, s. 10 — Personal property — Next of kin of intestate and their representatives.*]—W. died intestate leaving one brother and two sisters surviving him. One sister predeceased him, leaving a son and three grandchildren, children of her deceased daughter:—*Held*, that the grandchildren are entitled under s. 10 above, as representatives of their mother, to her distributive share in W.'s estate. *Re William Dodd Estate*, 6 E. L. R. 578.

Intestacy — *Real Property — P. E. I. Statute of Distributions, s. 2 — No collaterals after brother's and sister's children.*]—W. died intestate without issue. His father died also intestate leaving six sons, including W., and three daughters. Four of W.'s brothers predeceased him without issue and intestate, and one brother and two sisters are still living. His other sister died intestate, leaving a son and three grandchildren, children of her deceased daughter, of whom plaintiff is one:—*Held*, that plaintiff is not entitled to a share in W.'s real estate, being a collateral "after brother's and sister's children," under s. 2 above. *Phillips* v. *Gillis*, 6 E. L. R. 575.

Lawful widow — Contestation—Costs. *Brown* v. *Warnock* (1910), 1 O. W. N. 343.

Legacies — *Overpayment of legatees under judgment—Mistake—Repayment — Interest.*]—A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay: (1) to a sister a legacy of $500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of $500; (3) to the children of another niece a legacy of $500; and (4) to a charitable institution a legacy of $500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:"—*Held*, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each. Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees, and one of the other legatees:—*Held*, that the trustees and the charitable institution were bound to repay the excess which they had received; *per curiam*, with interest from the date of proceedings taken by the children of the niece; and per Maclennan, J.A., dissenting, with interest from the date of distribution under the report in the administration proceedings. *Uffner* v. *Lewis* (*No.* 2), *Bays' Home* v. *Lewis* (*No.* 2), 23 C. L. T. 217, 5 O. L. R. 684, 2 O. W. R. 441.

Legacy—*Acceptance — Legatee-executor.*]—The fact that a universal legatee has claimed from an insurance company moneys due by the company to the heirs of the testator, does not import acceptance of his legacy, if the legatee is also executor. *Renouf* v. *Turner*, 24 Que. S. C. 194. See also *Turner* v. *Renouf*, 6 Que. P. R. 175.

Legacy — *Charge on land — Interest—Statute of Limitations—Legatee also administrator with will annexed.*]—A legatee of money charged on land, whose legacy was to be paid six months after the death of the testator, was appointed administrator with the will annexed, but did not sell the land to pay herself the legacy, and held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties, some eight years after the death of the testator:—*Held*, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment. *In re Yates*, 22 C. L. T. 413, 4 O. L. R. 580, 1 O. W. R. 630.

Legacy — *Sickness, provision in case of—Executors, discretionary power of — Personal representatives of deceased legatee — Creditors.*] — A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest

the same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying funeral and other necessary expenses, to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares:—*Held*, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives. 2. The son having taken ill and died, the trust arose; and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it. 3. The son's creditors had no direct claim upon the executors or the fund. *In re Evans*, 22 C. L. T. 164, 3 O. L. R. 401, 1 O. W. N. 92.

Legatee predeceasing testatrix — *Rights of husband and children.*]—A testatrix by will dated 23rd March, 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the four children predeceased her, intestate, leaving a husband and two infant children:—*Held*, that by virtue of s. 36 of the Wills Act, R. S. O. 1897 c. 128, the husband took one-third of a one-fourth share in the estate of the testatrix, the two infant children taking the rest. *In re Hannah Hunt*, 23 C. L. T. 95, 5 O. L. R. 197, 2 O. W. R. 94.

Loss or destruction — Establishing—Evidence — Solicitor — Privilege — Proof of execution — Proof of contents — Presumption of revocation — Rebuttal — Declarations of testator — Evidence of beneficiary — Corroboration — Admissions — Cross-examination. *Stewart v. Walker*, 6 O. L. R. 495, 1 O. W. R. 489, 2 O. W. R. 990.

Money paid to compromise action for reconveyance of land — Realty or personalty — Construction of will—Gift—Income or corpus. *Re McVicar*, 5 O. W. R. 479.

Mortmain Act — *British Columbia — Probate duty.*]—Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will:—*Held*, that the statute 9 Geo. II. c. 36, relating to charitable uses, and commonly known as the Mortmain Act, is not in force in British Columbia. (2) Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate. *In re Pearse, In re Brabant, Sweetman v. Durien*, 24 C. L. T. 162, 10 B. C. R. 280.

Neglect to appoint executor — Application of husband and beneficiary for probate according to the tenor of the will — Grant of letters of administration with the will annexed. *Re Coleman*, 9 O. W. R. 985.

Originating notice of motion — *Determination of questions.*] — Testator by his will dated 13th October, 1896, gave certain portions of his estate to each of his 7 children, naming them, who were all then living. Four of his children predeceased the testator, leaving personal representatives who are still living. In 1908 testator made a codicil to his will. He died in 1909. The residuary clause of his will directed the residue of his estate to be divided amongst all of his children, share and share alike. The question arose as to whether the residue should be divided into seven shares, one to go to each of the three surviving children and one to the representatives of each of the four deceased children, or should it be divided amongst the three surviving children only:—*Held*, that the testator intended that the residue should be divided into seven shares. As to interest payable by one of the children in respect of lands devised to him it was held that the interest was to be paid annually upon the whole amount from time to time remaining unpaid:—*Held*, also, that the executors, while the residuary estate remained in their hands, could exercise their discretion as to payment of interest on another child's share. If, in their opinion, she needed the interest for her maintenance they could pay it to her, and if they paid the money to the children of said child (as permitted by the will) they would not be liable after such payment. — Divisional Court affirmed judgment of Britton, J., 15 O. W. R. 4, and dismissed the appeal without costs. —*Wisden* v. *Wisden*, 2 Sm. & G. 396, followed; *Re Williams*, 5 O. L. R. 345, and *Re Clark*, 8 O. L. R. 599, distinguished. *Re Bauman* (1910), 15 O. W. R. 423, 1 O. W. N. 493.

Partition — *Renunciation by one of the children now become of full age, in favour of his mother who had been his guardian — Renunciation before rendering account of the guardianship.*]—A minor on becoming of full age may validly renounce in favour of his mother his share in their common property inherited from his father, and this may be done before his mother, who had been his guardian, had rendered him an account of her guardianship. Hence it is useless to move to set aside a sale of real estate, the property inherited, made by the mother to a third party at the same time as the renunciation. *Montreal Fire Ins. Co. v. Morache* (1909), 18 Que. K. B. 493.

Power of appointment—Restriction to class — Validity of restriction — Valid appointment with invalid conditions annexed. *Rogerson* v. *Campbell*, 6 O. W. R. 617, 10 O. L. R. 748.

Power to sell land — *Reinvestment—Substitution — Family council—Order of Judge.*]—Under a will creating substitution, the institute had power to dispose of immovables belonging to the substitution, subject to the obligation of reinvesting the proceeds in other immovables. The institute was represented by a curatrix. The question specially submitted to the Court was whether the curatrix to the institute required the authorisation of a family council as to the reinvestment to be made of the price of an immovable belonging to the substitution, which had been sold under the power conferred by the will:—*Held* (affirming the judgment in 13 Que. S. C. 516), that the law does not require the authorisation of a family council for the reinvest-

ment by the institute of the proceeds of an immovable sold; all that is necessary is that the institute give notice to the substitutes if they are of age, or to the curator to the substitution, and, on their or his refusal to consent, obtain the authorisation of a Judge. *Daly* v. *Amherst Park Land Co.*, 16 Que. S. C. 570.

Powers of executors — *Time limit — Legacy — Investment — Special legislation — Extension of time.*]—The provisions of the Quebec Statute 3 Edw. VII. c. 136 have not the effect of extending indefinitely the time limited by the will of the late Owen McGarvey for the investment of $50,000 for the appellant's benefit as directed by the will. Judgment appealed from, 32 Que. S. C. 364, reversed. *McGarvey* v. *McNally*, 40 S. C. R. 489, 5 E. L. R. 340.

Probate fees — *Statutory authority.*]—By Rule 1065, the appendices to the Supreme Court Rules form part thereof, and by s. 94 of the Supreme Court Act (R. S. B. C. 1897 c. 56) the Rules are declared to be valid and binding; therefore probate fees as set out in appendix M. of the Rules may be collected as being imposed by statutory enactment. *In re Porter Estate*, 10 B. C. R. 275.

Property of absentee—*Provisional possession.*]—An order for provisional possession of the property of an absentee will not be granted to any person interested other than a presumptive heir. *St. Denis* v. *Masson*, 6 Que. P. R. 308.

Substitution — *Payment of debts — Alienation of estate.*] — Land subject to substitution cannot be alienated in a definite way except in the cases expressly mentioned in Art. 953, C. C., and in the manner there indicated. It cannot be alienated at will, even for the purpose of paying the debts of the entailing grantor, unless he has expressed a wish to that effect.—When a testator, after having provided for payment of his debts, leaves what remains of his property burdened with a substitution, he is considered to have permitted indefinitely the alienation of his property to the extent of what is necessary to pay such debts. *Choquette* v. *Masson*, 16 Que. S. C. 606.

Surrogate Courts — *Letters probate —Exemplification of letters issued by English Court—Application to seal—Saskatchewan Surrogate Courts Act, ss. 70, 71 — Saskatchewan Evidence Act, s. 15.*] — On appeal the clerk of the Surrogate Court at Moosomin directed to attach the seal of the Court to an exemplification of probate granted by the High Court of Justice of England. *Re Chesshire*, 11 W. L. R. 257.

Time for distribution — *Vested estates.*]—A testator gave a certain farm to his son to be delivered to him on attaining the age of 25 years. He also directed that certain properties should be equally divided amongst his children, the children of a deceased child to take the parent's share, but no child to take until he or she attained the age of 25 years. He further directed that another property should be held as a home for his widow, and on her death or marriage it should be sold and the proceeds divided amongst his children then living, the children of a deceased child to take the parent's share. The said son and a daughter, both unmarried, predeceased the widow, each leaving a will:—*Held*, that the two deceased children were qualified to receive a share of the testator's estate, except the homestead property, and that their shares were vested and passed under their respective wills; that the homestead property should go to the children living at the time of the death of the widow. Costs out of the estate. *Re John Knox* (1910), 16 O. W. R. 44.

Trustees — Advances — Division of estate—Discretion. *Hospital for Sick Children* v. *Chute*, 1 O. W. R. 321, 3 O. L. R. 590.

Trusts — Power to appoint new trustee — Exercise of — "Surviving brothers and sisters" — "Then."—Parties—*Cestuis que trust. Sanders* v. *Bradley*, 2 O. W. R. 697, 6 O. L. R. 250.

Trusts.]—R. died in 1876, leaving practically all his property upon trust for the benefit of his widow and children. In his will, in order to make an equal distribution of a large portion of his estate among his five daughters, he grouped together certain properties, in part real estate and in part personal, in five separate schedules. The property in schedule (a) was devised to the testator's daughter M. A. A., who died in 1902, leaving a will by which, in exercise of the power of appointment in her father's will, she devised one-third of her estate to her husband who survived her.—The clause in the will relating to the final distribution of the scheduled property was as follows:—"And upon trust on the death of either of my said daughters to convey one-third of the said lands, tenements, hereditaments, and premises apportioned to her in such schedule, to such person or persons upon the trusts and for the ends, intents and purposes or in such manner as my said daughter may by any writing under her hand, attested by two or more witnesses, or by her last will and testament, direct and appoint, and as to the remaining two-thirds, to hold the same for the child or children, or such of them of my said daughter so dying, upon the trusts and in the proportions, and for the intents and purposes my said daughter may by her last will and testament direct and appoint and in default of such directions and appointments then and in such case the said two-thirds and one-third shall be held by said executors and trustees in trust for such child or children and be divided equally between them and their heirs, share and share alike, on the youngest child living attaining the age of twenty-one years, and in the meantime and until such child shall attain such age, the rents, issues and profits thereof shall be applied by my said executors toward the support, maintenance and education of such child or children, and in the event of my daughter dying, leaving no issue her surviving, then and in each case I will and direct that the said two-thirds and one-third before mentioned (if no disposition of the same shall be made by my said daughter) shall be equally divided by my said executors and trustees between her sisters and brother and their respective heirs in equal proportions *per stirpes* and not *per capita*":—*Held*, that the trustees, in order

to make a distribution, had power to sell and dispose of the scheduled property, apportioned to the deceased daughter, such power being implied in the will in order to carry out the trusts, though no express power was given:—*Held*, also, that the deceased daughter having died without issue, the unappointed two-thirds of her scheduled property should be equally divided now between the surviving daughters and the heirs of the deceased son. The residuary clause in the will was:—"The rest, residue and remainder of my said estate, both real and personal and whatsoever and wheresoever situate, I give, devise and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following, that is to say: upon trust after paying my brother, Duncan Robertson, or his heirs, to whom I give and bequeath the same, the legacy or sum of four thousand dollars, Dominion currency, to sell and dispose of the same as and when they shall in their discretion see fit and consider to be most for the benefit and advantage of my said estate, and shall apportion the same or the proceeds of such parts or portions as shall be sold from time to time, equally to and among my said children, share and share alike, and shall hold the same for my said children and their heirs, share and share alike, subject to any advances or sums made or to be made by me, as aforesaid, upon the same trusts, with regard to my said daughters, as are hereinbefore declared with respect to the said estate in the said schedules mentioned": — *Held*, that the deceased daughter had a disposing power over one-third of her share of the residuary estate; and that the remaining two-thirds was divisible as was directed in regard to the scheduled property. *Smith* v. *Robertson* (1909), 4 B. N. Eq. 139.

Void legacy — *Distribution — Residuary legatees—Next of kin.*] — A testator gave, subject to the payment of his debts, etc., to his widow a life estate in all his real and personal estate, and, subject to bequests to a university and a mission board, gave the proceeds of his real estate (with power of sale to the executors) to certain residuary legatees. The personal property being insufficient to pay the debts, etc., sufficient of the real estate to pay those debts, etc., and the specific legacies, was sold. The bequest to the missionary society was admittedly void under the Mortmain Act:—*Held*, that the amount of it fell into the residue and should go to the residuary legatees, not to the next of kin. *In re Smith's Will* (*Carlton, C.*), 7 O. L. R. 619, 3 O. W. R. 380.

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2. CONSTRUCTION.

Absolute bequest — *Bequest for maintenance—Discretion of executors — Division of residue.*]—In construing a will it was held that certain legacies were not a charge upon lands; executors had power to sell lands to satisfy debts and legacies if personal estate was insufficient; widow must elect between dower and legacies; legacies to abate equally in full and widow should receive residue. *Re Petty* (1909), 14 O. W. R. 350, 487.

Action to recover what has been paid by error—*Tax upon property devolving by succession—Duty of particular legatee — Interest—C. C. 891, 1047, 1140, et seq., R. S. Q. 1374 et seq.*]—The will in question in this case provided for a legacy of $1,200 in plaintiff's favour, and contained the following clause: "And it is understood that the four hundred dollars due me by her husband, or any other sum of money which he may owe me at my death, shall be deducted from the said sum of $1,200, and any balance remaining will only be payable to the said legatee out of the revenue collected by my testamentary executors:"—*Held*, affirming the judgment of the Court below, that, at the testator's death, all interest accrued at that date having been paid by the legatee's husband, the sum of $400, being the amount of the capital of the sum due by her husband, had become extinguished, and that the interest on that amount, from the date of the testator's death, could not be charged against the legatee, when payment was subsequently made to the legatee by the testamentary executors of the balance remaining payable out of the legacy of $1,200; that interest having been illegally charged against the said legatee upon the said sum of $400, she had a right to be reimbursed that interest. *Daust* v. *Boileau* (1910), 17 R. de J. 8.

Administration of trusts — *Power of appointment in heir—Time for distribution —Implied power in trustees to sell property.*] —Bill for directions as to administration of the trusts declared in will of deceased:—*Held*, that trustees have power to sell and dispose of property in order to make payments to executors of one of the devisees. Second, that as to the unappointed two-thirds share of a devise it should be equally divided now between surviving children of testator and heirs of D. Third, that the above devisee had a disposing power over one-third of her share of the residuary estate. As to the remainder, it should be distributed as declared in second answer. *Smith* v. *Robertson*, 6 E. L. R. 483.

Testator directed that certain property left to his daughter was to be divided if she left no issue, between her sisters and brothers and their respective "heirs," in equal proportions *per stirpes* and not *per capita*. *Held*, that the widow of a deceased brother is not included in the word "heirs." *Ibid*, 7 E. L. R. 312.

Administration with will annexed — *Land — Power of sale — Trustee.*]—Deceased directed his executor to sell his real estate. The executors obtained probate and died and his executors renounced as to this estate. The widow and another then took out letters of administration with will annexed. The widow entered into an agreement to sell the homestead farm mentioned in the will, she, and the next of kin, with the exception of an infant and a legatee, executing the conveyance. Specific performance refused:—*Held*, that the power of sale was confined to the original executor. There is no trustee of the trusts in the will to give a discharge. If debts and funeral expenses are paid, a trustee may be appointed under the Trusts Act. *Wymers* v. *Hilton*, 6 E. L. R. 326, 43 N. S. R. 161.

"All my children" — *Children of predeceased child.*]—The testator by his will directed that after the death of his wife his estate should "be divided amongst all my

children." One daughter died, leaving issue, before the execution of the will:—*Held*, that the daughter's children did not take directly under the will, nor by virtue of s. 36 of the Wills Act of Ontario, there having been no gift to their parent. *In re Williams*, 23 C. L. T. 156, 5 O. L. R. 345, 2 O. W. R. 47.

Allowance to guardian of infants—Additional to infants' allowances for maintenance—Income of estate—Direction for accumulation of part—Annuities out of surplus income—Costs—Action brought where summary application sufficient. *Hardy* v. *Sheriff*, 10 O. W. R. 1045.

Alternative absolute gifts.]—A testator gave to his widow his real estate for life, and at her death to his eldest son John for life, and thereafter to "become the absolute property" of John's eldest son, alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue; James and his son, who predeceased him, survived the widow: — *Held*, that the gift to John's eldest son being of an absolute interest, it must, in the absence of words importing a different intention, and having regard to the context, be deemed to have been the intention of the will that the alternative gift to James should also be absolute. The gift over to the appellant in case of the death of James without male issue was defeated if either James or his son lived to take absolutely. — Judgment of the King's Bench, Quebec, 15 Que. K. B. 515, affirmed. See also 29 Que S. C. 368. *McCormick* v. *Simpson*, [1907] A. C. 494, 16 Que. K. B. 523.

Alternative disposition — *Death of testator and wife "at the same time."*]—H. by his will provided for disposal of his property in case his wife survived him, but not in case of her death first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time, I request the following disposition to be made of my property." . . . H. died sixteen days after his wife, but made no change in his will:—*Held*, affirming the decision of the Court of Appeal, 4 O L. R. 666, 22 C. L. T. 405, which affirmed the judgment of a Divisional Court, 2 O. L. R. 169, 21 C. L. T. 434, that H. and his wife were not deprived of life at the same time, and he therefore died intestate. *Henning* v. *Maclean*, 23 C. L. T. 180, 33 S. C. R. 305, 1 O. W. R. 657.

Ambiguity — Distribution of estate — Designation of beneficiaries — Acceleration of distribution — Perpetuity. *Re Hopkins*, 5 O. W. R. 417.

Ambiguity — *Intention of testator — Avoidance of intestacy.*]—Appeal by some of next of kin from judgment herein dismissed. *Re Carmichael* (1909), 14 O. W. R. 6.

Annuities—*Creation of fund for—Right to resort to corpus.*]—The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each one of my sisters . . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than the others, and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . . whatever may remain of the estate:"—*Held*, that the sisters of the testator had the right to resort to the *corpus* of the fund provided for the payment of their annuities, if the income was sufficient. *Mason* v. *Robinson*, 8 Ch. D. 411, and *Illsley* v. *Randall*, 50 L. T. N. S. 717, followed. *In re McKenzie*, 23 C. L. T. 15, 4 O. L. R. 707, 1 O. W. R. 739, 2 O. W. R. 1076

Annuities — Deficiency — Arrears — —Death of annuitants — Application of accumulated income — Residuary bequest to charities. *Re Foley*, 8 O. W. R. 141, 597.

Annuities — *Income — Distribution of estate — Hotch-pot.*]—Annuities under this will held to be payable out of income only. Income, not capital, received from testator's widow to be brought into hotch-pot. Surplus after providing for annuities and arrears to be distributed as on an intestacy. Other special questions on construction of will decided. *Re Sisson*, 13 O. W. R. 620.

Annuities — Shrinkage in rate of interest—Encroachment on *corpus*—Remainderman—Vested estates—Right to devise. *Re Crawford*, 5 O. W. R. 12.

Annuities — Succession duty — Charge on annuity. *Re Scott*, 6 O. W. R. 312.

Annuity — *Amount left blank — "College."*]—Testator by his will left a fund to be invested to provide an annuity for his widow, directing that she be paid quarterly as an allowance. A blank left as above in such a will as this is not fatal to the will or bequest. Parol evidence is not admissible to explain it, the reason being obvious that the interest is understood. Legacies were left to various children payable at thirty-five:—*Held*, that they became payable at twenty-one. Where money is provided for sending a child to college, "college" implies a university education. *Re Hamilton*, 12 O. W. R. 1177.

Annuity—*Interest on fund — Corpus.*]—A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife . . . each and every year of her life, said $200 to be paid by my executors to my beloved wife on the

1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. . . . At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year:—*Held*, that the widow was entitled to $200 a year, and that the *corpus* of the estate could be resorted to, if necessary, for that purpose. *Kimball* v. *Cooney*, 20 C. L. T. 346, 27 A. R. 453.

Annuity to widow—Claim to dower in hands of deceased—Implication—Intention of testator. *McDowell* v. *Shankie* (1910), 1 O. W. N. 813.

Appeal — *Rules.*] — Motion was made for an order construing the will of Michael Shepard, who died in 1873, and for an order determining the boundaries between the portions of lot No. 17 in the first concession west of Yonge street in the township of York, and authorising the plaintiff to mortgage the land devised to Joseph Harkness Shepard, deceased. — Divisional Court reversed judgment of Latchford, J., 19 O. W. R. 25, 2 O. W. N. 1012, which defined the boundaries and authorised the mortgage.—Testator taken to have specifically disposed of all estate; (2) Court leans against intestacy; (3) residuary clause covers payment only; (4) natural construction should be given; (5) plain words of limitation not to be ignored—not to yield to equity view; (6) apparent omission "of my part" filled in. *Shepard* v *Shepard* (1911), 19 O. W. R. 497, 2 O. W. N. 1274.

Application by the widow and one of the executors, of Elijah Becksted, for an order determining her interest, and the interest, if any, of the next of kin of deceased in a certain piece of land:—*Held*, that the devise to the son was vested and not contingent upon his death. His sister having predeceased him and he having also died, his mother as his sole heir became entitled to his interest in the said land. *Re Becksted Estate* (1910), 15 O. W. R. 302.

Appointment of executor — *Bishop—Corporation sole.*] — Testator by his will gave his real and personal estate to the Roman Catholic Bishop of St. John, and appointed the Roman Catholic Bishop of St. John one of his executors. The Roman Catholic Bishop of St. John is a corporation by Act of Parliament:—*Held*, that the bishop took as executor in his personal capacity, and that it was not sought by the will to appoint him in his corporate capacity. *In re Sweeney*, 21 C. L. T. 511.

Ascertainment of persons entitled to share in residuary estate—"The rest of my surviving children" — Period of ascertainment — Death of testatrix — Time when fund becomes divisible. *Re McCubbin*, 6 O. W. R. 771.

"**Benefit.**"] — Widow was given the "benefit" of all the real and personal property, particularly all monies, as long as she remained the widow of the testator:—*Held*, that the word "benefit" is not a word of art, not a technical legal expression, to which a certain fixed interpretation must be given; that the will should be construed as if it had read, "I also will my wife all my real and personal property as long as she remains my widow," and that the widow should receive the instalments of a mortgage as they were paid. *In re Story Estate* (1909), 14 O. W. R. 904, 1 O. W. N. 141.

Bequest — *Assigned reason for, ill founded — Validity — Intention.*] — The reason assigned by the testator for a gift proving ill founded will only affect the validity of the bequest in so far as the circumstances clearly shew that the desire of the testator was that the gift should depend on the truth of the reason assigned for it. *Blouin* v. *Royer*, 27 Que. S. C. 81.

Bequest — *Church — Trust — Mixed fund — Perpetuity — Abatement — Mortmain Acts.*]—A testator, who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed $2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the trustees of the church:—*Held*, a good bequest. — *Held*, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given by the will. *In re Johnson, Chambers* v. *Johnson*, 23 C. L. T. 189, 5 O. L. R. 459, 1 O. W. R. 806, 2 O. W. R. 289.

Bequest — *Classes of relatives "most in need" — Distribution — Representation.*]—A clause of a will, directing that the surplus of assets, if any, be distributed amongst the brothers and sisters or nephews and nieces of the testator, who are most in need, in the discretion of the trustees, is not void for uncertainty. Such distribution need not be made by representation, *i.e.*, amongst the brothers and sisters living, and the children of those deceased at the time of the testator's death, but may be made, in the discretion of the trustees, amongst the brothers and sisters, and nephews and nieces, children of brothers and sisters, even if such brothers and sisters be also living at the time of the testator's death. Judgment in 26 Que. S. C. 466 reversed. *Doré* v. *Brosseau*, 13 Que. K. B. 538. Affirmed, 35 S. C. R. 205.

Bequest — *Condition — Marriage.*]—A provision in a will by which a testator directs his wife, whom he appoints the usufructuary of all his immovable property, "provided his son does not marry," "to give and deed him" (the son) certain property, should that event take place, is to be construed as a legacy of the property to the son in the event of his marriage. *Farmer* v. *Smith*, 29 Que. S. C. 406.

Bequest—*Restrictive condition—Validity—Religious faith — Marriage.*]—In a universal bequest to the children of the testator, with substitution to his grandchildren, the condition imposed that the latter should be born of a marriage contracted according to the rites of the Roman Catholic faith, and

be brought up and instructed in that faith, is valid in regard to grandchildren born before the death of the testator, and is not open to attack by them as contrary to liberty of conscience or as restrictive of marriage. *Lamothe* v. *Renaud*, 15 Que. K. B. 400.

Bequest — *Trust of absolute gift.*] — Where a testator by his will said: "I . . . do give and bequeath unto my wife, Sarah A. McNeil, all the property which I possess at my death, to dispose of to the best advantage for the support of the family and to leave the residue as she sees fit and proper at her death:"—*Held*, that no trust for the family was created, and that the wife took absolutely. *Sinclair* v. *Malay*, 40 N. S. R. 181.

Bequest for life to widow — Use in specie of furniture — Income. *Valleau* v. *Valleau*, 1 O. W. R. 65.

Bequest in lieu of dower—*Election—Dower out of land sold pursuant to option.*] —The testator by his last will devised to his executors all his real and personal property, in trust to pay to his wife during her natural life, or so long as she remained his widow, one-third of the income arising from his real estate, and to divide the remaining two-thirds among the persons mentioned. The executors were empowered to sell or rent and convert into money said real and personal property, at such times and for such sums as they deemed best in the interest of the estate. By another clause of the will the executors were directed to hand over absolutely to his wife all the household furniture situated in the part of the house occupied by him:—*Held*, that the bequest to the wife, being in excess of her legal rights, was intended in lieu of dower, and that she was compelled to elect, and that, having done so by accepting such bequest, she was barred from claiming dower. —*Held*, also, that the wife was entitled to receive from the executors, under the terms of the will, one-third of the proceeds of the sale of a piece of land upon which the testator had given an option during his lifetime, which option was exercised after his death. *McDonald* v. *Slater*, 42 N. S. R. 183, 4 E. L. R. 263.

Bequest of bonds — *Specific or demonstrative — Succession duty.*] — A testator possessed both at the time of making a codicil to his will and at the time of his death a considerable number (more than 5) of $1,000 debentures, bearing interest at four per cent., of a certain city, by the codicil devised to each of two devisees "one debenture of (the city) for the sum of $1,000, bearing interest at four per cent. per annum," and directed "that, if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of $1,000, bearing interest at four per cent:—*Held*, that the legacies to the two legatees were not specific legacies; and that, even if they had been, the legatees were not entitled to receive them free of succession duty, and the executors should either deduct or collect the duty before paying them the legacies. *In re Mackey*, 23 C. L. T. 297, 6 O. L. R. 292, 2 O. W. R. 230, 689.

Bequest of income—Right of legatee to *corpus* — Maintenance — Discretion of executors — Life interest. *Re Nelson*, 12 O. W. R. 760.

Bequest of interest on payments by devisees — Sale in lifetime of testator of land devised — Failure of bequest. *Heffernan* v. *McNab*, 1 O. W. R. 165.

Bequest of money—*Life interest—Gift — Deposit in bank — Distribution of estate — Probate Court — Appeal — Decree of Court below.*]—The mere fact that money has been deposited in a bank by a testator in the joint names of himself and his daughter, with power to either to withdraw, raises no presumption that a gift of the fund to the daughter was intended.—Testator bequeathed to his daughter any money which he might die possessed of "to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage," then over:—*Held*, that the daughter took only a life interest.—*Quære*, whether the Court will hear an appeal from a Probate Court when the decree of the Judge below is not before it. *In re Daly*, 37 N. B. R. 483, 1 E. L. R. 487.

Bequest of personal effects — Mortgage — Liability for debts and expenses of administration. *Re Way*, 1072, 6 O. L. R. 614.

Bequest of personalty — "*Reversion*" — *Gift over — Life interest — Absolute interest.*]—The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father," and gave, devised, and bequeathed, to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank:—*Held*, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely. *In re Percy, Percy* v. *Percy*, 24 Ch. D. 616, *In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, and *In re Walker, Lloyd* v. *Tweedy*, [1898] 1 I. R. 5, distinguished. *Osterhout* v. *Osterhout*, 24 C. L. T. 219, 390, 7 O. L. R. 402, 8 O. L. R. 685, 2 O. W. R. 842, 3 O. W. R. 249, 4 O. W. R. 376.

Bequest of property—Afterwards disposed of by testator in lifetime—Gift of money — "During her life" — Life interest in company shares - Property not specifically dealt with — Intestacy — Charitable gifts—"Missions"—Church not specifically named. *Re Campbell* (1910), 1 O. W. N. 865.

Bequest of right to a "home"—Limitations. *Re McMillan*, 3 O. W. R. 418.

Bequest of shares — *Precatory trust in favour of children of legatees—Trustees — Retention of shares—Sale of right of subscription for new shares—Proceeds accounted as capital—Payment of income to legatees.*] —The testator bequeathed to each of his 3 sons one-third of his shares in the capital stock of an incorporated company, "the share of each to be transferred in the books of the company to each of such legatees." He added: "My wish and desire, however, is that, though each of my said 3 sons shall have had such shares so transferred to them as aforesaid, they shall not dispose of them, but only the income derived therefrom shall be expended by them respectively, and that upon the death of each of them his share shall be disposed of and the proceeds thereof divided equally amongst all my grandchildren, and, in the event of my son Percy dying and not leaving lawful issue, his shares shall be sold and apportioned amongst my grandchildren as aforesaid:—*Held*, that the will, in respect of the shares, created a trust in favour of the grandchildren.—Review of the authorities bearing upon precatory trusts.—2. That the petitioners were not justified in transferring to the legatees absolutely the shares in question, and each of the sons was entitled to receive during his lifetime only the income derived from the shares.—3. That moneys arising from the sale of the right of the executors as shareholders to subscribe for and receive new shares were capital and not income; and in respect of these moneys the will created a trust in favour of the grandchildren.—4. That the petitioners were not justified in paying over absolutely to each of the sons one-third of the moneys arising from the sale of the "rights," and each legatee was entitled to receive during his lifetime only the income from each one-third. *Re Walton* (1911), 16 W. L. R. 679, Man. L. R.

Bequest of shares in company—Distinction as to shares held in different rights — Codicil — Direction that legatee may purchase shares at par. *Davies* v. *Fox*, 10 O. W. R. 361.

Bequest of use of chattels for limited period — *Sale — Interest — Executors.*]—A part of a will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request, and the proceeds were paid to him:—*Held*, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only: but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Bequest to "aforementioned children," their heirs or assigns — Child or daughter deceased at date of will. *Re Ross*, 3 O. W. R. 154.

Bequest to Bible and Tract Society —*No society by that name—Good charitable bequest — Bequest divided between two societies which might have been intended.*] — Testator gave a bequest to the Bible and Tract Society. There was no society by that name. Meredith, C.J.C.P., divided the bequest equally between the Upper Canada Religious Book and Tract Society and the Upper Canada Bible Society, holding that there was a good and effective charitable bequest, and that either society might have been intended by the testator.—*Williams* v. *Roy*, 9 O. R. 534, followed. *Re Paine* (1910), 17 O. W. R. 1065, 2 O. W. N. 494.

Bequest to "children" — *Legitimate and illegitimate — Illegitimate previously mentioned by name—Exclusion of legitimate children by inference from wording of will and circumstances.*]—Testator married in England and had lawful issue, whom he deserted and came to Canada. Here he again went through a form of marriage with another woman and had three illegitimate children by her. In his will he devised his property to these three illegitimate children by name and his reputed wife. The property given to this wife was to be divided after her death among his children share and share alike. The legitimate children claimed to share in the estate of their father.—Mulock, C.J. Ex. D., *held*, (1910), 16 O. W. R. 200, 21 O. L. R. 262, 1 O. W. N. 848, that the word "children" wherever it appeared in the will, meant only the three illegitimate children, and it was the intention of the testator to exclude his legitimate children.—Divisional Court dismissed plaintiff's appeal from above judgment. Costs of action and appeal of both parties out of estate. *Lobb* v. *Lobb* (1910), 17 O. W. R. 212, 2 O. W. N. 44; 22 O. L. R. 15.

Bequest to grandchildren — Devise—Bequest for improvement of land — Revocation — Money invested in shares. *Re Gilbert*, 2 O. W. R. 135.

Bequest to grandchildren—*Income—Corpus — Grandchildren living at testator's death and those born thereafter.*]—A testator, by his will, gave his wife, during her lifetime or widowhood, an annuity of $900, to be reduced, in case of her again marrying, to $250, and the rest of the income of his estate to his grandchildren, to be paid over to their respective parents, to be applied towards their maintenance and education, and to be paid to the grandchildren themselves in case the parents were not making proper application thereof. On each of the grandchildren attaining majority, the allowance for maintenance and education was to cease, and they were to be paid $250 each. In case his wife should then be dead, the residue of his estate was to be equally divided amongst his children, share and share alike, or set apart for their maintenance. The children of a deceased son J., and those of any other sons and daughters who should have in the meantime died, to receive their parents' share; but, if his wife should be living when the youngest grandchild attained his majority, a sufficient sum to meet his wife's annuity and the neces-

sary outlay for the education and maintenance of a grandson J. was to be set apart, and the remainder divided equally among his said children and the children of any deceased child, as theretofore provided; and that on his wife's death and the completion of the education of his grandson J., if he should have availed himself of the provision therefor, the portion so set apart was to be distributed amongst his children and the children of such as were deceased, as hereinbefore provided:—*Held*, that the gift of the income to the grandchildren must be limited to those living at the testator's death, and that the gift of $250 was also so limited, none of the grandchildren born thereafter being entitled to receive such amount. *In re Moffatt*, 15 O. L. R. 637, 11 O. W. R. 485.

Bequest to "my family"—Exclusion of children of deceased child. *Re Wilkie*, 7 O. W. R. 473.

Bequest to "My nephews and nieces" —*Not to include those of testator's wife—Oral evidence — Not admissible — Dower — Benefits under will—No election required.*]—Mulock, C.J.Ex.D., *held*, that the words "my nephews and nieces" did not include the nephews and nieces of testator's wife; that widow was not required to elect between her dower and a gift of the "remainder of the net proceeds of the rents and profits of the residue, during the first year immediately following my decease." *Re Urquhart* (1910), 17 O. W. R. 937, 2 O. W. N. 451.

Bequest to putative wife — *Falsa demonstratio — Solicitor's undertaking—Failure to fulfil — Costs.*]—A testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, and had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid: —*Held*, that the bequest was good, and J. R. entitled to the property.—In the course of the trial the counsel and solicitor for the plaintiffs undertook that the other next-of-kin to the testator should be added as plaintiffs. This undertaking he was unable to fulfil, as the next-of-kin referred to refused to sign a written consent thereto, as required by Con. Rule 206 (3).—*Held*, that, as the solicitor was unable to fulfil his undertaking through no fault of his own, and as, if he had asked for an order (subsequently made) for representation, it would have been granted, he should not be ordered to pay the costs of the action unobtainable from the plaintiffs, except those of speaking to the case after failure to add the parties. *Reeves v. Reeves*, 12 O. W. R. 124, 16 O. L. R. 588.

Bequest to relatives — Shares — *Per capita or per stirpes* — "Respective." *Re Smith*, 6 O. W. R. 45.

Bequest to widow — "*Dower of one-third of my estate*" — *Non-technical use of word "dower"* — *Absolute gift of one-third.*]—A testator, after directing payment of his debts and funeral and testamentary expenses, directed the executors to sell the whole of his real and personal estate (excepting certain household goods reserved for his wife), turning the same into money, and after the payment of his debts, etc., and "my wife receives her dower of one-third of my estate," he gave to his wife the whole of the interest of his estate as long as she lived, "that is, the interest on the balance of my estate after she receives her dower:" and upon his wife's decease he gave two-thirds of the balance of his estate to his son, and the remaining one-third of the balance to his two brothers and a sister, to be equally divided among them:—*Held*, that the word "dower" was not used in its technical sense of a life interest in one-third of the testator's realty; but meant one-third absolutely of his whole estate; so that the wife took such one-third absolutely, and a life interest in the remainder. *Re Manuel*, 12 O. L. R. 286, 8 O. W. R. 70.

Bequest to widow of income of fund —To commence when son attains 18—Provision because widow in possession of receipts of farm during time intervening—No limit upon gift of income—Gift cannot be cut down—Executor to invest funds at once—Widow to be paid without regard to delay contemplated—Gift of chattels "used on the farm"—Reasonably necessary to due operation—Division of residue among children in proportion to legacies—Alteration in amount of legacy by codicil—Devise of interest in land—Unpaid purchase money—All costs out of estate. *Re Hunter* (1911), 18 O. W. R. 299, 2 O. W. N. 540.

Bequest to wife — *Limited power of disposal — Summary application — Rule 938 — Scope of.*]—A will was as follows: "I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time:"—*Held*, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will. The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938. *In re McDougall*, 25 C. L. T. 18, 8 O. L. R. 640, 4 O. W. R. 428.

Bequest to wife — *Use during lifetime —Power to dispose of moiety by will.*]—The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime, instructing his executors "who she wishes to give her half to among her relations:"—*Held*, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety. *In re Bethune*, 22 C. L. T. 229, 7 O. L. R. 417, 3 O. W. R. 286.

Bequest to wife—Whether in lieu of dower—Election. *Re Taylor*, 3 O. W. R. 745, 4 O. W. R. 211.

Bequests — *Conditions — Validity.*]—A testator by his will directed his executors to give his son T. $15,000, on the condition of his personally appearing before them at a named place before receiving any part thereof; and that he was not to engage in malt or spirituous liquor traffic, or in any form of gambling or games of chance, directly or indirectly, personally or through an agent or partner, and should furnish the executors with a reasonable proof of his strict observance of the condition. The testator also directed his executors to give another son W. $5,000, as follows: $500 five years after his decease and $500 each year thereafter for 9 years, and that before receiving any part he should appear personally before the executors at the said place: — *Held*, that T. had not an estate vested in him; that the restriction against being engaged in the liquor traffic or gambling was with the object that he should, if physically able, be engaged in some honourable calling, exclusive of the liquor traffic or gambling, as a means of livelihood, and had no reference to merely playing games by way of amusement or diversion; and as to the appearance before the executors, this would be complied with by appearing once before them. *Re Quay*, 9 O. W. R. 823, 14 O. L. R. 471.

Bequests of income for life—Bequests of *corpus* — Division among grandchildren — Equal division — Ascertainment of members of class. *Re Sprung*, 12 O. W. R. 420.

Bequests to children—Death of children — Devolution of shares — Vested or contingent interest — Income — Maintenance. *Re Sandison* (N.W.T.), 5 W. L. R. 316.

Charitable bequest—*Gift of income—Vesting of corpus — General rule — Contrary intention.*]—The rule that a gift of income without limitation of time operates as a gift of the *corpus*, in the absence of other disposition thereof, does not apply to a case in which the testator has expressed an intention that the *corpus* should not be vested in the donee.—Therefore, where a testator directed by his will that a sum of money should be invested by his executors upon trust to pay the interest to the A. W. hospital in the city of S., for the benefit of poor patients, so long as said A. W. hospital should be used for hospital purposes, and that, in the event of said hospital ceasing at any time to be so used for one year, the interest should be devoted to other charitable purposes:—*Held*, that the testator's intention that the *corpus* should not be vested in or paid to the hospital was sufficiently expressed and precluded the application of the general rule. *Re Chambers, Chambers* v. *Wood*, 16 O. L. R. 62, 10 O. W. R. 1089.

Charitable bequest—Uncertainty—Intention of testatrix — Bequest to church—Bequest to I. O. O. F. — Bequest to St. Andrew's Society — Several other similar bequests — 7 Edw. VII. c. 79, s. 2 — Construction of — Costs out of residuary estate —Plaintiff's costs to be taxed as between solicitor and client. *Jone* v. *St. Stephen's Church* (N. B. 1910), 9 E. L. R. 23.

Charitable bequest — *Uncertainty — Trust — Executors as trustees — Parties.*]—A devise in a will that "all my property, real and personal, be retained in trust for the maintenance of a manual labour school for girls," is not void for uncertainty, and an appointment in a codicil of two persons "to act as executors of my will and take charge of all property of all kinds which I may leave for the purposes contained or expressed in my will," is in reality an appointment of trustees governed by Art. 981*a*, C. C., and following, to which Art. 918 does not apply. Hence, trustees so appointed are vested with and represent the estate of the testatrix, and are competent to contest, alone, a suit brought to have the will set aside.—Judgment in 28 Que. S. C. 365 reversed. *Stevens* v. *Coleman*, 16 Que. K. B. 235.

Charitable devise — To "Wesleyan Methodist Foreign Missions" — Name of society changed—By Act of Parliament—Now Methodist Church—Evidence of identity of object—Sutherland, J., *held* will to be a good charitable devise, and that the Methodist Church took to be held by it for purposes of foreign missions—Costs of all parties out of property in question. *Re Edwards* (1911), 18 O. W. R. 678, 2 O. W. N. 765.

Charitable devises and bequests — *Designation of beneficiaries — Perpetuities —Mortmain Acts.*]—Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown, . . . Ireland. The presiding clergyman, committee and elders to have full control of all after me. They shall have power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and the broken-hearted with the joy of Christ's death and sufferings, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months of the making of the will and codicil, leaving both real and personal property: — *Held*, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently well designated, and came within the meaning of s. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2, and, the gifts being charitable the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect.—*Held*, also, that the word "assurance" in s.-s. 6 of s. 7 of that Act refers to a deed, not to a will, and therefore leaves s. 4 of R. S. O. 1897 c. 112 untouched, and under that section a devise in favour of a charity is good, though made within six months before the

testator's death. *In re Kinny*, 23 C. L. T. 332, 6 O. L. R. 459, 2 O. W. R. 881.

Charitable gift — Condition — Gift over — Interest. *Re Innes*, 945.

Charitable gift — *Mortmain—Testator domiciled in England — Money invested on mortgage of freehold land in colony — Impure personalty — Invalid gift—Charitable Uses Act, 1736 (9 Geo. II. c. 36).*]— A testator domiciled in England, died in 1888, possessed of money invested on five legal mortgages of freehold land in Ontario, by his will made in 1878 gave his residuary real and personal estate to his wife for life, and after her death he gave one-third part of it to charity.—At the time of his death the Charitable Uses Act, 1736, was in force in England and in Ontario.—The wife died in 1906.—It was decided that the gift of one-third part of his residuary estate to the charity constituted a good charitable gift so far as such one-third part consisted of pure personalty; but, in answer to the enquiry directed as to how much of such one-third part consisted of pure personalty, it was certified that the testator's Ontario mortgage investments were impure personalty.—On a summons taken out to vary the certificate on ground that the money invested on Ontario mortgages was pure personalty:—*Held*, the testator's Ontario mortgage investments were impure personalty, and that the gift to the charity was invalid as to the moneys invested therein. *Re Hoyles; Row* v. *Jagg* (1910), 103 L. T. 127; 30 C. L. T. 993.

Charitable use — *Bequest to poor house —Mortmain — Void condition — Costs.*]— A testator directed his farm to be sold and the proceeds paid over to the Bruce County Poor House Treasurer, to be expended in luxuries for the inmates, said sale to be made at the expiration of four years from the date of the will, namely, the 21st February, 1900. The testator died a few days afterwards. The House of Refuge of the County of Bruce was generally known as the Bruce County Poor House:—*Held*, that the county was entitled to the proceeds of the sale under R. S. O. c. 112, the bequest being a charitable use within that Act.—*Held*, also, that the provision postponing the sale more than two years from the death of the testator, contrary to s. 4 of that Act, was invalid, unless the period allowed by the Act were extended by the Court or Judge. Costs as upon an originating notice under Rule 938. *In re Brown—Brown* v. *Brown*, 21 C. L. T. 32, 32 O. R. 323.

"**Chattels**" — *Mortgage for purchase money.*] — A testator, after devising "all that I possess to be disposed of as follows," made two specific devises of land, and then bequeathed to his two sisters "all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, moneys, and notes to" the survivor. Part of his estate consisting of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised, sold by him in his lifetime:—*Held*, that the mortgage passed as a chattel under the above bequest. *In re McMillan*, 4 O. L. R. 415, 1 O. W. R. 471.

Codicil—*Annuity payable out of legacy—Revocation — Lapse of legacy — Date of distribution.*]—Testator by his will gave to his trustees $600 in trust to pay an annuity from the interest or *corpus* thereof of $300 to his son R. during his life, and upon his death to pay to R.'s children P., S. and M., one-half, one-quarter and one-quarter of said principal, respectively. In a subsequent clause it was provided that in case of the death of R. while any or either of the said children should be under the age of 25 years, the trustees should pay to their mother while such children should be under that age an annuity of $300 from said principal, "to which such child or children will be entitled on the decease of their father," for the maintenance of such child or children respectively, while he or she should be under that age. A codicil revoked the annuity to R. Testator was survived by R. and R.'s children, all being under the age of 25 years at testator's death, but S. was now of that age:—*Held*, that the codicil did not revoke the gift to R.'s children; that each child on attaining the age of 25 years was entitled to be paid his or her share; and that it was not the meaning of the will that the fund should be kept intact until the youngest of the children attained that age. *Lewin* v. *Lewin*, 23 C. L. T. 267.

Codicil — Bequest of life interest with power of appointment by will — *Corpus* to legatee in default. *Re Hanmer*, 4 O. W. R. 474.

Codicil — *Revocation of legacy—Statute of Mortmain — Bequest to school and poor —Validity.*]—The testator in his will gave $2,000 to his son William McMurray, and no other person named William was mentioned in it. In the codicil to the will he said: "I am sorry, my dear William, to make this alteration. I cut you off my will and leave you $200. I leave $500 to Acton school, . . . and $300 to the three oldest and poorest people in Rosedale municipality . . . . :"—*Held*, 1. That the bequest of $2,000 to the son was revoked and one of $200 substituted for it. 2. That the Statute of Mortmain, 9 Geo. II. c. 36, is in force in Manitoba, and the bequest to the school district of Acton, so far as it was directed to be paid out of land or the proceeds of land, was void, but that such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid, subject to abatement *pro rata* with other legacies if the estate should not be sufficient to pay all. *Re Staebler*, 21 A. R. 266, followed. *Brook* v. *Badley*, L. R. 3 Ch. 672, and *Re Watts*, 29 Ch. D. 947, distinguished. 3. That the gift of $300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out. *Law* v. *Acton*, 22 C. L. T. 419, 14 Man. L. R. 246.

Codicil — *Testamentary succession — "Heirs" — Universal legatee.*] — R. A., who died in Montreal in 1896, had, by his will, made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residu-

ary estate. M. A. died in 1895, leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A., and made a codicil to his own will in the terms following:—"With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A., . . . my will and desire is that her said share of said residue shall go to her heirs:—*Held*, Gwynne and Girouard, JJ., dissenting, that, under the provisions of the Civil Code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will. Judgment in 9 Que. Q. B. 257 reversed. *Allen* v. *Evans*, 20 C. L. T. 371, 30 S. C. R. 416.

Condition — *Vested estate subject to be divested — Application under Rule 938— Executors — Locus standi.*] — The testatrix devised certain land to her grandson "when he arrives at the age of twenty-five years. Should he not survive till the age of twenty-five years, I give" (the same land) "to my son Andrew, and should he die without heirs of his natural body, I give" (the same land) "to my son Robert, his heirs and assigns forever:"—*Held*, that the land was vested in the grandson, subject to be divested in the event of his not attaining the age of twenty-five years. *Doe dem. Hunt* v. *Moore*, 14 East 601, *Phipps* v. *Ackers*, 8 Cl. & Fin. 583, and other cases cited in Theobald on Wills, 5th ed., p. 497, referred to.—*Semble*, that the executors, having no estate in the land given to them by the will, and none under the Devolution of Estates Act, seven years having elapsed since the death of the testatrix, had no *locus standi* to make an application under Rule 938 to have questions arising under the will determined. *In re Young*, 22 C. L. T. 31.

Conflicting bequests of personalty— Reconciling — *Ejusdem generis* rule — Residuary bequest. *Re Pink*, 4 O. L. R. 718, 1 O. W. R. 772.

Contingent legacies — *Infants — Interest as maintenance.*] — The testator bequeathed to his two infant sons $4,000 each contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—*Held*, that interest as a means of maintenance is payable out of the general residence of an estate, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Contingent or vested interest — *Legacy.*]—A testator devised certain property to trustees to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the *corpus* among his children, naming them, in certain shares: — *Held*, that the children took vested interests. *Kirby* v. *Bangs*, 20 C. L. T. 61, 27 A. R. 17.

Conversion — Mortgage — Intestacy— Residuary legatee — Executors. *Re Moore*, 1 O. W. R. 50.

Conveyance by executors and trustees.]—G. E. F. died in 1899, and by his will left the greater part of his property to his executors and trustees upon various trusts.—The testator's widow is still living, and the surviving executors and trustees are the plaintiffs G. C. F. and W. J. H. F., two of the testator's children.—In December, 1907, negotiations were entered into by the defendant J. and W. T. H. F., acting for and with the consent of his co-trustee and mother, for the sale and purchase of the Linden Hall property, which with other real estate had been devised by the testator to his executors. An agreement was made, and a memorandum containing its terms was drawn up by J., and signed by him and W. T. H. F.; there was only one copy of this memorandum which was retained by J., and later destroyed by him, when he determined not to go on with the purchase. This memorandum as stated by the plaintiff W. T. H F. was as follows:—"December 13th, 1907, Johnston to purchase from Fenety estate property on Brunswick Street, 76 x 185, 25 to be cleared on upper side, 15 feet on lower side; estate to give an unencumbered title; Johnston to hand the estate 25 shares of Toronto Street Railway and 10 shares Fredericton Gas Stock—all furniture, including that belonging to Mrs. Roberts, to be removed from the premises. Stock not to be transferred before January 2nd, 1908. Sgd. L. W. Johnston, Wm. T. H. Fenety."—It contained the name of the vendor and purchaser, the property to be sold and the price to be paid:—*Held*, that there was a valid agreement for purchase and sale; that the memorandum was amply sufficient to satisfy the Statute of Frauds, and was capable of being enforced.—The will contained the following provisions:—"I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situated of which I may be seized or possessed or otherwise entitled, to my executors and trustees herein named upon the trusts following, etc." The clause in the will which referred to the Linden Hall property was:—"Upon

trust that my trustees will hold my residence known as Linden Hall and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one-half of the taxes, insurance, water rates and such like—also she paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may so wish. If, however, the above property be leased or sold during my wife's lifetime, with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good as one of my present houses situate on College Road, Sunbury Street, Fredericton, and if after paying such rent with the money received from the rent of the said Linden Hall property there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife. Should, however, the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows: so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living:"—*Held*, that while no express power of sale was contained in the will, there was an implied power in the executors and trustees to sell the Linden Hall property, to be drawn from the provisions contained in the will itself, and to enable them to carry out the trusts declared in the will; and that a conveyance executed by the surviving trustees and executors, in whom the title was vested, and the widow of the testator, gave a good title to the property in question, and that it was not necessary that the beneficiaries under the will, other than the widow, should join in the conveyance. Memorials of judgment on record against some of the *cestui que trusts* are not a bar to the trustees giving a good title to the property, as they have no interest in the real estate involved, which would be liable under an execution.—Courts of first instance in deciding questions of title are bound to decide according to their own view, whether they have doubts or not, leaving it to be decided by a Court of Appeal. *Fenety* v. *Johnston* (1909), 4 N. B. Eq. 216.

Death of beneficiary — *Application for directions—Payment into Court for benefit of next of kin—Reference directed.*]—The testator died in September, 1895; the son received various payments from the executor and died in November, 1910, having a will in which he assumed to dispose of the estate in the hands of the executor, amounting to about $15,000. The executor disclaims all interest beneficially and asks to whom the fund should be paid, 1st. under the will of the son, or 2nd, to the next of kin of the testator as an undisposed of residue:—Boyd, C., *held*, that the undisposed of residue in the hands of the executor should be paid into Court for the benefit of the next of kin of the testator, and that it be referred to the Master at London to ascertain who they are and to distribute the fund accordingly. The executor to pass his accounts and receive his costs and commission and be discharged. Costs of the application out of the estate. The solicitor appointed to represent the unascertained next of kin to have the carriage of the matter in the Master's office. *Re Rispin* (1911), 19 O. W. R. 269, 2 O. W. N. 1122.

Death of devisee before testator—Subject of devise falling into residue — Death of one of two residuary legatees and devisee — Tenants in common — Lapse as to lands devised — Survivor entitled to personalty. *Re Gamble*, 8 O. W. R. 797.

Death of legatee—*Another legatee to take—No direction in will regarding income of legacy.*] — Testator gave his grandchild $5,000 to be paid him on attaining 21 years of age, directing the income of which to be applied towards his support, maintenance and education. He further provided that in case said grandchild died during infancy then the legacy should go to another grandchild. The child died.—Sutherland, J., *held*, that the income of the legacy could not be used for the support, maintenance and education of the other grandchild, but must accumulate until she became of age. The will otherwise provided for her support, etc. *Re Leitch* (1911), 18 O. W. R. 528, 2 O. W. N. 714.

Death of legatee—*Gift over*—"*Time of distribution or settlement of my estate*"—*Costs out of estate.*]—*In re Wilkins, Spencer* v. *Duckworth*, 18 Ch. D. 634, and *In re Goulder, Goulder* v. *Goulder*, [1905] 2 Ch. 100, 103, approved. *Re Marshall* (1910), 17 O. W. R. 778, 2 O. W. N. 399.

Death without issue — Executory devise — Power of sale — Executors—Representatives of. *Re Fitzsimmons*, 1 O. W. R. 220.

Declaration of trust.]—J. A. C. the testator died April 15th, 1907. In his will, which was dated March 13th, 1906, there was the following residuary clause: "All the rest and residue of my estate, real and personal excepting only such personal property as may be found in my private cash box, or in my box in the vaults of the Bank of New Brunswick, St. John, and which I have already given to my daughter Hanna Gertrude, to meet the immediate personal necessities of herself and her sister Jean, I give in trust to my executors, etc."—On or before April 11th, 1905, the testator gave to J. S. C., one of the executors afterwards named in his will, an envelope which J. S. C. believed to contain securities, and which the testator at that time stated he had given to his daughter H. G. C., and requested J. S. C. to take the envelope and deposit it in a vault box in the Bank of New Brunswick. J. S. C. leased a vault box as directed, in the name of J. A. C. and H. G. C., either to have access, and gave both the keys of the box to J. A. C. After J. A. C.'s

death a number of securities were found in the private cash box and in the vault box an envelope containing securities was found, addressed "Rev. John A. Clark, Hannah Gertrude Clark," and also a number of loose securities:—*Held*, that only those securities which had been actually assigned, and to which she had the legal title, and which were therefore ear-marked for her, were the property of H. G. C. as given to her by the testator during his lifetime. — *Held*, also, that in respect to the other securities there was no perfected gift *inter vivos*, as no delivery had been shewn; that there was no valid declaration of trust by the testator in favour of H. G. C.; that there was no valid testamentary gift to H. G. C.; and that therefore the other securities were a part of the testator's residuary estate. — Where the only evidence of a gift of a promissory note is its endorsement to the alleged donee without delivery, the title does not pass. Money deposited by one, in a savings account, in his own name and another's, payable to the survivor, as a rule becomes the property of the survivor absolutely. *In re Paul Daley*, 37 N. B. R. 483, distinguished. *Clark* v. *Clark* (1909), 4 N. B. Eq. 237.

Delivery of legacy.]—In an action between the heirs and the legatees of the deceased, where the want of delivery of the legacy was pleaded.—*Held*, that in a universal legacy no delivery was necessary. See *Holland* v. *Thibaudeau*, 4 L. C. R. 121; holding the reverse. The *deliverance de legs* is entirely abolished by Art. 891, C. C. *Ed. Robert* v. *Dorion* (1837), C. R., 3 A. C. 387.

Devise — *Absolute gift—Conditional gift over — Validity — Disposition of corpus—Income — Executor.*]—A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—*Held*, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *In re Deller*, 24 C. L. T. 22, 6 O. L. R. 711, 2 O. W. R. 1150.

Devise — Absolute interest — Gift — Intestacy. *Re Chapman*, 4 O. L. R. 130, 1 O. W. R. 434.

Devise — *After-acquired property.*] — A testator devised "all my real estate . . . being composed of the south-east part of lot 10 . . ." Afterwards he acquired the northerly half of lot 10:—*Held*, that the after-acquired property passed under the devise. *In re Smith*, 10 O. L. R. 449, 6 O. W. R. 390.

Devise — *Charge — Debts and legacies —Bequest of rents — Estate — Proceeds of sale — Principal and interest — Administration expenses — Apportionment.*] — A testator devised land to his son, and in his will directed the son to pay debts and legacies:—*Held*, that the effect of this was to charge the payment of both debts and legacies upon the land devised. *Robson* v. *Jardine*, 22 Gr. 420, followed. *McMillan* v. *McMillan*, 21 Gr 594, distinguished. The testator by his will gave a house and lot to his daughter, but by a codicil purported to revoke the gift, and directed as follows: "I will that the said house and lot be held by my daughter . . . who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age."—*Held*, that by the rule in Shelley's case the daughters took an estate in fee simple in the lands. *Van Grutten* v. *Foxwell*, [1897] A. C. 658, and *Verulam* v. *Bathurst*, 13 Sim. 374, followed. With reference to another parcel of land, the codicil directed that all rents derived from it were to be divided between the testator's wife and daughter equally, and that on the death of a life-tenant the property should be sold and one-half the proceeds given to his wife or her heirs, and the other half invested, the principal for the benefit of the heirs of his daughter, and interest to go to his daughter during her life. —*Held*, that as to one-half of this land also the daughter took an estate in fee simple. The testator did not provide for the payment of administration expenses, though he directed that his debts and funeral expenses should be paid by his son.—*Held*, that the estate as a whole should defray the expenses of administration, and if there was a different disposition of the real and personal parts, there should be ratable apportionment according to the respective values of the real and personal estate. *In re Thomas*, 21 C. L. T. 594, 2 O. L. R. 660.

Devise — *Charge — Maintenance — Personal liability—Declaration — Consent decree—Appeal — Future payments — Partition.*]—The testatrix bequeathed the balance of moneys remaining in the banks to her credit, after payment of certain specified charges, to M. M. and E. M., share and share alike. To her son, A., she devised her half of the homestead property charged with the comfortable maintenance of M. M. and E. M. upon such homestead during their lives:—*Held*, that the maintenance of M. M. and E. M. under the terms of the will was made a charge upon the property, and not upon A. personally:—*Held*, that a declaration made in the decree, with the consent of the plaintiff, the surviving beneficiary, restricting the liability of A. to a charge upon the land, could not be varied by the Court of Appeal: — *Held*, that a sum of money having been set apart which would be sufficient for the support of the plaintiff for the period of 13 years, and such maintenance being a charge upon the land, binding it as effectually as a mortgage, it was not necessary to provide for securing future payments:—*Held*, also, no partition having been asked for in the statement of claim, that the appeal from the decree, on the ground that partition had not been ordered, must be dismissed. *McKean* v. *McKean*, 33 N. S. R. 310.

Devise — Charge on debts — Mortgage —Apportionment — Valuation — Costs. *Re Foster*, 2 O. W. R. 212, 895.

Devise—Charge on unspecified portion of lands devised—Conveyance of — Portion of lands free from charge — Vendor and purchaser. *Re Zimmerman and Senner*, 7 O. W. R. 275.

Devise—*Charges on land devised—Payment of expenses of administration — Payment of debts—Legacies—Annuity — Land Titles Act—Incumbrances—Costs.*]—Where a testator devised a quarter section to one son, directing him to pay $100 to each of two daughters, and to another son another quarter section, and all personal property and cash, directing the latter to bear all sickness and funeral expenses, to keep the testator's wife, and to pay her $100 every year:—*Held*, that the quarter sections were respectively chargeable with the moneys directed to be paid by the respective devisees.—*Held*, also, that the specific devises of the lands and the charging of them with the legacies and the annuity, indicated that the testator had no intention of making them liable for the payment of debts, unless there was not sufficient movable property or cash to satisfy these.—*Semble*, that the provisions of the Land Titles Act, 1894, 57 & 58 V. c. 28, s. 3, and 63 & 64 V. c. 21, s. 5, making land descend as personal property, have not altered the common law rule that the personal property is the primary fund for the payment of debts.—*Held*, further, that the executors could not convey the lands to the devisees, without seeing that the proper registrations were made, and that, with the consent of the devisees, the proper manner of carrying this out was for them to execute incumbrances to be handed in for registration at the same time as transfers in their favour from the executors. — *Held*, lastly, that the costs of these conveyances and registration should be paid out of the estate. *Re McVicar*, 3 W. L. R. 492, 6 Terr. L. R. 363.

Devise — Condition—"Die without lawful issue"—Lifetime of testator. *Re McMichael and Doidge*, 2 O. W. R. 689.

Devise — Condition — Survival — Heirs —Title — Vendor and purchaser. *Re Henderson*, 2 O. W. R. 14.

Devise — *Condition subsequent—Uncertainty.*] — Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease:"—*Held*, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, and not a condition precedent to the acquisition of the land devised, but a condition of its retention. *In re Ross*, 24 C. L. T. 231, 7 O. L. R. 493, 3 O. W. R. 405.

Devise—Conditions construed as trust—Willingness of devisee to perform—Inability through no fault of her own—Declaration of title—Issue—Costs. *Re Chapman, McEwen v. Patterson*, 12 O. W. R. 97.

Devise — *Construction—Lapsed devise—Failure of objects—Residuary clause—Wills Act, s. 27—Rules of construction—Avoidance of intestacy.*]—The will of a testator who devised and bequeathed all his real and personal estate to trustees to hold for the benefit of his wife for life and after her death to hold for his daughter, and after her death to divide among her children. The will then provided that, notwithstanding the directions thereinafter contained, if the testator's son returned to Toronto within 5 years from the date of the testator's death, the trustees were to hold in trust for him from the time of his return certain specified lands (being a part of those before devised), subject to the existing life estate of the testator's wife during the term of the son's natural life, and to pay over to him the rents and profits thereof, and after his death to divide the same among his children. The son returned and entered into the receipt of the rents and profits of the lands, but died without issue. The first clause of the will, containing the general devise and bequest to trustees, was expressed to include all the testator's real estate, consisting of lots named and described, "and also all other real estate and the personal estate of which I may die seised or possessed." It was held that this was a residuary clause, and that the devise to the son and his children lapsed on his death without issue and was swept up by the residuary devise. *Walsh v. Fleming*, 25 C. L. T. 356, 5 O. W. R. 693, 10 O. L. R. 226.

Devise — Death of devisee—Vested estate — Contingency—Subsequent divesting—Conveyances of lands—Setting aside—Charges of fraud—Costs. *McNeil v. Stewart*, 11 O. W. R. 162, 868.

Devise—*Direction to keep and maintain.*] —A testator directed his two sons to keep their two sisters until they married, in a suitable manner free of expense, and that so long as the sisters, or either of them, kept house for their brothers, they or she were to have control of the poultry, eggs, butter, etc., and all moneys thence derived, for their own use and benefit. He devised his farm on which he was residing at his death, to his sons, who were compelled to sell it, as it was heavily incumbered:—*Held*, that all the sons were bound to do, was to offer to support and maintain the sisters, free of expense, in a suitable manner, either on the farm devised, or in the home of either of them, but that they were not bound to allow the sisters to reside wherever the latter wished, and to pay the cost of their maintenance. *In re O'Shea*, 23 C. L. T. 113, 283, 6 O. L. R. 315, 2 O. W. R. 224, 749.

Devise — *Directions to executors—Controlling condition—Gift to church—Refusal to accept.*]—A testator by his will appointed executors, and directed that his body should be buried by them in a designated spot on his farm, and that the greater part of his estate should be applied to the erection on his grave, of a monument to his memory. He further directed that his executors should donate a piece of his farm comprising the grave lot to a designated church congregation, which had a cemetery then existing, adjacent to the testator's proposed burial place. The church refused to accept the donation. The executors buried the body of the testator in the place indicated in the will, and took the necessary proceedings to have the same legally constituted as a cemetery. In actions by relatives of the testator

to have the bequest declared lapsed, and to set aside the transfer of the land in question to a cemetery company: — *Held*, that the fact that the land in question did not form a portion of any cemetery lawfully established at the time of the testator's death, did not destroy the validity of the will, nor prevent the execution of the testator's instructions as regards his burial. 2. The principal and controlling condition and requirement of the will was that the testator's body should be buried in a certain place on his farm, and that a monument should be erected over his grave. The provision that certain land comprising the burial lot should be donated to a particular church, as a cemetery, was only a detail in the mode of executing the testator's principal bequest, and not an essential and controlling condition which must be exactly complied with, and therefore the refusal of the church to accept the land did not invalidate the bequest. *Wright* v. *Bennie*, 13 Que. K. B. 379.

Devise—Estate—"Children"—Estate tail with executory devise over—Dower of widow of deceased devisee—Division of farm—Right to remove timber and stone—Personal right — Personal property — Absolute gift. *Re Weir*, 6 O. W. R. 58.

Devise — *Estate—Defeasible fee—Executory devise over.*]—A testator dying in 1833 devised land "to his loving son Alexander, during his natural life, after the demise of his mother, and after his death, then he did bequeath the same to his heir-at-law should he have any (*sic*); if not, he did bequeath the same to his brother John Grant:"—*Held*, that the gift to Alexander gave, by the operation of the rule in Shelley's Case, a fee simple or tail to him. Heir is *nomen collectivum* and carries the fee. But the last clause of the devise imported a defeasible estate in Alexander, should he die and have or leave no child, and, as he left no "lawful heir," or "heir-at-law," his fee tail or simple was defeated by the executory devise in fee simple in favour of John. *Grant* v. *Squire*, 21 C. L. T. 379, 2 O. L. R. 131.

Devise — *Estate — Fee simple — Life estate — "Je veux" — Words of direction or desire — Real Property Act — Refusal to register transfer to devisee in fee.*]—By his will, written in French by himself, the testator gave everything to his wife, using language which, if uncontrolled by what followed, would have been sufficient to make an absolute gift to her of all his property, real and personal. He then used langauge translated as follows: "I direct that . . my body be sent to Belgium . . . ; I direct that my wife pay . . $400 to Z. G. . . . I leave to my wife . . to give what she shall think suitable to our daughter B. when she shall marry. In case that our daughter B. shall not marry, or that she shall die without having a child, I direct that, after the death of my wife all that she shall have had of my succession be divided between the Simon and Pirson families"—that is, his own and his wife's relatives. The words "I direct" in the translation read in the original "je veux" wherever they occurred. The wife was executrix, and, as such, executed a transfer of certain lands of the testator to herself personally in fee simple, the title to the lands being registered under the Real Property Act.—*Semble*, that the absolute estate to the widow was cut down to a life estate by the subsequent words:—*Held*, at all events, that the words 'je veux" could not, in the absence of the Simon and Pirson families, be construed as words of mere desire, and that the District Registrar was justified, upon the will as it stood, in refusing to register the transfer. *Re Simon* (1910), 14 W. L. R. 56.

Devise—Estate—Fee simple or life estate with executory devise over — "Die without lawful issue"—Death in lifetime of testator — Lapsed devise — Annuities and legacies charged on lands devised—Payment by life tenant—Reimbursement of his estate—Statute of Limitations. *Re Kelcher*, 8 O. W. R. 225, 9 O. W. R. 90.

Devise—Estate—Fee simple subject to be divested on death of devisee leaving children —Rule in Shelley's case. *Re Eagle*, 10 O. W. R. 995.

Devise—*Estate—Rule in Shelley's case.*]—"I give and devise to my daughter Mary . . . the following described parcels of real estate to be held and controlled by her during her natural life, and after her death to be divided in a legal manner among her heirs:"—*Held*, that the devisee took an estate in fee simple, under the rule in Shelley's case. *In re McCallum—Hall* v. *Trull*, 21 C. L. T. 565.

Devise—*Estate—Rule in Shelley's case—Specific performance.*]—Action by the vendor to compel the purchaser to specifically perform a contract for the purchase of certain lands, the title to which was obtained under the following devise: "I give and bequeath to my son Francis (the plaintiff) for the term of his natural life and at his decease to his heir, all that, etc. . . ." The defence was, that, on the proper construction of the will, the plaintiff was not entitled to the lands in fee simple, but only for the term of his natural life. The will was dated the 19th July, 1881, and the testator then had a wife, three daughters, and two sons; the devise to the other son, Gregoire, who was then the father of two children, was as follows: "I give, devise, and bequeath to my son Gregoire for the term of his natural life and at his decease to be divided between the children of my said son, share and share alike, but in the event of his leaving no issue the said property shall go to the next heir," etc.:—*Held*, that, as it was doubtful whether the testator so used the word "heir" as to make the rule in Shelley's case applicable, and thereby confer a fee simple, the devisee could not get specific performance of a contract for the purchase of land, his title to which depended on the will. *Garriepie* v. *Oliver*, 21 C. L. T. 424, 8 B. C. R. 89.

Devise—*Estate—Summary application to determine—Scope of Rule 938.*]—There is no jurisdiction upon an originating summons under Rule 938 to decide a question arising between legal devisees under a will, where the question propounded does not in any way relate to the administration of the estate. *Re Cafferty Estate*, 10 O. W. R. 119, 15 O. L. R. 306.

Devise—Estate for joint lives of devisees —Remainder to heirs of both—Period for as-

certainment of heirs—Mortgage by joint tenants for life. *Haight* v. *Dangerfield*, 2 O. W. R. 120, 5 O. L. R. 274.

Devise—Estate for life—Legacy—Annuity—Abatement on deficiency of assets. *Re Laur*, 5 O. W. R. 444.

Devise — Estate in fee—Condition. *Re Rooney*, 5 O. W. R. 323.

Devise—*Estate in fee—Divesting—Executory devise over—Contrary intention—Vendor and purchaser.*] — A testator gave his widow a life estate in land and then devised it to his son P., his heirs and assigns. After devising other land to another son, he directed that, should any of his sons die leaving no children, the property given to such son should be equally divided between all his children, and should any of the children be disposed to sell, they should give the refusal to one of the family. At the time of the testator's death (1878) P. was married and had two children, and he and they were alive at the time of this action, the widow having died in 1898, and seven children of the testator having survived him:—*Held*, that the estate in fee in Philip was subject to being divested by his dying "leaving no children," which might still happen, and in which event the executory devise over would take effect. *Olivant* v. *Wright*, 1 Ch. D. 346, followed:—*Held*, also, that the provision in the will as to any of the children of the testator being "disposed to sell" did not shew a "contrary intention:"—*Held*, also, that a "contrary intention" was not indicated by a devise in the same will to another son subject to the same limitation and conditions, but subject also to the payment of legacies of $2,000 at the expiration of two years from the testator's death:—which appeared to be inconsistent with anything short of an absolute estate in fee. *Cowan* v. *Allen*, 26 S. C. R. 292, followed:—*Held*, therefore, that the plaintiff's title was not one that could be forced upon an unwilling purchaser, and a decree for specific performance should be refused. *Vanluven* v. *Allison*, 21 C. L. T. 468, 2 O. L. R. 198.

Devise — *Estate tail—Estate of life—Mistake of title — Improvements.*]—A will made in 1877, by a testator who died in 1882, contained the following provision: "To my son Moses I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandchildren." Moses married after his father's death, and left children surviving him at the time of his own death:—*Held*, that Moses took an estate for life with a remainder in fee to the children and not an estate tail:—*Held*, also, that a person who had purchased the land in question under the *bona fide* but mistaken belief that Moses took an estate tail, was entitled to a lien for lasting improvements, the statute being held to apply to a mistake of title depending upon a question of law. The point for determination in such a case is whether the person claiming for the improvements made them under the *bona fide* belief that the land was his own. *Chandler* v. *Gibson*, 21 C. L. T. 558, 2 O. L. R. 442.

Devise—Estate tail—"Heirs of body"—"Heirs and assigns"—"In fee simple." *Re Brand*, 4 O. W. R. 473, 5 O. W. R. 297.

Devise—Estate tail—Male — Restrictions on sale—Repugnancy. *Re Smith*, 4 O. W. R. 226.

Devise—Estate tail—Vested remainder in fee over—Uncertainty—Repugnancy—Absolute bequest of personalty. *Re McDonald*, 2 O. W. R. 968, 6 O. L. R. 478.

Devise—Event — "Or"—"And" — Executory devise over—Proof of will—Registration—Death of witnesses. *Bawtenheimer* v. *Miller*, 2 O. W. R. 393.

Devise—Event of death of devisee—Death in lifetime of testator—Will speaking from date. *Re Cumming*, 11 O. W. R. 987.

Devise — Executor—Power to mortgage. *Re Webb*, 2 O. W. R. 169, 230.

Devise—Executory devise over in certain events—"Or"—"And"—Estate — Vendor and purchaser. *Re Chandler and Holmes*, 5 O. W. R. 647.

Devise—Fee simple or life estate—Gift of personalty—Absolute gift of life interest. *Re Burk*, 12 O. W. R. 527, 999.

Devise—"Heirs"—Fee simple—"Or"—"And"—Condition *in terrorem*. *Re Bray*, 2 O. W. R. 520, 711.

Devise—Heirs of brother—Heirs of wife—Will of wife—Will of brother—Trust — Conversion—Power of appointment — Exercise by will—Implied gift—Distribution of estate. *Re Pellatt*, 9 O. W. R. 587.

Devise.] — In his will testator directed that at the decease of the survivor of A. and B. certain lands were to go to C. for life, and within one year after the death of these three the lands were to be sold, and proceeds divided among C.'s children, but if she had no surviving children then to go to testator's brothers and sisters *per stirpes*. The latter were all dead but A., some dying childless, others leaving children. C. is now 38, and has five children ranging from two to twelve:—*Held*, that as there is a possible contingency that C.'s children may all predecease her, that she has only a life estate contingent on her surviving A. and B. *Re Millington Estate*, 13 O. W. R. 566.

Devise—Incomplete form — Sufficiency—Substituted devise over—Restraint on alienation—Void condition—Annuity in perpetuity—Vagueness—Charge on land—Sale subject to. *Re Corbit*, 5 O. W. R. 239.

Devise—Intention — Supplying words to carry out—Estate—Fee simple or tail. *Re Walton and Nichols*, 2 O. W. R. 1035.

Devise—Intestacy—Rejecting surplusage. *McDonald* v. *Gollan*, 6 O. W. R. 603

Devise — Life estate—Charge on—Payment of mortgage and legacies—Acceptance—Refusal — Acceleration of estate of remainderman — Executors — Legal estate—Power of sale—Crop-payments—Deductions—Labour—Waste—Repairs—Fire insurance—Lease. *Re Bell*, 7 O. W. R. 199.

Devise—*Life estate—Devise in fee—Covenant—Restriction on alienation.*]—A testa-

tor devised to his widow for life, and then to D. for life, with the power to D. to devise in fee:—*Held*, that the widow and D. and the heirs of the testator, ascertained at the time of his death, could make a good title in fee simple to a purchaser, who should be assured against exercise of the power by D.'s covenant:—*Held*, also, that subsequent words in the will, referring to "that part I have directed not to be sold," did not import a restriction on the sale, no direction not to sell being found in the will. *In re Drew and McGowan*, 21 C. L. T. 186, 1 O. L. R. 575.

Devise—Life estate—Estate in fee or tail—Devise of remainder to children after express devise for life—Rule in Shelley's case—Purchaser from mortgagee of life tenant—Title by possession—Limitation of actions—Ejectment—Defence — *Mesne* profits — Improvements under mistake of title — Reference—Costs. *Bullen* v. *Nesbitt*, 10 O. W. R. 119.

Devise — Life estate—Estate tail—Survivorship—Disentailing deed — Condition — Use of testator's name—Conveyance to trustee — Title — Vendor and purchaser. *Re Brown and Slater*, 2 O. W. R. 101, 5 O. L. R. 386.

Devise—Life estate—Power of appointment to children in fee—Debts due by devisee of life estate charged against property devised—Charge against life estate only. *Re McKea*, 10 O. W. R. 689.

Devise—Life estate—Remainder in fee—Vested estate—Shares — Partition — Costs. *Re Blewett, Bartlett* v. *Blewett*, 11 O. W. R. 638, 12 O. W. R. 156.

Devise — *Life estate or fee simple—Conditional gift.*]—Testator gave real estate to C. F. B. J. upon his attaining the age of twenty years, with the provision that in case of his death the said estate to go to his brother; and in case of the death of both brothers, the said estate to go to the next heir and after his death to the next heir:—Meredith, C.J.C.P.:—*Held*, that C. F. B. J. having attained the required age, he took an estate in fee simple in the land devised. *Re Jebb* (1911), 19 O. W. R. 348, 2 O. W. N. 1163.

Devise—Life estate or fee simple—Rule in Shelley's case—Only applies where testator used technical words "heirs" or "heirs of body"—Has no application to "children" or "issue," etc. *Re Anderson* (1911), 18 O. W. R. 924, 2 O. W. N. 923.

Devise—Life estate to widow with power of appointment by will—Power of sale given to executors with consent of widow—Quit claim by executors to widow—Conveyance by widow to child—Will of widow — Consent shewn by acceptance of quit claim—Conveyance of widow's estate in another parcel—Exercise of power of appointment—Partition. *Burrows* v. *Allen*, 10 O. W. R. 179.

Devise—*Life estates—Remainder in fee—Estate tail—Period of distribution—Surviving wife—Title — Vendor and purchaser.*]—A testator devised to one of his sons, G., fifty acres of land, "to have and to hold to him, etc., *as aforesaid* and not otherwise." In an earlier part of the will he had devised lands to his other sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their and each of their wives to have and to hold to their children respectively and their heirs forever." G. was unmarried at the date of the will and of the testator's death:—*Held*, that G. took an estate for life, and his widow (if he left one) an estate for life after his death, and his children the remainder in fee after her death, or if no widow, after G.'s death.—G. was not entitled to an estate tail under the rule in Wild's case, for that rule applies only where the gift to both parent and children is immediate, nor under the rule in Shelley's case.—*Grant* v. *Fuller*, 33 S. C. R. 34, and *Chandler* v. *Gibson*, 2 O. L. R. 442, followed. —*Held*, also, that the devise to the children of G. was a gift to a class, which would comprise all children coming into existence before the period of distribution.—G. had married and had children living, and his wife had died at the time of an application under the Vendors and Purchasers Act, he having contracted to sell the land:—*Held*, that if he married again his second or any future wife who survived him would be entitled to a life estate.—Title could not be made without the order of the Court. *Re Sharon and Stuart*, 12 O. L. R. 605, 8 O. W. R. 625.

Devise — *Life interest* — "*Premises*"—*Election.*] — The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set out in his will, in which were the following provisions:—"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life." "To my son Joseph Martin the south-west half of the north-west half of lot 10 . . . containing 50 acres . . also the south-west quarter of lot 10 . . fifty acres . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay," etc. "My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain, or mortgage . . before he attains his thirty-fifth birthday." "Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority." The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph, the widow leased the 100 acres, reserving the dwelling-house and outbuildings and four acres for herself:—*Held*, Meredith, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life:—*Held*, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of "the use of the premises." *Martin* v. *Martin*, 24 C. L. T. 367, 8 O. L. R. 462, 3 O. W. R. 930.

Devise — Misdescription of land—*Falsa demonstratio* — Evidence of extrinsic facts —Correction of mistake. *Re Harkin*, 7 O. W. R. 840.

Devise—Misdescription of lots—Reference to buildings on lots—Title to land—Vendor and purchaser. *Re Vair and Winters*, 5 O. W. R. 337.

Devise — Power of sale — Executors—Devisee—Trustee Act—Devolution of Estates Act—Vendor and purchaser—Parties to conveyance. *Re Ross and Davies*, 2 O. W. R. 217.

Devise—Predecease of devisee—Estate or interest—Liability for debts of devisee. *Re Greenwood*, 9 O. W. R. 100.

Devise—*Provision as to division of land —Proof of accomplishment by testator—Survey—Action en licitation — Intervention — Distraction of part of land — Judgment — Bornage—Costs.*]—Where a testator in a devise of immovables declares that he intends to have a line drawn which will shew the boundaries, and the *procès-verbal* of which will bind those interested, the accomplishment of this is sufficiently established, after the opening of the succession, by the production of a certified copy of a plan and an explanatory letter from a surveyor, found between the leaves of the draft of the will, and by oral proof of the operation itself, and the existence of boundary marks and posts planted in the ground by the surveyor.—2. Where a third party intervenes in an action *en licitation* and prays that a part of the immovables shall be withdrawn from the quantity demanded by the plaintiff, upon the ground that they belong to the intervener, the Court, when maintaining the intervention, is not bound to order *bornage* of the territory in question. Costs should be awarded against the party who fails. *Guay* v. *Langevin*, 17 Que. K. B. 76.

Devise—*Repugnancy.*]—The testator gave his wife an interest for life, or until she should marry, in his dwelling-house and lot and the furniture, etc., therein, and after her death or re-marriage, whichever first happened, he gave them to his children, living when he made his will or living at his decease, or born after his decease, share and share alike, and their heirs and assigns forever:—*Held*, that the gift thus made to his children was the largest the law admits of and the endeavour, by subsequent clauses in his will, to take away the gift to his children, which he had bestowed by the above clause, was fruitless. The will plainly offended against the principle recognized in *Holmes* v. *Godson*, 8 DeG. M. & G. 152; *Shaw* v. *Jones-Ford*, 6 Ch. D. 1; *Bowman* v. *Oram*, 26 N. S. R. 318. *Corning* v. *Bent*, 23 C. L. T. 336.

Devise—*Restraint upon alienation—Period of — Insaisissabilité.*]—*Held*, that the following clause of a codicil, "I do hereby will and direct and it is my express will and intention that no part of my real property which I have bequeathed to my sons William and Richard be sold or disposed nor mortgaged or hypothecated or otherwise alienated in any way or for any cause or for any reason for and during the period of fifteen years from and after my decease, and it is my express wish that the said properties shall remain in the family and not in any way be disposed of or alienated during the said period of fifteen years, and that the same shall not be liable for any debts or claims which my said sons William and Richard may in any way contract," limited to a period of fifteen years the restraint upon alienation by the devisees, but made the property inexigible during the lives of the devisees. *Banque Jacques-Cartier* v. *Tozer*, 10 Que. Q. B. 81.

Devise — Restraint upon alienation — Summary application under Rule 938 — Scope of. *Re Martin*, 4 O. W. R. 429.

Devise—Restriction—Validity—*Res judicata* — Master of titles. *Re Phelan*, 2 O. W. R. 21.

Devise—*Restrictions against incumbering — Mortgage by devisee — Breach of condition — Vendor and purchaser.*]—A will providing for the division in specific halves of a certain farm lot, between the testator's two sons, contained restrictions against the devisees selling or mortgaging their respective halves until after the expiration of twenty-five years from the testator's death, and also against incumbering it for a like period:—*Held*, on a petition under the Vendors and Purchasers Act, that the later restriction was void; but, following *Chisholm* v. *London and Western Trusts Co.*, 17 C. L. T. 172, 28 O. R. 347, that the former restriction was good, so that the giving of a mortgage by one of the devisees on his half constituted a breach of condition for which the heir might enter and divest the devisee; and therefore the title was not such a one as a purchaser could be compelled to take. *In re Chisholm—In re Lot Three in the Eighth Concession of the Township of Mosa*, 21 C. L. T. 525.

Devise—Revocation by codicil — Specific devises — Residuary devise — Summary application. *Re Savage*, 2 O. W. R. 491.

Devise—*Sale of land devised—Mortgage for purchase money.*] — The testator bequeathed all his personal estate to his wife absolutely, and devised his land to his executors in trust for her benefit during life or widowhood, and then over. Between the date of the will and his death, the testator sold all his land, and took back a mortgage for part of the purchase money, which mortgage was an asset of his estate at his decease:—*Held*, that s. 25 of the Wills Act, R. S. O. c. 128, had not the effect of making the devise applicable to the interest in the land which the testator had at the time of his death by virtue of the mortgage; the mortgage was part of the personal estate and fell under the absolute bequest to the wife. *In re Dods*, 21 C. L. T. 81, 1 O. L. R. 7.

Devise — *Sale of land devised pursuant to statute — Ademption — Proceeds of sale —Lands unsold at death of testator — Distribution.*]—Where a change has occurred in the nature of the property even though effected by an Act of Parliament, ademption will follow unless the change is in name or form only, and is substantially the same thing:—*Held*, that s. 2, c. 100, 34 V., is a legislative declaration that the proceeds of the sale are to be treated as if they were still land. The above Act does not affect lands unsold at testator's death. *Re Spragge*, 13 O. W. R. 741.

Devise—*Sale of land devised pursuant to statute.*]—Where a change has occurred in

the nature of the property devised even though effected by an Act of Parliament, ademption will follow unless the change is in name or form only, and is substantially the same thing:—*Held*, that 34 V. c. 100, s. 2, is a legislative declaration that the proceeds of the sale are to be treated as if they were still land. The above Act does not affect lands unsold at testator's death.—Court of Appeal affirmed the judgment of Sir Wm. Meredith, C.J.C.P., 13 O. W. R. 741. *Re Spragge* (1909), 15 O W. R. 49.

Devise—*Substitution — Partition.*] — A devise by will of an estate to the wife of the testator to "hold in usufruct only during her natural lifetime," and after her decease to his children, with a proviso that, in the event of the death of any one or more of them, without children, during the life of the testator, or of his wife, the share of such child or children shall accrue to the others, creates a substitution which only opens on the death of the surviving widow. Hence, during her lifetime, no action will lie in favour of any one of the children for a partition of the estate. *Thornton* v. *Thornton*, 31 Que. S. C. 233.

Devise—Successive estates tail — Bar—Mortgages by tenant in tail — Fee simple. *Re Bastedo*, 9 O. W. R. 721.

Devise—*Usufruct — Right of property—Substitution — Opening.*]—A testamentary provision by which a testator devises to M. immovable property, "to be by the said M. enjoyed and disposed of in usufruct and sole enjoyment, during his life, *en bon père de famille*, the said testator giving and devising the property in such immovable property to the children of the said M., to be by them, or the survivors of them, in case some of them die in minority without issue, enjoyed and disposed of in full ownership after the decease of M., their father, but the testator desires, if the said M. dies without issue, or if all his children die in minority without issue, that the enjoyment of the said property shall go to W. and E., equally between them, and the property therein to their children, half to each family, the children representing their father, so that the children shall have the disposal of it in full right of property, and if it should happen that either the said W. or the said E. should die without issue, the children of the survivor shall have the right of property in the whole," is not a gift of usufruct and bare property, but a gift of full property, subject to a substitution, first, to the children of M., and, second, in default of children of M., or in the event of his children all dying in minority without issue, to W. and E.; and, third, on the decease of W. and E., to their children *per stirpes*, or, in default of children of one, to those of the other. Therefore, the substitution is not opened in favour of the latter, in case of the death of M. without children, until the death of the survivor of W. and E. *Fraser* v. *Fraser*, 16 Que. K. B. 304.

Devise—Vested estate—Death of devisee before period fixed for transfer of land by executors — Effect of will of devisee—Forfeiture — Sale of land — Charge of legacy and maintenance — Bequest of personalty —Postponement of enjoyment. *Re Powell*, 6 O. W. R. 181.

Devise—Vested estate—"Shall be dead"—Devolution of interest in estate — Partition — Parties. *Re O'Donnell, O'Donnell* v. *O'Donnell*, 12 O. W. R. 607.

Devise—*Vested estate liable to be divested—Gift over to church—Statutes of Mortmain — Failure of gift — 63 V. c. 135 (O.) — Construction of — Lapsed devise—Absence of residuary clause — Intestacy.*]—The testator made his will on the 17th December, 1885, and died on the 25th December, 1885. He bequeathed to his wife all the rents and profits arising or accruing from his real or personal estate, during her lifetime, and at her decease the rents and profits of his real estate of Jane McA. during her lifetime, and at her decease he devised his real estate (describing it) to her son William, his heirs and assigns, but if William should die without issue before his mother, she was to have one-half of the real estate to dispose of as she might think fit, and the other half was to go to the Presbyterian Church in Canada. There was no residuary clause. The widow died on the 26th March, 1886, and William on the 3rd November, 1889, under the age of 7 years, his mother surviving him:—*Held*, that William took a vested estate, liable to be divested upon his death in the lifetime of his mother; that one moiety had been divested beyond dispute, and as to the other, that a provision for divesting is not rendered of no avail by the fact that the gift over is void by the Statutes of Mortmain. —*Robinson* v. *Wood*, 6 W. R. 728, 27 L. J. Ch. 726, followed.—*Held*, also, that the gift over to the church, if effective, vested in the church not later than the death of the infant, in 1889; and, therefore, the statute 63 V. c. 135 (O.) was not applicable; moreover, that Act, when it provides that "all gifts, devises . . . which have been or shall hereafter be made to or intended for the Presbyterian Church in Canada . . . shall vest in the said board of trustees," must refer to valid and effective gifts, not to such as are void by the statutes or otherwise; and, therefore, the gift over to the church was void by the Statutes of Mortmain.—*Held*, lastly, that, there being no residuary devise, there was an intestacy as to the moiety intended for the church. *Re Archer*, 9 O. W. R. 652, 14 O. L. R. 374.

Devise—*Vested estate, subject to be divested — Rents — Expenditure for improvements.*] — Testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors, to expend at least $50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter:—*Held*, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than $50 each year, but more if necessity should, in the opinion of the executors, arise. *In re Dennis*, 23 C. L. T. 50, 5 O. L. R. 46, 2 O. W. R. 15.

Devise creating substitution—"*Usufruct*" — "*Usufructuary.*"] — Notwithstanding the use of the words "usufruct" and "usufructuary" therein, a universal legacy by a husband to his wife "in usufruct during her natural lifetime, but from the moment of her death or that she enters wedlock, the same to go in full property to his children, then living," is not a devise of usufruct and ownership, but of ownership only, subject to a substitution (*à charge de substitution*), the widow being the institute, and the children living at her death or second marriage the substitutes. *Whelan* v. *Whelan*, 35 Que. S. C. 78.

Devise for life—*Remainder to devisee's children — Estate tail.*]—Land was devised to D. for life "and to her children, if any, at her death," if no children to testator's son and daughter. D. had no children when the will was made:—*Held*, that the devise to D. was not of an estate in tail, but on her death her children took the fee. Judgment of the Court of Appeal, 1 O. W. R. 452, affirmed. *Grant* v. *Fuller*, 23 C. L. T. 81, 33 S. C. R. 34.

Devise for life—*Remainder to issue—Estate tail.*]—Testator devised land to W. for life and after her death to her issue, providing that in case W. died without issue, and without making a will, the land should be divided among certain named persons.—Latchford, J. (17 O. W. R. 92; 2 O. W. N. 120), *held*, that W. was not given an estate tail, but took only a life estate.—Divisional Court *held*, that W. took an estate tail. Judgment of Latchford, J., reversed. Costs out of the estate. *Watson* v. *Phillips* (1910), 17 O. W. R. 489, 2 O. W. N.

Devise for life and that of wife or survivor—*Special occupant — Part intestacy.*]—A testator by his will devised his farm to his son, Abner Butler, "for and during his natural life, and, in the event of his marriage during the life of his wife, or the survivor; and at his or their decease to his children, if any, but if the said Abner Butler should die, without issue, the said land to descend to my then living children." The son married twice, having children by his first wife, but none by his second, who was left a widow:—*Held*, that the widow was not entitled to a life estate by implication, and that there being no special limitation to the heirs of Abner, they could not take as special occupants during her life, and the result was, that the estate for the residue of her life went to the executors of Abner, and were assets in their hands. *Wilson* v. *Butler*, 21 C. L. T. 564, 2 O. L. R. 576.

Devise in trust—*Estate of cestuis que trust—Bequest of personalty — Absolute interest—Condition subsequent in restraint of marriage—Invalidity.*]—The testator by his will appointed executors and devised and bequeathed all his property, real and personal, to them in trust for the benefit of his wife and two sons, share and share alike, and then provided: "In the event of my said wife's marriage again after my decease and my said executors finding that the advantage of the children will be promoted by the grant to them of all the property they may apply it to them;"—*Held*, that the testator's widow was entitled as beneficiary to an undivided one-third share in all the testator's interest in the real estate, both as regards the corpus and the profits thereof, and also an undivided one-third share in the testator's personal property and any income to be derived therefrom. —In the absence of an intention to the contrary, it was to be assumed that the testator intended to vest in the beneficiaries an estate as large as the legal estate which he devised to the executors.—*Knight* v. *Selby*, 10 L. J. C. P. 263, followed.—The same words which were used for the purpose of passing the real estate were used for the purpose of passing the personal property, and it could not have been the testator's intention to give an unlimited interest in the real estate and a limited one in the personal estate:—*Held*, also, that the clause above quoted, as to the event of remarriage of the widow, was a condition in restraint of marriage, and, being a condition subsequent, was void.—*Morley* v. *Rennoldson*, 2 Hare 570, and *Re King's Trusts*, 20 L. R. Ir. 401, followed. *Re Tucker* (1910), 16 W. L. R. 172, Sask. L. R.

Devise in trust—*Substitution—Accumulation—Perpetuity—Distribution of estate.*] —A provision in a will, made before the promulgation of the Civil Code, whereby the testator gives and devises his property to his executors and trustees upon trust, with a direction to divide it into as many shares as he has children, to pay (at the end of 10 years) half the income of each share to each child during his life, and after his death the whole of the income of his share to his children, to invest and keep invested the surplus, with substitution of such income, for descendants, from generation to generation "indefinitely or so far as the law permits," is a universal legacy to the children of the testator, subject to substitution in favour of their children, and, after them, to their grandchildren, for two degrees beyond the institutes. This provision being made jointly, at the decease of one of the institutes without children, his share of the property accrues to the benefit of the other institutes, subject to a substitution in favour of those who are still *grevés*, and definitely in favour of those of the last degree. The remedy by way of action *en partage* is open to the last named for such share, for that of their branch, and for the undivided residue of the estate. *Masson* v. *Masson*, 33 Que. S. C. 108.

Devise not a legacy.]—"All those to whom legacies are given above in this my will," will not exclude one to whom a homestead farm was devised. *Re Read*, 13 O. W. R. 508.

Devise of all testator's property — *Chose in action.*]—A devise of all "my real estate and property whatsoever and of what nature and kind soever," at a place named, does not include a debt due by the devisee, who resided and carried on business at such place, to the testator. Judgment of the Court of Appeal, 4 O. L. R. 682, 22 C. L. T. 379, affirmed. *Thorne* v. *Parsons*, 23 C. L. T. 180, 33 S. C. R. 309.

Devise of family residence in trust —*Use and occupation "while unmarried"* —*Tenants in common — Residuary devise*—

Right to possession]—Testatrix devised her family residence to trustees to hold upon trust for her son John during his natural life while unmarried, on condition that he should not alienate it, and that he would permit his sisters and nephew, while unmarried, to also reside therein. On the death of John, the daughters were to occupy the residence while unmarried, and on the death of John, the nephew was to become absolute owner, subject to his aunt's right to reside therein while unmarried. The residuary clause gave residue to the two daughters, son John and the grandson equally. One daughter died, John married, and nephew came of age. — Middleton, J., *held*, that John's estate came to an end at his marriage. Nephew only took estate on death of John. The estate, during remaining years of John's life, passed to those mentioned in residuary clause, the representatives of deceased daughter taking her share. *Re Ryan* (1910), 16 O. W. R. 1001; 2 O. W. N. 32.

Devise of farm and house with "curtilage and outbuildings thereof"—Extrinsic evidence to shew meaning — Intention of testator — Barn and barnyard — Whether included—Action — Costs. *Thompson* v. *Jose*, 10 O. W. R. 173.

Devise of income per stirpes — *Subsequent devise of corpus per capita — Intent.*]—The testator by his will devised certain land after his wife's death to his two daughters "to receive the rents and profits of the same equally during the natural lives of my said daughters, and at the death of either before the other, the children of such deceased daughter to receive their proportion of said rents or profits of said lands, during the life of my said surviving daughter, as the case may be, and at the death of both my said daughters . . . that the land hereinbefore devised to them be sold and the price thereof equally divided between the children of my said daughters . . . or their legal representatives:"—*Held*, that after the death of both daughters, their children took *per capita*, and not *per stirpes*. *Re Ianson*, 9 O. W. R. 278, 14 O. L. R. 82.

Devise of land not owned by testator—*Intention to devise other lands — Misdescription — Parol evidence inadmissible to explain will — Intestacy.*]—Testator directed that his wife, M. Clement, should have the S. W. ½ lot 3, in 4th concession of North Dorchester, to have and to hold for and during the term of her natural life. As a fact testator did not own the S. W. ¼ or any part of it, but he did own the south half of the north half of the lot. Riddell, J., *held*, that it was perfectly manifest that the testator intended to devise land which he owned—the very precise description of it proved that beyond question, but it is not enough in our law for a testator to intend to devise, he must use words which are in law effectual to make a devise. Declaration granted that the testator died intestate in respect of the land in question, there being a clear and well-defined rule of law which stands inexorably in the way of receiving parol evidence as to what land was intended. *Re Clement* (1910), 17 O. W. R. 110; 2 O. W. N. 127; 22 O. L. R. 121.

Devise of land not owned by testator—*Mistake in description — Intention of testator to devise land he did own—General words of devise — Sufficiency of to pass estate.*]—Testator made a mistake in his will, in the description of the location of 50 acres of land which he bequeathed to an heir. He willed 50 acres which he did not own.—Riddell, J., *held*, that the testator had used general words in his will which were sufficient to pass the 50 acres which he did own and had intended to devise. *Re Clement* (1910), 17 O. W. R. 110, 2 O. W. N. 127, explained. *Smith* v. *Smith* (1910), 17 O. W. R. 251; 2 O. W. N. 179; 22 O. L. R. 127.

Devise of land to executor in trust to sell and apply proceeds—*Power restricted to person named.*]—W. by his last will directed his executor to sell his real estate, and invest and apply the proceeds as directed.—After the death of the executor named in the will, before carrying out the power vested in him, an administrator with the will annexed was appointed, by whom an agreement was made to sell the land to defendants. A deed signed by all the heirs of W., and the next of kin and all the beneficiaries under the will with two exceptions was tendered, which defendants declined to accept. —In an action claiming specific performance:—*Held*, affirming the judgment of the trial Judge, that the power of sale conferred upon the executor under the terms of the will was personal and could not be exercised by the administrator with the will annexed. —*Held*, nevertheless, that the Court had power, under the Trustee Act, R. S. 1900, c. 151, to appoint a trustee who could give a good title, and that, while plaintiff's appeal must be dismissed, defendants' right to costs of the trial and appeal must be made conditional upon their accepting the title joined in by the trustee so appointed. *Wymers* v *Hilton*, 43 N. S. R. 161, 6 E. L. R. 326.

Devise of lands subject to mortgages—*Devises — Charges — Exoneration.*] — Motion by executors under Rule 938 for an order declaring the construction of the will of Alexander Goulet, who died in February, 1902, leaving a will and codicil, the material parts of which were as follows:—"1. I hereby constitute and appoint my two sons Francis Xavier and Alexander Blake to be my executors of this my last will, directing my executors to pay all my just debts and funeral expenses. 2. (a) I devise and bequeath to my wife Mary the easterly half of lot number 154 Talbot Road with everything appertaining thereto during her natural life. (b) I give to my wife Mary all household goods and chattel property of all kinds that may belong to me at the time of my death. 3. I devise and bequeath to my son Francis Xavier the easterly half of lot number 154 Talbot Road, after his mother's death, the easterly half of the northerly half of lot 7 in the 14th concession of the township of Raleigh, and the south 95 acres of lot 8 in 14th concession of the township of Raleigh. 4. I devise and bequeath to my son Alexander Blake the westerly half of lot number 153 Talbot Road, on condition that he pays $1,000 to assist in paying off the mortgage. If he fails to pay the above said amount, then I devise and bequeath the said westerly half of lot 153 to my son

Francis Xavier. 5. In place of land mentioned in the 4th clause of my will I devise and bequeath to my son Alexander Blake the south 95 acres of lot 8 in the 14th concession of the township of Raleigh mentioned in the 3rd clause of will, and further will him $500 and hold the lands willed to my son Francis Xavier for the said amount. 6. I devise and bequeath to my daughter Rachel Jane the westerly half of the south 80 acres of lot number 7 in the 14th concession of the township of Raleigh, in the county of Kent. 7. I devise and bequeath to my daughter Margaret Christenna the easterly half of the south 80 acres of lot 7 in the 14th concession of the township of Raleigh, in the county of Kent. 8. I devise and bequeath to my daughter Delia Eugenie the westerly half of the northerly half of lot 7 in the 14th concession of the township of Raleigh, in the county of Kent. 9. I further will that my wife Mary shall have full use and control over all my lands for 10 years after my death in order to pay off the mortgage now standing against my real estate if not paid off at the time of decease. This is a codicil to my last will and testament. 1. I will that if at the time of my decease the mortgages on my real estate are not paid off, each of my daughters shall pay to the executors of my last will and testament the sum of $150 to assist in meeting that debt, and I charge the lands willed to each for the respective amounts. 2. I will to my wife Mary all money to be derived from a policy in the Edinburgh Life Insurance Company. In all other respects I do hereby confirm my last will and testament." The testator's wife predeceased him. At the time of his death the land mentioned in the 3rd paragraph of the will was subject to a mortgage for $750, and all the other parcels mentioned in the will were subject to a mortgage for about $4,000. Alexander Blake Goulet declined to take the lot in the 4th paragraph mentioned, and elected to take the lot in the 5th paragraph mentioned, with the charge upon the lands of Francis Xavier of $500:—*Held*, 1, that Francis Xavier was not bound to pay the sum of $1,000 because the will did not require him to do so in the event which happened, but substituted a payment by him of $500 to be made to Alexander Blake. — *Held*, 2, that any trust created by that clause terminated at the death of Mary Goulet.—*Held*, 3, that he was unable to find in the language used by the testator an intention to exonerate the daughter's lands from all but $150 of the mortgage debt. The question was governed by s. 37 of the Wills Act, R. S. O. c. 128. Under that Act every devise of land which was under mortgage was treated as a devise of the equity of redemption only, and the devisee takes subject to the obligation of paying off the mortgage, or a proportion of it, if it covers lands devised to others, unless the testator has by his will or some other document signfied a contrary intention. The three daughters by the will took therefore an equity of redemption in the land devised to them, subject to the payment of a proportion of the $4,000 mortgage. The codicil directed them to pay $150 each to the executors to assist in paying the mortgage, and created a new charge upon their land for that amount. The testator had not anywhere signified an intention that the payment of this $150 should relieve them from the liability which existed under the devise in the will of paying their shares of the $4,000 mortgage debt. The $450 to be paid by them was by the terms of the codicil to be applied in reduction of both mortgages, that for $750 as well as that for $4,000. *Re Goulet*, 6 O. W. R. 161, 10 O. L. R. 197.

Devise of legacies — *Releases by legatees*—Presumption when releases lost—Evidence—Corroboration of admissions — Corroboration of allegations — Consideration — Costs. *Garland* v. *Emery* (1911), 19 O. W. R. 467; 2 O. W. N. 1265.

Devise of life estate—Remainder in fee —Executory devise over—Subject to be defeated by will—Costs out of estate. *Re Moore* (1911), 18 O. W. R. 832, 2 O. W. N. 881.

Devise of life estate in lands *not owned by testator — Illusory devise—Claim against estate for compensation — Pecuniary legatees.*]—Testator devised to plaintiff a life estate in Blackacre. Testator having a mortgage thereon foreclosed it and went into possession and sold some of the property. He had, however, left out one of the necessary parties, who brought redemption proceedings when it was found there was nothing due on the mortgage. Plaintiff, therefore, took nothing:—*Held*, that he cannot look to the estate for compensation. He is not a pecuniary legatee. *Kennedy* v. *Kennedy*, 13 O. W. R. 984.

Devise of life estate with remainder — *Charge on remainder — Devise in fee — Vested estate subject to be divested—Annuity charged on land—Payment from rents and profits — Abatement in case of deficiency — Possession—Executors—Guardians of infant devisees — Devise of mortgaged lands — Estate subject to mortgages — Residuary estate—"Heirs"—Discretion of executors—Misdescription of lot—Evidence to explain.*] —The testator devised land to his wife for life and after her death to the Bishop of St. A., "less a note amounting to $250 given in aid of the St. A. Cathedral:"—*Held*, that the Bishop was entitled to the land, subject to the life estate of the widow, and subject to a charge for the amount of the note. The testator devised to his nephews J. H. C. and J. C. certain described lots of land, containing 523 acres—"J. C. to have the easterly half of said land, together with the house and other buildings on said farm." He also devised to his nephew R. C. other land, 208 acres. He then provided that the lands devised to all three should not become their absolute property until the youngest, R. C., had attained majority:—*Held*, that the devisees took a vested interest in the lands, subject to divestment in the case of any of them who might die before the youngest attained majority. The testator also bequeathed to his wife $350, to be paid in monthly instalments from the produce of the lands devised to his nephews, and also bequeathed to his wife the sum of $50 to be paid by his nephews "upon her decease in defraying her burial expenses:"—*Held*, notwithstanding the fact that the title to the land must remain in the executors during the minority of the youngest devisee, that the

eldest (who had become of age) and the guardian of the other two were entitled to immediate possession, and it would be their duty to apply the rents and profits, so far as necessary, in payment of the annuity to the widow; in case of deficiency, the annuity to be lessened by the amount of the deficiency. The testator devised other lands to two other nephews, subject to the conditions that they should provide for and keep their mother "in the house in which she is now living, during her widowhood, and also to their sisters S. W. and R. W. the sum of $25 each," and when the younger of these two nephews reached the age of 21, they should pay their sister M. C. $100:—*Held*, that executors should not be charged with the duty of seeing that the conditions of this devise were fulfilled; that should devolve upon the guardian of the devisees during their minority, and upon them when they reached the age of 21; if proper charges were executed by the devisees in favour of the persons entitled, the executors should convey the lands to the devisees. "To . . . R. C. I leave 5 cows and other chattels belonging to me in her possession at this date:"—*Held*, that the legatee was entitled to 5 cows only from the number in her possession at the date of the will.—*Held*, also, that, under 17 & 18 V. c. 113 and 30 & 31 V. c. 69, the devisees took the land subject to the payment of the mortgages thereon. The testator directed that the residue of his estate should be converted into money and the money applied in payment of debts and bequests, and that the balance should be distributed "among my heirs at the discretion of my executors:"—*Held*, that "heirs" meant those who would take real estate upon intestacy, the meaning not being affected by the provision of the Land Titles Act that real estate shall be distributed as personal estate. *Coatsworth* v. *Carson*, 24 O. R. 185, approved.—*Held*, also, that the "discretion" of the executors was to be exercised as to the share or proportion of the residue which each heir should receive, and did not extend to the power to deprive any one of a share. In making a devise the testator described the land as "the southwest quarter of section 6." It was admitted that he never owned the south-west quarter, but that he did own the east half:—*Semble*, that evidence might be admissible to shew that the southeast quarter was intended, but not the northeast quarter. *Re Cust* (1910), 13 W. L. R. 102.

Devise of majority—Vested estate subjected to be divested — Benefit of rents during minority — Summary application — Costs — Affidavits. *Re Dennis*, 5 O. L. R. 46, 2 O. W. R. 15.

Devise of real and personal estate—*Mistake in description of real estate—Life interest to widow—Remainder to daughters with power of appointment — "Then" construed to mean "in that event"—Sale under Settled Estates Act (Ont.)—Unborn children—Representation of by official guardian.*] — On motion for construction of a will, Middleton, J., *held*, that widow took life estate; that the word "then" should be read to mean "in that case" or "in that event"; that upon death of widow the property was to be divided between two daughters if living. If either daughter should die leaving issue, such issue to take, and if either leave no issue she was given power of appointment under the will, and if power of appointment is not exercised, there will be an intestacy as to her prospective share. Order granted for sale under Settled Estates Act on consent of son. Official guardian appointed to represent any unborn issue. Costs out of estate. *Re Hunsley* (1910), 16 O. W. R. 995, 2 O. W. N. 29.

Devise of real and personal property to husband and daughter to jointly enjoy so long as husband remained unmarried—*Husband died—Right of survivorship of daughter—Sale of personal property by order of Court—Was jewelry included in contents of house?*] — Testatrix willed a house and contents to her husband and daughter to jointly enjoy the same so long as husband remained unmarried. Husband died. The contents of house were sold by order of Court. The will contained no provision for case of husband's death, and the question arose as to what interest had the daughter in the estate:—*Held*, that the daughter was entitled, for life, to the income on the sum derived from the sale of the contents; that daughter was entitled to a life estate in the house; that certain jewelry which was in the house at the time of testatrix's death was to be deemed part of the contents of the house and the daughter was entitled to the use of same during life; that daughter being life tenant of the house was under obligations to repair, etc.; that trustees could not sell the house without daughter's consent and if she gave her consent the contract must be approved by official guardian. Costs out of estate. *In re Perrie* (1910), 16 O. W. R. 90, 21 O. L. R. 100.

Devise of rents to wife, subject to annuity—*Death of annuitant — Amount of rent payable to wife — Amount raised to pay debts — Proportion.*]—A testator, after directing payment of his debts, bequeathed to his wife his household furniture, and the "balance of the rents arising or accruing" from his homestead farm, after payment thereout and therefrom of $200 per annum to a daughter during her lifetime. He then devised the farm to two grandsons, who "were not to receive or to be allowed the possession thereof" until after his wife's death. The testator owned another farm, which he devised to another daughter. The daughter died in the lifetime of the testator. The executor, for the payment of debts, was obliged to raise $200, while for the repairs of the homestead farm, a yearly expenditure of $30 would be required:—*Held*, that the widow was entitled to the whole of the rent of the homestead farm, subject to any expenditure for repairs, and that the annuity to the daughter did not fall into the residuary estate.—*Held*, also, that the amount raised for the payment of debts was chargeable on the whole of the testator's realty proportionately to the respective interests of the parties in the two farms. *Re Brown Estate*, 18 O. L. R. 245, 13 O. W. R. 597.

Devise of residue—*Executory devise—Event happening in part.*]—A testator by his will gave his wife a life interest in his estate, directed payment at her death of some specific legacies, and then provided: "The residue . . . I give, devise, and bequeath as follows, that is to say; it shall be equally divided between my brothers R. M. and M. M., or in case of their dying be-

fore my . . . wife L. M., it shall be equally divided between the heirs of my brothers R. M. and M. M." R. M. died in the lifetime of the widow, and M. M. survived her:—*Held*, that, as the event provided for, viz., the death of both R. M. and M. M. during the widow's lifetime, had not happened, the devise of the residue to R. M. and M. M. was not divested, and R. M.'s widow took his share under his will. *In re Metcalfe—Metcalfe* v. *Metcalfe*, 20 C. L. T. 381, 32 O. R. 103.

Devise of west half of lot with limitations—Codicil substituting east half — Implication of limitations — Estate. *Re McNicol*, 6 O. W. R. 562.

Devise over—*Condition — Estate.*] — A testator devised all her real and personal estate to her son in fee and provided in case the son should die without issue previous to the death of her brother and sister, that they should take certain interests. The sister died in the lifetime of the son:—*Held*, that, as the event, the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie* v. *Willis*, 20 C. L. T. 14, 31 O. R. 198.

Devise subject to conditions — Death of devisee—Sale of land—Disposition of proceeds—Sale of timber — Consent—Unsold lands—Personal restrictions on sale—Land passing by will of devisee. *Re Attrill, Heaton* v. *Toronto General Trusts Corporation*, 12 O. W. R. 204.

Devise to child—Pre-decease—Rights of husband — Tenancy by the curtesy. *Re Hunt*, 5 O. L. R. 197, 2 O. W. R. 94.

Devise to children as joint tenants—*Subsequent clause — Jus accrescendi — Issue of child dying to take parent's share, or, in default of issue, surviving children — Effect on devise.*]—Vendor's and purchaser's application. By the ninth clause of a will certain property was left to four daughters as joint tenants. By a later clause upon the death of one of testator's children their lawful issue should stand in their place, etc.:—*Held*, that the later clause does not make a severance of the joint tenancy, and this objection to the title is not valid. The fifteenth clause may relate to other devises or it relates to the death of the children during the lifetime of the testator or the lifetime of his wife, and does not take effect after the estate is vested. *Re Millar & Roman Catholic* (1909), 14 O. W. R. 205.

Devise to husband—Life estate and remainder—Takes estate in fee. *Re Mulgrew* (1911), 18 O. W. R. 559, 2 O. W. N. 745.

Devise to one of testator's sons to be selected by widow.] — Testator bequeathed his property to one of his sons his lawful heirs and assigns absolutely forever, his wife to appoint and choose the worthier. She failed to make a selection, one of the sons having predeceased his mother unmarried. A son and a daughter survived the mother:—*Held*, that the property vested in the sons on the death of the father as joint tenants. No partition. Administration ordered as children infants. *Hutchinson* v. *Hutchinson*, 7 E. L. R. 454.

Devise to son of residue on attaining age of 25 years—*Devise over in case son died before 25—Income—Gift of to son an infant—Motion for allowance for increase of maintenance as provided in will—Vested estate subject to be divested.*]—Motion by Homer Carr, an infant, and Catherine Carr, his mother, for the opinion, advice and direction of the Court as to the construction of the will of the late Alexander C. Carr, father of Homer and husband of Catherine, and as to whether Homer Carr took under the will a vested estate in the property given to him; and also a motion by Catherine Carr for a larger allowance for the support and maintenance of Homer Carr:—*Held*, that Homer Carr took a vested estate subject to be divested upon certain events. Order granted for maintenance as asked. *Re Carr* (1910), 16 O. W. R. 869, 1 O. W. N. 1142.

Devise to two persons — *Death of one before testator — Lands and personalty — Lapse — Residue — Tenants in common — Joint tenants — Survivorship.*]—A testator, by his will, amongst other provisions, devised certain land to two sisters, naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator:—*Held*, that, as regards the land, the sisters would have taken as tenants in common, and therefore as to the deceased sister's share there was a lapse, and it was undisposed of, but as to the personalty they would have taken as joint tenants, and the survivor took the whole. *Re Gamble*, 8 O. W. R. 797, 13 O. L. R. 299.

Devise to widow—Condition against remarriage — Validity — Absolute gift — Gift over — Duty of executor. *Re Deller*, 2 O. W. R. 1150.

Devise to widow—Dower — Election—When widow compelled to elect. *Sabine* v. *Wood* (P. E. I. 1910), 9 E. L. R. 169.

Devise to widow—Estate during widowhood — Fee—Residuary devise. *Re Doughty & Johnson*, 2 O. W. R. 42.

Devise to widow — *Specified annuity—Construction — Intention — Distribution — Not limited to particular fund—Incidents of annuity—Costs.*]—The question arose as to whether property was vested so that a disposition should be adjusted as between an annuitant and a residuary legatee, or between a life-tenant and a remainder-man.—Britton, J.:—*Held*, that upon the construction of the will, the intention of the testator or his possible intention being considered, the gift fell within the category of a specified annuity, and must be paid in full in any event and not exclusively out of the interest reserved and payable out of a particular fund. *Re Plaetzer* (1911), 19 O. W. R. 294, 2 O. W. N. 1143.

Devise to widow of life estate in third of testator's land—Right to dower as well — Election. *Re Hurst*, 6 O. W. R. 417, 721, 11 O. L. R. 6.

Devise to wife — *Condition—Children.*]—A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children, "and if she should fail or neglect to make the will, it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided, share and share alike, between my said two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife:"—*Held*, that under the above devise the widow, who had complied with the condition by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare. *In re Turner, Turner* v. *Turner*, 22 C. L. T. 389, 4 O. L. R. 578.

Devise to wife — *Life estate—Power of sale — Use of proceeds — Income.*]—The testator gave and devised to his wife "all my personal estate of every description for her own use and that my landed property and the balance that may be coming due on the . . . . mortgage shall be disposed of after the death of my wife and shall be made into fifteen parts of which fifteen parts each of my sons shall receive two fifteenth parts and each of my daughters one fifteenth part and that so long as my wife . . . lives she shall have the use of the landed property and either use it, rent it or sell it and use the money as she thinks best:—*Held*, that the interest of the wife in the landed property was a life interest only, with a power to sell the land, if she so desired, and, in that event, a right to invest the proceeds as she should deem best, and enjoy the income derivable therefrom during her life. *Re Silverthorn*, 10 O. W. R. 798, 15 O. L. R. 112.

Devise to wife—Words sufficient to pass estate in fee—Contrary intention expressed in will—Cut down to life estate—Vested interests in remainder—Personalty to follow same as realty.—*Gravenor* v. *Walkins*, L. R. 6 C. P. 500, followed. *Re Cotterill* (1911), 18 O. W. R. 560, 2 O. W. N. 745.

Devise to wife during widowhood—*Devise over in case of widow re-marrying—Vested remainder.*]—Testator devised to his wife Elizabeth lots Nos. 6 and 7 on Davenport Road, "to have and to hold for her personal benefit so long as the said Elizabeth Branton shall remain my widow, and in the event of the said Elizabeth Branton re-marrying, the said lots, houses and appurtenances will all the privileges thereof to become the property of my children, Fanny Lydia Branton and Mary Johnson Branton, to have and to hold as theirs without let or hindrance." Elizabeth Branton died in 1880 without having married again. Mary J. Branton died in 1904 intestate:—*Held*, that there must be a declaration that the two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife. Upon the death of the daughter, M. E. Branton, intestate and without issue, her undivided one-half of the land became under the provisions of the Devolution of Estates Act distributable in like manner as personal property, and the applicant, though but a half brother, was entitled as one of her next of kin to share equally with the other next of kin, the surviving sister. Declaration accordingly. Costs out of estate. *Re Branton* (1910), 15 O. W. R. 783, 20 O. L. R. 642.

Devise to wife for life—*Power to use and enjoy the "corpus" — Remainder to brothers and sisters—Implied power of sale.*]—A testator gave "all my property of every nature and kind to my wife for her use and benefit so long as she lives, with full power to use and enjoy the same and such corpus of the estate as she may require or desire to use for her own benefit during her life, and should any part of my estate remain unused at her death, then such part so remaining is to be divided equally among my brothers and sisters, and my wife is not to be required to account for my estate or any part thereof."—The widow claimed this to be an estate in fee simple to her.—Teetzel, J., *held*, that the widow was entitled to a life estate with a right to use such of the corpus as she might desire for her own enjoyment, and not to the mere use of the farm in specie, which would limit her to the rent and profits, and whatever remained unused should go to the brothers and sisters. For the purpose of giving effect to her right to use the corpus; that she had, by necessary implication, a power to sell and convert the farm into money; that the three essentials to a power existed; that, unless a main purpose of the wife was to be defeated, a power of effectuating such purpose of sale must of necessity be implied. Order accordingly. Costs out of the estate. *Re Davey* (1910), 17 O. W. R. 1034, 2 O. W. N. 467.

Devise to wife for life and for maintenance of children—*Remainder to children and issue of children dying before testator and his wife—Sale of land by wife — Vendors and Purchasers Act.*]—A testator devised all his real and personal estate to his wife in trust for her support during her lifetime, and for the maintenance and education of his children, and on the wife's death to be equally divided amongst them. By a codicil he directed that if M., a married daughter, should die before her parents, leaving a child or children, they should receive her portion, with a like provision in case of his two other children, then unmarried. On the testator's death, his wife and children surviving him, they sold a portion of the lands, joining in a conveyance to the purchaser S., who agreed to sell to N. On a petition under the Vendors and Purchasers Act:—*Held*, that the conveyance to S. was effective to pass the fee in the land to him. *Re Street & Nelson*, 12 O. W. R. 339, 17 O. L. R. 50.

Devise to wife for life or widowhood—*Election between dower or right under will.*]—Riddell, J., *held*, that a widow must elect whether she will take dower or an estate for life or widowhood under the will.—*Westacott* v. *Cockerline*, 13 Grant 79, followed. *Re Smith* (1910), 17 O. W. R. 989, 2 O. W. N. 474.

Devisee—*Use of house and allowance—Care in institution in the alternative—Exercise of judgment by executor—Reasonable-*

ness.]—A testator by his will gave the defendant all his estate on condition that he should pay the plaintiff $50 a month, and that she should have the use of the testator's house and furniture for her life, and by a codicil provided that if "in his (the executor's) own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case), and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance. The defendant chose an institution where the plaintiff would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house, and the defendant ceased paying the monthly allowance, and the plaintiff brought this action for the arrears of the allowance and for the construction of the will:—*Held*, that the will, executed in 1896, indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to the plaintiff that it would be for her welfare to give up housekeeping, and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case), without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house, and to cease paying the monthly allowance. *Leduc* v. *Booth*, 23 C. L. T. 46, 5 O. L. R. 68, 1 O. W. R. 800.

Devisee dying without living issue—Life estate. *Re Blackwell, Blackwell* v. *Blackwell*, 3 O. W. R. 232.

Direction to accumulate — *Contingent interest — Acceleration — Cancellation of legacy if will attacked.*]—The testatrix, who died on the 14th February, 1892, by her will devised certain moneys and lands to her executors and trustees, with directions to invest and keep invested and re-invest (compounding interest) until the 17th March, 1915, when the whole accumulated fund was to be handed over to the plaintiff, if he was then alive; but if he died at an earlier date, leaving living issue, then to his children, and if he died without leaving any living issue, then to the other children of the testatrix:—*Held*, that the illegal part of the will was not that deferring payment of the *corpus* till 1915, but that directing the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be divested if he did not live until 1915; that the Court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries, as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest, but that in this case there was no acceleration in the enjoyment of any interest under the will as an effect of R. S. O. 1897 c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment; that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years; that for the following two years the accumulation must cease and the income be paid out to those entitled, personally to the next of kin and realty to the heirs-at-law if the plaintiff were then alive:—*Held*, also, that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against action adverse to the testatrix's bounty. *Harrison* v. *Harrison*, 24 C. L. T. 222, 7 O. L. R. 297, 3 O. W. R. 247.

Direction to pay debts and testamentary expenses—*Specific legacies—Residue—Succession duties — Exoneration or specific legacies.*] — It was contended that under a direction in a will to pay debts and funeral expenses, the executors were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees:—*Held*, by the Divisional Court, approving *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235, *Manning* v. *Robinson*, 29 O. R. 483, and *Re Holland*, 3 O. L. R. 406, that succession duty does not come within the description either of a debt or a part of the testamentary expenses, and that the specific legacies not being specially exonerated by the will, were not to be exonerated from their proportion of the successive duties payable upon the whole of the estate, at the expense of the residuary legatees. *Re Bolster*, 25 C. L. T. 455, 6 O. W. R. 300, 10 O. L. R. 591.

Direction to pay testamentary expenses—Devise—Succession duty — Charge against devisee—Municipal taxes—Provincial government taxes—Residuary estate—Charge. *Re Watkins* (B.C.), 1 W. L. R. 457.

Direction to sell land—Conversion into personalty—Death of devisees—Personal representatives — "Equal moieties." *Jordan* v. *Frogley*, 5 O. W. R. 704.

Direction to sell land and divide proceeds among class—Conversion into personalty—Distribution *per capita*—Members of class dying before testatrix—Posthumous child. *Re Byer*, 11 O. W. R. 885

Direction to set apart fixed sum to be realized out of lands—*Sale of lands in lifetime — Sum realized less than sum fixed.*]—If certain property sold during life of testatrix, then $2,000 was to be set apart for certain persons. The property had been sold, but possession not given at date of will, nor was testatrix at time of her death actually aware of final closing of sale:—*Held*, that the sum of $2,000 must be set apart and invested. *Re Crysler*, 13 O. W. R. 613, 1138.

Disinheritance—*Does not deprive right to share in dower.*]—The declaration on the part of the testator that he excludes one of his children from the estate "because he has already received from me more than any share to which he might be entitled" is not such a disinheriting as will deprive that child of his right to a share in the legal dower. *Douglass* v. *Fraser* (1910), 20 Que. K. B. 144.

Disposition of estate—Primary scheme of the will—Alternative scheme—Operation of—Inconsistent provisions unimportant be-

cause of death of widow—Sale of farm—Three children by second marriage entitled in equal shares—Residue tied up for nineteen years mentioned in will—Executors to pass accounts forthwith and pay into Court—Costs of all parties out of fund before payment into Court. *Re Salter* (1911), 18 O. W. R. 815, 2 O. W. N. 858.

Disposition of income before division of corpus—Widow to receive entire income of shares of children—Clearly expressed intention governs—Costs. *Toronto General Trusts Corp.* v. *Goad* (1911), 19 O. W. R. 450, 2 O. W. N. 1244.

Distribution of estate—*Disappearance of devisee.*]—On an application for an order declaring that one son owned a certain lot subject to a payment to the heirs of another son who had disappeared twenty years ago, an order was made for the administration of the estate, no satisfactory evidence of the latter son's death having been furnished. *Re Stubbins*, 12 O. W. R. 1104.

Distribution of estate — "*Heirs*" — "*Next in heirship*"—*Period of ascertainment.*]—Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Walkins, and my deceased sister, Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship:"—*Held*, that the persons entitled in the first place were all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the life of the widow, *per capita*, and not *per stirpes*. The words "children or their heirs" meant "children or their issue," and gave the shares of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was diverted and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty. The heirs or next of kin are to be ascertained at the death of the person whose vested share they took. *In re Gardner*, 22 C. L. T. 119, 3 O. L. R. 343, 1 O. W. R. 157.

Distribution of estate — "Heirs" of deceased children of testatrix—Widows of deceased sons—Exclusion — Compromise—Approval by Court. *Re Waldie*, 6 O. W. R. 1003.

Distribution of estate—Income—*Corpus*. *Re Butler*, 1 O. W. R. 826.

Distribution of estate — Period for—Acceleration — Income—Accumulation—Infant. *Re Hughes*, 4 O. W. R. 462.

Distribution of estate — Shares—Income — *Corpus* — Survivorship — Period of distribution. *Re Totten*, 7 O. W. R. 886, 8 O. W. R. 543.

Distribution of fund—*Intention of testator — Distinct contingencies.*]—Where it appeared from the testator's will, in relation to the distribution of a certain fund among his children and their offspring, that he had in mind two distinct contingencies, in one of which he provided for the distribution of the fund in one way and in the other in a different way:—*Held*, that it made no difference whether a reason could be discovered for the distinction made by the testator between the two cases, the duty of the Court being merely to interpret the will, and not to make a new one.—The cases provided for being mutually exclusive, and the event that happened being that provided by the testator in the earlier clause of his will:—*Held*, that the fund must be disposed of as in that clause provided. *McDonald* v. *Jones*, 41 N. S. R. 536, 3 E. L. R. 241.

Distribution of fund between "the legatees named in the will"—Persons entitled to share—Persons to whom specific chattels bequeathed—Representatives of persons dying before period of distribution — Representatives of legatees predeceasing testator — Hospital fund — Evidence to aid designation—Provision for payment of an obligation—Equality among distributees — Abatement. *Re Solmes*, 11 O. W. R. 985.

Distribution of residue after death of annuitants—Ambiguity — Intention of testator—Avoidance of intestacy—Punctuation. *Re Carmichael*, 12 O. W. R. 1266.

Division of estate per stirpes or per capita. *Macdonald* v. *Jones*, 3 E. L. R. 241.

Dower—*Election — Annuities — Pre-decease of first annuitant—Rights of subsequent —Intestacy—"Balance" of estate.*] — The testator gave annuities to his wife and only child; the latter pre-deceased him. He gave to his wife $200 a year during widowhood, and to his daughter $200 a year as long as she remained unmarried, but in case she married, only $150, the other $50 to go to the wife. At her death the $150 was to go to a charity. Until the testator's farm was sold, his wife and daughter were to have the house and lot with furniture and chattels while they remained unmarried; at the death or marriage of either it was to go to the other, but after the death or marriage of both the house and lot were to be sold and the money was to go to a charity. The annuities were to be taken out of the farm rent. Any balance of money received from rent was to go, with the interest of money on deposit, annually to two charities until the farm was sold. The executors were to have power to sell the farm in case of increased expenses or rise in property, and the amount was to be invested, and the amount of interest required was to be used in place of rent, and the balance of interest to go to the two charities until the death or marriage of the wife or daughter. After the death of both, the estate was to be divided among charities:—*Held*, that the widow was put to her election between the provisions of the will and her dower.—2. That because the first annuitant died in the testator's lifetime, it did not follow that those who were to take at her death took nothing; the annuity was payable to them from the testator's death, but only $150 a year.—3. There was no intestacy as to the additional $50.—4. Upon the facts,

as found by the Judge, with regard to the money on deposit, there were no reasons impelling the conclusion that there was an intestacy as to the interest therein, in the face of the testator's declaration that he disposed of all his property.—5. There was no intestacy as to the *corpus* or any part of it. By the word "balance" the testator meant the rest or residue of the whole of his property.—6. There was no intestacy as to the furnitutre and chattels, after the expiration of the interest therein given to the widow; his property was included also in the "balance." *In re Newborn*, 22 C. L. T. 120, 1 O. W. R. 122.

Dower—*Election—Specific devise of portion of lot — Use of driving house, etc. — Rooms in dwelling house.*]—A testator by his will devised to his widow for life 17 acres on the west side of a lot, together with the use of a drive house on his lands for the storage of crops, taken off the 17 acres, and of two rooms, certain furniture and bedding, and all the fruit she wanted for her own use from that now grown thereon; and, subject to such life estate and a payment of $100 to his daughter, he devised the same to one of his sons. To another son he devised the remainder of the lot, containing 33 acres, together with all buildings and erections thereon, reserving such privileges as were theretofore given to his widow during her lifetime, and subject to a bequest of $150 to the said daughter, and the payment of the funeral and testamentary expenses:—*Held*, that the widow was not entitled to dower in the dwelling house, but was so entitled as to the 33 acres, but being put to her election by reason of the disposition made in her favour. Judgment of Anglin, J., affirmed. *Re Hurst*, 11 O. L. R. 6, 6 O. W. R. 417, 721.

Dower—*Election to take under will—Sale of lands—Intestacy as to surplus from sale—Election no bar to widow's interest in surplus—Devolution of Estates Act, s. 4.*]—Middleton, J., *held*, that testator intended to prevent his wife from asserting dower in lands in question to the prejudice of the scheme of his will, *i.e.*, an immediate sale, and that the widow having elected to take under the will could not assert any claim against the lands, but as to the proceeds of the lands not disposed of in the will the testator died intestate, and the widow had the same right in the surplus as if the testator had declared on the face of the will that it was to be so distributed. *McEwen* v. *Gray* (1911), 18 O. W. R. 888, 2 O. W. N. 945.

"Dying without heirs"—*Estate.*]—A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters:—*Held*, that the ulterior devisees being related to the first devisee, the "heirs" of the first devisee must be construed to be "heirs of the body," and therefore that as to the realty the daugbter took an estate tail, and as to the personalty an absolute estate. *In re McDonald*, 23 C L. T. 326, 6 O. L. R. 478, 2 O. W. R. 968.

"Dying without issue"—*Vested estate on birth of child—Absolute estate in fee.*]—A testatrix by her will gave certain real estate to an adopted daughter; but in the event of her "dying without issue" the devise was to lapse. There was no devise over:—*Held*, that "dying without issue" meant without a child being born; and therefore, on the birth of a child, the devise became absolute. *Re Johnston & Smith*, 12 O. L. R. 262, 7 O. W. R. 845.

Effect of codicil—Decree in former suit—Annuities—Setting apart whole estate to answer—Revocation of legacies—Arrears—Interest—Reference—Costs. *Dalton* v. *Williams*, 2 O. W. R. 814, 3 O. W. R. 415.

Enumeration of properties—*Absence of specific disposition — Residuary gift.*]—The testator, by his will, first directed that all his just debts and funeral and testamentary expenses should be paid and satisfied by his executors. Then followed: "I give, devise and bequeath all my real and personal estate of which I may die possessed in manner following, that is to say;" and immediately thereafter an enumeration of six properties, followed by: "All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto" his son and daughter, naming them:—*Held*, that there was not an intestacy as to the enumerated properties, but that all the property of the testator, real and personal, was included in the residuary gift. *In re Fraser, Lawther* v. *Fraser*, [1904] 1 Ch. 726, distinguished *Re Conger* (1909), 1 O. W. N. 57, 19 O. L. R. 499.

Estate — *Rule in Shelley's case—Vested remainder subject to be divested—Executory gift over to class.*]—The testator devised to his wife, the defendant, all his real estate for life, and directed that at her death it should be divided equally among two brothers, the children of a deceased brother, and a sister. He then added: "Should either of my two brothers or my sister predecease my said wife, then one-quarter of my real estate is to go to their heirs, executors and administrators." The sister predeceased the wife, leaving a son, the plaintiff, and by her will disposed of her real and personal property:—*Held*, that the sister took a vested remainder, to which the rule in Shelley's case was not applicable; that under the clause above quoted, she having died before her estate became vested in possession, her estate was divested, and her heirs took her share as *personæ designatæ* as upon an executory gift to them as a class; and that the plaintiff was, therefore, entitled to take his share as purchaser under the will of the testator. *Glendinning* v. *Dickinson* (1910), 14 W. L. R. 419.

Estate during widowhood — No devise over—Widow taking in fee, subject to bequests in the event of re-marriage. *Re Morton*, 10 O. W. R. 211.

Estate for life—*Remainder to heirs — "Then surviving."*]—A testator devised land to his wife "during the full term of time that she remains my widow and unmarried," and subject thereto to two sons "during the full term of time of their natural lives, and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the de-

cease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike:—*Held*, that the will gave a life estate for the joint lives of the two persons answering the description of the heirs of each son at the death of the longest liver of the two sons. *Haight* v *Dangerfield*, 23 C. L. T. 87, 5 O. L. R. 274, 1 O. W. R. 551.

Estate of devisee—Limitations — Fee simple—Vendor and purchaser. *Re Reid & Randall*, 7 O. W. R. 559.

Estate tail.]—*Re McAllister*, 1 O. W. R. 230.

Executors—*Implied power to sell land—Devolution of Estates Act—Vendor and Purchaser.*]—After giving the whole of her estate, real and personal, to her stepson and his wife and their three children, the testatrix proceeds, "It is my will that the personal effects shall be kept in the family, but the real estate shall be sold and equally divided, and I appoint my stepson, Harry Roberts, and his daughter, Annie Roberts, to execute this will. Teetzel, J., held that the executors had an express power of sale, not depending upon nor affected by the Devolution of Estates Act. *Re Roberts & Brooks*, 25 C. L. T. 400, 6 O. W. R. 49, 10 O. L. R. 395.

Executors — Mortgage — Covenant for payment—Possession. *Haight* v. *Dangerfield*, 1 O. W. R. 551.

Executors — Power to sell—Real estate undisposed of—Intestacy—Trust. *Re Campbell & Horwood*, 1 O. W. R. 139, 396.

Executors — *Power to sell lands—Power to exchange — Vendor and purchaser.*] — A testator devised her real estate to be equally divided between her children when the youngest of them attained twenty-one, with a power of the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:"—*Held*, that the executor had no authority to exchange the lands of the testatrix for other lands. *In re Confederation Life Association & Clarkson*, 23 C. L. T. 325, 6 O. L. R. 606.

Executory devise—Period of vesting—Majority — Death of life tenant — Double event. *Evans* v. *Evans*, 1 O. W. R. 69, 233.

Express revocation by subsequent document—*Validity of document as a will notwithstanding invalidity of bequests—Relationship of witnesses to legatees—Mode of revoking wills — Evidence of intent, when admissible — Dependent relative — Revocation.*]—A testatrix, by a holograph will, after directing her executors to pay her debts and funeral charges, gave to them the residue of her estate, in trust to pay certain legacies therein provided for, which included legacies to her sister E. A. R. and her nephew E. B. F. R., and to pay the residue, if any, to the said E. A. R. By holograph document written under the will, she revoked her will, and gave to E. A. R. all the money she possessed, save the legacy to E. B. F. R. This was witnessed by the husband of E. A. R. and the wife of E. B. F. R.:—*Held*, that, while the effect of the relationship of the witnesses to the beneficiaries was to nullify the bequests made to them, the document was, in other respects, valid as a will, and duly revoked the original will, including the appointment of executors. Judgment of Winchester, Surrogate Court Judge, reversed. *Re Tuckett* (1907), 9 O. W. R. 979, overruled. The mode of revoking wills, the admissibility of parol evidence of intent, and the doctrine of dependent relative revocation, discussed. The Court directed the issue of letters of administration with the will annexed, and the division of the estate as upon an intestacy. *Freel* v. *Robinson* (1909), 18 O. L. R. 651, 13 O. W. R. 1164.

Extending powers of executors — *Powers given with respect to a universal legacy without reference to particular legacies.*]—The clause in a will whereby a testator enlarges the powers of his executors, either as to their nature or their duration, beyond the provisions of art. 918 C. C., is to be strictly interpreted against them. Hence, in a will containing a universal legacy to several legatees, with substitution, and on condition the property so devised is not to be divided until the youngest of the male institutes reaches a stated age, a clause which provides, in the interval, for the seizing by the executors of all the property bequeathed, with the evident intention of securing the observance of the conditions respecting such legacy, does not refer to property bequeathed in the same will, and by particular legacy, the more so when the testator expresses his desire that such particular legacies should be enjoyed after the happening of an event distinct from the partition. *Bruneau & Genereux* (1909), 19 Que. K. B. 507.

Free from seizure.] — A condition attaching to a legacy and declaring it free from seizure does not also mean that it is inalienable. Consequently, the legatee, under such a condition of an immovable, may hypothecate it. *Germain* v. *Rousseau*, 37 Que. S. C. 189.

Fund for heirs—Period of distribution — Determination of class — Discretion of trustees. *Earle* v. *Lawton*, 5 E. L. R. 472.

Fund for heirs—*Time for distribution—Determination of class—Discretion of trustees.*]—I. died in 1889, having made a will in 1898, by which he left all his property to two trustees, to hold in trust for the benefit of the infant children of two nephews. The trustees were to use the income, according to their discretion, for the support, maintenance, and education of these children, until each reached the age of twenty-one years. The words in the will were: "And on each child attaining the age of twenty-five years, to pay to such child what they consider would be his or her share in my estate, dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be *per stirpes*, and not *per capita*," etc.—In 1904 one of the

children died without issue, and in 1906 another child was born to one of the nephews. The oldest child had now reached the age of twenty-five years:—*Held*, that the child who had reached the age of twenty-five years was entitled to be paid her share of the *corpus* of the estate, which share was to be ascertained by dividing the *corpus* equally among the children then *in esse*, they being the only ones entitled to rank, as the class was then determined.—*Held*, that the child born after the death of the testator, but before the time for payment to the oldest child, was entitled to rank equally with the other children, as the class was not determined until then.—*Held*, that, as the testator had given the trustees full discretion to use the income as they might see fit, for the purposes mentioned in the will, the Court would not, in the absence of fraud or wrongdoing, interfere or direct them in this respect. *Earle* v. *Lawton*, 4 N. B. Eq. 86, 5 E. L. R. 472.

Fund for maintenance and education.]—B. G. F., the testator, died October 1st, 1895, leaving him surviving a widow and one child, a son, the present plaintiff. The will contains the following provision: "And I hereby will and bequeath all my estate, real and personal (of which I may die possessed) to my said executors and trustees for the following purposes—that they shall, in the first place, convert all property into cash within one year from the date of my death, and after the payment of my just debts shall invest the remainder in safe interest paying investments, and out of such investments I direct that one thousand pounds (£1,000) or the equivalent thereof be set apart and used by my executors and trustees for the purpose of educating and giving a profession to my son, Gordon Winslow Taylor, providing he has not already been educated and received a profession." The will also provides that the plaintiff is not to receive his share of the residue of the estate until he reaches the age of twenty-five years. G. W. T. became twenty-one years of age September 2nd, 1909:—*Held*, that as the plaintiff has reached the age of twenty-one years he is now entitled to have paid over to him the £1,000 fund with accumulations and interest, or to have transferred to him the securities in which this fund is invested. Trustees who refuse to pay over a legacy when they have no reasonable doubt but that it should be paid, will not be allowed any costs in an action to compel its payment. —*Quære*, in such a case are not trustees personally liable for the costs of the proceedings? *Taylor* v. *McLeod* (1909), 4 N. B. Eq. 262, 7 E. L. R. 450.

Fund for payment of debts, etc.—Specific legacies. *Re Page*, 1 O. W. R. 849.

General bequest of personalty — "*Goods and chattels*" — "*book debts*" — *Intestacy as to part of realty—Absence of direction as to payment of debts—Payment out of personalty.*]—The testator bequeathed to his wife "all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate," etc.:—*Held*, that the testator's book debts were covered by the general words in the will, "all goods and chattels whatsoever and wheresoever," and that there was no context which interfered with that construction. Decision of Clute, J., affirmed. The will dealt with certain lands and all the goods of the testator. The goods were given by general (not by specific or residuary) bequest to the widow, and nothing was said in the will as to payment of debts. The testator left some real property not mentioned or included in the will, and as to which he died intestate. As against the widow, it was contended that the debts should be paid out of the personalty in exoneration of the lands descended:—*Held*, that, notwithstanding the Devolution of Estates Act, ss. 4 and 9, the personal estate is still the primary fund for the payment of debts. *Re Hopkins Estate* (1900), 32 O. R. 315; *Re Tatham* (1901), 2 O. L. R. 343, and *In re Moody Estate* 1906), 12 O. L. R. 10, approved. And in this will no sufficient indication was to be found of the testator's intention to relieve the personalty from the payment of the debts. *Re McGarry* (1909), 18 O. L. R. 524, 13 O. W. R. 982, 14 O. W. R. 244.

General gift—*Context — Real estate—Deleted words.*]—By one of the clauses of his will, a testator gave to his nephew his mill, tannery, houses, lands, and all his real estate, effects, and property whatsoever, and of what nature and kind soever, at a named place, chargeable with certain legacies:—*Held*, that the clause, when taken by itself, would include personal as well as real property, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate.—*Quære*, whether in construing a will deleted words can be looked at. *Thorne* v. *Parsons*, 22 C. L. T. 379, 4 O. L. R. 682, 1 O. W. R. 608.

General intention of testator.]—The following provisions were contained in the will of Miss F.:—"That the sum of twenty dollars per annum be paid annually to Madeline Fisher, daughter of G. Frederick Fisher, formerly of Fredericton, now deceased, as long as she lives and remains single." M. F. had been married, but before the date of the will, had been divorced *a vinculo*, which fact was well known to the testatrix:—*Held*, that M. F. was entitled to the legacy. The following clause was contained in the will of Mrs. F.:—"I release and direct my executors to cancel, without collecting the money, the mortgage to me from John Doherty." Mrs. F. held no mortgage from J. D., and she never had any dealings with anyone of the name of J. D., but she did hold one from W. D.:—*Held*, that parol evidence was admissible to correct such a mistake. The codicil to Mrs. F.'s will contained the following provisions:—"All the residue of my estate given to the city of Fredericton by the said will I give and bequeath to J. Carleton Allen and J. Albert Gregory, both of the said city, barristers-at-law, in trust for the purpose of founding an institution to be called the J. J. Fraser Fanaline Place for a home for old ladies, and for that purpose to execute a deed of settlement, containing such provisions and regulations and appointing such trustees, including themselves if they see fit, as they shall consider expedient, at which Home I direct that the said Sarah F. Bliss shall have a comfortable living for her life." The fund created by this provision is not at present sufficient for the purpose for which it was intended:—*Held*, that the general intention

of the testatrix that S. F. B. should have a comfortable living at the Home for the remainder of her life should not be defeated by reason of the funds being at present inadequate for the maintenance of the Home as intended, and that an allowance from the annual income of the fund would be made to S. F. B. in lieu of the support and living intended for her at the Home. *Morrison* v. *Bishop of Fredericton* (1909), 4 N. B. Eq. 162.

General legacies—Insufficiency of estate—Abatement ratably—Exceptions—Legacies to be paid in full—Bequest of half a share of stock—Direction for sale of one share—Charitable bequest—Benefit of poor—Devise of land to municipal corporation for a public park—Public Parks Act—Mortmain and Charitable Uses Act—Amending Act of 1902—Construction—Exemptions. *Re Battershall*, 10 O. W. R. 933.

General scheme of will.]—R. died in 1876, leaving a will by which he devised practically all his property to trustees, upon trust for the benefit of his children and their heirs. D. D. R., a son of the testator, died after his father, leaving him surviving a widow and five children:—*Held*, that the word "heirs" in the will should be construed in its strict legal and technical sense, and was intended to mean the heirs of law and not the statutory next of kin; and that the widow of the deceased son was not entitled to any part of the testator's property under his will. *Smith* v. *Robertson* (1909), 4 N. B. Eq. 252.

Gift — Restrictions—Investment—Estate—Responsibility of executors—Defeasance—Executory devise over. *Re Kennell*, 7 O. W. R. 566.

Gift "during natural life"—*Absolute interest.*]—A testator gave $500 to A. S., but limited the disposition of it so that she got for her own use absolutely, only the interest upon it. He provided that at her death this $500 was to be given to her eldest son, E. C. S., and that he could use this sum "for his benefit during his natural life." Then the testator purported to give to his wife all that remained after the $500 was taken out, but he limited her for her own use absolutely, to the interest only, and when the capital should be no longer needed to earn interest for his wife, he gave it to certain persons named, and in all cases "for their benefit during their natural lives:"—*Held*, that the testator intended to dispose of all his real estate, and had carried out his intention by a payment over of the $500 after the death of A. S., and by a division of the rest after the death of his wife; and that the sum of $500 was an absolute gift to E. C. S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate. *In re Chapman*, 22 C. L. T. 259, 4 O. L. R. 130, 1 O. W. R. 434.

Gift during widowhood.]—A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added: "The real property while the said (wife) remains my widow. But in case my wife should again marry, I request my executors to sell all my real and personal estate when the youngest child should come of age, and that they, my executors, shall divide the proceeds between my 6 younger children." The widow did not marry again and left a will devising all her real and personal estate:—*Held*, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the widow's marriage, and that the real estate passed under her will. Order of Street, J., 3 O. W. R. 146, affirmed. *In re Mumby*, 24 C. L. T. 315, 8 O. L. R. 283, 4 O. W. R. 10.

Gift for life—*Codicil—Bequest of life interest with power of appointment by will—Bequest of corpus of legatee in default.*]—A codicil gave Louis merely a life interest in an income, with a power of appointment by will in default of the exercise of which the testator would be intestate as to the disposition of the *corpus* after Louis's death. While an unlimited gift of income carried to its donee the *corpus* as well, no authority could be found for holding that a gift of income for life had this effect. Nor did that superadded power of appointment, which could never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which was its subject. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The *corpus* of the $10,000, of which the income by the codicil was given to Louis, would not, under the scheme of the will as originally framed, have been residuary estate. By a preceding clause, (d), which the codicil revoked, Louis E. Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revoked the gift to his son of the principal of his estate; by the same instrument he expressly confirmed, *inter alia*, the residuary bequest to him, which, the testator being otherwise intestate as to the *corpus* of the $10,000 (except that he gave his son a power of appointment by will over it), therefore, carried that *corpus*:—*Held*, the testator had in fact given the *corpus* of the fund to his son in default of his exercising the power of appointment. The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over. *Re Hanmer*, 4 O. W. R. 474, 9 O. L. R. 348.

Gift of aliquot share of residue to each child of testator—*Share of one child to be applied by trustee for maintenance—Gift to trustee of unexpended balance—Right of trustee to receive share.*]—Residuary devise upon trusts to sell and divide proceeds equally among the testator's eight children (naming them), including E., with directions to executor to pay the share bequeathed to E. to W., upon trust, to pay for proper clothing for E., while an inmate of an insane asylum, provided that, in case she died before her share was exhausted, "then I bequeath the remainder of her said share to W., to be applied by him towards the liquidation of the debt on the Roman Catholic Church at C." E. died in testator's lifetime:—*Held*, that, inasmuch as the children did not take as a class, but of an aliquot part of the estate bequeathed to each child, W. was entitled notwithstanding the death of E., to receive the one-eighth share which she would have been entitled to, to be applied by him as above mentioned. *Stewart* v. *Jones* (1859), 3 DeG. & J. 532, discussed and distinguished. *In re Pinhorne*, [1894]

2 Ch. 276, and *In re Whitmore*, [1902] 2 Ch. 66, discussed and followed. Judgment of Clute, J., reversed. *In re Shannon* (1909), 19 O. L. R. 39, 13 O. W. R. 378, 1003.

Gift of annuities—*Power to give capital by will—Dividing estate after death of annuitants.*]—Testator gave his widow and his daughter each an annuity. He also gave the daughter power to direct by her will, to whom the capital invested to produce her annuity should be payable after her decease. He also directed a distribution of so much of his estate, as from time to time was necessary to furnish capital to produce the annuities. Both widow and daughter died. —Middleton, J., *held*, 18 O. W. R. 371, 2 O. W. N. 605, that the capital invested, to produce widow's annuity, fell into the residue and became divisible: That one claiming under daughter's will was entitled to share in the distribution.—Divisional Court *held* that there was no intestacy, that the interests of the residuary legatees were vested, and the widow and a daughter having died, that the capital invested to produce widow's annuity fell into the residue and became divisible; that those claiming under daughter's will were entitled to share in the distribution.—Rule in *Leeming* v. *Sherratt* (1842), 2 Hare 14, applied. Judgment of Middleton, J., affirmed. *Re Macdonald* (1911), 19 O. W. R. 385, 2 O. W. N.

Gift of personal property for life—*Absolute gift—Gift over confined to undisposed of property—Legacy—Death of legatee—Time of vesting—"Before receiving"—Devise—Estate—Rule in Shelley's case—Restraint on alienation—Life tenant—Liability for taxes—Advancement — Interest—Use of house — Survivorship — Proceeds of sale—Distribution.*]—Motion by executors of will of Charles Tuck for a summary order determining certain questions arising as to the construction of the will and distribution of the estate of the testator, who died on 26th May, 1877. The words of the will which dealt with this property were as follows: "Also I give, devise, leave, and bequeath to my said wife the full possession and occupation of the lands and premises now owned by me for and during her natural life, together with all my household furniture, personal property, goods and chattels, money, notes, and securities for money of every kind soever, to be for her use and behoof during her natural life, in lieu of dower, which she consents to accept instead thereof, and which possession is to be held by her so long as she shall remain my widow. And finally I do hereby will and ordain that all the personal property consisting of goods, chattels, money, or notes receivable, of what kind soever that may be in possession of my said beloved wife at her decease, and not otherwise disposed of, shall within one year after her decease be sold by my executor hereinafter named, and the proceeds or moneys arising from the same shall be equally divided among my daughters as being part of my estate:"—*Held*, that the widow, May Ann Tuck, took absolutely all of the personal property which she appropriated to her own use and used up during her life, and that there was a gift over of only so much of the personal property of Charles Tuck as was in the possession of the widow at the time of her death. The part of the will referring to the daughters was as follows: "And also I hereby will and ordain that at the decease of my beloved wife the said lot shall be sold for the benefit of my daughters, the legatees hereinafter named, and the moneys arising from the sale of said lot shall be equally divided among my daughters, the legatees of this my will, share and share alike. The names of my daughters, the legatees herein named and who are alive at the date hereof, are as follows and if any one or more of the above named legatees shall be deceased before receiving her or their interest or share in or from my estate, then and in such case her or their heirs shall inherit the same, and if any one or more of the above legatees shall have become deceased and have left no legal heirs then her or their shares shall revert to the other legatees, or their heirs, and shall be equally divided among them:" — *Held*, that the share of Martha had become vested at the time of her death, and that share must be paid to her estate. The words "before receiving" might in this case well be interpreted as "before time to receive." The words of the will as to William Tuck were: "Also at or upon the decease of my beloved wife, I give and devise to my son William Tuck for and during his natural life, and his lawful heirs after him, subject nevertheless to the provisoes and conditions herein contained, all that certain parcel to have and to hold the same from and after the decease of my said beloved wife, during his natural life, and subject to this express condition, namely, he the said William Tuck shall have no power to sell nor any right to dispose of the above real estate or any part thereof, but shall transmit to his lawful heirs unimpaired, if he shall have any. And I further will and ordain that should my said son William Tuck fail to have any lawful heirs, then my will is that the said lands and premises thus devised shall at his decease be sold and the proceeds arising therefrom equally divided among the other legatees or their lawful heirs. And I further will and ordain that whether my said son shall have lawful heirs to inherit after him or fail therein, the above provisions made by me in his favour shall be and constitute his entire share in my estate:"—*Held*, that the effect of what the testator did was, by the operation of the rule in Shelley's case, to give the fee simple in the land mentioned to William Tuck. *In re Tuck*, 6 O. W. R. 150, 10 O. L. R. 309.

Gift of real and personal property to widow for life "and then to heirs"—Fee simple—Absolute interest in personalty — Rule in Shelley's case. *Re Newbigging*, 10 O. W. R. 213.

Gift of whole estate—*Incomplete enumeration—"Appurtenances" — Farm stock and implements — "Household goods" — Money—Intestacy.*]—A testator by his will after directing payment of debts, etc., proceeded: "I give, devise, and bequeath all my real and personal estate, which I may die possessed of or interested in, in the manner following, that is to say: I give, devise, and bequeath to my son W. my farm . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed;" and appointed an executor:—*Held*, that all the testator's estate, including money, farm stock, and farm implements, passed by the will to the son named. *Re Hudson*, 16 O. L. R. 165, 11 O. W. R. 912.

Gift to charitable institution — *No institution by that name—Claimed by an institution in same city — Application by cy-près doctrine—Residuary clause—Gift to persons hereinbefore named — Only person actually named included.*]—Testator willed $500 to the "Methodist Children's Orphans' Home," at Kingston. There was no such institution.—Falconbridge, C.J.K.B., *held*, that a clear charitable intention was expressed, and that the *cy-près* doctrine should apply. Legacy ordered to be paid to the Kingston's Orphans' Home and Widows' Friend Society:—*Held*, also, that only persons actually named in the will should take under the residuary clause certain institutions and the Methodist ministers referred to in the will by description were thus excluded. *Re Clapper* (1910), 17 O. W. R. 57, 2 O. W. N. 111.

Gift to child — *Condition—Marriage—Consent of executors — Invalidity — Mixed fund.*]—Testator died on the 1st May, 1900, leaving a will dated 14th March, 1898, in which he gave to his son out of and from the annual income and profits of the investment and rents of his real and personal estate $300 per year while unmarried, "but, if he marries to the satisfaction of and with the consent of the executors, then he is to receive the whole annual income of the estate during his life." There was no bequest over in case the son married without consent, nor any subsequent disposal of the estate affecting these assets. The son married without consent:—*Held*, nevertheless that he was entitled to the whole income. With regard to personalty, the Court of Chancery long ago adopted the rule of the civil and ecclesiastical law by which such a condition is void or regarded as merely *in terrorem;* and according to modern rules a mixed or massed fund is to be treated in the same way as personalty. Review of English authorities. *In re Hamilton*, 21 C. L. T. 126, 1 O. L. R. 10.

Gift to children—*Conditional substitution of grandchildren — Enjoyment of usufruct—Restraint of alienation—Construction of 60 V. c. 95 (Que.).*]—A testator having seven children, directed his estate to be divided into seven shares; each child was to receive the usufruct of one share during life. Upon the demise of any child, then the children born to that child were to have full proprietary rights and interest in their parents' share. The grandchildren were given the right to use, enjoy or dispose of their parents' share as to them might seem best, subject, however, to two conditions: (1) that the property so bequeathed to his children in usufruct should not be assignable, or capable of being seized by their creditors; (2) that the property bequeathed by him whether movable or immovable, should not be sold or alienated under any pretext, but should pass *en nature* to his grandchildren. The testator by a codicil provided that should his children or any of them die before his wife, without leaving children or legitimate descendants, then such share or shares should go to the testator's wife during widowhood, and after her death the property should go to the surviving children of the testator, if living, and, if not, then to their children. After the testator's death his estate was divided and the division confirmed by an Act of the Quebec Legislature, being 60 V. c. 95. On the death of one of the testator's children, who left a will, but no issue, the questions arose, was the division provisional or final? and was there an accretion to the other legatees, or did the share of the deceased child pass under his will?:—*Held*, that it was the intention of the testator to give each of his children a specific share of his estate and that those shares had been ascertained by partition and confirmed by 60 V. c. 95 (Que.) And, that each child was sole proprietor of his specific share, subject only to his passing it in the course of nature to his children:—*Held*, also, that, there was no right of accretion to the other legatees, either the children or the grandchildren of the testator, and that the share of the deceased child did not devolve to them jointly, but passed under his will to his executor. Judgment of the Supreme Court of Canada, 31 S. C. R. 1, discharged; judgment of the Superior Court of Quebec, 28 Que. S. C. 257, and Fortin, J., at trial, restored. *Prévost* v. *Prévost*, C. R. [1908] A. C. 94.

Gift to children—*Substitution in favour of grandchildren—Distribution per capita.*]—Where by a will property is given to the children of the testator, a *charge de substitution* in favour of his grandchildren in equal shares, the division should be made *per capita* among those named. The "substitution" opens on the death of each heritor for life as to his share in favour of all the grandchildren living at the time of the opening of the "substitution" for each share. *Rémillard* v. *Chabot*, 26 Que. S. C. 408.

Gift to children on attaining 30 years of age—*Child dying prior thereto—Period of vesting.*]—A testator, out of certain insurance moneys, amounting to $70,000, by his will gave to his wife, during widowhood, $10,000, and the balance equally amongst his children. He also, out of the rest of his estate, gave to his wife during widowhood a further sum of $10,000, and of the rest and residue thereof, he gave one-third to his daughters and two-thirds to his sons. In case his wife should marry, $15,000 of the $20,000 was to be equally divided amongst his children, and the remaining $5,000 was to be hers for life. The children's shares were not to be paid until they attained 30 years of age, but they were to have the interest thereon, on attaining 21 years of age, his executors, however, being empowered to expend on them before attaining such latter age, such part of the interest as they might deem advisable; on attaining 30 years of age, the executors might still, if they deemed it advisable, continue to pay the interest only. All moneys invested in his partnership business with his brother were to remain therein so long as his brother desired, and out of the annual profits thereof, if amounting to 10 per cent. or less, one-half of the profits on one-third of his interest therein was to be added to the daughters' shares and the balance to the sons; but, if the profits should exceed 10 per cent., 5 per cent. thereof on such one-third interest was to be added to the daughters' shares, and the balance to the sons'; and upon the dissolution or winding-up of the partnership, the amount so added to the said shares was to be paid to those entitled, in the manner and subject to the same terms and conditions, and the executors' discretion, heretofore expressed. The sons could, of their own ac-

cord, purchase the daughters' interest in the partnership, and were to have the first right to do so, should the daughters desire to sell the same. One of the daughters, who survived the testator, died before attaining the age of 30 years: — *Held*, that she had a vested interest in her share. *Re Livingston*, 9 O. W. R. 333, 14 O. L. R. 161.

Gift to church.—"To St. James Presbyterian Church $375 which I owe it"—There were two Presbyterian churches in the city—One St. James to which he did not owe anything—Other "Zion" church which he did owe $355—Testator life-long adherent and pew holder of "Zion" church — Question which church was entitled to the legacy.—*Held*, that "Zion" church was entitled—Evidently mistake in name—Admissibility of evidence. *Re McLaurin* (P.E.I. 1911), 9 E. L. R. 326.

Gift to class—*Ascertainment.*]—A testator bequeathed the sum of $500, as to income to be applied for the support of his grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years, and that those grandchildren born after the death of the testator and before that time were entitled to share. *In re Archer*, 24 C. L. T. 230, 7 O. L. R. 491, 3 O. W. R. 510.

Gift to class—*Death of member before testator—Children of deceased member.*]—The testator, who at the time of making his will in 1891, had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children:—*Held*, applying the principle of *Re Williams*, 23 C. L. T. 156, 5 O. L. R. 345, that s. 36 of the Wills Act did not apply, and that the children of the deceased child took no share. *In re Clark*, 24 C. L. T. 399, 8 O. L. R. 599, 4 O. W. R. 414.

Gift to class—*Time for distribution — Income—Provision for maintenance—Costs.*]—*Held*, upon the terms of the will in question in the next preceding case, that the oldest child, having reached the age of twenty-five years, was entitled to be paid her share of the *corpus* of the estate, and took an absolute vested interest:—*Held*, that the remainder of the capital was not to be set apart now, but held in trust until another child reached the age of twenty-five years, when another division must be made.—*Held*, that the oldest child was not now entitled to any share of the accumulated income. That could only be divided when all possible claims upon it had ceased.—It was ordered that the costs in this matter, as between solicitor and client, be paid out of the *corpus* of the estate. *Earle* v. *Lawton* (No. 2), 4 N. B. Eq. 92, 5 E. L. R. 502.

Gift to daughter to take effect at death of wife — *Death of one daughter before death of wife—Vested interest—Designated legatees — Survivorship not provided for.*]—Testator devised his estate existing at the death of his wife in trust to his executors to divide same equally among his four daughters. One of the daughters who survived the testator, predeceased her mother:—*Held*, that this daughter had a vested interest at the time of her father's death, as the distribution was not delayed for any reason personal to the legatee, nor was there any intention to provide for survivorship. *Re Abell Estate* (1909), 14 O. W. R. 369.

Gift to members of a class — *Substitution — Ascertainment.*]—The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son:—*Held*, that this son was not entitled to a share of the residue. *Christopherson* v. *Naylor*, 1 Mer. 320 followed. *In re Potter's Trust*, L. R. 8 Eq. 52, not followed. A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share. *In re Fleming*, 24 C. L. T. 323, 7 O. L. R. 651, 3 O. W. R. 622.

Gift to niece or heirs — *Predecease of niece.*]—A testator, by his will, after a provision in favour of his wife for life, directed that at the death of his wife any money that might then be remaining should be equally divided and paid to two nephews and two nieces, naming them, or their heirs, executors, or assigns. One of the nieces predeceased the testator, having a husband and children:—*Held*, that the gift to the deceased niece did not lapse, and that her heirs were entitled to her share, and that her heirs were those who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property. *In re Wrigley*, 20 C. L. T. 387, 32 O. R. 108.

Gift to "surviving children"—*Period of distribution.*]—Middleton, J., *held* (18 O. W. R. 646, 2 O. W. N. 782), that "where there is a gift to 'A.' for life, and after his death to others, that any words used in connection with the gift in remainder indicating survivorship, refer to the period of distribution and not to the death of the testator." —Clute, J., approved of the above holding. *Re Elliott* (1911), 18 O. W. R. 902, 2 O. W. N. 936.

Gift to two named daughters — *Subsequent provision in case of dying without issue—Death in testator's lifetime.*]—A testatrix, after leaving the residue of her estate to be equally divided amongst her four daughters, C., M., H., and E. directed that if C. and M. should "die without leaving a child, or children," her executors should pay annually the interest accruing on the money bequeathed to them to her son R. during his lifetime, and after her son's death the prin-

cipal should be equally divided amongst all the living children of her two other daughters, M. and H., on attaining their majority:—*Held*, that the words "die without leaving a child or children" meant in the testator's lifetime; and that the daughters, C. and M., who survived the testatrix, took the shares bequeathed to them absolutely.—The rule in *Bowers* v. *Bowers*, L. R. 8 Eq. 283, applied. *In re Wilkin*, 15 O. L. R. 646, 11 O. W. R. 468.

Gift to widow — Dower — Election—Abatement of legacies — Administration order. *Re Hunter, Hunter* v. *Hunter*, 3 O. W. R. 141.

Gifts to religious bodies — Statutes of Mortmain—Legislation permitting societies to take gifts in mortmain—Validity of gifts—Provision for accumulation—Right of legatees to immediate payment—Application of rule to charities—Lapsed gifts—Division as upon intestacy. *Re Youart*, 10 O. W. R. 373.

Heirs and personal representatives —*Next of kin.*] — By his will the testator directed that his executors were, after his widow's death, to divide the residue and pay same in equal proportions to those of his heirs and personal representatives who would be entitled if he died intestate. "Personal representatives" here mean "next of kin," excluding the widow. "Heirs and next of kin" here mean "heirs," that is heirs at law at the death of the testator. The division is to be *per capita*. *Re Read*, 12 O. W. R. 1009.

Heirs-at-law by laws of Massachusetts—*Same as in England and Ontario—Evidence as to.*]—An action for a declaration as to who were the heirs-at-law of one Dixon, who died in Massachusetts in 1849. Several members of the bar of Massachusetts were examined, and they agreed that by the law of Massachusetts the heirs-at-law must be the heirs-at-law at the time of the testator's death.—Riddell, J., *held*, that the cases cited fully justified the above statement, the law being the same as in England and Ontario. Declaration accordingly. *Dixon* v. *Dixon* (1910), 17 O. W. R. 1061, 2 O. W. N. 466.

Heritable spouse — *Declaration — Art. 1276, C. C.*]—The explicit declarations by which an ancestor of a heritable married man makes known his wish that a devise, apparently in his favour, is not intended for him, may be made not only by a formal expression to that effect, but also by the acts and the manner of acting of the ancestor. In this case the ancestor having declared in a former will, subsequently revoked, that he devised to his son, a heritable married man, a certain part of an immovable, and having afterwards declared in another will that he devised to his daughter-in-law the same part of the same immovable, his wish thus expressed in his last will is equivalent to an explicit declaration that the devise is made to the non-heritable spouse, and must be considered as the declaration required by Art. 1276 of the Civil Code. *Bourassa* v. *Bourassa*, 32 Que. S. C. 533.

In lieu of dower a testator devised certain chattels, his town house and his Bethel farm to his wife "to have and to hold while she remains my widow—when her claim shall cease by death or marriage, then I will my said farm to W. and O.":—*Held*, that "to have and to hold" refers to the Bethel farm only. There is nothing shewing that the different devises go together, but the contrary. *Re Burk*, 12 O. W. R. 999.

"Inadequacy of maintenance."] — George Wright, father of the complainant, Phœbe Brecken, and of defendant, devised certain lands to his wife for life, and after her decease to defendant, and directed that these lands "should be subject and chargeable with the support of his daughter, Phœbe (complainant), in a manner suitable to her station in life." In case of dispute as to the "inadequacy of the maintenance," the testator directed that £40 per annum should be paid to her in lieu thereof. The daughter resided with her mother and defendant until her marriage with R. Brecken in 1844, and for eighteen months afterwards, when she went to her husband's house. The mother died in December, 1851, and the defendant paid the £40 a year up to November, 1890, when he discontinued paying. The defendant contended that there was no dispute as to the adequacy of the maintenance supplied by him, and, therefore, he was not liable to pay the £40 in money:—*Held*, Peters, M.R., that the wording of the will made the daughter the sole judge as to the inadequacy of the maintenance, and she was not bound to give a reason for objecting to it, but could demand the £40 a year at any time. Also, that her marriage and removal to her husband's house was, in itself, notice that she considered the previous maintenance inadequate, and coupled with a demand for the £40 constituted a dispute respecting the adequacy of the maintenance.—That defendant having paid the £40 for nine years was precluded from objecting to continue the arrangement. *Brecken* v. *Wright* (1867), 1 P. E. I. R. 267.

"Including" — *"Estate" — Policies of insurance.*]—By a clause in his will a testator bequeathed to his wife one-half his estate, "including policies of insurance made payable to her upon my death." The testator left three policies, one for $1,000 payable to his wife, the second providing for payment to his wife of an annuity of $250 per annum, for twenty years, and the third payable at his death to the "legal heirs." There were no children, grandchildren, or mother, living at the time of the testator's death, but his widow survived him:—*Held*, that the third policy, being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator:—*Held*, also, that "including" imported addition. *In re Duncombe*, 22 C. L. T. 167, 3 O. L. R. 510, 1 O. W. R. 153.

Income of estate — Direction for accumulation of part—Annuities out of surplus income—Costs—Action instead of summary application. *Hardy* v. *Shirreff*, 11 O. W. R. 1011.

Incomplete bequest — Legatee not named—Vagueness as to subject—Extrinsic evidence, inadmissibility of—Void bequest—Bequest—Bequest to church—Income—Perpetuity—Charitable bequest—Validity. *Re Cameron*, 7 O. W. R. 416.

Inconsistent bequests — *Reconciling —Formal bequest of residue.*] — A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister. He then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and bequeathing the rest and residue of his real and personal property to his nephew. At the time of his death the testator's personal property consisted of: household goods and furniture, $150; farming implements and live stock, about $500; book debts and promissory notes, $35; cash, $273; wearing apparel, watch, chain, etc., $25; total, $983: —*Held*, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it. The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. *In re Pink*, 23 C. L. T. 16, 4 O. L. R. 718, 1 O. W. R. 772.

Inconsistent clauses — *Executory devise—Failure of issue—Estate in fee.*] — A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:— *Held*, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot, which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple, subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. Judgment in 30 O. R. 627, 19 C. L. T. 227, affirmed. *McMillan* v. *McMillan*, 20 C. L. T. 199, 27 A. R. 209.

Instrument operating in lifetime of testator—Intention—Grant of life estate—Charge upon lands. *Pratt* v. *Balcom* (N. S. 1911), 9 E. L. R. 274.

Insurance — Debts — "Designation" —Election—Mortgage — Charge on land—Failure of specific legacy—Devise — Estate —Term—Maintenance. *Griffith* v. *Howes*, 5 O. L. R. 439, 2 O. W. R. 293.

Insurance policy—*In favour of wife—Afterwards devised to executors—Trust—Attempt to dispose of property over which testator had no control—No election by widow—Costs.*]—Motion by executors of estate of Richard Edwards, under Con. Rule 938, for an order construing the will. The late Richard Edwards, in 1883, insured his life for $1,000 in favour of his wife, Jane Ann Edwards, still living. He afterwards by will devised and bequeathed to his executors this policy and a large amount of other property to be held in trust for the maintenance of his wife, and at her death to be divided in manner in his will set out. The testator attempted to dispose of property over which he had no power of disposition, and by the same will gave his wife property to which she had no claim. It was argued that the will raised an election and that the widow must either allow the insurance money to be disposed of as the will directed or lose all benefit under the will. —Riddell, J., *held*, that there was no reason why the widow should not have the insurance money as well as the other benefits under the will. Costs of all parties out of insurance money. *Re Edwards. Allen* v. *Edwards* (1910), 17 O. W. R. 643, 2 O. W. N. 323, 22 O. L. R. 367.

Inter vivos and testamentary dispositions — *Gifts in contemplation of death—Holograph will—Post letter—Legacy left in trust.*] — A gift in contemplation of death is not a method of disposing of property explicitly prohibited by law. It is only implicitly forbidden, and that by reason of an omission in Art. 754 C. C. respecting the disposal of property by gift. A gift made to take effect only after death is of no effect when it is not valid as a will or as permitted in a contract of marriage. (758 C. C.) Hence, the Courts may give to a gift which appears to be a gift in contemplation of death the effect of a will, if the Court is of the opinion that it contains the necessary elements. Thus the Court can legally declare that a provision in a letter, whose author died without revoking it, is a legacy left in trust under a holograph will, although conceived in the following words:— "In case of my death and without other notice previous to such death and modifying my views, this hypothec assumed as a trust by you, will revert to Madame E. B., etc.; you will give her notice of the legacy, you will protect her interests, and you will come to some agreement with her as soon as possible respecting the repayment of the capital." *De Sieyes* v. *Thompson* (1909), 37 S. C. (Que.) 424.

Interest passing on a devise.—Devisees under will of Alexander Muir, who owned ½ interest in a shipbuilding business at Port Dalhousie, sued the executors, (owners of the other half interest) for $745.32 claimed to have been received by them out of the estate as executors. Middleton, J., *held*, that a testator can only deal in his will with what he owns, i.e., the net equitable value or balance due him on an accounting.—Judgment for plaintiffs for $47.71 without costs. *Muir* v. *Currie* (1911), 19 O. W. R. 513, 2 O. W. N. 1275.

Interlineation — *Custody — Evidence.*] —D. Green, senior, who died in 1825, before the passing of the Will Act of 1843, devised 100 acres to his son, D. Green, junior, and "the heirs of his body forever," the words

"heirs of his body forever" being interlined. The devisee died unmarried, and the plaintiffs claimed as co-heirs of D. Green, senior, against the trustees of Joseph Green, residuary devisee under the will of D. Green, senior. D. Green, junior, survived the testator over thirty years. The will was drawn by Samuel Green (no relation of any of the parties), and the interlineation was in his hand-writing, and appeared to be in the same ink as the rest of the will, and he was a witness to the will. He survived D. Green, junior, several years, and he had had the custody of the will from the time of making it until the testator's death, and no question was raised during his lifetime. Ellis, another subscribing witness, swore that he believed the will was now in the same state as when he signed it. It was not disputed that if the words interlined were not to operate as part of the will the lessor of the plaintiff would be entitled to recover, and it was contended on their part that there was no sufficient evidence to shew the interlineation to have been made before the execution of the will. At the trial the Judge directed the jury that if they were satisfied from the evidence that the interlineation had been made before the will was executed to find for defendants, which they did. The lessors of the plaintiffs moved to set aside the verdict on the ground that the evidence did not warrant the finding.—*Held*, Peters and Hensley, JJ., Hodgson, C.J., concurring, that the evidence warranted the finding and that the rule must be discharged. *Green* v. *Green* (1872), 1 P. E. I. R. 384.

Investment of trust funds.]—Motion under Con. Rule 938 for the determination of the right of a son of the testator to the profit made by the trustees on the sale of land purchased by them under powers conferred by the will:—*Held*, that the son was not entitled under the direction in paragraph 21 of the will to be paid as part of the "interest," which the trustees were directed to pay to him, the profits realized from the money invested by the trustees in the purchase of land. Costs out of the *corpus* of the trust. *Re Watkins* (1909), 15 O. W. R. 123; 20 O. L. R. 262.

Investment securities — Legacy — Interest accruing from investment funds — Residuary bequest—Profits arising from sale of right to subscribe for fresh shares—Right thereto as between life and residuary legatees — "Capital"—"Accumulated profits"—Succession duty—Commission. *In re Hart, Payzant* v. *Coleman*, 5 E. L. R. 93.

Joint life estate — Remainder in fee in common—Rule in Shelley's case—Gift to class. *Re Rutherford*, 7 O. W. R. 706.

Joint stock companies — Dividends—Income—Revenue — Accumulation — Capital. *Toronto General Trusts Corporation* v. *Hardy*, 19 O. W. R. 43.

"Land property" — Absence of residuary devise — Personalty—Inference—Parties—Next of kin. *Howard* v. *Quigley*, 2 O. W. R. 694.

Lands subject to charge — *Property primarily liable for payment of debts—Which debts are to be paid—Duty of executors.*]—Where a testator devised a quarter section to one son, directing him to pay $100 to each of two daughters; and to another son another quarter section, and all personal property and cash, directing the latter to bear all sickness and funeral expenses, to keep the testator's wife, and to pay her $100 every year:—*Held*, that the quarter sections were respectively chargeable with the moneys directed to be paid by the respective devisees.—*Held*, also, that the specific devises of the lands and the charging of them with the legacies and the annuity indicated that the testator had no intention of making them liable for the payment of debts unless there was not sufficient movable property or cash to satisfy these.—*Semble*, that the provisions of The Land Titles Act, 1894, 57 and 58 Vic. c. 28, s. 3, and 63 and 64 Vic. c. 21, s. 5, making land descend as personal property, have not altered the common law rule that the personal property is the primary fund for the payment of debts.—*Held*, further, that the executors could not convey the lands to the devisees without seeing that the proper registrations were made, and that with the consent of the devisees the proper manner of carrying this out was for them to execute encumbrances to be handed in for registration at the same time as transfers in their favour from the executors.—*Held*, lastly, that the costs of these conveyances and registration should be paid out of the estate. *Re McVicar* (1906), 6 Terr. L. R. 363.

Lapsed bequest — Absence of residuary clause—Intestacy. *Re Nevett*, 6 O. W. R. 971.

Lapsed devise — Effect on legacy — Charge on land devised—Effect on devise of remainder — Acceleration — Contingent remainder—Intestacy—Dower — Alimony decree—Release—Estoppel. *Re Wilson*, 3 O. W. R. 754.

Lapsed devise — Land Titles Act — Rules applicable to personalty—Right of residuary legatees to lands subject of lapsed devise. *Re Biden* (N.W.T.), 4 W. L. R. 477.

Lapsed devise—Lapsed legacies — Residuary devisee and legatee—Income—*Corpus* —Succession duty. *Re Merritt*, 12 O. W. R. 524.

Lapsed devise — *Residuary devise.*]—By one clause of his will a testator devised and bequeathed all his real and personal estate, etc.; by another clause he provided that a sister should have certain lands owned by him, which devise lapsed; and the last clause was as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles and implements, I give and bequeath to my brother:"—*Held*, that the will must be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the sister passed to the brother under the residuary clause. *Re Farrell*, 12 O. L. R. 580, 8 O. W. R. 442.

Legacies — *Abatement — Devastavit.*]—Testator died in 1878 having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any

codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated:—*Held*, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor. *In re Dunn*, 24 C. L. T. 295, 7 O. L. R. 560, 3 O. W. R. 311.

Legacies — *Abatement* — *Devise* — *Residue—Distribution—Surplus.*]—A testator by certain clauses of his will devised and bequeathed property to some of his children, adding to each of these clauses a statement of the value of the property mentioned in the clause.—By another clause he devised certain land to his daughter Margaret, subject to a payment of a legacy of $200 to her daughter. He did not add to this clause a statement of the value of the land. The will provided that in case of deficiency in the estate, each legatee should be liable to abatement, but that in the event of a surplus, "the same shall be divided equally between each." There was a residue:—*Held*, that the stated valuations were not intended to be the basis for abatement, and that Margaret and her daughter were entitled to participate in the surplus, the devisees and legatees taking share and share alike. *Patterson* v. *Hueston*, 40 N. S. R. 4.

Legacies — Annuity — Resort to *corpus* of estate — Time for first payment — Priorities between legacies—Vested legacies. *Re Ashenden*, 3 O. W. R. 424, 674.

Legacies — Conditions — Defeasance—Payment before period mentioned in will. *Re Shore*, 1 O. W. R. 586.

Legacies — *Date of vesting.*]—By his will the testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter K. a sum of money to be invested in the name of A., her son, or any more issue of hers there might be; the interest to be hers for life; and in case of her death or her said son "leaving more issue, the remainder to be equally divided among them; and in case of her death, and her said son leaving no other issue, then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other children:—*Held*, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of A. dying, leaving no brother or sister surviving him. *Kerrison* v. *Kaye*, 23 C. L. T. 158, 2 N. B. Eq. R. 455.

Legacies — *Interest.*]—A will directed that the estate, real and personal, should be sold, and that the executors should hold the proceeds in trust to pay an annuity of $800, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the *corpus*, paying to two grandchildren $1,000 each, and dividing the residue among the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—*Held*, that interest on the legacies should be paid by the estate only from the death of the widow. *Toomey* v. *Tracey*, 4 O. R. 708, distinguished. *In re Scadding*, 22 C. L. T. 409, 4 O. L. R. 632, 1 O. W. R. 467, 683.

Legacies — Interest — Commencement —Testator *in loco parentis*—Realization of estate. *Re Sweazey*, 2 O. W. R. 792.

Legacies — *Payment out of real estate.*]—A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters, and proceeded as follows:—"I give to my wife all the moneys that remain after paying my former 'bequeaths,' debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing, then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living:"—*Held*, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville* v. *Browne*, 7 H. L. C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. *In re Bailey*, 24 C. L. T. 54, 6 O. L. R. 688, 3 O. W. R. 20.

Legacies — Period of vesting — Distribution — Realty and personalty — Sale — Direction to trustees. *Smith* v. *Mason*, 1 O. W. R. 478.

Legacies charged against farm devised to son — *Money secured by mortgage—Mortgage paid off during lifetime of testator — Residuary estate.*] — A testator gave his son a farm. He then charged the farm with $5,000, directing that this sum, together with $1,500 from a mortgage which he held, should be divided into legacies for his daughters. The residue to go to said son. The mortgage was paid off during testator's lifetime. Middleton, J., *held*, that the daughters were entitled to receive their legacies in full and that the said son was entitled to have the $5,000 charged on the farm resorted to before the residuary estate

to meet these legacies. *Re Michael Schellenberger Estate* (1910), 16 O. W. R. 268.

Legacies to infant children — Provision for maintenance—Shares payable at majority—Death of some before majority—Shares not vested — Survivorship among children. *Re Sanderson* (N. W. T.), 6 W. L. R. 615.

Legacies to nephews and nieces and children of deceased nephews and nieces — Children of persons predeceasing testator—Cumulative legacies—Deficiency of assets—Abatement of general legacies—Residuary bequest—Persons entitled to share. *Re Church*, 8 O. W. R. 228.

Legacy—Death of legatee — Bequest falling into residue—General bequest of chattels construed as including whole residue. *Dredge, Re* (1910), 1 O. W. N. 828.

Legacy — Defined payment — Executor—Mortgagee — Change of circumstances. *Re Boyd, Boyd* v. *Boyd*, 2 O. W. R. 1056.

Legacy — Gift over — Lapse — Failure of gift—Residuary bequest. *Re Feeney*, 11 O. W. R. 440.

Legacy — Implication of revocation — Interest—Costs. *Re Munroe*, 11 O. W. R. 427.

Legacy — Interest — Accumulation — Limitation — Condition—"Against." *White* v. *McLagan*, 1 O. W. R. 59.

Legacy — *Interest in company—Shares —Arrears of salary.*] — A particular legacy by a testator, who is both a shareholder in, and a creditor for arrears of salary of, a joint stock company, of "*all his right, title, and interest, whatever it may consist of, whether in stock or otherwise in the company,*" includes both his shares and his claim for arrears of salary. *Cochrane* v. *Royal Trust Co.*, 29 Que. S. C. 177.

Legacy — Period of vesting — Direction to distribute estate—Discretion of executors. *Re Burch*, 1 O. W. R. 436.

Legacy — *Privilege of a particular legatee.*]—Claim of a legacy by privilege of hypotheque by an ante-nuptial contract, against a fund in the hands of the sheriff, the produce of a sale under execution of real estate, belonging to the husband, who was the sole executor and residuary legatee of his wife, dismissed; if not appearing that the fund was the produce of any portion of the property included in the marriage contract, or that the legatee had any right of priority to a judgment creditor. Judgment of the Court of Appeals for Lower Canada, reversed. *Smith* v. *Brown* (1837), C. R. 1 A. C. 118.

Legacy — *Revocation of life interest — Acceleration — Period of distribution.*] — A testator directed a sum of money to be set apart by his trustees, and the income paid to A. for life, and that after his death the capital should be divided among A.'s children in certain shares. The testator further directed that in the event of A. dying while any of his children should be under the age of 25 years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age." By a codicil the testator revoked the "legacy and annuity" to A.:—*Held*, that the gift to the children was not revoked, but vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of 25 years. *Lewin* v. *Lewin*, 23 C. L. T. 267, 2 N. B. Eq. R. 477.

Legacy — Specific or demonstrative — Absence of source of payment designated. *Re Wildey*, 6 O. W. R. 599.

Legacy — Support and maintenance — Absolute gift—Life interest—Discretion of executors. *Re Evans*, 3 O. L. R. 401, 1 O. W. R. 92.

Legacy — *Survivorship — Accruer.*] — A testator gave a legacy of $500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors, and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren, the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them share and share alike." One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried.—The other grandson attained his majority, and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon:—*Held*, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it. *Clifton* v. *Crawford*, 20 C. L. T. 301, 27 A. R. 315.

Legacy — *Usufruct — Substitution.*]—"I give . . . unto my daughter . . . wife of K., the use, usufruct, and enjoyment, during the term of her natural life, of all my property, real and personal, movable and immovable, of which I may die possessed, hereby constituting my said daughter my universal usufructuary legatee and devisee, without being held to give security for such usufruct and enjoyment, and whom I exempt from taking an inventory of my said property, which said usufruct shall at all times be excluded from the community of property existing between her and her husband. And as the bequest made by this will is meant as and for her maintenance and alimentary support, I expressly exempt the same from seizure for any debts created by her or her husband . . . After the death of my said daughter . . . I order and direct that my said property, of which the use and usufruct is granted to her, shall go and belong to the child or children, issue of her marriage with the said K., or with any future husband, and in default of such issue, said property to become the absolute property of

my nearest relatives or nearest of kin, in equal proportion, share and share alike." This clause in a will, *held* to give a legacy of usufruct and not a substitution. *Kidder* v. *Campbell*, Que. 20 S. C. 324.

Legacy given to executors — *Revocation of office by codicil (1) without mention of legacy, (2) with mention of legacy—Sufficient to rebut presumption.*]—A motion by executors for construction of the will of Mary Bassett.—Teetzel, J., *held*, that the general rule that a legacy to a person appointed executor is given to him in that capacity did not apply in the case where appointment to office only was revoked by codicil when in a parallel case under the same instruments a similar legacy was expressly revoked. That the legacy should be paid. *Re Cronin* (1910), 15 O. W. R. 817, followed. *Re Bassett* (1911), 19 O. W. R. 420, 2 O. W. N. 1219.

Legacy in trust—*Substitution—Transmission of property.*]—Where a testator gives his property, in trust, to executors and trustees, with instructions to divide it into as many shares as he may leave children, to pay, after 10 years, one-half of the revenue of each share to each child during his life time, and, after the latter's death, the whole of the revenue to the latter's children, with substitution of such revenue from descendant to descendant "indefinitely or as far as allowed by law," creates a legacy of the testator's property to the testator's children, under the obligation to transmit it to their children, and after the latter, to their grandchildren, *i.e.*, two degrees besides the institute.—The share received by one of the children, who dies without issue, does not accrue to his brothers and sisters, but is transmitted to the latter or their children by representation, and such transmission constitutes one of the degrees of the substitution. *Masson* v. *Masson* (1909), 20 Que. K. B. 1.

Legacy to charitable institution — Uncertainty as to object—Division among instructions with similar names—Residuary bequest—Failure for indefiniteness — Trustees—Compensation. *Re Young*, 9 O. W. R. 566.

Legal estate *divided into three equal shares—"Heirs" of living person — Take equitable estate of one share—Present legatee to have right to use income during lifetime—No liability to account—Executors.*]—Divisional Court *held*, that the rule in Shelley's case was defeated by the expressed object of the testator. The word "heirs" as used being taken to mean to cover the case of several persons equally entitled. Judgment of Riddell, 18 O. W. R. 544, 2 O. W. N. 704, affirmed. *Re McAllister* (1911), 19 O. W. R. 333, 2 O. W. N. 1171.

Life estate — *Estate tail — Survivorship — Disentailing deed—Condition of devise—Bearing testator's name—Vendor and purchaser.*]—A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their second surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father:—*Held*, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.—*Held*, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee. *In re Brown & Slater*, 23 C. L. T. 172, 5 O. L. R. 386, 2 O. W. R. 101

Life estate — *Gift over — Residue "as left unused" by life tenant.*]—Testator by his will gave his estate to his wife for life, and the residue "as left unused" to his children. The wife was given power to sell and convey the real estate, but none was left:—*Held*, that "as left unused" equals "whatever remains of" or "what shall be left." The widow gets a life estate, the *corpus* goes to the children. *In re Elliott*, 7 E. L. R. 308.

Life estate. *Re Padget and Curren*, 1 O. W. R. 427.

Life estate — Remainder — Period for ascertainment of remaindermen — Executor —Dealings with estate — Leases. *Re Gallagher*, 6 O. W. R. 28.

Life estate — Remainder — Power of disposition given to life tenant by codicil — "Dispose and deal with" — Enlargement of beneficial interests. *Re Armstrong*, 3 O. W. R. 627, 789.

Life estate—*Remainder — Survivorship indicated — Period of distribution.*]—Middleton, J., *held*, when there is a gift to A. for life, and after his death to others, that any words used in connection with the gift in remainder indicating survivorship, refer to the period of distribution and not to the death of the testator. *Re Miller* (1911), 18 O. W. R. 646, 2 O. W. N. 782.

Life estate — Remainder — Vested interests of remaindermen. *Re McNichol*, 2 O. W. R. 105.

Life estate — Remainder to brothers and sisters of life tenant, "or their legal representatives." *Parker* v. *Black*, 1 E. L. R. 128.

Life estate — *Substitution — Lapse.*]—A will contained the two clauses following:—"2. I will, devise, and bequeath unto Dame Elizabeth McQuillan, my beloved wife, all my property and estate, real and personal, movable and immovable, stocks, securities, moneys, stock in trade, book debts, and credits to me belonging, and wheresoever situate, being, and to be found, and in whatever the same may consist, and of which I may die possessed, to be enjoyed by her

only during her natural lifetime.—3. I will, devise, and bequeath unto Matthew Ryan, Mary Ryan, Bridget Ryan, and Catherine Ryan, my beloved brothers and sisters, all my property and estate, real and personal, movable and immovable, stocks, securities, moneys, stock in trade, book debts, and credits as aforesaid, wheresoever situate and to be found, and in whatever the same may consist at the time of my decease, to be enjoyed by them in absolute property and ownership, share and share alike, but only from and after the decease of the said Elizabeth McQuillan, my beloved wife:—*Held*, a universal bequest of the property to the widow, with a substitution in trust in favour of Matthew, Mary, Bridget, and Catherine Ryan, and there was a lapse as to any of the latter who predeceased the widow. *Ryan* v. *Ryan*, 15 Que. K. B. 289.

Life estate to widow — Remainder to "first family or the survivors" — Costs. *Ward* v. *McKay*, 1 E. L. R. 427.

Life insurance policy — *"Family"—"Children" — Costs.*] — Executor moved under Con. Rule 938 for an order construing a will as to payment out of Court of moneys paid in under a policy of life insurance. The policy by endorsement was made payable to Amanda Hope Francis, mother of insured. The insured by his will directed the $500 to be paid to his executors to invest and retain all interest earned by the investment as a fund to which the mother might resort in event of her having exhausted her own money; her funeral expenses were also to be paid from the fund, and after her death, fund was to be applied for general support of his family. The mother survived insured a few days only. Her estate was left to the grandchildren, who would take under their father's will if the word "family" was construed as children. — Middleton, J., *held*, here the word family might well mean children alone, indeed that was its primary meaning, and the Court would only attach a secondary meaning, which would invalidate the gift, when driven to do so by the context: That the claim of the executrix failed and the money must remain in Court to the credit of the infants and divided among them share and share alke, and the shares paid out to each on attaining majority. Mother's and official guardian's costs out of fund. No order as to grandmother's costs. *Re Hope* (1910), 16 O. W. R. 1016, 2 O. W. N. 63.

Life interest to widow — Personalty —Beneficial enjoyment in specie — Household furniture — Executors — Power of sale — Payment of debts — Legacy—Assent of executors—Trustees and *cestui que trust* —Devolution of Estates Act — Real estate —Specific devises — Equitable tenant for life — Lease — Sale — Discretion. *Re Sibbett*, 7 O. W. R. 173.

Maintenance clause — *Lien.*]—Where a testator by his will gave his estate, consisting of a farm and dwelling-house and personal property, to his son upon condition that he would maintain the testator's widow and daughters, excepting in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool* v. *Cool*, 25 C. L. T. 6, 3 N. B. Eq. 11.

Marriage settlement — *Executed in Ontario — Under Quebec law — Power of appointment — Exercised by will — General devise — Domicil.*]—Motion by the trustees under a marriage settlement of Thomas Ross and Ellen Eliza Creighton (both deceased) for an order determining in what manner should the capital fund be dealt with by the trustees. Latchford, J., *held*, that Thomas Ross clearly reserved to himself in the deed of settlement the power of appointment; and that he effectively exercised such power, by the general devise or bequest in his will; and that the trustees should hold the capital subject to the trust to pay the income of $3,000 to his granddaughter, and to hold the residue in trust to pay the income thereof to his daughter during her life, and thereafter to said granddaughter, and after her death the estate to pass to her children. *Re Ross Marriage Settlement* (1910), 16 O. W. R. 327, 1 O. O. W. 867.

Marriage settlement — Reservation of matrimonial rights — Lands conveyed to wife — Trust for children — Rights under will — Satisfaction of portion by settlement — Child born subsequent to making of will — Distribution of estate. *Re Vidal*, 12 O. W. R. 1079.

Marriage settlement — *Rights under will — Distribution.*]—A marriage contract made in Quebec reserved to the widow all matrimonial rights which she might be entitled to according to Ontario laws:—*Held*, that this does not give her the same interest in her husband's estate as if he had died intestate. The will gave a daughter by his first wife a lien for $8,000 on his property unless this should be varied by his will. According to his will all of his children were to share alike.—*Held*, that this lien was of no avail. The shares of his children were to be held in trust until they attained twenty-one, but as this manifestly refers to the children mentioned in the preceding part of the will, the child born after the date of the will takes nothing. *Re Vidal*, 12 O. W. R. 1079.

Meaning of the word "heirs" — *Res judicata — Statement by plaintiff of defendant's quality and upon which the action is based — Judgment maintaining the conclusions.*]—The word "heirs" applies to both universal legatees named by a will and to those persons called by law to succeed to an estate.—The judgment which maintains the conclusions of an action in licitation instituted by a widow, owner of one-half of the assets of a community, against those persons whom she alleges have succeeded, in different capacities, to her late husband's estate, is *res judicata* between her and such persons as to her recognition of their quality as heirs. Hence she is not at liberty to deny, under pretext that she had committed an error in her action for licitation, the benefit of the quality so given by her to such heirs. *Favreau* v. *White* (1909), 38 Que. S. C. 135.

"Mill" does not include the fee in the soil under the mill-stream and dam.]—*A devise to testator's wife for life, and at her death to be divided among his sons and daughters in such proportions as she should by will direct does not give a child a vested remainder.*]—S. G., father of both parties, by his will gave a mill and 30 acres of land to plaintiff. All the remainder of his real and personal property he gave to his wife for life and at her death to be divided among his sons and daughters (except plaintiff and another son otherwise provided for), in such proportions as his wife should by will direct. One daughter, Ann, died in her mother's lifetime, and in 1872, the mother died intestate, without having exercised the power of appointment. Plaintiff, on testator's death, went into occupation of the mill. In 1873 the dam was carried away by a freshet and plaintiff built a new one higher up in the bed of the old pond, with a pipe to carry the water down to the mill. Defendants then built a fence below the old dam, and fenced it and cut the pipe, and plaintiff brought this action for trespass. The Judge told the jury that plaintiff had the fee simple of the land under the pond and that even if he had not, yet he had a right to build the dam there, and plaintiff got a verdict. On motion for a new trial for misdirection, plaintiff contended (1) that the word "mill" in the will passed the fee of the land under the mill and stream, and such adjoining land as was necessary for its enjoyment; (2) that even if the word "mill" did not pass the fee, yet that Ann had a vested remainder which, at her death and the death of her mother, passed to her next of kin, of whom plaintiff was one, and that, therefore, he was tenant in common with defendant to the extent of his interest in Ann's share, and as such had a right to place personal property on the land and the defendants had no right to destroy it when there, and having done so are liable for trespass:—*Held*, (Palmer, C.J., and Hensley, J.) that the word "mill" in the will did not pass the freehold in the soil under the mill and stream. 2. That Ann had not a vested remainder, which on her death in her mother's lifetime would pass to her next of kin. *Green* v. *Green* (1875), 2 P. E. I. R. 8.

Misnomer of legatee — Intention — Legacy — Vested interest — Condition subsequent — Divesting — Death of legatee — Foreign domicil — Distribution of legacy. *Re Mitchell*, 4 O. W. R. 43.

"Money" — Residuary personal property — Pecuniary legacies — Insufficiency of personal estate — Resort to residuary real estate — Devise — Mortgage — Exoneration. *Re Bailey*, 2 O. W. R. 888.

Monthly allowance to widow — Payment out of income or *corpus* — Legacies — Postponement — "Balance" — "Extra" — Abatement — Dower — Election. *Re Morrison*, 7 O. W. R. 231.

Mortgage to be paid.] — Testatrix directed a mortgage to be paid, not as a debt but as a bequest, and there was not sufficient personal, or undisposed of, or residuary estate to pay the claims:—Boyd, C., *held*, that 10 Edw. VII. c. 56, s. 6. made the real and personal estate comprised in the residuary bequests primarily and *pari passu* liable for the mortgage burden as per directions in the will; and that s. 38, s-ss. 1 and 2, left the equitable rule in force as to paying of pecuniary legatees in priority to devisees, where the personalty or residuary estate fails to answer both. *Re Auston* (1911), 19 O. W. R. 684, 2 O. W. N. 1358.

Motion for—*Absolute gift— Enjoyment postponed — Possibility of being divested— Power of advancement by executors—Rights of any possible issue.*]—Testator gave property absolutely with enjoyment postponed, but in event of death of beneficiary leaving issue the gift was to go to said issue. By another clause executors were given power to make advancement.—Middleton, J., *held*, that beneficiary could not take any portion of estate immediately unless executors saw fit to make an advancement, which he recommended, as beneficiary was in poor health and unable to maintain himself. *Re Scanlon* (1910), 16 O. W. R. 973, 2 O. W. R. 39.

Motion for — Division of farm—Intention of testator—Buildings not interfered with —Leave granted to mortgage lands to discharge debts of estate—Lands under lease with 9 years to run—No necessity for construction of line fence at present—Certain costs out of estate. *Shepard* v. *Shepard* (1911), 19 O. W. R. 25, 2 O. W. N. 1012.

Motion for under Con. Rule 938 — Children take vested interest — Available after death of mother, an annuitant — Balance divided into five shares — One for each child of testator — Representation of deceased children by issue — Mortgage — Power to discharge in favour of administrator — Payment into Court. *Re Todd* (1910), 17 O. W. R. 270, 2 O. W. N. 182.

Motion for under Con. Rule 938 — Executors required to retain sufficient capital to answer growing payments of widow's annuity to be paid out of income — Death of annuitant — No further necessity to retain capital for that purpose — No application to any other part of estate — Costs out of estate — Infant's share to be paid into Court. *Re Wilson* (1910), 17 O. W. R. 556, 2 O. W. N. 283.

Motion for under Con. Rule 938— Legacy—Vested interest—Representatives entitled to legacy—All costs out of estate. *Re Cook* (1911), 19 O. W. R. 70, 2 O. W. N. 1017.

Motion for under Con. Rule 938 — *What documents constitute the will—Question to be determined by Surrogate Court —High Court Judge has no jurisdiction to go behind letters probate — Money in bank part of residuary estate though not mentioned.*]—A testator directed a sale of his chattel property, and that the proceeds thereof should form part of his residuary estate, as should also the proceeds of his notes and mortgages, and "the whole" (of the residuary estate) should be divided, etc.:—*Held*, that money on deposit in a bank, though not mentioned, formed a part of the residuary estate. Where two or more documents

bearing same date, purport to make a disposition of an estate, the probate issued by the Surrogate Court conclusively determines what documents constitute the last will of the testator, and it is not open to a High Court Judge, upon a motion for construction, to go behind the letters probate to determine what documents constitute the last will. *Gunn* v. *Gregory*, 3 D. M. & G. 777, and *Re Cuff*, [1892] 2 Ch. 229, followed. *Re Wm. Smith* (1910), 16 O. W. R. 224.

Motion under Con. Rule 938 — *Devise of dwelling — Structural changes made after date of will — No effect on will.*]—Testator devised, to his adopted daughter, a Mrs. Anderson, "the dwelling on the south side of Banfield street in which we now reside in the town of Paris," subject to the life estate of his widow. During the interval between the date of the will, October, 1907, and his death, December, 1909, he added two rooms to the original house, and removed a barn, which had been on the rear of the lot, to the front and converted it into another dwelling house. The executors moved under Con. Rule 928 for an order construing the will as to the disposition of the testator's property. Boyd, C., *held*, that the structural changes did not affect the testator's intention to deal with all his property and that the devisee took the whole premises on Banfield street. *Re Stokes* (1910), 16 O. W. N. 982.

Motion under Con. Rule 938—"*Per stirpes*"—*Payment out of Court to Surrogate guardian — Costs.*]—A testator prior to his death made advances to each of his children, stating in his account book that these advances were to be charged against the amount willed to them. One of the testator's sons predeceased him and the question arose as to whether that son's son was chargeable with the advances made to his father: — *Held*, that the expression "*per stirpes*" used by the testator shewed that he had considered the issue of a deceased son in their representative capacity and that the share of the infant must be reduced by the amount advanced to the father:—*Held*, also, that it was the settled policy of the Court, not to sanction the payment out of some $30,000, the share of the infant, to his Surrogate guardian, even though she is the mother and of ample means. *Re Carter Estate* (1909), 14 O. W. R. 1244, 1 O. W. N. 275, 20 O. L. R. 127.

Motion under Con. Rule 938 — "*Time for distribution hereinafter mentioned*" — "*Distribute*" *and* "*Pay.*"] — Motion under Con. Rule 938 for construction of the will of Charles Gurney. The questions submitted were : (1) Should the widow L. Gurney receive the interest upon the share of N. Gurney until he attains the age of 20 years? (2) What is meant by the words "the time for distribution hereinafter mentioned?":—*Held*, that A. Gurney was entitled, May 8th, 1909, to receive a part of the principal, that made it the duty of the trustees to lay aside $10,000 and pay her the remainder. The other half should not then be distributed, but should remain in the hands of the trustees. Whether it is vested in the son, the time has not come for the payment; that testator made the words "distribute" and "pay" synonymous in respect of principal by the second paragraph of this clause, and there is no reason why the "time for distribution" may not be the two times for distribution or payment. Until the death of the son, or until he attains the age of 20 years; that there was no reason why the widow should not receive the income unless and until after the son is 25 years, the executors should see fit to pay some part of the son's share to him under the provisions of the last paragraph of the clause. This answered both questions. Costs out of the estate. *Re Gurney* (1910), 15 O. W. R. 876.

Motion under Vendors and Purchasers Act — "*Bequeath*" — "*Devise.*"]—Motion by vendor under the Vendors and Purchasers Act, to have it declared that the vendor acquired a title to the land in question under the will of his wife, and could make a good title thereto. The words in the will were: "I hereby bequeath to my husband, George W. Booth, all my earthly goods and possessions:"—*Held*, that while the word "bequeath" in the language of wills is primarily applicable to a disposition of personal property, yet if the intention of the testator to be gathered from the whole will is to dispose of his real estate, the use of the word "bequeath" instead of the more appropriate word "devise" cannot defeat that intention, and that the language of above will disclosed an intention of the testatrix to give her real as well as her personal estate to her husband; therefore vendor had a good title so far as the will was concerned. *Re Booth & Merriam* (1910), 15 O. W. R. 759.

Motion under Vendors and Purchasers Act — *Restraint upon alienation —Invalid—Object to title fails*]—Middleton, J., *held*, that the words, "Directing that my said son not to sell or dispose of the said lands during his life," do not constitute a valid restraint upon alienation.—*Blackburn* v. *McCallum*, 33 S. C. R. 65, followed. Headnote is misleading. *Re Baldwin & Hunter* (1910), 17 O. W. R. 294, 2 O. W. N. 199.

"**My own right heirs**" — Period of ascertainment — "Then" — Division of residue—Specific devisee entitled to share. *Re Karn*, 2 O. W. R. 841.

Omission in will — *Giving effect to intention — Distribution of estate.*]—P. K., who left a widow and five children by his last will directed that his property should be sold in two years after his decease by his trustee, who, in the meantime, should pay the interest and rents to his wife and four of the children who were named. On the death of any one of the four children named, leaving a child or children, the share of such child was to be paid to the offspring. Whenever one of his children should die leaving children, the estate was to be divided equally among his children. Should his wife marry again, her share of the interest money was to be divided among his children, and, after her decease, not having remarried, the interest of her share was to be paid to his

son W., and on his death to be equally divided among his children. Reading the will literally, no share was given to the widow, beyond a share of the interest payable to her, until the estate came to be divided, but it was obvious that it was the intention of the testator that the widow should share equally with the four children named, and that, on her death unmarried, such share should go to his son W., and on his death be equally divided among his children:—*Held*, that the Chambers Judge, on application under O. 55, r. 2, was right in disregarding the literal reading of the will and in so construing it as to give effect to the obvious intention of the testator.—*Held*, also, that the Judge was right in construing the direction made by testator in relation to the division of his property among his children, as referring to the four children named. *Eastern Trust Co.* v. *Rose*, 38 N. S. R. 546.

Ont. Rule 938 — *Direction given to executors.*]—Where a testator gave power to the majority of his executors to say whether one of his sons should participate in his estate and the majority of the executors decided to exclude the said son, it was *held*, that an assignee of said son had no claim upon the estate. *Bain* v. *Mearns* (1878), 25 Gr. 450, followed. *Re Virtue* (1909), 14 O. W. R. 607, 1 O. W. N. 23.

"Or in the lifetime of my husband" — *Devisee — Vested estate — Contingency — Subsequent divesting.*]—Testatrix gave life estate to husband with power of appointment to her husband's son. On default of appointment being made in favour of her step-son, then Janet Gibson should receive the estate upon attaining the age of 21 years: — *Held*, that Janet Gibson took a vested interest in the estate, and not being divested by the contingency provided for happening, it was further *held* that neither the heirs-in-law of the testatrix nor the said step-son had any interest in the estate. Judgment of Divisional Court (1908), 11 O. W. R. 868, reversing judgment of Falconbridge, C.J.K.B., at trial (1908), 11 O. W. R. 162, affirmed. *McNeil* v. *Stewart* (1909), 14 O. W. R. 651, 1 O. W. N. 19.

Payment of debts — *Mixed fund — Specific bequest to widow of third of personalty.*]— By clause 3 of his will, the testator directed all his real and personal property to be converted into money, and, by the first part of clause 4, directed payment of his debts, funeral and testamentary expenses, and expenses of administration; after payment of which, also by clause 4, he bequeathed to his wife "a one-third part of the proceeds of all my personal property and effects, in satisfaction and lieu of all claims she may have as my widow on my decease":—*Held*, that the debts, etc., should be paid out of the fund raised by the conversion of the real and personal property into money, and that the bequest to the widow was a specific one, of one-third of his personal property, provided one-third was left after payment of debts. *Re Cooper* (1910), 14 W. L. R. 522, 3 Sask. L. R. 186.

Pecuniary legacies — Specific bequests — Identification of moneys — Recourse to general personal estate. *Re Moyer*, 10 O. W. R. 3.

Period of ascertainment of class — Period of distribution — Validity of bequest. *Re Mackay*, 7 O. W. R. 318.

Period of distribution — *Clauses of will — Survivors — Vested estates.*]—By clause 3 of his will the testator devised all his real estate to his executors and directed them to pay thereout his funeral and testamentary expenses, and that all the residue should be at the disposal of his wife for her maintenance during her lifetime, and that after her decease the real estate be converted into money and divided equally among his children or the survivors. But in the event of any of the children predeceasing the wife, his or her share was in the event of him or her leaving no issue, to be divided between the survivor's other heirs, etc. But should the executors determine to sell the real estate during the wife's lifetime, the proceeds were to be invested for her maintenance during her life, and at her death to be divided equally among the three children, or the survivors, share and share alike; but if the wife elected to take her third of the proceeds instead of the annual income from the whole, the remainder was to be divided in the same way among the children. The testator died in 1880, leaving a widow, two sons, and a daughter. The widow died in 1901. The daughter died in 1892, leaving an infant child, who died in 1894. The two sons were still living. The executors sold the lands in the lifetime of the widow, and she did not elect:—*Held*, that the executors having acted with regard to the land under the provisions of clause 3, that clause only was to be looked at to ascertain the testator's intention, being a complete clause in itself. The period of distribution was that of the death of the widow, and the daughter's share went to the sons or survivors, and not to the daughter's child, as claimed by the child's father. *Cripp* v. *Walcott*, 4 Madd. 11, followed. *Sharter* v. *Groves*, 6 Ha. 162, distinguished. *In re Fingland, Fingland* v. *McKnight*, 21 C. L. T. 566.

Period of distribution — *Gifts to class — "Wife and child or children" — Life insurance policy — Declaration—Trust —Immediate vesting.*]—A testator directed a certain investment, after the death of his son, "to be appropriated for the benefit of his wife and child or children:"—*Held*, that it being a gift that was not immediate, a second wife and also all the children coming into existence before the period of distribution were entitled to share in the bequest, as well as the children living at testator's death.—A testator, having a policy of life insurance which was made payable to his executors, subsequently executed a declaration indorsed on the policy, which stated that all advantages to arise from said policy should accrue for the benefit of all his children, the policy to be held in trust for said children, who were to share equally. The children of the first wife claimed the whole fund, to the exclusion of the children of the said wife:—*Held*, that such a gift was, in effect, immediate, the right to the fruits of the policy vesting in the trustee at the moment of its delivery to him in trust, and the gift, being then complete,

both as to the settlor and the children of the settlor, then in existence, vested in such children exclusively. *Starr* v. *Merkel*, 40 N. S. R. 23.

Period of vesting — "*My heirs-at-law*"—*Date of death of testator—Costs—Advancement—Annuity.*]—The testator bequeathed the sum of £10,000 to trustees in trust to pay the income thereof to his wife for life, on her death to his only son for life, and on his death, without issue, to pay one-third of the £10,000 to his heirs-at-law. The son survived the widow and disposed of his estate by will. The plaintiffs, nephews of the testator, claimed as heirs-at-law of the testator: — *Held*, that the expression "my heirs-at-law" must be construed to mean the heirs-at-law of the testator at the time of his death, and consequently the gift over of one-third of the *corpus* passed under the will of the son.—*Held*, also, that where a legatee makes an unsuccessful claim, and the case involves difficulty owing to conflicting decisions or the acts of the testator, or if the legatee has a fair ground for making the claim, each party bears his own costs. *Jost* v. *McNutt*. 40 N. S. R. 41.—Further construction of will as to advancement to a son of the testator and the annuity payable to a legatee, considered. *In re Jost, Crowe* v. *Bell*, *ib.* 121.

Perpetuity — *Determinable fee — Wrongdoer — Doctrine of Cy-près.*] — In 1810 Captain J. McDonald devised the Donaldson estate, of which the *locus* was part, to W. & A. McDonald in trust, to permit his daughter, Flora, to enter into possession and have the sole management of it, and, during her life, to receive the rents and profits free from the control of any husband she might marry, and after her death he directed the trustees to permit the rents and profits to be laid out by guardians appointed by her or (failing such appointment) by her brother, in bringing up the eldest and younger children of her first marriage, until the eldest son by her first marriage should arrive at the age of thirty years, and then to convey the estate to such eldest son and his heirs male. In 1821, after testator's death, Flora married plaintiff's father, and she and her husband continued in possession until his death in 1864, and she continued in possession until 1864, when she also died, intestate. The lessor of the plaintiff was their eldest son, and was over thirty years of age. There was no conveyance from the trustees to him. D. McIsaac, brother of defendant, had been in possession of the *locus* and paid rent to plaintiff's mother and to plaintiff and then abandoned, when defendant entered. For defendant, it was contended that the legal estate was in trustees, and no demise being laid in their name plaintiff must be non-suited. The plaintiff argued that the trustees took no estate under the demise, or if they took any it was only an estate in fee during Flora's life:—*Held*, Peters, J., that the trust in favour of the eldest son was void for perpetuity. — That the other trusts having been executed, and no further trust existing, the objects of the trust ceased, and, therefore, the trustees' estate also ceased, and the plaintiff, as one of the testator's heirs, had a right to recover. — That plaintiff was entitled by prior possession to maintain ejectment against the defendant, who was a wrongdoer.—That the doctrine of *cy-près* would probably apply, and if so Flora would take an equitable estate tail, and on her death plaintiff would become legal tenant in tail, and as such would be entitled to recover. *McDonnell* v. *McIsaac* (1871), 1 P. E. I. R. 353.

Personal estate — *Life interest with power of control.*]—The testator by his will provided, "If I predecease my wife, I give and bequeath to her the whole control of my real and personal estate as long as she lives." He then made disposition of his real estate to take effect after the death of his wife, and of the stock and implements appertaining thereto, but did not otherwise dispose of his personal estate. As a fact his personal estate included a mortgage. His widow survived him only a few days and made no disposition of the mortgage: —*Held*, that the widow had only a life interest in the mortgage, with power of control during her life; and, as she had made no disposition of it, whether entitled to do so or no (as to which, *quære*), it fell into the testator's undisposed of estate, and went according to the Statute of Distributions, the widow's next of kin taking the moiety to which she was entitled notwithstanding her life interest under the will. *In re Turnbull Estate*, 11 O. L. R. 334, 7 O. W. R. 358.

Personal representatives — Executors or next of kin—Part intestacy—Rights of widow—Advertisement for creditors. *Re Daubeny*, 1 O. W. R. 773.

Personalty — Absolute bequest to wife, followed by bequest to take effect on death of wife. *Re Latimer, Latimer* v. *Latimer*, 9 O. W. R. 261.

Persons interested should be parties to the construction.] — Privy Council *held*, that they would not consider the construction of a will, where certain persons were not made parties to the proceedings, inasmuch as the interests of those persons materially depended upon that construction. *Dorion* v. *Dorion* (1830), C. R. 3 A. C. 375.

Power of advancement — *Exercise of, by trustees — Division of estate.*]—A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the *corpus* or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities:—*Held*, that a division of the estate among the children made by the trustees in good faith two years after the death

of the testatrix was a valid exercise of the power. *Hospital for Sick Children* v. *Chute*, 22 C. L. T. 173, 3 O. L. R. 590, 1 O. W. R. 321.

Power of sale — Exercise by substituted trustee—Application to particular property—Release of trustee — New trustee. *Re Bell*, 5 O. W. R. 442.

Power of sale — Trust — Executor — —Costs. *In re Miller*, 5 E. L. R. 501.

Power of sale — Vacant land — "Unproductive of a substantial net profit" — Trustees. *Re M.*, 6 O. W. R. 938.

Power of wife to continue business.] When a testator devises the usufruct of his estate to his wife and the ownership of his children and provides that a business he carried on may be continued by his wife, the usufructuary, with all the powers of a sole universal legatee, and she does so; the business is not merely her business, but is that of the testator's estate and the heirs of the ownership become liable for debts contracted by her on its account. *Sewell* v. *Peters* (1910), 20 Que. K. B. 255.

Powers of executors — *Promissory note—Advancing legatee's share.*]—M. by his will gave a special direction for the winding up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary right and powers at any time to pay to any of his said children over the age of thirty years, the whole or any part of their share, in his said estate for their assistance, either in establishment, or, in case of need, the whole, according to the discretion, prudence, and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts:—*Held*, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier* v. *Gratton*, 20 C. L. T. 271, 30 S. C. R. 317.

Powers of trustees set out in will.]—A motion by executor, for advice as to (1) Walter Curran's right to be a trustee and (2) as to right of the tenants for life to manage the property instead of the trustees, which were referred to in the judgment at the hearing.—Riddell, J., *held*, that when a trustee goes to reside abroad, the remaining trustee may appoint one in his stead, but until that is done the emigrant remains trustee. "Abroad" means in foreign parts, that is, any place out of Ontario, whether under the British flag or not.—When a trustee is appointed by a will with contemplated duties such as paying off incumbrances, charges, taxes, etc., the rule that an undefined gift of the rents and profits vests an absolute interest, will not oust the trustees of the management, despite the circumstances that there are no such duties in fact. Declarations made accordingly. *Re Curran* (1911), 19 O. W. R. 501, 2 O. W. N. 1268.

Presumption created by 890 C. C applies to every legacy devised to a creditor, even to a remunerative one, in the absence of express positive terms in the will, or by the creditor's own admission, established according to the rules of evidence, such presumption cannot be destroyed. All presumptions are left to the discretionary appreciation of the Judge. *Bonin* v. *Ducharme* (1910), 17 R. de J. 60.

"Principal of this money" — *Application for payment out of Court — Per capita or per stirpes.*]—A testator gave one-third interest on certain monies to one legatee and two-thirds of the interest to another, and further directed that at their death or the death of either of them "the principal of this money" should be divided between the members of the Marr family who would be his natural heirs:—*Held*, that the testator gave to each of the two legatees not an aliquot part of the interest upon the whole of the residuary estate, but the whole of the interest upon an aliquot part of the estate, and that the death of one of the legatees realised only one-third of the residue, the other two-thirds going on to earn interest for the other legatee. On another question, as to whether the division should be *per capita* or *per stirpes*, it was held that it should be *per stirpes*. *In re Estate of Bint* (1909), 14 O. W. R. 1270, 1 O. W. N. 285

Probate — *Testamentary writings of different dates standing together.*]—Testatrix died in 1908, leaving two properly executed wills, one dated 1875 and the other 1879. The two documents were found, after death, folded together. The first four paragraphs of each were in the same words. The fifth paragraph of each was the same, except that in the later document additional provision was made for paying off a mortgage on a certain cottage. The sixth paragraph of the first document provided for the division of the surplus of the estate (except articles therein specifically bequeathed) among three nieces of the testatrix. This paragraph was omitted from later document, which contained no direction as to the disposition of the residue of the estate, nor any revocatory clause. The sixth and seventh clauses of later document disposed of the said cottage, and the subsequent paragraphs disposed of various articles of personal property, some to some persons to whom they were given by first document, while in other cases the destination was changed. No pecuniary legacy was given by second document. The same executors were appointed in both. The later one was called "my last will." If the later one alone was admitted to probate, there would be an intestacy as to part of the estate as there was a considerable residue and no residuary gift:—*Held*, that the two documents together constituted the last will

of the testatrix, and letters of administration with both documents annexed were properly granted. *In re Estate of Bryan*, [1907] P. 125, 76 L. J. P. 30, distinguished. —Judgment of Surrogate Court of Northumberland and Durham, affirmed. *Re Molson, Ward* v. *Stevenson* (1910), 21 O. L. R. 289.

Prohibition to alienate — *Exception in favour of the heirs of the legatee—Meaning of the expression "heirs."*]—The exception made by a testator, in prohibiting his legatees to alienate, made in the following terms "except in any event in favour of their heirs" is intended to mean those to whom they leave their property by will. *Favreau* v. *White*, 37 Que. S. C. 305.

Property in trust — *Motion for directions — Statute-barred creditors entitled.*]—Motion by executor of the will of Alice Kerr, for an order interpreting the disposition clauses of the will under Con. Rule 1269. The property was bequeathed upon trust to pay the proceeds to her husband in such sums as the executor should see fit, and on his death to pay funeral and testamentary expenses, "And any just debts that he may owe, a list of which I hope my said husband will make out and leave, shewing those he desires to be paid." The Court ordered that the surplus in the hands of the executor be paid to the creditors of her husband, and the executor now asks if he should regard the Statute of Limitations.—Middleton, J.:—The Statute of Limitations applies only between debtor and creditor. When a third party creates a trust all within the trust take despite the Statute of Limitations having barred their rights as against the debtor. *Re Alice Kerr* (1911), 19 O. W. R. 642, 2 O. W. N. 1342.

Property passing — "New" — Stock in trade — Furniture — Books — Legacy — Incomplete words. *Re Holden*, 5 O. L. R. 156, 2 O. W. R. 11.

Provision for maintenance of person — Alternative provision. *Leduc* v. *Booth*, 1 O. W. R. 800.

Residuary bequest — *"Biens ecclésiastiques."*] — The final provision of a will made by a priest of the Roman Catholic Church, after specific legacies, was a gift of "*tout le reste de mes biens ecclésiastiques*:" —*Held*, a universal legacy of all the property remaining to the testator. *Blouin* v. *Le Séminaire de Rimouski*, 30 Que. S. C. 97.

Residuary bequest — Church—Amount more than sufficient to answer specified purpose — Application of balance *cy-près* — Intestacy — Gift for maintenance of burial plot—Perpetuity — Charity. *Re Harding*, 4 O. W. R. 316.

Residuary bequest — Distribution among legatees in proportion to their legacies—Legatees of income—Interest — Subscription to charity. *Re Sloane*, 3 O. W. R. 848.

Residuary bequest — "Heirs and personal representatives"—Heirs and next of kin—Period of ascertainment—Persons entitled — Grand-nephews and grand-nieces — Widow of deceased brother—Persons entitled as upon intestacy. *Re Read*, 12 O. W. R. 1009.

Residuary bequest — *"Parties mentioned" in will—Application to beneficiaries only—Restriction to those in will but not in codicils.*]—A testator by his will, after a number of bequests, directed the conversion into cash of the residue of his real and personal estate, and, after the payment of the winding-up expenses, that it should be divided, share and share alike, among the different parties mentioned in my will who shall be living at the time of the winding-up of my estate;" and by a subsequent clause he appointed executors and trustees of his will: —*Held*, that the testator intended by the words "parties mentioned" those named as beneficiaries, and not persons whose names were mentioned only for the purpose of identifying the objects of his gifts or for the purpose of dividing the estate, as the executors; and that the parties intended to be benefited were those mentioned in the will and not those in the codicils. *Re Miles*, 8 O. W. R. 817, 9 O. W. R. 555, 14 O. L. R. 241.

Residuary bequest — *"Personal Effects" — Mortgage — Debts and expenses of administration — Ratable charge on real and personal estate.*]—A will was in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give, devise and bequeath as follows: I give, devise and bequeath absolutely to my beloved wife . . . all my furniture, books, plate and other personal effects and so long as she remains my widow but no longer I give, devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children. The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—*Held*, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things *ejusdem generis* with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate:—*Held*, also, following *Re Thomas*, 2 O. L. R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values:—Devolution of Estates Act, R. S. O. 1897 c. 127, s. 7. *In re Way*, 24 C. L. T. 20, 6 O. L. R. 614, 2 O. W. R. 1072.

Residuary bequest — Personalty—Gift of *corpus* — Gift of income — Vested interest — Period of distribution — Reference of question of construction to master —

Consent order — Superseding — Administration — Costs. *Re Metcalfe*, 12 O. W. R. 894.

Residuary bequest — "Remaining children" — "Other" or "surviving" children — Grandchildren — Period of ascertainment of class. *Re Garner*, 3 O. W. R. 584.

Residuary bequest to children as a class — *Death of one child before testator —Wills Act, s. 36 — Rights of issue of deceased child.*]—The testator gave the residue of his estate in equal shares to all his children except J., and directed that J.'s shares or a double share should go to M. At the time of the making of the will the testator's eight children were all alive and all survived him except M., who predeceased him leaving issue:—*Held*, that in the case of gifts to children as a class, as tenants in common, the shares of members of the class dying before the testator do not pass to the issue of those dying, as under s. 36 of the Wills Act, R. S. O. 1897 c. 128, but go to the other members of the class, and the fact that one of the class is named specially makes no difference; and therefore the residue was divisible among the six surviving members of the class in equal shares. *Re Moir*, 9 O. W. R. 858, 14 O. L. R. 541.

Residuary clause — *Division of income among children—Nomination with substitution of grandchildren—Death of a child before period of distribution of corpus—Devolution upon next of kin.*]—Testator devised income of residue of property to his children A. B. C. D. E., share and share alike, grandchildren to be substituted for a deceased child. *Corpus* to be divided equally between surviving two children. All the children survived. B. died a bachelor shortly after:—*Held*, that B.'s share of the income went to his next of kin. *Re Stephens*, 13 O. W. R. 998.

Residuary clause — *Gift inter vivos —Declaration of trust—Testamentary gift—Wills Act (N.B.).*]—Testator in the residuary clause of his will gave all the residue "excepting only such personal property found in his private cash box or in his box in certain bank vaults, and which he had already given to his daughter Hannah," to, etc.:—*Held*, that Hannah took nothing in these boxes except what was in her name, the testator not having perfected the gift in his lifetime. *Clark* v. *Clark*, 7 E. L. R. 318.

Residuary clause—Intention of testator to dispose of his entire estate — Insurance moneys—Deduction from shares of legatees—Costs. *Re Lenz* (1911), 18 O. W. R. 556, 2 O. W. N. 721.

Residuary clause — "Issue"—"Children" — Grandchildren — Distribution of estate. *Evitte* v. *Smith*, 5 E. L. R. 497.

Residuary clause — *Power of selection—Discretion of trustees.*]—A devise in a will directing the distribution of the residue of the testator's estate among his brother and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the classes of persons mentioned. *McGibbon* v. *Abbott*, 10 App. Cas. 653, followed. *Ross* v. *Ross*, 25 S. C. R. 307, referred to. *Brosseau* v. *Doré*, 25 C. L. T. 2, 35 S. C. R. 205.

Residuary devise — *Vested remainder —"Family"—Specific benefit—Members of class — Distribution of estate.*]—A testator devised the residue of his property, both real and personal, to his son A. by a second marriage, and, in the event of the death of A. to the testator's widow for her lifetime, the remainder, on her death, to be equally divided among his first family or the survivors of them. A. predeceased his mother. There being no survivors at the period of distribution:—*Held*, that on the death of A. the remainder vested in the children of the first family, subject to being defeated in favour of the survivors at the period of distribution (the death of the life tenant), but, there being then no survivors, there was nothing to defeat it, and it remained the property of the representatives of the children. In the previous part of his will the testator referred to some of the children of the first family as having received in his lifetime all that they were then entitled to out of the estate.—*Held*, that the children mentioned were not thereby excluded from participation in the distribution of the remainder consequent upon the death of A. *Ward* v. *McKay*, 2 E. L. R. 353, 41 N. S. R. 282.

Residuary estate — *Income.*]—A testator gave to each of his children, on attaining the age of twenty-five years, an equal share of the income of the whole of his residuary estate, but until each child had attained the age of twenty-five years would have been his or her share of the income was to accumulate and form part of the testator's general estate:—*Held*, that the accumulations so directed were intended to be for the benefit of the general estate and not for the exclusive benefit of a particular child. Judgment of the Court of Appeal for Ontario and Riddell, J. affirmed, with a variation. *Fullford* v. *Hardy*, C. R. [1909] A. C. 255, [1909] A. C. 570, 79 L. J. P. C. 8.

Residue — "*Survivors*" — "*Child*"—*Distribution of estate.*]—Testator, by his last will, after providing for his wife during her lifetime, and setting apart a sum of money to be invested after the wife's death for his two daughters, left his business and the residue of his estate to his two sons.—In case of the death of either or both of the daughters without issue, it was provided that her or their shares of the estate should become part of the residue thereof, and be divided equally among the survivors, and the issue of any child who should then be deceased. One of the daughters having died without leaving issue:—*Held*, that the use of the words "survivors" and "child" in the clause in question excluded the idea that the share of the deceased daughter was to go to the two sons as part of the residue of the estate, and indicated an intention, on the part of the testator, that this particular part of the residue was to be divided equally among the surviving children of the testator and the issue of any deceased child; and that it was only subject to this disposition that all the rest and residue of the

estate was to go to the two sons exclusively. *In re Mackinlay*, 38 N. S. R. 254.

Restraint against alienation — "*The property that shall remain.*" — Testator directed his estate to be divided between his two daughters, Cecilia and Mary Ann, after providing an annual income for his widow. The widow died in 1906. He further directed that in case either daughter should die without leaving issue, then her share should go to her sister, and in case both daughters died without leaving issue then the whole estate should go to the Roman Catholic Episcopal Corporation. Cecilia married one Brown and is now a widow. Mary Ann married one Tobin and died in 1906, leaving a daughter Cecilia Matilda. Before Cecilia married the executors of the estate conveyed to her certain lands in question. Cecilia conveyed these lands to one J. Hamilton Burgar. The Roman C. E. Cor. and Cecilia Matilda Tobin both filed adverse claims and claimed to be contingently interested in the event of Cecilia Brown dying leaving no issue:—*Held*, that neither the Roman C. E. Co. nor Cecilia Matilda Tobin had any interest in the lands in question, as the devisees were intended by the testator to have power of disposition over their property during their lives, subject only to the limited restriction above mentioned, and as Cecilia having exercised that power, it could not be part of "the property that shall remain" at her decease. *Re Burgar* (1909), 14 O. W. R. 772.

Restraint upon alienation.]—Testator willed land to two grandchildren as tenants in common, without power to incumber the same during the lifetime of either, but with power of disposing of their interest to each other, but to no other person. One purchased the share of the other, and sought to quiet his title to the land:—*Held*, that the restraint as to mortgaging in the life of the devisees was valid, but the restraint as to disposal of the land except from the one to the other was valid. *Re Buckley* (1910), 15 O. W. R. 329.

Right of legatee — *Executrix — Trustee — Perpetuities, etc.*]—A continuation of the case before the Divisional Court reported 19 O. W. R. 346, 20 O. W. N. 1173. The plaintiff having been allowed to make her argument upon the law when *Foxwell* v. *Kennedy*, which involved the same will, came on for argument, Divisional Court dismissed the appeal. *Foxwell* v. *Kennedy*, reported 19 O. W. R. 595, followed. *Kennedy* v. *Kennedy* (1911), 19 O. W. R. 606, 2 O. W. N. 1304.

Rights of executrix—*Legatee—Executor and trustee — Jurisdiction of Court — Doctrine of perpetuities.*]—Appeal from judgment of Teetzel, J., 18 O. W. R. 782, 2 O. W. N. 821, O. L. R. , upon a motion for judgment to dismiss certain claims in an action arising out of the will of David Kennedy, s. 13 O. W. R. 684, an order for the disposition of the question of law having been granted.—Divisional Court *held* that the Court has no jurisdiction to examine into the fact of a renunciation of probate being obtained by undue influence; that the plaintiff had no interest in the sale of the land, the gift being void for perpetuity, nor in the residuary clause of the will. Judgment of Teetzel, J., affirmed. *Kennedy* v. *Kennedy*, 18 O. W. R. 442, followed. *Foxwell* v. *Kennedy* (1911), 19 O. W. R. 595, 2 O. W. N. 1299.

Rights of wife — *Usufructuary or institute — Action by heirs — Inconsistent claims—Election.*]—The respondents charged against the appellant waste of certain of her deceased husband's estate, rights in which she possessed under his will, and neglect to secure the appointment of a "curator to the substitution," and it appeared that there was doubt whether under the will she was a usufructuary or an "institute;" and claimed, in case the Court should decide that the will only created a simple right of usufruct, the extinction of such right, or, in the alternative, that the estate be vested absolutely or qualifiedly in the heirs called by the will to succeed her; and, in case the Court should decide that there was a substitution, that the appellant might be "*assujetie à souffrir l'envoi en possession des appelé à titre de séquestre, et que tel séquestre soit ordonné par le jugement à intervenir*," and other relief appropriate to the situation:—*Held*, that the relief claimed was inconsistent and contradictory, and that the respondents should be required to exercise an option as to which relief they would claim. *Hurtubise* v. *Décarie*, 13 Que. K. B. 366.

Roman Catholic bishop — *Corporation sole—Devise of personal and ecclesiastical property — Construction.*]—The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property:—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust according to the intention and purposes for which they are used and established;"—yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established:"] — *Held*, affirming the judgment in 36 N. B. R. 229, that the private property of the testator, as well as the ecclesiastical property vested in him as bishop, was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. *Travers* v. *Casey*, 24 C. L. T. 169, 34 S. C. R. 419.

Rule in Shelley's case applied.] — Testator, by his last will, devised to his sister, M. B., one-half of a lot of land described "to have and to hold . . for and during her natural life, and after her decease to go to and be enjoyed by her heirs." M. B. died in testator's lifetime:—*Held*, there being nothing in the will to shew that the testator used the word "heirs" in any other than its ordinary technical sense, that the rule in Shelley's case applied; that the devise to M. B. was a fee simple, and lapsed upon her decease before testator. *Atkinson* v. *Purdy*, 43 N. S. R. 274.

Sale of devised land by testator subsequent to will — *Bequest of "cash, negotiable notes, and mortgages"* — *Wills*

Act, s. 21—Lapsed legacy—Compensation to executors.]—1. Notwithstanding s. 21 of the Wills Act, R. S. M. 1902 c. 174, a devise of land specifically described fails when the testator has, after making the will, entered into an agreement to sell the land, although no part of the purchase money has been received during his lifetime, and the devisee takes no interest in either the land or the purchase money.—*Ross* v. *Ross*, 20 Gr. 203, followed.—2. Unpaid purchase money of land sold by the testator in his lifetime will not pass under a bequest of "all cash, negotiable notes, and mortgages," if there were, at the time of his death, mortgages which would answer the description in the will.—3. A legacy lapses if the legatee dies before the testator, unless it can be regarded as a legacy to a class.—4. The executors in this case should be allowed as compensation the following commissions: one half of one per cent. on cash in the bank, three per cent. on collections of all other sums, and one per cent. on all payments out. *Re Ferguson Estate*, 18 Man. L. R. 532, 10 W. L. R. 637.

Separate gifts — *Rule in Shelley's Case —Lien for improvements.*]—Action for the recovery of land, into the possession of which the defendants had entered under an agreement of sale made between them and the plaintiff. The plaintiff alleged a title in fee to the land by a conveyance from a devisee under a will as follows: "I give and devise to my grandson J. H. the last half . . . . for the term of his natural life; after his death I devise the same to his children, lawfully begotten, in equal shares; should he die without a child living at the time of his death, then I devise said land to my son G. for the term of his natural life, and after his death to his children in equal shares, and if G. should die without a child living at the time of his death, then," &c., &c., J. H. was alive at the time of this action, aged 50 years, and had one child, a daughter, born after the death of the testator:—*Held*, that neither the rule in *Wild's* case nor that in *Shelley's* case applied. There were plainly two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child, or children, subject to be divested if he died without a child living at his death. The plaintiff, therefore, could not make title. The defendants were entitled to a lien for improvements, and for purchase money paid on account, with interest, less an occupation rent. *Young* v. *Denike*, 22 C. L. T. 27, 2 O. L. R. 723.

Settled Estates—*R. S. O. (1897) c. 71*—Trust for sale—Representation of uniform issue and absent adults. *Re Cornell* (1905), 5 O. W. R. 60, 9 O. L. R. 128, followed. *Re Phipps* (1911), 19 O. W. R. 149, 2 O. W. N. 1126.

Settled Estates Act—Motion by legatees for the construction of the will of Daniel Macdonald; for an administration of the estate by the Court and for the sale or partition of the lands in question—Intestacy — Powers of executors — Representatives of issue signing. *Macdonald* v. *Peters* (1911), 19 O. W. R. 404, 2 O. W. N. 1209.

Shares of children — Period of vesting — Rents — Interest — Equal division. *Re Hunter*, 2 O. W. R. 791.

Shares of estate — *Period of distribution — Life interest — Children born after testator's death.*]—If a fund is given by a will to be divided into as many shares as there are children of S. who survive S., one share to be paid to each child for life, and on his death to his children, the children of those children of S. who were born in the testator's life will take the share in which their parent had a life interest, while the children of such children of S. as were not born until after the testator's death, will take nothing. *McDonald* v. *Jones*, 40 N. S. R. 232.

Shares of stock — *Calls—Right of executors to pay same out of proceeds of sale of real estate—Trust fund—Specific bequests.*]—Appeal from the judgment of Laurence, J., ordering calls on shares to be paid out of the general funds of the estate. Reported *sub nom. In re Longworth*, 8 E. L. R. 235. *McDonald* v. *Eastern Trust Co.* (N. S. 1910), 9 E. L. R. 173.

Speaking from death — *Stock in trade — "Now" — Household furniture—Books—Legacy—Incomplete words.*]—A testator gave all his estate of which he might die possessed in manner following: "to my sister E. the house and lands with all household furniture and all stock and trade now in house and out of house, with all book accounts now due to me, wherever found, for her own use and benefit forever, and out of this she shall pay $100 to my brother W." At his death, and when he made the will, the testator was the keeper of a country village shop, and his possessions consisted of a house and lot, where he carried on his business and lived, the capital employed in his business, his stock of goods, and what was owing to him by his customers, and his household and other effects, consisting of furniture, books, horses, harness, carriages, and sleighs. Shortly after he made his will he sold his house and lot and business and afterwards re-purchased them:—*Held*, that although the gifts of the household furniture, the stock in trade, and the book debts, were specific bequests, nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the will carried the household furniture, the stock in trade, and the book debts, as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed at the date of his will. This was confirmed by the words of general bequest at the commencement, as also by certain other features of the will.—*Held*, also, that in the gift of the "stock in trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling-house, two horses, harness, and vehicles, were embraced.—*Held*, also, that a number of books belonging to the testator passed as part of the household furniture. The incomplete words of the gift to one brother were insufficient. *In re Holden*, 23 C. L. T. 52, 5 O. L. R. 156, 2 O. W. R. 11.

Specific bequest to wife — Lapse by predecease of wife — Residuary clause — Conflict—Declaration of intestacy. *Re Coy*, 10 O. W. R. 884.

Specific bequests of shares — Change in shares by statute — Rights of legatees. *Re Thompson*, 3 O. W. R. 627.

Specific devise — *Charge of "debts" and testamentary expenses in residuary fund — Municipal taxes — Locke King's Act.*]— The testatrix made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and provincial taxes had accumulated on the devised lands. The persons taking the lands under the will claimed the right to have the taxes paid out of the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral and testamentary expenses and debts: — *Held*, that the succession duty payable under the Succession Duty Act, R. S. B. C. 1897 c. 175, in respect of the real estate of a deceased person, did not form part of the testamentary expenses of the deceased, but was chargeable against the different properties devised under the will.—2. That the taxes due by deceased were payable out of the residuary estate, and not chargeable against the different properties in respect of which the taxes had been imposed.—3. To allow taxes to fall into arrears does not charge land by way of mortgage so as to bring it within the operation of Locke King's Act, 17 & 18 Vict. c. 113. *In re Watkins*, 12 B. C. R. 97, 3 W. L. R. 471.

Specific devise — *Residuary devise — Bequest of personal estate — Provision for payment of debts, etc., "out of my estate"— Incident of—Bequest of chattels under conditional sales agreement — Devolution of Estates Act.*]—A testator bequeathed all his personal estate to his son, to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts, and directed that the debts and funeral and testamentary expenses should be paid "out of my estate:"—*Held*, that the whole personal estate was primarily chargeable with such payments, and that the balance remaining unsatisfied should be borne by all the real estate *pro ratâ*.—Section 7 of the Devolution of Estates Act provides that "the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto), be applicable ratably, according to the respective values, to the payment of his debts:"—*Held*, that this section does not apply where there is not both real and personal property comprised in the residuary gift, and, as the bequest of the testator's personal property was not in its nature residuary in the original sense, the section did not apply to it. — Among other personal property bequeathed were a threshing machine and engine under the usual conditional sales agreement: — *Semble*, that, as the gift was in no sense a specific legacy, these chattels were not exonerated from the liens created by such agreement at the expense of the real estate. *Re Moody*, 12 O. L. R. 10, 7 O. W. R. 808.

Specific legacies — *Bequest of residue —Condition — Application of.*]—There were two distinct dispositions in one clause of a will. In the first part of the clause the testator gave specific legacies of $200 each to five of his children, and in the second part he divided the residue of the moneys and book debts which he should leave at his decease among his ten children and the children of Malvina, a deceased daughter. At the end of the clause he added: "But on condition that the children of the deceased Malvina and Amabel and Joseph (who were two of the five specified legatees) shall renounce the succession of the late Dame Julie Leclerc, their mother and grandmother, in order that they may be on a footing of equality with my other children, and that of the said Amabel and Joseph and the children of the said Malvina claim the succession of the said dame, their mother and grandmother, the property which I have given them above shall pass to my other children above lastly named:"—*Held*, that this condition did not apply to both dispositions, but only to the latter disposition, namely, of the residue. *Bélanger* v. *Bélanger*, 10 Que. K. B. 207.

Specific legacy — Lapsed legacy—Absorption in residue—Distribution *per capita* —Sale of lands—Payment of incumbrances and other debts. *Re Feaver*, 9 O. W. R. 769.

Statute interpreting will — *Construction—Income of estate—Saisissabilité.*] —A statute interpreting or modifying a will should be construed as a codicil to such will. If such statute detaches from a considerable sum, to be divided later among the heirs, a certain sum to be used as income, without declaring that the latter sum shall be regarded as alimentary, the sum so detached will not be insaisissable, even if the capital would be. *Union Bank* v. *Ogilvie*, 4 Que. P. R. 157.

Subject of devise — *After-acquired property.*]—Testator by his will devised to his daughter "the homestead farm on which I reside," and the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A., upon which he resided at the time of his death. By s. 19 of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will:"—*Held*, that lot A. was not included in the devise to the daughter. *Ayer* v. *Estabrooks*, 22 C. L. T. 328, 2 N. B. Eq. R. 392.

Substitution — *Annuity — Accumulations.*]—A testator set apart a fund as a provision for his wife, and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share, limited to $6,000 a year, each child being charged with a substitution in favour of his or her children:—*Held*, that the annuity of each child was a charge on the revenue of his own share and its arrears, not on the total revenue of the estate.—2. That each child was entitled from the testator's death to an equal share of the net revenue current and accumulated, without regard to the benefits which during minority he received from the fund set apart or under other clauses of the will.—3. That the substitution was confined to the share of each child in the capital of the residue, and

did not extend to the accumulation of its revenue. *Beaudry* v. *Barbeau*, [1900] A. C. 569.

Substitution — *Clauses creating.*] — The testator bequeathed to his wife all his property "to be enjoyed by her during her natural lifetime;" by the next clause of his will he bequeathed to his brothers and sisters all his property "to be enjoyed by them in absolute property and ownership," share and share alike, but only from and after the decease of his wife. The testator's wife survived him, and at the time of her death, B. was the only one of the brothers and sisters mentioned who was living, and she took possession of all the testator's estate. A nephew of the testator, a son of one of the brothers mentioned in the above clause of the will, brought this action for one-sixteenth of the estate, claiming that the will gave the widow only the usufruct, and that the brothers and sisters of the testator were bequeathed the naked ownership:—*Held*, affirming the decision of the Court of Review, that the will created a substitution, and that B., as the sole survivor of the substitutes at the death of the widow (the institute), was entitled to the whole estate. *Ryan* v. *Ryan*, 23 C. L. T. 116.

Substitution — *Degree* — *Accretion*— *Partition.*]—In the case of a will containing the following clauses:—"As to . . . . all that I will leave at my death . . . I direct and desire that it be divided into as many equal shares as I shall leave children at my death, issue of my marriage . . . and that each of my said children shall receive only one-half of the revenues of such shares during his or her life-time . . . and that the revenue from each of such shares of my property shall, at the death of each of my said children, revert to their children born in lawful wedlock and be substituted from descendants to descendants to the last degree allowed by law, with this provision that I direct and desire that at each succession to or substitution of my property, partition shall be effected, as far as possible, between each of my descendants in such a way that it will be possible to know and distinguish the share or part of my property of which each of my said descendants is to have the enjoyment of the revenues during his or her life-time, the whole subject to the clauses and provisions hereinafter mentioned," and when one of the testator's children dies without leaving issue, his share in the estate does not pass by accretion to the other legatees, but such share passes to such other legatees by transmission in such a way as to form one degree in the substitution. *Masson* v. *Masson* (1910), 16 R. L. n. s. 244.

Substitution — *Legacies of usufruct and ownership* — *Intervention* — *Costs.*]— In construing a will regard must be had chiefly to the intention of the testator as manifested by the document read as a whole. The use of the word substitution in one of its clauses when it is apparent there was no intention to create one but merely to bequeath the *usufruct* to one set of legatees and the ownership to another, does not affect the nature of the devise.—2. While a party may by means of an intervention contest an action brought by one who claims as legatee the right to an account and to a share of an estate from the executors, he cannot in an issue so raised seek for a judicial pronouncement on his own pretended rights against the parties defendant.—3. An order to pay costs of litigation respecting a will and its construction out of the estate, will not be made unless it appears clearly to the Court that it was instituted and carried on for the benefit of all parties interested. *Bond* v. *Macfarlane*, 29 Que. S. C. 220.

Substitution — *Opening* — *Legacy to substitutes* — *Per stirpes or per capita.*]— By his will, which created a substitution, the testator bequeathed the *usufruct* of all his property to his widow, and after her death to his surviving children, and then gave it to the legitimate children of his children, to enjoy and have in equal parts and portions among them from the day that the enjoyment and *usufruct* of his children should cease, instituting his said grandchildren his universal legatees:—*Held*, that all the grandchildren participated in the legacy, and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such fifth portion, should be divided among all the grandchildren then living in equal shares, they taking *per capita* and not *per stirpes*. *Remillard* v. *Chabot*, 33 S. C. R. 328.

Substitution of legatees.] — In a legacy to the children of the testator with substitution in favour of their children, by roots, the provision whereby in the event of the death of one of the institutes without children or leaving children who die in minority, his share will revert to his brothers and sisters, will not prevent, if the death of an institute is followed by that of one of his minor children, another child surviving, the share of such deceased minor child from accruing to its legal heirs, subject to the resolutory condition, if it occurs, resulting from the surviving child dying during minority without leaving children. *Turcotte* v. *Skelly* (1910), 38 Que. S. C. 505.

Substitution or usufruct.] — In the interpretation of a will, if it is doubtful whether a certain provision creates a substitution or a legacy of usufruct and bare property, the decision must be in favour of a substitution. 2. There is a substitution when there are in one provision two successive gifts, a period of time between, and a successive order. 3. If the testator in disposing of his property does not say, whether it is absolutely or by way of usufruct, it will be held to be absolutely. 4. The following clause in a will creates a substitution: "I will, devise, and bequeath unto my beloved wife . . . . . all my property and estate . . . to be enjoyed by her only during her natural lifetime. I will, devise, and bequeath unto . . . my beloved brothers and sisters all my property and estate . . . . to be enjoyed by them in absolute property and ownership, share and share alike, but only from and after the decease of my said wife." *Ryan* v. *Ryan*, 22 Que. S. C. 174.

Substitution or usufruct.] — The following clause in a will effects a substitution and not a bequest of usufruct and bare

property:—"I will and bequeath to my well beloved wife . . . the enjoyment and usufruct during her life of all the property, movable and immovable, and the proceeds and revenues thereof of whatsoever nature and of whatsoever amount and wheresoever situated and title deeds, papers, rights of action, and other things generally whatsoever I shall leave at the date of my decease without excepting or reserving anything, for my said wife to enjoy the usufruct during her life and as long as she remains my widow without being obliged to give security nor to take any inventory nor to render an account to any one; and I forbid by this my will my children or any other person in any way to force my said wife to render an account of to make an inventory; but on her re-marriage, if she should re-marry, I will and intend that she shall render an immediate account to the children born of our marriage and afterwards make a good and true inventory; and the property in all such my said effects, movable and immovable, title deeds, papers, and rights of action, shall then belong to our said children as at the death of their mother my said wife." *Cabana* v. *Latour*, 24 Que. S. C. 83.

Succession to estate of alien—*Laws of England as to who are aliens.*]—In 1831, an alien could not devise by last will and testament. The succession of an alien then devolved to his grandchildren, natural born British subjects, to the exclusion of his own children who were aliens. Who is an alien? is a question to be decided by the law of England, but when alienage is established the consequences which result from it are to be determined by the law of Canada. If an alien dies, without issue, his lands belong to the Crown, but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and then all the children inherit as if they were natural born subjects. Where an alien has a son who is also an alien, the children of the latter inherit from the grandfather to the exclusion of their father. Although an Act of the Legislature passed after judgment rendered in a Court of original jurisdiction may affect the rights of a party as they existed at the institution of a suit, this circumstance cannot be taken advantage of in the appeal from the judgment. Judgments of the Court of Appeal for Lower Canada, and of the Court of King's Bench at Montreal, affirmed. *Donegani* v. *Donegani* (1835), C. R. 1 A. C. 50.

Tenant for life — *Renewal of lease—Carrying on business—Profits—Account.*]—A testator devised and bequeathed all his property real and personal to his wife, "to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again" to named members of his family. At the time of his death he was carrying on business as a brickmaker upon premises leased by him, he having the right to take clay. The widow, with the assent and co-operation of members of the family, carried on the business and developed it, using the plant and renewing it when necessary, and when the lease fell in some years after the testator's death she took a new lease of the same premises, and at her death the business had increased very much in value:—*Held*, that the personal estate should have been converted into money and not used in specie by the widow, but that having been so used the increased value of the business enured to the benefit of the remaindermen, and did not form part of the widow's estate. Judgment of a Divisional Court, 32 O. R. 36, 20 C. L. T. 255, affirmed. *Wakefield* v. *Wakefield*, 21 C. L. T. 367, 2 O. L. R. 33.

Terms of codicils—*Republication of will—Substituted gift — Intention — Extent of rule—Incidents of legacy—Effect on residuary clause.*]—General rule of construction. Where a legacy is given by codicil as a mere substitution for another, providing it is consistent with the scope of the rest of the will, the substituted gift is subject to the incidents and conditions of the original, although it is not so expressed in the testamentary instrument. A testator died having made a will and two codicils. By the will he left certain sons specific legacies and also a proportionate part of the residue, bearing ratio to the specific legacies; by the codicil he left his sons specific legacies of greater dimensions in the place and stead of the amount bequeathed in the will. In the second codicil he revoked the sums granted to one son, but the revocation was not to apply to the residuary paragraph in the will. In all other respects the will was confirmed.—Middleton, J., *held* that the giving of the increased legacy by the codicil did not in any way alter or enlarge the legatees' rights under the residuary clause.—Divisional Court affirmed the judgment of Middleton, J. *In re Courtauld*, 1882, W. N. 185, 47 L. T. R. 647, distinguished. *Re Hunter* (1911), 19 O. W. R. 338, 2 O. W. N. 1166.

Testator gave the sole use of a farm to his widow until his son John became 21. John then was to get the east of and half of all property on farm at that time. They might then work farm together, or if widow was tired of working the place, then John was to have the full management, but was to support his mother during widowhood, aid his four sisters until of age or married, at which time each sister was to receive £10, etc.:—*Held*, (1) that the claims the sisters had to legacies under the will were barred by Statute of Limitations. (2) That the three sisters who had remained out of possession for the statutory period were barred by the statute. (3) That the son and the sister who had remained in possession were entitled to a two-fifths interest of the farm as tenants in common and to a three-fifths interest of the estate *pur autre vie* of the married sisters. (4) That John was entitled to remainder in fee. Judgment of Falconbridge, C.J.K.B. (1909), 13 O. W. R. 86, varied. *McKinnon* v. *Spence* (1909), 14 O. W. R. 1144, 1 O. W. N. 240; 20 O. W. R. 57.

Testator's children to take equal shares in the residue at majority — *Accumulations of income during minority of donee.*]—The testator gave to each child an equal share of the income of the whole of his residuary estate subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate:"—*Held*, that according to the true construction of this provision the accumulations of each share during conventional minority were in-

tended to increase the general residuary estate of which each child was entitled to a share at twenty-five and not for the exclusive benefit of the sharer. *Fulford & Hardy*, [1909] A. C. 570.

Testator's intentions — *Annuity to widow — "Shall pass unclouded"—"Condition of title."*]—Testator willed lands to his son for life subject to an annuity to his widow:—*Held*, that after the death of said son, the widow had no charge upon the lands for her annuity on the ground that the only interest charged with the annuity was that which the son received. The charge could not extend to that which he did not receive, viz., the reversion which passed to his children, "unclouded by condition of title." See 1 O. W. R. 427. *Re Padget* (1909), 14 O. W. R. 1069, 1 O. W. N. 202.

Trust — *Annuity — Request — Transfer of fund.*]—The testator by his will conveyed property to trustees upon trust to pay to his daughter an annuity of $1,000 during her life, and on her death to invest the securities set apart to pay the annuity and to divide such investment among his daughter's children on the youngest coming of age. The will then provided that should the daughter be alive on her youngest child coming of age, the daughter, if she should see fit, might have and receive from the trustees the fund set apart to yield the annuity, and the same should be absolutely assigned to her, free from all control of her husband. The youngest child came of age in the lifetime of the daughter, who died without making a request to have the fund transferred to her:—*Held*, that there was an absolute trust in favour of the children, which would not have been defeated had the request been made. *In re Fisher Trusts*, 3 E. L. R. 492, 3 N. B. Eq. 536.

Trust — *Charitable — Creation of bishopric — Contingency — If happens — Valid transfer to another charity — After 25 years — Rule against perpetuities — Effect of will.*]—Testator left an estate of $99,003, of which $44,000 was in real estate and Hudson Bay Co. shares. This latter sum was left in trust to supply an income for a Bishop of Cornwall, or if such a Bishop was not elected within 25 years after the testator's death, the money was to go to the University of Bishop's College, at Lennoxville, for the endowment of a Professorship of Natural Science.—Boyd, C., *held*, that there was an immediate gift for charitable uses delayed as to the actual conveyance till the secured debts were paid, and, therefore, vested at the death and effective in law, though the particular application of the gift might be in suspense for 25 years, or might never take effect at all, in which contingency there was a valid transfer to another charity at the end of 25 years: That the will did not offend against the rule concerning perpetuities. *Re Mountain* (1910), 17 O. W. R. 448, 2 O. W. N. 246.

Trust — *Conditional devise.*]—A will provided as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same;" and appointed executors:—*Held*, affirming the judgment appealed from, 38 N. S. R. 60, that the widow took the real estate in fee, with power to dispose of it and the personality whenever she deemed it was for the benefit of herself and her children to do so. *McIsaac* v. *Beaton*, 26 C. L. T. 188, 37 S. C. R. 143.

Trust — *Next of kin.*]—H., by his last will, after bequeathing certain legacies, made the following bequests:—"I give and bequeath seven hundred dollars to A. of Charlottetown, in the Province of Prince Edward Island, to pay any money that I may leave an order for, and also to pay my funeral expenses, also to pay himself for his time and trouble." There was no residuary clause in the will. He appointed B. and C. executors of his will; they renounced, and administration *cum testamento annexo* was granted to A. Testator left no order to pay any money, and A. claimed the balance of the $700 after payment of the funeral expenses:—*Held*, that A. was a trustee of the sum of $700, and after payment of debts, funeral and testamentary expenses, and of a reasonable sum for his trouble in carrying out the trusts of the will, he held the balance in trust for the next of kin. *Trainor* v. *Landrigan*, 21 C. L. T. 515.

Trust — *Obligation — Restraint against mortgaging — Trusts.*] — Testator willed property to applicant "with the wish that he may keep the same free from mortgage as a summer residence for himself and children."—Middleton, J., *held*, that the above words created no obligation or trust upon applicant; that he was owner in fee and could sell it. The question as to the validity of the provision against mortgaging was not considered as applicant desired to sell the property. *Re Williams*, [1897] 2 Ch. 12, specially referred to. *Re Bolster* (1910), 16 O. W. R. 986, 2 O. W. N. 54.

Trust — *Precatory trust — Power — Execution of.*] — A testator whose mother owned an estate for life in a farm in which he had the remainder in fee, by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother, after his death, conveyed the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will, or anything indicating on its face that it was executed in pursuance of a power or trust:—*Held*, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created or a power, inasmuch as, even if a trust was created in the mother, the conveyance by her operated, and was intended to operate, as an execution of the trust, although the whole of the property was granted to one daughter only. *Pettypiece* v. *Turley*, 13 O. L. R. 1, 8 O. W. R. 617.

Trust — Vesting of fund — Representatives of deceased beneficiaries. *In re Sterns*, 4 E. L. R. 138.

Trusts — *General intention of testator —Costs.*]—Testatrix by her will gave an annuity to M. so long as she remained single. M., before the date of the will, had been married and divorced *a vinculo* to the knowledge of the testatrix:—*Held*, that M. was entitled to the annuity. The testatrix also made provision for establishing a home for old ladies, B. to live at this home for her life. It turned out that the funds to establish this home were inadequate. B. was given under the special circumstances herein $300 until the home was established. *Morrison* v. *Bishop of Fredericton*, 7 E. L. R. 277.

Trusts — Power to appoint new trustee —Persons to exercise power — Time for exercising — Death of trustee after death of testator — "Surviving brothers and sisters" — "Then" — Action — Parties — *Cestuis que trust*. *Saunders* v. *Bradley*, 6 O. W. R. 436.

Trusts — *Provision for the appointment of new trustee — Construction — Person to exercise powers — Time for exercising.*]— A testator appointed his two brothers executors and trustees of his will, and provided that in the event of the death, liability, or refusal to act of either of them, "then my surviving brothers and sisters or a majority of them shall by an instrument in writing . . . . appoint a new trustee, etc. The testator died in 1899, and probate was granted to the two brothers, one of whom died in the same year. In 1900, by an instrument in writing, a majority of the brothers and sisters of the testator then living (one other brother having also died in 1899, after the testator) appointed the plaintiff a trustee in place of the deceased executor:—*Held*, that the appointment was valid. The power to appoint a new trustee became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death; and it was the survivors of the brothers and sisters at the time of exercising the power, or a majority of them, who had the power to appoint. *Saunders* v. *Bradley*, 23 C. L. T. 263, 6 O. L. R. 250, 2 O. W. R. 697.

Use of property for life — *Power of disposition — Intention of testator.*]—Testator by his will gave to his wife C. M. the use, rents, and proceeds of all his remaining real estate, personal property, mortgages, notes, etc., for her own use during her lifetime. At the death of his wife he devised the house and contents to A. M. for her own use and benefit during her lifetime, and at the death of A. M., he devised to his nephews and niece named, the said house and contents "as well as any money or securities which may remain after the death of my wife, C. M.:"—*Held*, that the disposal of any property which might remain over at the death of C. M. shewed an intention to give C. M. the disposition of the property during her lifetime. *In re Thompson's Estate*, 14 Ch. D. 263, and *Constable* v. *Bull*, 3 DeG. & Sm. 411, followed. *Re McDonald*, 35 N. S. R. 500.

Usufruct — *Substitution — Partition between institutes — Validating statute — Restraint on alienation — Interest of substitutes — Devise of property held under partition — Devolution of corpus — Accretion — Res judicata.*]—The effect of the statute 60 V. c. 95 (Q.), respecting the will of A. P., read in conjunction with the provisions of the will and codicils, is to declare the deed of partition between the beneficiaries thereunder final and definitive and not merely provisional; the judgment of the Court of King's Bench upon that statute has no other effect. Neither the statute nor the judgment sanctions the view that the will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees, and consequently accretion takes place among them, within the meaning of Art. 868, C. C., in the event of any legacy lapsing, under the terms of the will upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves upon the other joint legatees, as well in usufruct as in absolute ownership, and consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution. *De Hertel* v. *Goddard*, 66 L. J. P. C. 90, distinguished. Judgment in *Prévost* v. *Prévost*, 28 Que. S. C. 257, reversed. *Prévost* v. *Lamarche*, 28 S. C. R. 1.

Usufruct legacy.]—The legacy of an usufruct, made in express terms, cannot be considered as creating a substitution from the sole fact that the clause whereby the testator disposes of the ownership of his estate concludes with the words "and at the death or re-marriage of my said wife (the usufructuary), etc.," particularly when, considered as a whole, the will sufficiently constitutes a legacy of an usufruct. *Douglas* v. *Fraser* (1910), 20 Que. K. B. 144.

Validity of bequest for perpetual care of testator's grave — *Residue to executors — Charitable trust — Object unspecified — Void for uncertainty.*]—Motion by executors under C. R. 938, for construction of will of John Cronin. Clause 3 of will directed his executors to purchase a lot in St. Mary's Cemetery, Kingston, for testator's grave, and set aside a sufficient sum to provide for its perpetual care: —*Held*, that this direction was valid and that a sum reasonably sufficient for the purpose mentioned could be appropriated by the executors out of said estate, or if the governing body of the cemetery would undertake the perpetual care of graves within its limits, then the executors could pay to them such reasonable sum as might be required for such care of testator's grave. Clause 7 of the will gave the residue of the estate to the executors absolutely, to be used as they deemed best, trusting that they spend it upon some charitable object, but leaving their discretion absolutely unfettered as to that. —*Held*, that the testator did not intend to give the residue of his estate to the executors for their own use. By clause 6 he bequeathed to each of them $100, exclusive of their commission. Clause 7 should be construed so that the residue should be absolutely used upon and for some charitable object or objects. No trust being created in favour of any particular charity, the gift of residue was not a good charitable bequest, but void for uncertainty. Costs of all parties out of the estate. *Re Cronin* (1910), 15 O. W. R. 819.

Vendor and purchaser—*Petition under Act—Trust or power to sell lands—Intention—Exercise of power—Costs.*]—Falconbridge, C.J.K.B., *held*, that powers expressly given under a will are not to be cut down unless the intention so to do is perfectly clear. Vendor declared to have a good title. No costs. *Re O'Byrnes & Swan* (1910), 17 O. W. R. 1050, 2 O. W. N. 474.

Vendors and Purchasers Act — *Application under — Order declaring good title.*]—Application by two sisters as vendors, under the Vendors and Purchasers Act, for an order declaring that they could make a good title to certain lands under the will of their father:—*Held*, that there were several events not provided for in the will, but the event of the two daughters dying without issue was definitely provided for and they could not give an estate in fee. *Re Nichol & Reardon* (1910), 16 O. W. R. 48.

Vested estate—*Divestment of part on marriage—Trust—Inconsistent with absolute interest—Only to take absolutely if certain events happen—Executor not to hand over estate—Costs out of estate.*]—Judgment of Falconbridge, C.J.K.B., 17 O. W. R. 658, 2 O. W. N. 329, affirmed with a variation. *Re Graham* (1911), 18 O. W. R. 376, 2 O W. N. 608.

Vested estate — *Period of distribution—Distribution on youngest child attaining majority — Death of child — Right of surviving husband.*] — A testator by his will gave all his property, real and personal, to his wife for life, and after her death, and on the arrival of the youngest child at the age of 21 years, the property was to be equally divided amongst all his children, the children of any deceased child to take the parent's share. A daughter died during her mother's lifetime, but after the youngest child had attained her majority, leaving a husband surviving her, but no issue:—*Held*, that the children being referred to as a class and not nominatively, as each respectively attained majority, their respective shares became vested; but that any child who died short of that age took nothing, and that the deceased daughter's share was equally divisible between her husband and next of kin. *Re Stainsby*, 9 O. W. R. 839, 14 O. L. R. 468.

Vested estate — *Trust — Condition—Intestacy.*]—The testator by his will bequeathed all his property to his executors upon certain trusts. One bequest was a sum of $20,000, "in trust that the trustees, etc., do pay the income and interest thereof" unto his daughter, H. M., wife of E. C. M., half-yearly, "during her natural life," and it was further provided as follows: "And from and after the decease of my said daughter, H. M., I will and declare that the said trustees, or the survivor of them, etc., do, and shall pay and distribute said principal sum of $20,000 above mentioned to, between, and among the children of my said daughter H. M., and their legal representatives, respectively, equally, share and share alike, to their own use and uses forever." H. M.'s son, S. K. M., was living at the death of the testator, but died soon afterwards, intestate and unmarried. H. M.'s other children died before the testator: —*Held*, that the share, or estate in remainder, vested in S. K. M. at the testator's death; that the trust existed and was declared, and the other words were a mere direction to pay from and after the life tenant's death.—The Court is always slow to construe the words of a testator as importing a condition, if a different meaning can fairly be given to them. In construing a will the Court will prevent an intestacy if the language will reasonably admit of that being done. So, the Court always favours a vesting. *Caie* v. *Moulton*, 40 N. S. R. 308.

Vested estates — Survivorship — Sale of land — Death of devisee before sale. *Re McIntyre*, 6 O. W. R. 392.

Vested estates in remainder — *Construction — "Family" — Children of testator's children — Distribution per capita — Partition or sale.*]—Plaintiff was one of the beneficiaries under the will of deceased. Defendant George Harkness was a son of deceased, and was the sole surviving executor under the will. The testator died on 25th June, 1872, having made his last will, dated 16th June, 1870, as follows:—"I will that my son Archibald and my daughter Mary have (after the death of my wife if she survives me) the life use of all my real and personal property to hold to them jointly during their natural lives if they survive me, and to the longest liver of them. "4. I will that, after the death of my wife and my son Archibald and my daughter Mary, all real property belonging to me shall be divided into three equal portions and distributed as follows: one portion to my son James's family, one portion to my son George's family, and one portion to my daughter Margaret's family. Testator's widow died on 24th July, 1884, the son Archibald on 7th July, 1894, and Mary on 2nd February, 1902. Probate was granted to defendant George Harkness on 20th June, 1902:—*Held*, the word "family" in the fourth clause of the will meant the children of the testator's sons James and George and daughter Margaret. It was clear that the estates of the children of the testator's sons James and George and of his daughter Margaret became on the death of the testator vested estates in remainder, subject to the respective life estates of the widow and of Archibald and Mary. *Harkness* v. *Harkness*, 6 O. W. R. 122, 9 O. L. R. 705.

Vested estates subject to be divested—Period of ascertainment of class—Unborn children—Persons interested — Representation — Parties. *Re Walton*, 13 O. W. R. 87.

Vested interest subject to be divested — Codicil — Gifts made in will not affected by — Residue — Division among legatees — Persons entitled to participate — Time of distribution — Devise of homestead — Discretion of trustees—"Expenses" — Revenue duties. *Re Meudell*, 11 O. W. R. 1093.

Vesting of shares — "*Divide and pay*"—*Survivorship.*] — A testator by his will directed his executors and trustees "to divide all my estate, share and share alike among my children, and to pay" his or her

share to each upon their respectively attaining twenty-one or marrying. The income, and if necessary part of the *corpus*, was to be expended upon maintenance and education, and regard was to be had to this necessity in paying over any share. If none of his children survived the testator, the estate was to go to charitable institutions:—*Held*, that the direction to divide could not be severated from the direction to pay, and that consequently the shares did not vest, but the share of a child who survived the testator, and died before the time for payment arrived, was divisible among the children who survived until that time. *Re Sandison*, 5 W. L. R. 316, 6 Terr. L. R. 313.

Void devise of life estate — *Acceleration of remainder.*]—A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease without heirs" she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will:—*Held*, following *Aplin* v. *Stone*, [1904] 1 Ch. 543, that the will must be construed before the effect of the devisee being a witness could be considered; that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children.—*Held*, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once. *In re Maybee*, 24 C. L. T. 399, 8 O. L. R. 601, 4 O. W. R. 421.

Widow as usufructuary — Substitution — Deed — Validity. *Whelan* v. *Whelan*, 5 E. L. R. 453.

Wills Act, s. 36—*Executors—Passing accounts—Costs.*] — Mother willed daughter about $600. Daughter predeceased mother, leaving a will wherein she bequeathed any property which might come from her mother's estate.—Middleton, J., *held*, that the Wills Act, s. 36, applied and effect should be given to both wills as if daughter had died immediately after her mother. There was no necessity for an application to the Court. No costs of motion allowed, and executors not to be allowed their costs on passing their accounts. A fee of $10 may be then allowed for obtaining counsel's advice. *Re Mathe* (1910), 17 O. W. R. 656, 2 O. W. N. 327.

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3. DEVISE SUBJECT TO RESTRAINT ON ALIENATION.

Construction — *Exercise of power.*]—A testator devised land to his daughter subject to the following conditions: "My said daughter shall not sell or will or dispose of this 100-acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dispose of it if it is her will to do so." By her will, the daughter assumed to charge upon the land two legacies, and directed that her husband might occupy the land for one year after her death, and, subject to these charges and her debts and testamentary expenses, devised the land to her executors upon trust for the plaintiff, one of the testator's grandchildren, as beneficial owner. There were several other children and grandchildren of the testator surviving:—*Held*, that the restraint on alienation in the testator's will was valid, and that, inasmuch as the daughter's will must be held to have been made by her in pursuance of the power of disposition given her by him, though she intended to defeat the restraint against alienation by indirect means, the legacies in her will failed, as also her devise of the right of occupation in favour of her husband, and the plaintiff took the whole property free from any condition. *Rogerson* v. *Campbell*, 10 O. L. R. 748, 6 O. W. R. 617.

Partial restriction — "*Mortgaging or selling*" — *Vendor and purchaser.*] — A testator by his will, after directing payment of his debts, funeral and testamentary expenses, devised to his son W. M. certain lands, "subject to the following conditions, reservations, limitations therein," (directing the payment of two sums of money), "to have and to hold the same unto the said W. M., his heirs, executors, administrators, and assigns forever:" and, after making four other devises of other lands to four other sons, provided as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement, the executors will see that the same will remain in the Martin estate." W. M. was one of the executors named in the will. The sons became indebted, and neither they, nor the daughters, nor the widow, nor the executors, were in a position to purchase the land, and W. M. agreed to sell the land devised to him:—*Held*, that the restraint on alienation was valid, and that he could not make title.—Review of the cases here and in England.—*In re Macleay*, L. R. 20 Eq. 186, followed.—*In re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801, not followed. *Re Martin & Dagneau*, 11 O. L. R. 349, 7 O. W. R. 191.

Partial restriction — Validity. *Re Porter*, 8 O. W. R. 588.

Substitution — *Restraint on alienation —Statute.*]—A clause in a will providing for the substitution of immovables upon the condition "*que mes biensfonds ou immeubles, de quelque nature et qualité qu'ils soient, passent en nature à mest dits petits-enfants* (the substitutes), *et qu'en conséquence, ils ne puissent être en tout ou en partie vendus ou aliénés par quelqu'autorité que ce soit, ni sous quelque prétexte que ce puisse être, me sous celui du plus grand avantage de mes dits petits-enfants*," does not take the property out of the operation of 61 V. c. 44 (Q.), which provides that substituted property may be definitely alienated, when such alienation is to the interest of the institute and of the substitute. The above prohibition to alienate adds nothing to the substitution under which, taken alone, the property is intended to pass to the substitute, and the statute is enacted for the purpose of defeating that intention, in the case it contemplates. *Prévost* v. *Prévost*, 27 Que. S. C. 490.

4. EXECUTION, TESTAMENTARY CAPACITY, AND UNDUE INFLUENCE.

Acknowledgment — *Evidence — Appeal.*]—In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers, and if she wished the two persons present to witness it, and she answered "yes." Each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed, and his decision was affirmed by the Supreme Court of Nova Scotia, 24 C. L. T. 141, 36 N. S. R. 482; — *Held*, affirming the judgments, that two Courts having pronounced against the validity of the will, such decision would not be reversed by a second court of appeal. *In re Cullen*, 25 C. L. T. 54; *McNeil* v. *Cullen*, 35 S. C. R. 510.

Action for revocation of probate of will and to establish later will — Authenticity of document discovered nine years after testator's death — Evidence — Handwriting — Experts. *Foulds* v. *Bowler* (Man.), 8 W. L. R. 180.

Action to establish — *Proof in solemn form — Testamentary capacity — Costs — Order XXI., Rule 18, S. C. R.*] — Upon proof in solemn form of the due execution of a will and the mental competence of the testator, the will was admitted to probate, by a decree in an action brought to establish the will. Under Order XXI., Rule 18, S. C. R., the defendant was *held* not liable for costs, the trial Judge considering that there were grounds for opposing the will. *Forrest* v. *Spears* (1910), 13 W. L. R. 45.

Action to establish lost will—*No jurisdiction in High Court to hear—All jurisdiction in Surrogate Court—Action dismissed with costs.*]—Plaintiff brought action to establish the lost will of Andrew Alexander and to declare that the executor named therein was entitled to probate.—Middleton, J., *held*, that the High Court has no jurisdiction in such a matter, it being within the jurisdiction of the Surrogate Courts. Action dismissed with costs. *Mutrie* v. *Alexander* (1911), 18 O. W. R. 836, 2 O. W. N. 884. O. L. R.

Action to set aside — Application for probate — Withdrawal of caveat — Burden of proof — Want of testamentary capacity —Undue influence. *Northmore* v. *Abbott*, 1 O. W. R. 231, 2 O. W. R. 314.

Action to set aside — Costs — Separate defence. *Slaven* v. *Slaven*, 1 O. W. R. 410.

Action to set aside — *Pleading — Absentee — Existence of.*]—The plaintiff suing in the name of an absentee to set aside a will must allege that the absentee was in existence at the time of the opening of the succession. *Tetreault* v. *Rochon*, 6 Que. P. R. 235.

Action to set aside — Testamentary capacity — Undue influence — Costs. *McFadyen* v. *McFadyen*, 2 O. W. R. 528.

Action to set aside — *Undue influence — Senile dementia — Costs.*]—The testatrix died in her 90th year, leaving no near relatives. Defendant, a neighbour, had taken care of testatrix, and did much for her. The testatrix made several wills; each subsequent will defendant was given additional property until the last will gave her nearly all the estate of the testatrix. In an action to set the will aside it was *held*, that the evidence shewed no undue influence or fraud, but on the contrary, that the testatrix was a woman of strong will power and determination, who had viewed the defendant with ever increasing favour during a lengthy period of close intimacy. Action dismissed, but without costs owing to the fact that no independent person was called in during the preparation of the will, nor in the reading and explaining of it to testatrix. *Malcolm* v. *Ferguson* (1909), 14 O. W. R. 737, 1 O. W. N. 77.

Action to set aside — *Undue influence.*] — Where defendant had appeared on an examination for discovery, but on advice of her counsel had declined to write certain names, *held* that she should not be required to re-attend and write as requested. *Cook* v. *Winegarden* (1909), 14 O. W. R. 733, 1 O. W. N. 75.

Action to set aside and to establish a prior will—*Ground, incapacity of testator —Fraudulent conspiracy—Undue influence.*] —An action to set aside a will and to establish a prior will on the ground that testator was not competent to make the will in question and that the same was obtained by fraudulent conspiracy and under influence of his sons Allan and Albert. The testator had reached the age of 77, and was possessed of an estate of about $19,000. Of his six children, three sons survive. The deceased children left no issue, but one of his sons made an assignment for the benefit of his creditors in 1905.—Latchford, J., *held*, that it was for the brothers Allan and Albert, to establish to the satisfaction of the Court that the instrument put forward as the last will of their father was executed while he was in a free and untrammelled state of mind. That, where a person gives instructions for a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. That the onus lay upon the sons who gave the instructions for the new will, to shew as persons profiting by the change that the alleged will was the free and uninfluenced act of the testator and that this onus had not been discharged. The latter phase of the action was not considered. Judgment in favour of the plaintiff declaring the will in question was not the last will of the testator. Costs of plaintiff and Official Guardian out of estate. *Quickfall* v. *Quickfall* (1911), 19 O. W. R. 113, 2 O. W. N. 1127.

Action to set aside will — *Insanity of testator — Proof of — Undue influence.*] —A universal legatee under a prior will, plaintiff in an action to set aside a subsequent will upon the ground of insanity of the testator, will be allowed to prove facts occurring before both wills, in order to establish the intellectual condition of the testator at the period of the will which he attacks.—2. Incapacity to make a will by reason of insanity cannot be proven from facts establishing simply failures of memory, oddity or eccentricity of ideas, momentary lapses of thought, and weakening of the mind caused by old age.—3. Influence and suggestion are not grounds for setting aside a will unless they result from fraud and deceit, corrupt practices, or lying insinuations, which have deceived the mind and imposed upon the will of the testator. An inference of such practices cannot be drawn from means employed by a person benefited by the will to attract the good will of the testator as long as there is no practice which prejudices his moral liberty. *St. Andrew's Church* v. *Brodie*, 14 Que. K. B. 149.

Action to set aside will — *Testamentary capacity — Drunkenness — Sober intervals.*]—A will made at a time when the testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside, where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk. *Campbell* v. *Campbell*, 5 W. L. R. 59, 6 Terr. L. R. 378.

Attempted revocation by new instrument — Failure of attempt by reason of husband of sole devisee attesting instrument — Destruction of original of former will — Production of copy — Admission to probate — Dependent relative revocation. *Re Tuckett*, 9 O. W. R. 979.

Attestation — *Subscription of witnesses to affidavit, instead of to attestation clause—Validity.*]—At the execution of the last will of the deceased in Portland, Oregon, instead of the usual attestation clause, the attorney substituted a formal affidavit of execution commencing just below the signature of the testatrix and extending over part of another page. This affidavit was then signed by the witnesses in the presence of the testatrix and sworn to by them. Their evidence shewed that they intended to and did witness the will, and also intended to subscribe it as witnesses: — *Held*, that s. 5 of the Wills Act, R. S. M. 1902 c. 174, had been sufficiently complied with, and that the will had been validly executed. *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300, followed. *Re Harvie*, 7 W. L. R. 103, 17 Man. L. R. 259.

Attestation — Two attesting witnesses —Addition of signature of sole devisee apparently as witness — Affidavits—Explanation that signature not so intended — Admission to probate. *Re Lomas*, 9 O. W. R. 975.

Bequest of personal estate to tutor —"*Coutume de Paris.*"] — *Held*, that a minor of the age of twenty could bequeath personal property in Lower Canada to a tutor. *Durocher* v. *Beaubien* (1828), 1 C R A. C. 1; Stuart 307.

Captation — *Suggestion — Undue influence — Interdiction — Evidence—Onus —Appeal.*]—The existence of circumstances which might raise suspicion that the execution of a will was procured by captation, improper suggestions, or undue influence on the part of those promoting it, is not a sufficient ground to justify an appellate Court in interfering with the concurrent findings of the Courts below as to the validity of the will. Judgment appealed from, 17 Que. K. B. 215, affirmed; Girouard and Maclennan, JJ., dissenting. *Laramée* v. *Ferron*, 41 S. C. R. 391.

Codicil — *Increase of amount of legacy.*] —A codicil to a will, executed shortly before the testator's death, increased the provision for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece: — *Held*, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick, JJ., dissenting, that, as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece, even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence.—*Held*, also, following *Perera* v. *Perera*, [1891] A. C. 354, that, even if there was ground for saying that the testator was not at the time capable of making a will, the codicil would still have been valid. *Kaulbach* v. *Archbold*, 22 C. L. T. 9, 31 S. C. R. 387.

Codicil — *Suspicious circumstances — Testimony of beneficiary — Competency of testator.*]—A testator by his will among other annuities, gave one to K. of $600. By a codicil, executed in the following year, he increased the amount to $800. By a second codicil, executed some years later and shortly before his death, he increased the annuity to $1,000 and provided that, on the death of any of the annuitants, the amount should go to the survivor or survivors for life. There was evidence that K. had been actively concerned in procuring the execution of the second codicil; there were some suspicious circumstances as to the time and manner of execution; there was no evidence, except that of K., to shew that the testator had even seen the codicil before he executed; there was evidence of delusions on his part as to his will and the property he had to dispose of; and the witnesses to the execution were of opinion from his demeanour, that he was not at the time in a condition to transact any important business. On petition by the executors for proof in solemn form, the second codicil was rejected by the Surrogate Judge:—*Held*, affirming his decision, that it was open to him to discredit the testimony of K., and he having done so, the Court ought not to interfere with his finding. 2. That K. being the principal beneficiary under the codicil, and the principal witness in support of it, and having had knowledge of it, and been a party to promoting its execution, was required to reasonably satisfy the mind of the Court. *In re Archbold*, 34 N. S. R. 254.

Compliance with provisions of statute—Mental capacity — Suspicious circumstances — Knowledge and approval of contents of will—Onus probandi. *Re Murphy* (P.E.I. 1911), 9 E. L. R. 410.

Concurrent findings of fact by Courts below — *Gifts in expectation of death.*]—Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—*Held*, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered.—*Held*, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under Art. 762 of the Civil Code, where there was neither allegation nor evidence that they were made in expectation of death. The proviso in that article, "unless circumstances tend to render them valid," requires that those circumstances should be investigated. *Archambault* v. *Archambault*, [1902] A. C. 575.

Defective execution — Witnesses not present — Testimony of witnesses—Refusal to establish will — Preparation by beneficiary — Suspicious circumstances. *Connell* v. *Connell*, 3 O. W. R. 35.

Delusions — *Onus — Evidence of parties — Interest — Corroboration.*] — In March, 1897, testator made a will revoking a prior will made in 1890, materially reducing bequests to his wife and son, and giving away large portions of his estate to collateral relatives. The evidence shewed that, at the time of the making of the second will, the defendant was suffering from certain insane delusions as to the relations existing between his wife and son, and that the disposition of his estate made by the second will was affected by such delusions:—*Held*, that the decree of the Judge of Probate, admitting the second will to probate, must be set aside, and the will declared inoperative and void. The existence of the delusion being established, the burden rested upon the parties setting up the second will to shew that it was made during a lucid interval. The objection that important testimony had been given by the wife and son, who were interested parties, lost the force that it would otherwise have had, where their testimony was corroborated in all essential particulars by disinterested witnesses. The provision of the Witnesses and Evidence Act, R. S. N. S., 5th series, c. 107, s. 16, excluding parties from giving evidence of dealings, transactions, or agreements with the deceased on the trial of any issue joined, or on any enquiry arising in any suit, action, or other proceeding in any court of justice, &c., has no application to an investigation of this kind as to questions of testamentary capacity. *In re Farquharson Estate*, 33 N. S. R. 261.

Drunkenness — *Sober intervals — Unsoundness of mind.*]—A will made at a time when the testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk. *Campbell* v. *Campbell* (1906), 6 Terr. L. R. 378.

Evidence — *Art. 831 C. C. — Marriage contract — Duress.*]—Judgment of Superior Court in review, 25 Que. S. C. 275, affirmed. *Hotte* v. *Birabin*, 35 S. C. R. 477.

Evidence — *Delusions — Undue influence — Onus — Certificate of physician —Costs.*]—The best evidence of testamentary capacity is that which arises from rational acts, and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected. Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or any one capable of giving independent evidence as to the testator's intention and instructions, it will be regarded with suspicion, and its invalidity presumed, and the onus is on the part propounding it to clearly establish it. Where a physician improperly gives a certificate as to testamentary incapacity of his patient, it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto. Observations upon delusions and undue influence:—*Held*, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused. In the unusual circumstances the Court made no order as to costs. *McHugh* v. *Dooley*, 10 B. C. R. 537.

Evidence of attesting witnesses — *Presumption of validity — Infant — Voidable judgment.*]—In *McNeil* v. *Cullen*, 35 S. C. R. 516, the will in question was held not to have been duly executed. The appellant here, an infant, was not represented in the former proceedings by a guardian *ad litem*:—*Held*, that as the former judgment is voidable and must stand until reversed, the appellant cannot succeed in these proceedings. *In re Estate of Alicia Cullen*, 6 E. L. R. 298, 43 N. S. R. 149.

Execution — *Evidence — Onus — Beneficiary — Subsequent conduct of testator — Residuary devise — Trust.*]—In proceedings for probate by the executors of a will, opposed on the ground that it was prepared by one of the executors, who was also a beneficiary, there was evidence, though contradictory, that before the will was executed it was read over to the testator, who seemed to understand its provisions:—*Held*, Idington, J., dissenting, that such evidence and the fact that the testator lived for several years after it was executed, and on several occasions during that time spoke of having made his will, and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the Court that the testator knew and approved of its provisions. —*Held*, also, that where the testator's estate was worth some $50,000, and he had no children, it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.—Judgment of the Court of Appeal, 4 O. W. R. 360, affirmed. *Connell* v. *Connell*, 26 C. L. T. 383, 37 S. C. R. 404

Formalities — *Acknowledgment—Witnesses — Request — Attestation.*]—The tes-

tatrix having requested that witnesses be called in order that she might complete the execution of her will, two persons were brought, one of whom, presenting the instrument, which was signed by the testatrix, although not written by her, asked her if she was "perfectly satisfied with this," or "with this will." She answered, "I am perfectly satisfied." The two witnesses then signed the will in the presence of the testatrix and of several other persons, knowing it to be the will of the testatrix:—*Held*, that a document written in conformity to the directions of the testator, containing his wishes for the disposition of his estate, and signed by him, and also by two witnesses, is a will.—2. The acknowledgment by the testator, in the presence of the subscribing witnesses, and in answer to a question put by one of them, that the document signed is his will, is a sufficient compliance with Art. 851 of the Civil Code, which requires an acknowledgment by the testator of the signature, "as having been subscribed by him to his will then produced" in presence of the witnesses.—3. Art. 851, C. C., which says the witnesses "attest and sign the will immediately, in presence of the testator and at his request," but does not prescribe any form of request, is sufficiently complied with, where the witnesses, at the request of the testator, have been asked to come there for the special purpose of witnessing the will, although, when present, they were not personally requested by the testator to sign.—4. The word "attest" in Art. 851, C. C., means simply to sign as witness, no attestation clause being required. *Hannah* v. *Brereton*, 23 Que. S. C. 98.

Formalities — *Notarial will — Authentic form—Validity by English law—Proof of instruments — Holograph will.*] — A will drawn in authentic form, as made before a notary and two witnesses, in which no mention is made that it was read to the testator by the notary in presence of the witnesses, is invalid.—A will in authentic form, void by reason of the omission of a formality, may be valid according to another form, if it contains all that the latter requires. Therefore, a will signed at the end by the testator, in the presence of a notary and two competent witnesses present at the same time and who attest and sign it at once in the presence and at the request of the testator, although invalid according to the authentic form, because it does not state the observation of this formality, is valid according to the method derived from the law of England.—The verification of two testamentary instruments which contain the same provisions, one of which is invalid by the test of the authentic form, but valid according to the English form, and the other is holograph, may be made in the course of the suit in which they are propounded. *Blouin* v. *Le Séminaire de Rimouski*, 30 Que. S. C. 97.

Habitual drunkenness does not create a presumption of want of capacity to make a will. Proof of periods of drunkenness approaching delirium, although frequent, cannot prevail in face of the form of an holograph will, written with a firm hand, and in a handwriting which is regular and consistent, drawn in clear and rational language, particularly when the will agrees with another, made several years before, and which the testator thought had been lost, and with which, after it had been drawn, the testator on several occasions declared herself to be satisfied. *Hofman* v. *Baynes* (1910), 39 Que. S. C. 74.

Holograph — *Custom of Paris — Statute of Frauds — Will disposing of lands — What required by laws of Canada.*]— The Quebec Act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or chattels, in his or her lifetime, may devise or bequeath the same, at his or her death, by his or her last will and testament, such will being executed, either according to the laws of Canada, or according to the forms prescribed by the laws of England:—*Held*, that a will, invalid according to the French law, and not executed according to the provisions of the Statute of Frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England. *Meiklejohn* v. *Caldwell* (1834), C. R. 1 A. C. 32.

Holograph will — *Evidence — Intrinsic evidence of insanity—Probate—Onus.*]— Where an alleged testator is shewn to have been an educated person, well versed in the English language, and accustomed to speak and write it correctly, and is moreover proved to have been a confirmed dipsomaniac for 20 years, and an inmate of an inebriate asylum for 14 years preceding the date of a supposed holograph will; incorrect, ungrammatical, and meaningless language used therein is sufficient evidence that, if written at all by the testator, it was so written at a time when he was not in sound and disposing mind.—2. Probate of a will is *prima facie* evidence, under the law of Quebec, of the sanity of the testator, at the time it was made. The burthen of proof of insanity is on the party who impugns the will. *Doucet* v. *Macnider*, 14 Que. K. B. 232.

Holograph will — *Validity — Statutory formalities.*]—A will entirely typewritten and signed by the testator satisfies the requirements of Art. 850, C. C., which prescribes that a holograph will shall be written entirely and signed with the hand of the testator. *In re Aird*, 28 Que. S. C. 235.

Insane delusion.]—F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support; the son was given half the residue, and the testator's daughter the other half; his wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—*Held*, reversing the judgment in 33 N. S. R. 261, Sedgewick, J., dissenting, that the provision made by the will for the testator's wife and son, and the appointment of the former as executrix and guardian,

were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid. *Skinner* v. *Farquharson*, 22 C. L. T. 197, 32 S. C. R. 58.

Instructions for will. *Ryan* v. *Harrington*, 3 O. W. R. 685.

Lost will — *Evidence* — *Solicitor* — *Privilege* — *Declarations* — *Probate.*]—The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator, who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence. Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn, and was claiming large benefits under, the will in question, which it was alleged, had been lost or stolen. The fact that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will; were held sufficient to rebut the presumption of destruction of the will by the testator. *Stewart* v. *Walker*, 23 C. L. T. 320, 6 O. L. R. 495, 1 O. W. R. 489, 2 O. W. R. 990.

Mental capacity of testator—*Lunatic* — *Interdiction* — *Removal by judicial decree* — *Presumption of sanity* — *Rebuttal* —*Evidence.*]—A person who, after having been interdicted for lunacy, is relieved of the interdiction and assigned a *conseil judiciaire*, may dispose of his property by will. When the removal of the interdiction is decreed after a contest in Court, there is a presumption of mental capacity to make a will. Consequently, those who attack, on the ground of incapacity, a will made six days after the removal of the interdiction, must rebut the presumption and prove a change in the mental condition of the testator occurring thereafter. *Laramée* v. *Ferron*, 17 Que. K. B. 215.

Onus of testamentary capacity — Undue influence. *Purdy* v. *Purdy*, 1 O. W. R. 449.

Probate—*Proof in solemn form* — *Res judicata.*]—On petition in the Probate Court for proof in solemn form of the last will of C., the will was set aside as not properly proved, and a former will was admitted to probate. Appeals to the Supreme Court of this province and to the Supreme Court of Canada were dismissed and the judgment of the Probate Court affirmed.—Subsequently the petitioner applied to have the matter reopened, on the ground that, at the time of the former adjudication, he was on infant under the age of 21 years, and was not legally represented and some additional evidence was offered which, with the previous evidence, was regarded by the majority of the Court as leaving no room for doubt that the will set aside was duly executed: — *Held*, notwithstanding, that as the petitioner was in a sense a party to the former proceedings, although no guardian *ad litem* was regularly appointed, the judgment in such proceedings was binding upon him until set aside or reversed. *Re Cullen*, 43 N. S. R. 149, 6 E. L. R. 298.

Probate.]—Testatrix, a widow of about 85 years of age, made her will. An action for proof of said will was removed from Surrogate Court into the High Court. Objections were taken: (1) the want of testamentary capacity, and (2) undue influence.—Riddell, J., *held*, that any delusions such as were sworn to could not have influenced testatrix in making her will, and that even if testatrix had the delusions alleged, they were not capable of affecting the disposition of her property. Will declared valid and admitted to probate. *McIntee* v. *McIntee* (1910), 17 O. W. R. 302, 2 O. W. N. 202, O. L. R.

Procurement by importunity — *Setting aside* — *Construction* — *Life estate.*] —A testator had made a will on the 6th August, when he was very weak and ill. On the 9th August, when he was in the same condition, according to the medical evidence, a condition in which he would do anything and give in in anything for the sake of peace and quiet, he executed another will, upon the loud importunity of his sister, who was strong in body and will. He died on the 13th August:—*Held*, that the will so procured could not stand.—*Semble*, also, that upon the proper construction of the words of the second will, "I give . . . all my estate to my sister . . . for her own use with power to sell or dispose of the same as she may see fit . . . and after the death of my said sister, I desire the remainder of my estate, if any, to be equally divided between," etc., the sister was entitled to a life estate only. *Roman Catholic Episcopal Corporation for the Diocese of Toronto* v. *O'Connor*, 10 O. W. R. 76, 14 O. L. R. 666.

Promoter — *Evidence* — *Corroboration.*]—Where the promoter of and a residuary legatee under a will, executed two days before the testator's death, and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator, who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside.—Girouard, J., dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator.—*Per* Davies, J.,—The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will, should be

admitted to probate with it. *British and Foreign Bible Society* v. *Tupper*, 37 S. C. R. 100.

Proof of execution — *Acknowledgment —Witnesses.*]—The last will and testament of A. C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not express the true will of the deceased, that deceased did not know or approve of it, and that it was not properly executed, not having been "signed or acknowledged by deceased in the presence of two or more witnesses, present at the same time," etc. The evidence shewed that, at the time the will was executed, deceased was present, but was sitting about 15 feet away from the witnesses; that the words at the end of the will were read over in a low tone so that the witnesses were unable to say whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will when they signed, or that he saw it if it was there, and both agreed that, if the signature was there, deceased did not in their presence acknowledge it to be her signature; nor did they hear her ask the question whether it was her signature; nor was there evidence of any other act or conduct on her part which could be considered the equivalent of an acknowledgment. According to the evidence of the witnesses she said nothing, and appeared to be indifferent to what was going on. One of the witnesses was unable to say, after leaving, whether he had witnessed a will or not:—*Held*, that, assuming it to be true, as sworn by the witness in support of the will, that deceased was asked, in presence of the witnesses, whether this was her will, and whether she wished the witnesses to sign, the evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer. *In re Cullen*, 24 C. L. T. 141, 36 N. S. R. 482.

Proof of insanity — *Evidence.*]—In order to avoid a deed or will on the ground of insanity, it is necessary to look first at the instrument itself and its provisions in order to see the mental condition of the maker; and if these provisions are such as a wise and just man would make in the like case, the Judge, unless there is irrefutable proof of insanity, should treat the instrument as valid. 2. The testimony of witnesses who did not see the testator for a long time before his death, and knew nothing of his mental faculties at the time when he made his will, has no signficance, and cannot be a part of the chain of facts which constitute the general proof of insanity, unless it is sufficient in itself to annul the will, especially if there is medical testimony expressly contradicting it. *Hotte* v. *Birabin*, 25 Que. S. C. 275.

Revocation of probate — *Evidence—Appeal on facts — Parties to proceedings.*]—In 1877 the will of H. was proved in common form before the Registrar of Probate on the oath of one of the subscribing witnesses, who swore that he and the other witness signed in the presence of the testator, and in the presence of each other. The will was acted upon, and remained unquestioned for a period of twenty-four years, when, after the death of the witness on whose oath it was proved, it was set aside by the Judge of Probate, on the testimony of the remaining witness, M. H., said his brother, that M. H. did not sign his name to the will as witness, until after the testator's death:—*Held*, reversing the decision of the Judge of Probate, that, after the long lapse of time, it was impossible to accept the evidence of M. H., and his brother—both being interested parties—to establish the invalidity of the will, as against the oath of the deceased witness upon whose testimony it was proved. While some weight should be attached to the finding of the Judge of Probate, it was impossible for the Court, on appeal, to feel bound by such finding, when it appeared that he came to the conclusion he did simply on the evidence of the two interested parties, and without considering other facts bearing on the case. The devisee of a portion of the property under the will conveyed his title to a third party, and by several intermediate conveyances it came to M. *et al*, who opposed the setting the will aside.—*Held*, that M. *et al.*, as "parties interested," were competent parties, and clearly entitled to be heard, even though "parties interested" were not specifically mentioned among those to be cited.—*Held*, that the naming specifically of heirs, devisees, legatees, and next of kin, in the statute, was merely a matter of direction, leaving it open to those having an interest to intervene for the purpose of protecting their rights. *In re Hill Estate*, 34 N. S. R. 494.

Senile dementia — Insane delusions—Comprehension of terms of will — Attack on will by person accepting benefit — Costs. *McGarrigle* v. *Simpson*, 1 O. W. R. 685.

Senile insanity — *Facts indicating symptoms generally — Particular facts establishing capacity.*] — An old man of 78 years, suffering, as the result of a stroke of paralysis, from senile insanity and the symptoms whereof he shews to the time of his death, is incapable of making a will in the interval. Any sane answers he may have given on several occasions, even during a superficial medical examination, are insufficient to destroy positive evidence of his incapacity resulting from a number of facts indicating his symptoms, whether they have occurred before or after the will was made, as well as from the testimony of medical experts. *Giroux* v. *Giroux* (1910), 38 Que. S. C. 179.

Spiritual adviser — *Onus of proof.*]—The influence of a person standing in a specially confidential relation to a testator (In the present case the spiritual adviser and confessor) may lawfully be exerted to obtain a will or legacy in his favour, so long as the testator thoroughly understands what he is doing and is a free agent, and the burden of proof of undue influence lies upon those who assert it; but, if the person who obtains the benefit takes part in the actual drawing of the will, the onus is cast upon him of shewing the righteousness of the transaction. *Collins* v. *Kilroy*, 21 C. L. T. 230, 1 O. L. R. 503.

Testament authentique — *Irregularity—Validity by English law—Pleading.*]

—In an action based upon a *testament authentique*, if the defendant pleads that it is invalid as a *testament authentique* because certain formalities have not been observed, the plaintiff may reply that the will is valid as complying with the requirements of a will according to the form derived from the law of England. *Le Séminaire de Rimouski* v. *Joncas*, 3 Que. P. R. 256.

Testamentary capacity — *Undue influence — Evidence.*] — Suggestion and influence are not grounds for setting aside a will unless they amount to fraudulent practices or unless the testator is prevailed upon to such a point that he may be said to be deprived of his liberty. The most urgent solicitations and the greatest pressure brought to bear upon a testator from motives of cupidity will not suffice in the absence of fraudulent and false representations as grounds for setting aside testamentary dispositions.—2. It is not to be inferred from the fact alone that the testator in the space of 3 or 4 months before his death has made several wills with contradictory provisions, and has also made a universal gift of his property—followed at the expiration of 10 days by a solemn declaration that it was not the true expression of his will—that he had a disturbed and weakened mind to the point of not being able to make a valid will. *Dussault* v. *Morin*, 16 Que. K. B. 385.

Testamentary capacity — *Undue influence — Fraud and artifice — Improper suggestion — Captation — Importunity — Deception by beneficiary — Nullity of donation — Concurrent findings of fact — Reversal on appeal — Practice — Revocation of former will — Onus of proof.*]—The promoter of a will by which he takes a benefit is obliged to produce evidence clearly shewing that in making the will the testator acted without improper suggestion or undue influence in the revocation of a former will.—Shortly after their marriage, the testator and his wife made their wills, respectively, by which they each constituted the other general residuary legatee. A short time before the death of the testator from a wasting disease, the defendant took advantage of the testator's weakness, and by artifices and improper suggestions so influenced him as to secretly procure the execution of another will by which the former was revoked and the defendant was given the bulk of the testator's estate:—*Held*, reversing the judgment appealed from, that, under the circumstances, the insidious methods persistently made use of by the defendant amounted to captation and undue influence, and that, in the absence of clear proof that the testator was not deceived and misled thereby, the will should be annulled.—As there were concurrent findings by the Courts below against the contention that the testator was of unsound mind at the time of the execution of the second will, the Supreme Court of Canada refused to interfere on that ground. *Mayrand* v. *Dussault*, 27 C. L. T. 315, 38 S. C. R. 460.

Testamentary capacity — *Undue influence — Suggestion — Annulment.*]—A will made by a person weakened in body and mind by illness, to the point of not being able to understand the nature and bearing of the provisions which it contains, and which are proved to be contrary to the wish of the testatrix, expressed for more than thirty years and set forth in another will made two months and some days before, the new provisions being framed in confused and sometimes unintelligible language, and suggested by the person to benefit by them, and who, as spiritual director, has great influence with the testatrix, will be declared false and not the true expression of her last wishes, and therefore will be annulled and set aside. *Barbeau* v. *Feuiltault*, 17 Que. K. B. 337.

Testator insane—*Treated in hospital—Insanity different from lack of testamentary capacity—Medical evidence — Testamentary capacity defined.*]—Middleton, J., *held*, that although the testator was insane when he made his will, still he had testamentary capacity and fully appreciated the nature of his act and its effects. Plaintiff's action to set aside will, dismissed with costs, and order granted declaring defendants entitled to have the will admitted to probate upon application to the Surrogate Court.—*Banks* v. *Goodfellow*, L. R. 5 Q. B. 549 at 565, specially referred to. *Robertson* v. *McOuet* (1910), 17 O. W. R. 852.

Testator's signature — Conflict of evidence as to whether witnesses present — Lapse of time — Will drawn by person taking benefit — Onus. *Connell* v. *Connell*, 4 O. W. R. 360.

Undue influence — *Evidence — Circumstances attending execution.*]—The testator during his last illness made his will, leaving all his property to the defendant, who was not his wife, but had lived with him as such for many years, thus cutting off his only child, the plaintiff, with whom he was on friendly terms. It sufficiently appeared that he was of sound mind at the time, and evidence shewed the probability of his having been influenced to make the will in the way he did, by the action recently brought by his wife for alimony against him, and by a notion that the plaintiff had been assisting her mother in such action. The defendant was present in the room when the instructions for the will were taken by the solicitor; but, beyond the fact that she had untruly stated to the deceased during his last illness that the plaintiff did not want to visit him, there was no direct evidence of any improper influence brought to bear upon him by the defendant, and the plaintiff was compelled to rely on the general suspicion to be drawn from the surrounding circumstances:—*Held*, that the evidence was insufficient to warrant a finding that the will had been obtained by the exercise of undue influence. —It is not sufficient for that purpose to shew that the circumstances attending the execution of the will are consistent with the hypothesis of undue influence, but it must be clearly shewn that they are inconsistent with a contrary hypothesis; and it was impossible in this case to say that the circumstances surrounding the making of the will were consistent only with the hypothesis of undue influence. *Boyse* v. *Rossbor-*

ough, 6 H. L. Cas. 49. *Waterhouse* v. *Lee*, 10 Gr. 190, and *Baudains* v. *Richardson*, [1906] A. C. 185, followed.—The facts in this case did not bring it within the principle laid down by the Court of Appeal in England in *Tyrrell* v. *Painton*, [1894] P. 151. *Tellier* v. *Schilemans*, 7 W. L. R. 229, 17 Man. L. R. 262.

Undue influence — Fraud — Want of testamentary capacity — Action to set aside — Evidence — Bill of sale — Conveyance of land — Transfer of business — Absence of consideration. *Tellier* v. *Schilemans* (Man.), 7 W. L. R. 229.

Undue influence — Testamentary capacity — Evidence — Appeal—Costs. *Cornwall* v. *Cornwall*, 12 O. W. R. 552.

Undue influence — Testamentary capacity — Evidence — Demeanour of principal witness — Credibility — Character evidence — Residuary bequest to church — Alleged procurement by minister — Dismissal of action — Costs — Solicitor and client — Defendants making common cause with plaintiffs — Executors' costs. *Madill* v. *McConnell*, 10 O. W. R. 672.

Undue influence — *Testamentary capacity — Evidence — Onus — Testimony of attesting witnesses — New trial.*]—When the burden of proof has been cast upon the party upholding a will, he should call and examine the attesting witnesses, if it be possible to procure their testimony.—Order of a Divisional Court, 16 O. L. R. 314, 11 O. W. R. 345, directing a new trial, upon the ground, among others, of the unsatisfactory position in which the case was left by reason of the failure of the appellants to call the attesting witnesses, affirmed. *Madill* v. *McConnell*, 12 O. W. R. 124, 17 O. L. R. 209.

Undue influence — Want of testamentary capacity — Action to set aside — Evidence — Bills of sale — Conveyances of land — Transfer of business — Setting aside — Absence of consideration. *Tellier* v. *Schilemans* (Man.), 5 W. L. R. 536.

Undue influence — Want of testamentary capacity — Examination of conflicting evidence — Onus — Expert testimony — Change of domicil — Execution of will in foreign country — Proof of execution according to foreign law — Admission of evidence. *Hopper* v. *Dunsmuir* (B. C.), 3 W. L. R. 18.

Undue influence is a reason for setting aside a will only when it is the result of fraudulent practices. Services rendered, alacrity and assiduity shewn, care of every kind and advice given, to the testator, are not by themselves and in the absence of other reasons, unlawful acts, and, where there is no fraud, they are not sufficient to set aside the will. *Hofman* v. *Baynes* (1910), 39 Que. S. C. 74.

Unsustained charges of fraud — Costs. *Taylor* v. *Delaney*, 1 O. W. R. 208, 409.

5. LEGACIES AND DEVISES.

Ademption — Evidence. *Tuckett-Lawry* v. *Lamoureaux*, 1 O. W. R. 295. 3 O. L. R. 577.

Ademption — Parol evidence — Issue directed to be tried. *Re McKenzie*, 1 O. W. R. 739, 2 O. W. R. 1076.

Ademption of legacy — *Advancement.*]—A legacy is not revoked by a subsequent writing of the testator other than a will, unless the change of intention is thereby expressly stated. Thus, where a testator made his two sons his universal legatees, and made their legacies chargeable with the payment of certain sums to their sisters, and afterwards in the marriage contract of one of these sons he gave him the same property very nearly which he would have had as his half of the universal legacy, subject to the charge of paying to his sisters a sum equal to about half of the sums which he had designated for them by his will, the unversal legacy, as regards the half of the charges which it involved, was not revoked nor satisfied by the marriage contract. *Dagenais* v. *Robin*, 13 Que. K. B. 62.

Advances in lifetime of testator — Provision as to, in will — Interest—Period of distribution. *Re Sweazey*, 3 O. W. R. 360.

Alimentary provisions — *Aliments not declared insaisissable — Status of person attaching as debt.*] — Where sums of money and pensions bequeathed by a testator by way of aliments are seizable for alimentary debts, such an exceptional provision can only be invoked by one who has furnished aliments to the beneficiary himself. *Dupuis* v. *St. Mars*, 8 O. P. R. 170.

Bequest — *Condition — Restraint of religious liberty — Public policy — Quebec law.*] — Action by the respondent to have declared invalid, as contrary to public policy and public order, a clause in the will of his grandfather, the late Louis Renaud, to the effect that any of the testator's grandchildren who did not profess the Roman Catholic religion, or who were not the offspring of a marriage with a Roman Catholic, celebrated according to the rites of that church, should be excluded from the succession to his estate:—*Held*, that since the son of the testator (whose son the respondent was) had been married before the death of his father, the marriage could not have been in any way influenced by the condition in question, and that therefore, under these circumstances, it could not be regarded as being contrary to public order and public policy. Judgment of Taschereau, J., 20 C. L. T. 443, reversed. *Lamothe* v. *Renaud*, 21 C. L. T. 392.

Bequest to widow — Maintenance of children—Trust — Rights of children. *Re Shortreed*, 2 O. W. R. 318.

Bequest to widow for widowhood— Dower—Election—Intestacy in part—Power to sell—Conversion of realty. *Re Pollock*, 2 O. W. R. 109.

Bequest to wife — *Election—Property of wife—Mistake as to—Life insurance.*]—A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children, and the other payable to his executors for the behoof of his wife and children, directed by his will that his whole estate, including insurance moneys, should be divided one-half to his wife and the other half to his children. By a codicil he directed that "in lieu of the house and premises (describing them) deeded to my beloved wife but since disposed of and the proceeds used in the business, I give, devise, and bequeath, and hereby direct, instruct, and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not in fact been disposed of but were vested in the wife at the time of the testator's death:—*Held*, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one-half given by the codicil and the house; the two elements essential to a case of election being wanting, viz., the disposition by the testator of something belonging to a person taking a benefit under the will—while in this case there was merely an erroneous statement of fact—and a gift to that person of something in the absolute control of the testator—while the insurance money was not. Judgment of Britton, J., 3 O. W. R. 309, affirmed. *Mutchmor* v. *Mutchmor*, 24 C. L. T. 314, 8 O. L. R. 271, 3 O. W. R. 931.

Charge on land — Interest — Legatee also administrator with will annexed—Statute of Limitations. *Re Yates*, 1 O. W. R. 630, 4 O. L. R. 580.

Condition — *Pleading.*]—To an action for the recovery of instalments of a life annuity, where the defendant pleads that the annuity is not due to the plaintiff, because it has been given to her on condition that she remains a widow, and she has in fact remarried, she may reply that she was remarried at the date of the will, to the knowledge of the testator, and that her position is the same as then. *Gow* v. *Price*, 6 Que. P. R. 278.

Conditional gift — *Charitable bequest—Fulfilment of condition—"Or otherwise"—Ejusdem generis—Exception.*] — The testator directed his executors to pay over to a town corporation $20,000 for the purposes of an hospital "so soon as a like sum of $20,000 should be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to said bequest. The legacy was to lapse if the additional amount was not procured. The sum of $6,000 was raised by private subscription. The government of the province supplemented the amount by a grant of $14,000. It was contended on behalf of the residuary legatee that the grant from the government was not a compliance with the terms of the will:—*Held*, affirming the decision of Graham, E.J., 23 C. L. T. 216, that the words "or otherwise" in the will meant "from any source," and that the testator did not intend to place any restriction upon the executors as to the source from which the additional $20,000 should come. *In re Payzant*, 24 C. L. T. 140; *S. C. sub nom. Paulin* v. *Town of Windsor*, 36 N. S. R. 441.

Debt due by testator to legatee — Satisfaction of debt—Presumption—Circumstances rebutting. *Re Watson*, 5 O. W. R. 354.

Description of land — Statute of Frauds — Identifying land — Restraint on alienation—Invalidity — Repugnancy. *Re Corbett and Hartin*, 1 O. W. R. 744.

Devise — Misdescription of lands — Declaratory judgment. *Downey* v. *Downey*, 9 O. W. R. 510.

Devise of land of another beneficiary — *Election — Conduct — Compensation.*]—K. devised a certain lot to the plaintiff, which lot belonged to the defendant. The defendant, after the death of K., sold this lot to another person, and refused to convey or release it to the plaintiff. The defendant accepted certain benefits under K.'s will:—*Held*, that the defendant by this course elected to hold the lot devised to the plaintiff, and that the plaintiff was entitled to compensation. *Kirk* v. *Kirk*, 40 N. S. R. 147.

Devise subject to restraint on alienation — *Limited restriction — Validity.*]—A testator by his will devised certain land to his "son H. P., his heirs and assigns, to have and to hold to said H. P., his heirs and assigns, for his and their sole and only use forever, subject to the condition that the said H. P. shall not during his lifetime either mortgage or sell (the land) thus devised to him:"—*Held*, that the restraint on alienation, being limited, was good. Judgment of Britton, J., 8 O. W. R. 588, affirmed. *Re Porter*, 9 O. W. R. 197, 13 O. L. R. 399.

Devise to church of "rents and produce" of lands in perpetuity — *Will made less than six months before death of testator—Mortmain and Charitable Uses Act, s. 4 c. 112, R. S. O. 1897 — Lands not sold vesting in accountant under R. S. O. 1897, c. 112, s. 5.*]—After the death of A. and B. the rents and produce of a farm were given in perpetuity to support the acting incumbent of a church: — *Held*, that the will is valid although made within less than six months before testator's death. The devise of the rents and profits passes the fee simple. A. and B. being dead the land vests in the accountant of Supreme Court of Judicature for Ontario. Lands directed to be sold. *Re Thomas* v. *McTear* (1909), 14 O. W. R. 386.

Discretion of executors — Vested interest—Right to payment—Parties. *Ramsay* v. *Reid*, 2 O. W. R. 720.

Gift of income from realty coupled with devise of remainder — Estate in fee simple subject to charge—Executors—Conveyance to devisees—Satisfaction of charge—Consent of chargee. *Re Day*, 6 O. W. R. 890.

Gift to religious society — *Mortmain Act — "Charitable and philanthropic purposes"—Uncertainty in objects of gift.*]—A bequest "to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield to be applied in charitable and philanthropic

purposes" was upheld against the argument that it was void for vagueness and uncertainty in the objects to be benefited, Teetzel, J., saying that "charity was the dominant idea in the mind of the testator, and, while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic." If the words had been "charitable or philanthropic" the conclusion might have been different, as "or" would imply a discretion to select either "charitable" or "philanthropic" purposes. *Williams* v. *Kershaw*, 5 L. J. Ch. 86, 11 Cl. & Fin. 111 n., 42 R. R. 269, not followed. *Re Huyck*, 25 C. L. T. 358, 6 O. W. R. 112, 10 O. L. R. 480.

Gifts to religious societies—*Charitable uses—Time of execution of will—Computation of six months — Religious Institutions Act—Special Act — Provisions as to execution of will six months before death —Repeal by Mortmain Act of 1892 (R. S. O. c. 112)—"Land" — Proceeds of sale—Mortmain Act of 1902—Effect of.*] — A will was executed on the 4th December, 1903; and the testatrix died on the 4th June, 1904. The testatrix gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of the Regular Baptist Church at Port Rowan, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to the Regular Baptist Home Missionary Society, and the other half to the Regular Baptist Foreign Missionary Society for their sole use. By 50 V. c. 91 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate shall be valid unless made by deed or will executed at least 6 months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R S. O. 1897 c. 307. Teetzel, J., *held* that the 6 months' limitation contained in these two Acts must be regarded as having been repealed by the later Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, passed on the 14th April, 1892, which removes every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned. He was also of opinion that the gift was not of land, as interpreted by s. 3 of c. 112, but of personal estate arising from or connected with land" within the meaning of s. 8. It was argued, however, that, notwithstanding the provisions of c. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least 6 months before the testator's death by virtue of s. 7, s.-s. 6, of that Act. The statute which is now R. S. O. c. 112 was based upon the English Act of 1891, and our later Act of 1902 upon the earlier English Act of 1888, but by s. 1 of the Act of 1902 it was provided that the Act should be read as part of R. S. O. c. 112. The result of this is, as construed by Teetzel, J., to put our two Acts practically in the same position as the two English Acts, as determined by *In re Hume*, [1895] 1 Ch. 422, and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*; see *Re Kinney*, 6 O. L. R. 459, 2 O. W. R. 881. The nice question whether the full period of 6 months had elapsed between the making of the will and the death of the testatrix was not determined. *Re Barrett*, 25 C. L. T. 357, 5 O. W. R. 790, 10 O. L. R. 337.

Identity of devisee —Extrinsic evidence—Issue. *Re Robinson*, 3 O. W. R. 304.

Infant — Payment at majority — Interest. *Re Perrin*, 1 O. W. R. 209.

Legacy — Acceptance of — Liability of legatee to fulfil conditions imposed by will —Parent and child — Wages — Acquiescence. *Gillespie* v. *Gillespie* (Man.), 8 W. L. R. 725.

Mixed fund — Interest — Majority. *Re Scadding*, 4 O. L. R. 632, 1 O. W. R. 467, 683.

Mortmain and charitable uses — *Presbyterian Church in Canada — Validity of devise — Testamentary capacity — Attesting witnesses — Evidence — Undue influence — New trial.*]—A residuary devise of realty to the Foreign Missionary Society of the Presbyterian Church in Canada is valid under the Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, s. 4, notwithstanding *ibid.*, c. 333, s. 7, s.-s. 6, which requires "assurances" of land for charitable uses to be made six months before the donor's death, "assurances" in that section not including gifts by will; and also notwithstanding that the special Act relating to devises to the said church, 38 V. c. 75 (O.), requires wills of realty and impure personalty in favour of that church to be made six months before the testator's death. —In an action to impeach a will on the ground of undue influence it should not be upheld on the evidence of one witness, whose credibility is attacked, when the attesting witnesses may also be examined; and a new trial was ordered in this case because this had not been done.—As a general thing, witnesses to a will should inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. Judgment of Riddell, J., 10 O. W. R. 672, reversed. *Madill* v. *McConnell*, 16 O. L. R. 314, 11 O. W. R. 345. Affirmed, 12 O. W. R. 124, 17 O. L. R. 209.

Mortmain and Charitable Uses Act.] —*Re Bray*, 2 O. W. R. 520, 711.

Overpayment of legatees — Judgment—Mistake — Repayment — Interest — Distribution. *Uffner* v. *Lewis*, 2 O. W. R. 441, 5 O. L. R. 684.

Payment at 25 — Right to receive at majority—Declaration — Summary application. *Re Keating*, 2 O. W. R. 43.

Restraint on alienation — Validity—Case stated—Reference to Divisional Court —*Res judicata*. *Re Phelan*, 1 O. W. R. 741, 2 O. W. R. 21.

Right to maintenance — *Second marriage of widow — Discretion of executors.*]

—A testator directed that $40,000, part of his estate secured on mortgages, should, when his youngest son attained 21, be divided between his wife and his three children; and that his executors should manage his estate till his youngest son should attain 21, and out of the interest, and out of the proceeds of his real estate, maintain his wife and children. The testator died in 1904, and in 1908, when the eldest child was only 16, the widow married again, but continued to reside in the same house as before, it being her property:—*Held*, that the widow did not, by reason of her second marriage, forfeit her right to maintenance down to the time when she would become entitled to a share of the principal secured by the mortgages. *Cook* v. *Noble* (1886), 12 O. R. 81, distinguished. *Carr* v. *Living* (1860), 28 Beav. 644, and *Bowden* v. *Laing* (1844), 14 Sim. 113, doubted. The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children. The executors should determine what sum would be required out of the income to be applied for the maintenance of the mother and children, having regard to the competence of the second husband, but not laying overmuch stress on that, the income being ample, and the children not to be stinted, because all formed one household. *Re Miller* (1909) 14 O. W. R. 221, 19 O. L. R. 381.

Settled Estates Act — *Power of Court to order sale of land under ss. 14 and 16—Special circumstances — Little chance of others becoming entitled — Consent of all presently entitled.*]—Petition by the trustees of a will, under the Settled Estates Act, for authority to sell a certain parcel of land:—*Held*, that having regard to the fact that all persons presently entitled to the estate were desirous that the proposed sale should be carried out, and the further fact that within four months they would become absolutely entitled, therefore, there was but little chance of the children of any of them becoming entitled, the order authorising the sale was granted. *Re Graham* (1910), 15 O. W. R. 809.

Settled Estates Act. *Re Bridgman* (1910), 1 O. W. N. 468.

Specific legatee — *Right to copy of will—Notary.*]—A specific legatee is not one of the heirs or representatives of the testator to whom the notary, by virtue of Art. 1320, C. P., is bound to give a copy of the will. *Singer* v. *MacKay*, 9 Que. P. R. 151.

Specific or pecuniary — Debentures—Succession duties. *Re Mackey*, 2 O. W. R. 230, 690, 6 O. L. R. 292.

Statute of Limitations — *Possession—Adverse.*]—Where a man knew of a will he must be assumed to have taken the land under the trusts of the same, and his possession is not adverse. *Kent* v. *Kent* (1891), 20 O. R. 445, followed. *Burch* v. *Plummerfelt* (1909), 14 O. W. R. 929, 1 O. W. N. 133.

Subject to charge — Maintenance of brother—Enforcement of charge—Judgment—Terms—Reference—Costs. *Spotswood* v. *Spotswood*, 2 O. W. R. 1090.

Trust for church after expiry of life estates — Time of making will — Statutes. *Re Naylor*, 1 O. W. R. 809.

Uncertainty as to legatee — Legacy paid into Court—Motion for payment out—Decision on affidavits instead of issue directed—Costs. *Re Hall*, 4 O. W. R. 420.

Vesting — Assignment by legatees. *Re Steckley*, 2 O. W. R. 725.

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6. Validity of Conditions.

Bequest — *Condition — Restraint of religious liberty — Public policy.*]—R. died in 1878, leaving a will by which the usufruct of his estate was given to his widow for life, and afterwards to his children for their lives, and the estate then to be divided amongst his grandchildren, whom he instituted his universal legatees. A clause in the will provided that if any of his sons should marry otherwise than according to the rites of the Roman Catholic church, the issue of such marriage should be excluded from the succession, as should also any grandchildren who were not brought up and instructed in that faith. *See* Art. 760, C. C.:—*Held*, following *Kimpton* v. *Kimpton*, 16 Rev. Leg. 361, that the condition was void, being in restraint of religious liberty, and therefore contrary to public policy. *Hodgson* v. *Halford*, 11 Ch. D. 959, being a case under the English law on the subject, not applicable in the Province of Quebec. *Renaud* v. *Lamothe*, 20 C. L. T. 443.

Charitable bequest — Validity — Application of executors for direction of Court—Question covered by authority. *Re Rose*, 6 O. W. R. 937.

Conditional gift — *Charitable bequest—Fulfilment of condition — Procuring like sum.*]—Testator left a legacy of $20,000 to the corporation of the town of Windsor to assist in building and maintaining a hospital for the sick, on condition that the town should "procure a like sum by a tax on the citizens, or from private donations or otherwise, to be added to this bequest." There was a gift over to another legatee, if the town, within seven years after the decease of testator, "fails to raise" the said additional sum. The sum of $6,000 was raised from private donations, and the balance of $14,000 was procured by grant from the Provincial Government: — *Held*, that the condition in the will was complied with, and the town corporation were entitled to be paid the legacy. *In re Payzant*, 23 C. L. T. 246.

Devise — *Restraint upon alienation — Validity—Summary application to determine—Rule 938—Scope of.*]—A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid:—*Held*, that Rule 938 gives no authority to determine such a question. *In re Martin*, 25 C. L. T. 18, 8 O. L. R. 638, 4 O. W. R. 429.

Legacy — *Religious liberty — Public policy—Restrictions as to marriage—Educa-*

tion—Exclusion from succession.]—In the Province of Quebec the English law governs on the subject of testamentary dispositions; and, therefore, in that province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rites of any church recognised by the laws of the province, and that the grandchildren should be educated according to the teachings of such church, and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages, or who may not have been educated as directed. Judgment noted in 21 C. L. T. 392, affirmed. *Renaud* v. *Lamothe*, 22 C. L. T. 357, 32 S. C. R. 357.

Personal property — *Restraint on alienation — Invalidity.*]—A testator directed that his estate should be invested and the income paid to his two sons equally until they reached the age of thirty-five, when they were to receive the principal, and he further declared that "none of my children shall have power to anticipate or alienate, either voluntarily or otherwise, any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared." Notwithstanding the above, one of the sons assigned his interest under the will to various creditors:—*Held*, that the assignments were valid, and the restriction on alienation which the testator had sought to impose invalid.—The reasons for the rule of equity which enables a restraint against alienation and anticipation to be imposed on the separate estate of a married woman do not apply to such a case. *McFarlane* v. *Henderson*, 16 O. L. R. 172, 11 O. W. R. 218.

Restraint on alienation — *Precatory condition — Substitution — Heirs.*]—There may be a restraint upon alienation in a testamentary disposition, even where the testator has not used prohibitive terms, and has only expressed a simple wish, as long as there is no doubt as to his intention.—2. A restraint upon alienation constitutes a substitution, if it appears that the testator has made it in the interest of a person for whom he designs the property of which he forbids the alienation.—3. The restraint upon alienation, unless in favour of some of the presumptive heirs of the testator, constitutes a substitution, not only in favour of the heirs to whom the restraint does not apply, but in favour of all the presumptive heirs. *Létang* v. *Latour*, 24 Que. S. C. 15.

Restraint on alienation — *Time limitation.*]—A devisee of real estate under a will was restrained from selling or incumbering it for a period of twenty-five years after the testator's death:—*Held*, that, as the restraint, if general, would have been void, the limitation as to the time did not make it valid. *Blackburn* v. *McCallum*, 23 C. L. T. 133, 33 S. C. R. 65.

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7. Widow's Election.

Annuity — *Separation deed.*]—A husband in a separation deed covenanted to pay his wife an annuity of $200 in half-yearly payments, and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband, by his will, subsequently executed, directed his executors to pay to his wife $400 annually, $200 on the 1st June and December in each year during his life, and added: "which provision in favour of my said wife is made in lieu of dower:"—*Held*, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 20 C. L. T. 383, 32 O. R. 114.

Evidence of election — *Ignorantia juris.*]—A testator left to his wife all his personal estate absolutely, and his real estate for life or so long as she remained his widow, subject to which he devised his lands in specific parcels to his sons, and died in 1889. After his death his widow remained in possession of the land and supported the children, and built an addition to the house, and married again in 1891. She and her husband in 1893 took a lease of the property from the executors, to expire when the eldest son came of age On this latter event happening in 1899, his parcel of land was conveyed to him by the executors, who then granted a new lease of the rest of the land to the second husband which was now current:—*Held*, that the widow was put by the will to her election.—*Held*, also, that, though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle *ignorantia juris neminem excusat*, she must be held to have made her election in favour of the will. *Reynolds* v. *Palmer*, 21 C. L. T. 78, 32 O. R. 451.

Specific bequest — *Dower.*]—An estate consisting of realty and personalty amounting to over $10,000 was, after a direction to pay debts and funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow $3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces:—*Held*, that the widow was not put to her election, but was entitled to her dower in addition to the bequest. *Amsden* v. *Kyle*, 9 O. R. 439, distinguished. *In re Schunk*, 19 C. L. T. 361, 31 O. R. 175.

WINDING-UP.

See Benefit Society — Company—Insurance—Partnership.

WINNIPEG CHARTER.

See Company.

WINTERING CATTLE.

See Contract.

WITNESSES.

Competency — *Oath — Religious belief.*]—Where a person stated that he believed in a Supreme Power—a God as defined by Christ's teachings, in heaven and hell, and in a future state of rewards and punishments, but that he did not believe he was under any greater obligation to tell the truth by reason of taking the oath, and that he did not believe that a person who swears falsely will be punished in the hereafter, it was held that he was competent to be sworn as a witness. *Farrell* v. *Manchester*, 3 E. L. R. 244; *Farrell* v. *Portland Lavallée*, 8 Que. P. R. 364.

Fees—*Payment — Liability of party who subpœnaes witness—Payment of costs by opposite party.*]—A witness is entitled to an execution for his fees against the party who subpœnaed him, although the amount of the costs has been paid by the opposite party to the advocate of this party. *Lacroix* v. *La Presse Publication Co.*, 9 Que. P. R. 259.

Jew — *Form of oath.*] — A witness at a trial, who professes the Jewish religion, but is sworn on the Evangelists, and without placing his hat on his head, will be sworn anew by order of the Court when his religious belief is ascertained by counsel, notwithstanding the fact that the witness declares himself bound by the oath already taken. *Sessenwein* v. *Palmer*, 3 Que. P. R. 110.

Order to appear again — *Re-service.*] —An order ought not to be given to witnesses subpœnaed, or present in Court, to appear upon another day, unless they have been first sworn. *Dechêne* v. *Dussault*, 20 Que. S. C. 296.

Party called upon as a witness — *Refusal to appeal—Rule of the Court.*]—A party is not bound to appear on a motion signed by the solicitors of the adverse party to defend himself from being ordered to pay costs for delay which he has caused by his failure to appear as a witness. The appearance of such a party thus in default can only be obtained by an order of the Court and served personally. *Beaucage* v. *Harpin* (1909), 10 Que. P. R. 412.

Party subpoenaed — *Conduct money.*] —*Held*, upon objection taken at the trial, that a party to the action subpœnaed as a witness cannot be forced to attend unless he has been previously offered his conduct money as an ordinary witness. *Coulombe* v. *Lavallée*, 8 Que. P. R. 364.

See COSTS — CRIMINAL LAW—ELECTIONS —EVIDENCE — INTOXICATING LIQUORS — JUDGMENT DEBTOR—MASTER AND SERVANT— MECHANICS' LIENS—MINES AND MINERALS —VENUE—WILL.

WOODMAN'S LIEN.

See LIEN.

WORK AND LABOUR.

Action to recover value — Protection of plaintiffs' works from injury by defendants—Value of necessary work. *Lindsay Water Commissioners* v. *Fauquier*, 5 O. W. R. 635, 6 O. W. R. 400.

Agent — Joint liability — Guaranty — Damages for unskilful work — Set-off or counterclaim—Costs. *Kelso* v. *Thompson*, 1 O. W. R. 176.

Contract — *Action for work done — Authority of agent — Findings of jury.*]— In an action for work done and materials provided for certain steamers, the jury did not answer all the questions submitted, and the trial Judge gave judgment for the plaintiffs for the amount claimed for certain work covered by the certificate of an agent of the defendants, but discharged the jury as being unable to agree in respect of the other matters, and reserved further consideration:— *Held*, that on the findings as they stood the plaintiffs could not recover any amount other than the one allowed. *Galbraith* v. *Hudson's Bay Co.*, 7 B. C. R. 431.

Destruction before delivery — *Fire —Risk of workman.*]—A workman who undertakes to make repairs to a house and who furnishes materials, although the quantity of the materials, and therefore the price of the work, cannot be ascertained until the work is finished, can claim nothing from the owner of the house, if it is destroyed, before the completion and delivery of the work, by a fire which is not attributable to the fault of the owner. *Murphy* v. *Forget*, 19 Que. S. C. 135.

Plumbing — Contract not established —Proof of work done and material supplied —*Quantum meruit* — Set-off for defective work — Account — Damages — Report — Appeal—Costs. *Longstaff* v. *Hamilton*, 14 O. W. R. 208.

Work done upon property of another — *Payment for — Droit d'accession —Mala fides—Remedy.*]—If an article not belonging to a workman is transformed by his work into a different article which the owner wishes to get possession of, he is obliged to pay for the work done, whether the workman did it in good faith or not.— 2. The workman so acting in bad faith is liable for damages and to criminal prosecution; a workman acting in good faith is not. *Godard* v. *Mercier*, 25 Que. S. C. 372.

See BUILDINGS—CONTRACT—MASTER AND SERVANT—MECHANICS' LIENS—MINES AND MINERALS—MUNICIPAL CORPORATIONS.

WORKMAN'S COMPENSATION FOR INJURIES ACT, ONTARIO.

See APPEAL—ARBITRATION AND AWARD — COSTS — MASTER AND SERVANT — NEGLIGENCE.

WOUNDING WITH INTENT.

See CRIMINAL LAW.

WRECK.

See SHIP.

WRIT OF ATTACHMENT.

See ATTACHMENT OF DEBTS.

WRIT OF CA. SA.

See ARREST.

WRIT OF ELECTION.

See PARLIAMENTARY ELECTIONS.

WRIT OF ERROR.

See CRIMINAL LAW.

WRIT OF EXTENT.

See ATTACHMENT OF DEBTS.

WRIT OF POSSESSION.

Order for — *County Court Judge — Appeal—Prohibition—Title to land.*]—There is no appeal from the order of a County Court Judge upon a summary application of a purchaser at a sheriff's sale, for a writ of possession. If such an order were made without jurisdiction, prohibition would be the remedy. Upon such an application the Judge is not trying the title to lands, but is merely determining as a matter of discretion whether the purchaser should have possession. Such an application may be heard by the Judge of another district designated under s. 12 of c. 9 of the Nova Scotia statutes of 1889 to act in the place and stead of the Judge of the district in which the lands lie. *In re Gough*, 21 C. L. T. 92.

See EXECUTION—MORTGAGE.

WRIT OF REVENDICATION.

Irregularities — *Affidavit — Service.*]—The omission to describe the person making the affidavit for a fiat for a writ of revendication, and the failure to serve a copy of the affidavit on the defendant, or leave it for him at the office of the Court, within three days, do not constitute fatal irregularities in the procedure. *Haddad* v. *Marcotte*, 4 Que. P. R. 313.

See EXECUTION — PLEADING — PLEDGE.

WRIT OF SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

WRIT OF SUMMONS.

1. AMENDMENT, 4764.
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1. AMENDMENT.

Address of plaintiff — Insufficiency—Amendment — Costs — Order IV., Rule 1. *Gray* v. *Wallace*, 40 N. S. R. 607.

Costs.]—In an action between lessor and lessee, the plaintiff will be allowed, upon paying costs of motion, to add the words "summary procedure" to the writ and copy thereof. *Cusson* v. *Vaillantcourt*, 5 Que. P. R. 88.

County Court summons — *Mistake in — Statute of Limitations — County Court Appeal.*]—In the notice at the end of a County Court summons the name of R. L. was by mistake inserted instead of that of the plaintiff. The plaintiff signed judgment by default for want of an appearance and plea, issued a writ of inquiry, and gave notice of the execution thereof, when the defendants took out a summons calling upon him to shew cause why the writ of inquiry, interlocutory judgment, and the writ and the service thereof, should not be set aside. At the return of the summons the plaintiff applied for leave to amend the writ of summons by inserting the plaintiff's name instead of that of B. L. and for leave to reserve the same, when amended. This application the Judge of the County Court refused, although the Statute of Limitations would be a bar to the issuing of a new writ, and allowed that of the defendants. On appeal:—*Held*, that the amendment should have been allowed and an order made for the re-service of the writ as amended. *Semble*, that an appeal will lie from the decision of a County Court Judge on a point of law, even though the same does not arise at or out of the trial of an action. *Stewart* v. *Can. Pac. Rw. Co.*, 20 C. L. T. 88, 35 N. B. R. 115.

Description of defendant—*Company — Incorporation — Exception to form — Costs.*]—Where the company defendant is described in the writ of summons as a "*corps politique et incorporé*" when it is not an incorporate body at all, as it appears from the statute creating it, an exception *à la*

forme on this ground will not lie when the company fails to prove that it suffers a prejudice by being so described. 2. A motion to amend the writ by striking out the words objected to, will be granted. 3. No costs will be allowed on either proceeding. *Perrault* v. *Liverpool & London & Globe Ins. Co.*, 4 Que. P. R. 395.

Misnomer—*Terms.*]—The writ was in the Form "A" in schedule to 60 V. c. 28 (N.B.), except that the name "R. L." instead of that of the plaintiff was inserted in the clause, "and take notice that in default of your so doing the said R. L. may proceed thereon to judgment and execution." The defendant did not appear. After the issue of a writ of inquiry, the defendant moved to set aside the writ and all subsequent proceedings on account of this error. The Judge acceded to the motion, refusing leave to amend, applied for under the provisions of s. 66 of the Act, holding that the writ was a nullity:—*Held*, that the error was an irregularity, and leave to amend should have been granted. *Stewart* v. *Can. Pac. Rw. Co.*, 20 C. L. T. 88.

Motion to set aside—*Exception as to form — Time.*]—A motion to set aside an amendment made by the plaintiff to his writ of summons and declaration, as not having been authorised by the Court where authorisation was necessary, is an exception to the form, and is subject to the formalities of Art. 164, C. P., as to the time for giving notice, etc. *Pizzuto* v. *Can. Pac. Rw. Co.*, 3 Que. P. R. 471.

Non-conformity of writ with statement of claim—*Amendment — Re-service —Practice.*]—The indorsement on the writ of summons asked for the delivery up and cancellation of a certain document, dated the 24th April, 1906. The statement of claim, when delivered, shewed in effect that the document sought to be declared void was dated the 20th September, 1906, and was of a different purport:—*Held*, that the indorsement was defective and erroneous, but that it might be amended and reserved, on payment of costs. *Chang Shee Ho Chong* v. *Culley*, 13 B. C. R. 18.

Service.]—If the plaintiff obtains leave to have his writ regularly signed by the prothonotary, and such signature is not affixed in open Court, he cannot foreclose the defendant from pleading without having first served such amendment upon him. *Beauchamp* v. *Gourre*, 4 Que. P. R. 201.

Stamps — *Insufficiency — Amendment after declaration.*]—A plaintiff who has not sufficiently stamped his writ of summons may, after service thereof, when the declaration shews exactly the extent of his claim, apply to the prothonotary for leave to change the fiat, by inserting the correct amount demanded in the action, and adding the required stamps.—*Quære*, how must such application be made? *Sherwood* v. *Shepard*, 8 Que. P. R. 116.

Style of cause — *Irregularity or nullity.*]—J. S., trading under the name of the British Columbia Furniture Company, commenced an action in such name in respect of a promissory note. A summons under Order XIV. having been dismissed on the ground that one person cannot sue in a firm name, the plaintiff obtained an order amending the style of cause:—*Held*, that the writ was not a nullity and that the irregularity was properly amended. *British Columbia Furniture Co.* v. *Tugwell*, 7 B. C. R. 361.

Substitution of defendants.]—Where the plaintiff has sued the defendants as a corporation, he cannot, after the filing of an exception to the form, move to amend his writ by substituting for his designation of the defendants, the names of the members of the so-called corporation, which is in reality a partnership. *Lambe* v. *Thompson S. S. Line*, 4 Que. P. R. 161.

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2. COPY OF WRIT.

Uncertified copy — *Appearance.*]—The fact that the copy of a writ of summons has not been certified as true by the prothonotary or the attorney of the plaintiff is not a ground for an *exception à la forme*, if the defendant has appeared in the time allowed and has not suffered any prejudice in consequence. *Bélanger* v. *Brais*, 2 Que. P. R. 425.

Variance — *Name of attorney.*]—An action will not be dismissed upon exception to the form because it appears by indorsement on the writ that it was issued on the *praecipe* of one advocate while the copy of it is certified by another advocate, who is the true attorney for the plaintiff. *Boulet* v. *Cantin*, 3 Que. P. R. 252.

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3. ENDORSEMENT.

Action on bond — *Special endorsement —Necessity for — Unliquidated damages — Costs.*]—The defendants appealed to a Supreme Court Judge in Chambers from the order of an examiner under the Collection Act, committing him to gaol, and gave a bond in the sum of $61.42 required by s. 32 of the Act, conditioned personally to appear before the Judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant and his sureties for the penalty of $61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside, on the grounds (a) that being for a debt or liquidated demand the writ should have been specially endorsed under Order 3, Rule 5, and (b) that the writ in any event should have been endorsed with the usual claim for costs under Order 3, Rule 6: — *Held*, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one

in respect to which damages must be assessed. *Hennigar* v. *Brine* (*No. 2*), 24 C. L. T. 144.

Address of plaintiffs—*Amendment.*]—Where the plaintiffs sue as trustees for a corporation, it is not necessary to endorse on the writ the addresses of the individual plaintiffs. The plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was endorsed on the writ as "Edinburgh, Scotland:" — *Held*, insufficient address, but, as there was nothing misleading in their address, leave was given to amend by stating the place of business of the company. *Dundas* v. *McKenzie*, 10 B. C. R. 174.

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4. IRREGULARITIES — EXCEPTION TO FORM.

Company defendant — *Statement of place of business — District — Exception to form — Time — Service of writ.*]—It is not necessary in a suit against an incorporated company to mention in the writ of summons the place where the business of the company is principally carried on; it is sufficient to indicate that the company have an office in the district in which the action is brought. —An exception to the form filed on the 10th September is late, when the report of service of the writ was made upon the 30th August previous. *Hawkett* v. *Quebec Transport Co.*, 9 Que. P. R. 118.

Description of defendant — *Irregularity — Exception to form — Service — Replevin — Affidavit — Practice.*] — The defendant was described in the writ of summons as "Marie Godon, wife (*commune en biens*) of Arthur Gordon, labourer, of the city and district of Montreal, and the latter for the purpose of authorising his wife," whereas she should have been described as "Victoria Lacroix, boarding-house keeper, of Montreal, widow of the late Adélard Godon, in his lifetime labourer, of the same place:" —*Held*, that this designation was erroneous and irregular, and an exception to the form based upon such irregularity should be allowed.—2. That the omission to serve a copy of the affidavit upon the defendant or to leave it at the record office for her within three days of the service of the writ of replevin, was fatal. *Bartlett* v. *Godon*, 7 Que. P. R. 372.

Description of defendant—*Mistake—Irregularity — Exception to the form.*] — A defendant described in the writ of summons served upon her as "May Ardagh, widow of S. Ardagh," when her name is May Jones, and the name of her deceased husband was Thomas William Ardagh, is not in a position to know with certainty whether it is really she who is intended to be sued, and there is an irregularity which she has the right to invoke by way of exception to the form. *Kent* v. *Ardagh*, 8 Que. P. R. 31.

Intituling municipal election—*Contestation of — Quo warranto.*] — The fact that a writ of summons, to which is annexed a petition to set aside a municipal election, pursuant to the charter of the city of Montreal, is intituled "writ of *quo warranto*," does not invalidate the petition. *Charbonneau* v. *Roy*, 3 Que. P. R. 363.

Issue from wrong division—Irregularity — Appearance — Waiver — Rule 546 — Transfer to proper division—Venue —Change of — Preponderance of convenience and expense — Postponement of trial. *Doody* v. *Bigelow* (Y.T.), 8 W. L. R. 978.

Issue in name of deceased sovereign —Amendment — Costs. *Biggar* v. *Kemp*, 12 O. W. R. 863.

Omission of name of district — *Irregularity — Absence of prejudice — Exception to form.*]—The omission of the name of the district in the writ of summons after the printed words "to the bailiffs of the district of . . . ." is not fatal and causes no prejudice; an exception to the form based upon such irregularity will be dismissed with costs. *Villeneuve* v. *Leblanc*, 9 Que. P. R. 80.

Residence of defendant wrongly stated — *Exception to form.*]—An exception to the form, founded upon the allegation that the residence of the defendant is not given or is not correctly given in the writ of summons served upon the defendant, must clearly indicate the real residence of the party; if not it will be dismissed. *Beth* v. *Backman*, 8 Que. P. R. 108.

Revocation of probate—*Practice — Affidavit verifying endorsement — Citation —Stay of proceedings.*]—Where, in an action brought for the purpose of revoking a probate, the Rule requiring the filing of an affidavit verifying the endorsement on the writ of summons has not been complied with, the proceeding should not be invalidated, but the curative provisions of Order LXX., r. 1, ought to be applied.—Where the Rule requiring the issue of a citation calling on the defendant to produce the probate has not been complied with, proceedings will be stayed until this has been done. *McLagan* v. *McLagan*, 11 B. C. R. 325, 2 W. L. R. 12.

Setting aside — Failure to name place of trial not fatal. *Churchill* v. *Shand*, 1 E. L. R 225.

Stamps — *Insufficiency — Motion to dismiss action — Deposit.*] — A motion to dismiss an action for the insufficiency of the stamps affixed to the writ of summons is in the nature of an exception to the form, and must be accompanied by the deposit required by law. *Durand* v. *Lecours*, 8 Que. P. R. 418.

Style of Court — Judicial district — Amendment — Mechanics' Lien Act — Procedure — Originating summons. *Cushing Brothers Co.* v. *Groos* (N.W.T.), 4 W. L. R. 551.

Style of Court — Judicial district — Amendment. *Theriault* v. *Evans* (N.W.T.), 4 W. L. R. 550.

Untrue address of plaintiff—Setting aside writ — Staying proceedings until cor-

rect address furnished by plaintiff. *Sam Chak* v. *Campbell*, 5 E. L. R. 540.

Writ signed by clerk of Court instead of local registrar—Motion to set aside service of writ — Grounds. *Crown Lumber Co.* v. *Fitzsimmons* (Sask.), 8 W. L. R. 544.

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5. RENEWAL.

Ex parte order — Withholding material evidence—Statute of Limitations. *Langley* v. *Costigan*, 5 O. W. R. 147.

Grounds for — *Sufficiency of—Statute of Limitations.*]—An *ex parte* order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence having been made, it was shewn on a motion to set aside such order that the defendant had never changed his place of residence, and that it could readily be ascertained from the directory: — *Held*, that the order should not be set aside, the local Master who made the *ex parte* order having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him; despite the fact that, but for the existence of the writ, the ordinary period of limitation would have expired. *Howland* v. *Dominion Bank*, 15 P. R. 56, and *Mair* v. *Cameron*, 18 P. R. 484, distinguished. *Canadian Bank of Commerce* v. *Tennant*, 23 C. L. T. 202, 5 O. L. R. 524, 2 O. W. R. 277, 393.

Service — *Rule 132.*]—The time allowed for renewal of a writ of summons is, upon the proper construction of Rule 132, to be reckoned inclusive of the date of issue or of a former renewal. *Black* v. *Green*, 15 C. B. 262, 3 C. L. R. 38, and *Anon.*, 11 W. R. 293, 32 L. J. N. S. Ex. 88, 7 L. T. N. S. 718, followed. Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect. *Laird* v. *King*, 21 C. L. T. 34, 162; 19 P. R. 307; 1 O. L. R. 51.

Statute of Limitations — *Ex parte order—Master in Chambers—Local Judge.*]—The Master in Chambers has jurisdiction to rescind an order made on the *ex parte* application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld. Such an order was rescinded where on the *ex parte* application the facts that the writ had expired and that the Statute of Limitations had run against the claim, were not brought to the notice of the local Judge. *Williams* v. *Harrison*, 24 C. L. T. 24, 6 O. L. R. 685, 2 O. W. R. 1061.

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6. RETURN OF WRIT.

Dismissal for default of notice — *Deposit of copy—Time.*]—When a writ has not been returned, the defendant, in order to have the action dismissed for default, must not only give the plaintiff notice within three days from the expiration of the time allowed for appearance, but must also deposit in the record office his copy of the process within the same three days. *Coté* v. *Corporation d'Irlande*, 4 Q. P. R. 123.

Motion for leave to make return—*Motion to dismiss—Costs—Leave to sue in formâ pauperis.*]—A motion to authorize a plaintiff to return a writ after the time has expired will be granted with costs of motion against the plaintiff.—2. In such case, a motion for *congé-défaut*, made after a motion for leave to return after time expired, should be dismissed without costs.—3. Leave to sue in *formâ pauperis* will not be granted by the Superior Court when the action is more properly one for the Circuit Court (*e.g.*, alimony.) *Boiteau* v. *Boiteau*, 5 Q. P. R. 301.

Motion to compel—*Rights of defendant—Offer to discontinue—Costs.*] — Where a plaintiff offers to discontinue his action without costs, after the launching of a motion to compel the return of the writ of summons, which return had been postponed *sine die* by consent of the parties, the Court will order the return of the writ, the defendant having acquired rights. *Brown* v. *Tanguay*, 9 Que. P. R. 374.

Return—*Time—Application to extend.*]—An application to a Judge to be allowed to make a return as to service of original process in an action after the expiry of the delays, must be made in writing and not orally. *Hémant* v. *Hamel*, 9 Que. P. R. 243.

Vacation—*Extension of time—Consent—Security for costs.*]—Writs of summons issued and served between 30th June and 1st September (the long vacation) must be returned within the same delay as at other times. The provision of Art. 13, C. C. P., that, in reckoning delays, the 1st September is deemed to be the next day after the 30th June, applies only to pleading and trial.—A writ of summons may be returned after the delay fixed by law, with the consent of the defendant, and such consent may be express or implied. And when a writ is returned after the expiration of the delay, and the defendant afterwards moves for security for costs, he will be held to have impliedly consented to the return so made, and a motion by him in the nature of an exception to the form, on the ground that it is too late, will be rejected. *Morris* v. *International Portland Cement Co.*, 31 Que. S. C. 460, 8 Que. P. R. 249.

Without bailiff's report of service—*Irregularity — Amendment.*] — An action will not be dismissed upon exception to the form because the report of service does not appear upon the writ, if this irregularity is afterwards remedied; no prejudice having been caused, the exception to the form will be dismissed with costs against the plaintiff. *Soucy* v. *Forget*, 5 Que. P. R. 154.

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7. SERVICE.

(a) *Generally.*

Absent defendant—*Personal service—Dispensing with.*]—Where the plaintiff lives in the premises formerly occupied by the de-

fendant, now temporarily absent from the province, the service of process in an action must be made personally, except upon leave granted by the Judge or prothonotary. *Normandin* v. *Renaud*, 7 Que. P. R. 421.

Account accompanying writ.] — An exception to the form based upon the fact that no copy of the account sued upon was served upon the defendant at the same time as process in the action, will be dismissed, if it appears that a copy of the account was served upon the defendant between the service and the return of the writ. *Murphy* v. *Simpson*, 2 Que. P. R. 556.

Addresses by defendants — Omission —Defendant residing out of Ontario—Setting aside writ — Nullity. *State Savings Bank* v. *Columbia Iron Works*, 6 O. L. R. 358, 2 O. W. R. 733.

Affidavit—*Order.*]—An affidavit leading to an order for an *ex juris* writ should shew the grounds on which the deponent believes that the plaintiff has a good cause of action. *Northern Counties Investment Trust (Ltd.)* v. *Nathan*, 7 B. C. R. 136.

Agent of defendant company—Proof of agency—Notice to company. *Baird* v. *McLean Co.*, 8 O. W. R. 345.

Agent of defendant company resident out of Ontario—Service on alleged agent in Ontario—Cesser of business formerly carried on in Ontario. *Mackenzie* v. *Fleming H. Revell Co.*, 7 O. W. R. 414.

Bailiff—*Wrong district—Amendment.*]—A writ of summons addressed to the bailiffs of a certain district, and executed by a bailiff of another district, may, even after the lodging of an exception to the form founded upon such irregularity, be amended by addressing it to the bailiffs of the district in which it is desired to serve it. *Houle* v. *Paquet*, 20 Que. S. C. 297, 4 Que. P. R. 329.

Cause of action—*Agreement—Place of performance.*]—An *ex juris* writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a provincial company, not in terms providing for its performance within the jurisdiction:—*Held*, that the writ should be set aside. *Oppenheimer* v. *Sperling*, 7 B. C. R. 96.

Company — Head office removed from province — Substituted service. *Gold Run (Klondike) Mining Co.* v. *Canadian Gold Mining Co.*, 5 O. W. R. 411.

Company—Officer—Director. *McDonald* v. *Consolidated Gold Lake Co.*, 40 N. S. R. 623.

Company — Regularity — Rules 146, 159—Service on clerk at company's office—Service brought to knowledge of company. *Eastwood* v. *Harlan*, 10 O. W. R. 460.

Deceased defendant — *Appearance.*]—The defendant having been sued by the plaintiff, there was filed in the defendant's name an appearance and an exception of the form, alleging that the defendant died before the service of process, and that the service was irregular:—*Held*, that the plaintiff could not have served the defendant, who was dead, and for the same reason an appearance and defence could not be filed in the defendant's name. The parties were dismissed out of Court without costs. *Madore* v. *Graham*, 18 Que. S. C. 129.

Declaration — *Certified copy.*] — The copy of the writ and declaration is one and the same document, which, therefore, requires only one and the same attestation. Thus, the service is not void by reason of the fact that the copy of the writ left with the defendant is not certified to be a true copy, if the declaration is so certified. *United Counties Rw. Co.* v. *Sisters of the Precious Blood*, 8 Que. Q. B. 406.

Defect in copy served—*Irregularity—Exception to the form—Amendment.*]—The service upon the defendant of a copy of the writ of summons, which is a piece of black paper, in the sense that it indicates neither the names of the parties nor their occupations and domiciles nor the time for appearance, is void; such irregularities prejudice the defendant by depriving him of information which he has a right to have at the time of the service of process in the action; an exception to the form based upon such irregularities will be maintained, if the plaintiff does not ask to amend. *Tranchemontagne* v. *Bellerose*, 9 Que. P. R. 46.

Defect in copy served—Not addressed to defendants — Order validating service—Costs. *Ames-Holden Co.* v. *Cochrane*, 9 O. W. R. 825.

Delay—*Insufficient time for appearance —Exception to form.*] — A defendant has a right to complain, by way of exception to the form, of having been allowed, by reason of delay in service of the writ of summons served, an insufficient time for appearance, in view of the distance from the place of service to the place where the appearance is to be entered. *Grondin* v. *Lagueux*, 9 Que. P. R. 41.

Delay—*Reasonableness.*]—A delay of ten days between the issuance and service of a writ of summons is not unreasonable, and a petition for an order commanding the plaintiff to serve it, made five days after its issuance, will be dismissed. *Savaria* v. *Maguire*, 9 Que. P. R. 304.

Delay in—*Death of sovereign—Nullity.*] —A writ of summons issued in the lifetime of her late Majesty and in her name, but served and reported after her death, is not on that account a nullity, and if a second action for the same cause is begun in the name of the King, a plea that the first action is still pending is a good plea. *Ryan* v. *Fortier*, 3 Que. P. R. 526.

Domicil — *Service on attorney—Certificate — Deposit — Exception—Affidavits.*]—The service of a writ of summons and declaration upon a defendant at his last known domicil and place of residence is regular, although the same is no longer his ordinary residence.—2. Under the circumstances of this case the plaintiff's motion for leave to

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serve the writ and declaration upon the defendant's attorneys *ad litem*, was granted.—3. A copy of the prothonotary's certificate as to the deposit made with a declinatory exception must be served upon the plaintiff.—4. Rule 47 of the Rules of Practice of the Superior Court, regarding affidavits, applies only to special demands, and not to pleadings. *Higginson* v. *Reid*, 5 Que. P. R. 394.

Evasion.]—Where it appears by the return of the bailiff that the doors of the defendant's domicil are locked and barred, and that no reply is made to calls to open, the Judge may, under Art. 146, C. C. P., permit service to be effected by depositing copies at the door of defendant's domicil, after first ringing the bell and calling upon the occupant to permit him to enter and make service in the usual manner. *Marlatt* v. *Lynn*, 17 Que. S. C. 128.

Foreign company—*Agent.*]—A person who sells goods on commission for a foreign company, and who keeps samples in his office or carries them to customers whose orders he takes, these orders being filled by the company sending the goods directly to the customers, is not the agent of such company, within the meaning of Arts. 140-142, C. C. P., so as to authorize the service upon him of process in an action against the company. *Macdougall* v. *Schofield Woollen Co.*, 16 Que. S. C. 411.

Foreign company—*President served in jurisdiction — Prejudice.*]—A foreign company suffers no prejudice if process in an action is served on its president personally, in the province of Quebec. *Campbell* v. *Campbell*, 8 Que. P. R. 193.

Foreign company—Service on ordinary agent in jurisdiction — Validity where attorney appointed under Foreign Companies Ordinance — Rules of Court — Repugnancy. *Jones* v. *Central Canada Insurance Co.* (Sask.), 8 W. L. R. 614.

Foreign company — *Waiver—Appearance.*]—Service of process must be, if possible, personal, or in the case of a corporation, upon the duly constituted agent; the substitutional method is to be followed only when prompt personal service appears by affidavit to be unavailable. Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons. And where the plaintiff shewed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to shew that they could not be easily served at the head office, an order for substituted service was vacated. The Court declined to consider the question whether the defendants had waived proper service by entering a conditional appearance, there having been no evidence before the Chancellor that an appearance had been entered, and he having refused to consider it. *Young* v. *Dominion Construction Co.*, 20 C. L. T. 169, 19 P. R. 139.

Foreign company doing business in Nova Scotia—Order XLVII. — Dominion company — Service on agent. *Manley* v. *Temperance, etc., Society*, 40 N. S. R. 615.

Foreign corporation — *Officer temporarily in province — Setting aside service—Status of applicant.*]—A writ of summons describing the defendant company as "doing business in the province of British Columbia" was served upon J. G. McLaren, the manager of the defendant company, who was passing through British Columbia en route to Dawson. The company were incorporated in England, and not registered or licensed in British Columbia:—*Held*, that the service was irregular. Also that it is not necessary that a person who has been served with a writ should be a real defendant to entitle him to apply to set it aside. *Fall* v. *Klondyke Bonanza, Limited*, 9 B. C. R. 493.

Foreign corporation — Rule 159 — "Carrying on business in Ontario"—Service on general manager in Ontario. *Burnett* v. *General Accident Assurance Corporation*, 6 O. W. R. 144.

Foreign defendants — *Service on traveller — Sale of goods — Contract — Completion — Goods delivered and refused —Property of defendant in jurisdiction.*] — In a suit against a foreign commercial partnership, service of the writ of summons made upon a travelling salesman of the partnership, whose powers are limited to taking orders at prices furnished to him by his employers, is not sufficient to give jurisdiction to the Courts of the province of Quebec. 2. A contract for the purchase of goods is complete at the place where the order is accepted by the vendor. 3. The presence in the province of Quebec of a package of goods bought by the plaintiff from the defendants, and refused by him, which package the defendants' traveller is charged to take back if it is untouched and uninjured, and which he alleges is not so untouched, does not constitute property in the jurisdiction sufficient to give to the Courts of the province of Quebec jurisdiction over the defendants. *Malouf* v. *Zech*, 5 Que. P. R. 153.

Foreign insurance company — *Agent —Power of attorney — Cause of action.*]—An English insurance company, who had carried on business in Canada, and whose head office was at Toronto, by two powers of attorney had appointed its general agent at Toronto attorney to receive process under both R. S. O. 1897 c. 203, s. 66, and R. S. C. c. 124, s. 13, transferred its Canadian business to another company, and closed its Canadian offices, but the deposit under the Dominion Act had not been released, and neither of the powers of attorney had been cancelled. On a motion to set aside the service of a writ of summons, which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it, on the ground that the company was not within the jurisdiction:—*Held*, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property in Quebec was properly served upon the agent named as attorney at Toronto under Rule 159, and that the Court in Ontario, therefore, had jurisdiction to entertain the action.—*Semble*, that the power

of attorney required to be filed under R. S. C. c. 124, s. 13, is to receive service of process in any suit instituted in any province of Canada in respect of any liability incurred in such province, and not in respect of any liability incurred in Canada. *Armstrong* v. *Lancashire Fire Ins. Co.*, 22 C. L. T. 146, 2 O. L. R. 395.

Foreign unincorporated voluntary association — *Parties — Incapacity — Proper time to raise question.*] — The right to maintain an action or the liability to be used can only be by or against persons as individuals, or as a corporation, or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents. A local union of workmen, a purely voluntary association, occupying none of such capacities, are not liable to be sued; and a writ served upon them was therefore set aside. *Taff Vale Rw. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 429, distinguished. Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 23 C. L. T. 152, 5 O. L. R. 424, 2 O. W. R. 183, 266, 819, 844.

Fraud — *Foreigner — Judgment — Sale of lands — Title — Leave to defend.*]—In an action by judgment creditors of a company for a declaration that the individual defendants were trustees of certain lands for the company and for a sale of such lands and payment of the plaintiffs' claim out of the proceeds, an order was made for substituted service by mail of the writ of summons upon H., one of the defendants, upon an affidavit of the plaintiffs' solicitor shewing that the writ had been sent to a certain person for service in Alaska, and exhibiting a letter from that person giving the name of H.'s employer and certain information about him, but not stating definitely where he was. Proof of service in the way directed by the order having been given, and none of the defendants appearing, judgment was entered for the plaintiffs, and the lands sold thereunder:—*Held*, that the order for substituted service had been granted on sufficient material. 2. That no fraud on the part of the plaintiffs had been shewn. 3. Following *Moore* v. *Martin*, 1 N. W. T. R., part 2, p. 48, that service of the writ itself upon H., though a foreigner out of the jurisdiction, was neither a nullity nor irregular. 4. That, although H. had no actual notice of the proceedings, the Court had jurisdiction to deal with his interest in the property, and the title of the purchaser should not be interfered with. 5. But, as H. had disclosed a defence on the merits, he should be let in to defend upon terms. *Conrad* v. *Alberta Mining Co.*, 20 C. L. T. 108.

Heirs of deceased—*Infants—Curator—Renunciation — Vacant succession.*]—The general provision of Art. 135, C. C. P., authorising service upon the heirs of a person deceased within the previous six months, without mentioning their names or residences, by leaving the document for them at the former domicil of the deceased, does not apply to heirs who are not capable of pleading, *e.g.*, minors, and who, moreover, at the time of the service were not actually interested, their tutrix having renounced the succession of the deceased in their behalf. 2. The fact that the curator to the vacant succession may have had knowledge of the service of the writ and made no objection, cannot be taken as equivalent to a service nor avail to support an *ex parte* judgment obtained without legal service. *Turcotte* v. *Dansereau*, 27 S. C. R. 583, followed. *Marion* v. *Brien dit Desrochers* 23 Que. S. C. 45, 52.

In Ontario on defendant resident abroad—Appearance—Plea of jurisdiction —Dismissal of action — Frivolous or vexatious action — Master in Chambers—Rule 261. *Delap* v. *Codd*, 2 O. W. R. 790, 849.

Individual defendant — *Partnership —Name — Place of business — Review.*]—*Held*, Taschereau, J., dissenting, that an individual carrying on business alone under a partnership name may be served at the place where he carries on such business by leaving copies of the writ of summons and declaration with a grown-up person left in charge of his office, and such individual, if he is not prejudiced thereby, cannot by inscription in review, demand the setting aside of a judgment entered for default by alleging that the service is void. *Bourdon* v. *Bradshaw*, 18 Que. S. C. 388.

Insufficient delay for return — *Service a nullity — Exception to form — Prejudice.*] — The insufficiency of the time allowed for return of the writ of summons served upon the defendant absolutely nullifies the service, and the defendant is entitled to succeed upon an exception to the form without being obliged to allege or establish prejudice. *Larue* v. *Poulin*, 17 Que. K. B. 188, 9 Que. P. R. 157.

Irregularities — Jurisdiction—Foreign lands — Confirming proceedings — Conditional appearance. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112.

Irregularity — *Dismissal of action.*]—An action will not be dismissed upon exception to the form because the writ, addressed to the bailiffs of the district of Beauharnois, has been served upon the defendant at Montreal by a bailiff of the district of Montreal, no prejudice being alleged or proven. *Bromwell* v. *O'Farrell*, 5 Que. P. R. 85.

Irregularity—*Re-service—Exception to form — Costs.*]—A writ of summons and the declaration annexed thereto irregularly served upon the defendant, may be regularly served again upon him after the filing of an exception to the form complaining of the illegality of the first service, provided that the second service is made within six months of the date of the writ, and in that case the plaintiff will be ordered to pay the costs of an exception to the form. *Alexander* v. *Helfenberg*, 5 Que. P. R. 246.

Married women—*Place of service — Domicil of husband — Exception to the form.*]—Where a married woman, being sued upon a lease wherein she is not described as such, complains that process in the action was not served upon her at her own domicil, that is, her husband's domicil, an exception to the form will be maintained, but without costs. *Pattle* v. *Renaud*, 8 Que. P. R. 389.

Nullity—*Leave to re-serve.*]—The service of the writ of summons and declaration being void by reason of the disqualification of the person effecting it, permission to reserve—the writ being still in force—will be granted on conditions imposed by the Court. *Marsolais* v. *Grenier*, 3 Que. P. R. 142.

Nullity—*Re-service.*]—Service of a writ of summons if made otherwise than upon the defendant personally, or at his place of domicil, or at the place of his ordinary residence, or at his place of business, is absolutely a nullity, and the Judge cannot allow the plaintiff to re-serve, because the service is not only irregular, but non-existent. *Hudon* v. *Joncas*, 3 Que. P. R. 524.

On foreign corporation — *Service in jurisdiction — Agent.*]—A writ of summons for service within the jurisdiction was, with the service thereof, set aside, where it appeared that the defendant was a foreign corporation, having no agent within the jurisdiction who could be served. *Ehman* v. *New Hamburg Mfg. Co.*, 4 Terr. L. R. 363.

On insurance company — Power of attorney — Removal of office from province. *Armstrong* v. *Lancashire Fire Ins. Co.*, 3 O. L. R. 395, 2 O. W. R. 599.

Order allowing—*Jurisdiction of local Judge — Affidavit — Setting aside order.*]—A local Judge of the Supreme Court has jurisdiction to make an order for an *ex juris* writ. The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance, the order should not be made. A Supreme Court Judge has power on motion to set aside an *ultra vires* order made by a Judge of limited jurisdiction. *Tate* v. *Hennessey*, 20 C. L. T. 343, 7 Brit. Col. L. R. 262.

Original service—*Return of copy.* — The Court will allow copies of the writ of summons and the declaration to be substituted for the originals, where the originals have by mistake been served on the defendant. *Larivière* v. *Gauthier*, 9 Que. P. R. 287.

Partnership — *Action against, as corporate body — Amendment.*]—When members of a partnership are described in the writ of summons as a corporate body, and are sued as such, the service of the writ made upon them is radically bad, and an amendment to the writ and declaration will not be granted. *Gas, Electricity, and Power Co.* v. *Syracuse Smelting Works*, 8 Que. P. R. 301.

Person described as defendant — *Namesake of person intended — Attempt of latter to plead want of proper service — Amendment — Exception to form.*]—If the person described in the writ of summons and regularly served therewith is merely a namesake of the person with whom the plaintiff had dealt, the latter cannot appear and plead, in the name of the defendant, that the writ was not served upon him personally, or at his domicil.—2. A plaintiff cannot by amendment change the Christian name of the defendant, and serve his debtor with a copy of the writ and declaration originally served upon a namesake of the defendant; an exception to the form made by the party served in the second place will be maintained, and a motion by the plaintiff to amend his writ and declaration by changing the Christian name of the original defendant dismissed. *Craig* v. *Bourgeois*, 9 Que. P. R. 417.

Place of — *Business office — Domicil — Married woman — Bailiff's return — Declinatory exception.*]—If a woman carries on business in the cities of Montreal and Quebec, in the name under which she is impleaded, the service of the writ of summons at her office and place of business in the city of Montreal is valid, although she has her residence at Quebec, and especially when her husband has been served at his domicil at the said last city.—*Quære*, how far a bailiff's return is debatable under a declinatory exception. *Reid* v. *Audet*, 9 Que P. R. 228.

Place of—*Company — Dominion incorporation — No branch office in province — Provisions of charter — Service on agent.*]—A federal company having its head office in the province of Ontario, and having no branch office in the province of Quebec, cannot be considered a foreign company, and the service of process in an action upon it must be made in the manner provided by its charter.—2. The service upon a company's agent who does business for it on commission, in Quebec, at his own office, leased and paid for by himself, is irregular and illegal. *North Shore Power Railway and Navigation Co.* v. *Ontario Accident Insurance Co.*, 9 Que. P. R. 236.

Place of — *Office of firm—Prejudice — Costs.*]—The office of a commercial firm in which the defendant is a partner, is not that of the defendant, within the meaning of Art. 128, C. P. Nevertheless, the service in this case not having caused prejudice, an exception to the form was dismissed with costs. *Patterson* v. *Levy*, 4 Que. P. R. 196.

Place of business — *Domicil—Judge's order.*]—It is only in default of a regular domicil or of an ordinary residence, that a defendant may be served with process at his place of business. 2. In spite of an order of a Judge permitting service at the place of business, upon a report of a bailiff to the effect that the domicil of the defendant is closed and unoccupied, an action in which process had been served in accordance with such order will be dismissed upon exception to the form. *Soucy* v. *Electric Printing Co.*, 5 Que. P. R. 107.

Place of service—*Bailiff—Informality —Exception to form.*] — The service of a writ of summons, addressed to a bailiff of the district of Saint Francis, upon a de-

fendant in the district of Arthabaska, by a bailiff of the latter district, is not a nullity *per se;* and an exception to the form will not lie where no prejudice is suffered. *Hackett* v. *Courchesne*, 19 Que. S. C. 215.

President of trade union—Effect of registration of union under Ontario Insurance Act — Body corporate — Party to action. *Pepper* v. *Ottawa Typographical Union No. 102*, 8 O. W. R. 409, 445.

Proces-verbal—*Irregularity — Exception to form — Fresh service — Costs.*] — Where process in an action is served by a literate person in the absence of the bailiff, the *procès-verbal* of the service must be regularly sworn to; that is an essential formality. The plaintiff, however, will be permitted, where this has not been done, to serve a new copy of the demand, upon payment of the costs of an exception to the form. *Morand* v. *Markson*, 9 Que. P. R. 40.

Proof of—*Oath—Person administering—Default judgment.*]—A judgment cannot be obtained by default against a defendant served in another province, if the oath of the person who has signed the report of service has been taken before a notary, instead of before one of the persons designated by Art. 137, C. P. *Lydon* v. *Moore*, 4 Que. P. R. 169.

Regularity — *Order — Amendment — English forms.*]—A writ of summons was issued in the form of a writ for service within the jurisdiction, in which the time for appearance was that fixed in such cases, and in which the defendant was stated to be a resident of the judicial district wherein the writ was issued. It appeared that the defendant was not in fact at the time within the Territories, but that, for portions of each of several years previous, he had resided within the said judicial district:—*Held*, following *Fry* v. *Moore*, 23 Que. B. D. 395, that the writ was not irregular. Subsequently an order was made giving the plaintiff leave to serve the said writ on the defendant out of the jurisdiction and extending the time therein fixed for appearance; but the order did not expressly amend or authorise the amendment of the writ.—*Held*, as to the objection that a concurrent writ for service *ex juris* should have been issued, or that the original writ should have been amended, that the Judge's order should be looked upon as involving an exercise of the powers given by E. M. R. 1037, and also as a constructive amendment of the writ. None of the British forms of writs of summons are introduced into the Territorial practice.—*Semble*, that the one form provided by the Judicature Ordinance is adaptable even to the case of foreign defendants *ex juris*, inasmuch as it is in effect a notice, not a command. On an application for leave to serve a writ out of the jurisdiction the plaintiff need shew only a *prima facie* case within the provisions of the Ordinance. *Moore* v. *Martin*, 1 Terr. L. R. 236. See also *S. C.*, 18 S. C. R. 634.

Service on stranger — *Dismissal of action.*]—If the copy of the writ of summons is left with a person who is a complete stranger to the defendant and has no authority to receive the writ for him and this in a house which is neither the residence of the defendant, nor his domicil, nor his office, nor the place where he boards, the action will be dismissed upon exception to the form. *Lapointe* v. *St. Onge*, 3 Que. P. R. 68.

Time—*Dismissal of action.*]—Service of a writ effected more than six months after issue, the writ not having been renewed, is void, and the action will be dismissed upon exception to the form. *Langevin* v. *Grand Trunk Rw. Co.*, 4 Que. P. R. 162.

Unincorporated foreign association — Parties — Service on officers. *Wallace* v. *Order of Railroad Telegraphers*, 5 O. W. R. 787.

Unincorporated foreign voluntary association — International association — Service upon executive officer in Ontario — Conditional appearance — Question of incorporation — Pleading — Trial. *Small* v. *American Federation of Musicians*, 2 O. W. R. 26, 33, 99, 278, 310.

Validity—*Bailiff.*]—The service of process in an action made by a bailiff of the district where the writ issued, is valid, although the writ is addressed to a bailiff of another district. *Lapierre* v. *Brunet*, 6 Que. P. R. 384.

Validity—*Election of domicil.*]—Where a party has elected domicil at the office of the prothonotary for all the purposes of a certain obligation, the service of process in an action at that office will be valid. *Forest* v. *Robert*, 8 Que. P. R. 440.

(*b*) *Out of Jurisdiction.*

Action for price of land sold—Contract — Performance — Place of payment — Breach within the jurisdiction—Previous breach without the jurisdiction. *Saskatchewan and Battle River Land and Development Co.* v. *Hunter* (Sask.), 7 W. L. R. 298.

Action on money covenant — *Place of payment — Breach within jurisdiction — Performance of contract — Breach of same contract without jurisdiction — Action for both causes.*] — In determining whether a cause of action is founded on a breach within the jurisdiction of a contract which ought to be performed within the jurisdiction, the Courts must look at the contract and at the facts which eixsted at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction.—2. Where in an action on a covenant to pay money there is no place specified in the contract for the payment, the debtor must follow his creditor, and pay where his creditor is; and if the creditor is within the jurisdiction, and the contract was made without, and the parties under obligation and residing without the jurisdiction make default in payment, the cause of action arises within the jurisdiction.—3. *Held*, also (*hæsitante*), that where the plaintiff brings an action in respect of a breach arising within the jurisdiction, he may also claim in respect of a breach of the same contract which occurred without the jurisdic-

tion. *Saskatchewan and Battle River Land and Development Co.* v. *Hunter*, 7 W. L. R. 298, 1 Sask. L. R. 27.

Action on promissory note made and payable abroad — *Indorser resident in Quebec.*]—Article 103, C. P., does not authorise the holder of a promissory note made out of the province of Quebec, by a non-resident, and payable out of the province, to sue the maker thereof before the Courts of the province of Quebec, because a subsequent indorser of the note, co-defendant, is domiciled therein. *Hackett* v. *Ryan*, 8 Que. P. R. 380.

Action to rescind purchase of shares.]—An action to rescind the purchase from the defendant of shares in an incorporated company on the ground of misrepresentation, is not an action within Order XI., so as to enable the plaintiff to obtain an *ex juris* writ against the defendant. *Davies* v. *Dunn*, 21 C. L. T. 364, 8 B. C. R. 68.

Affidavit—Grounds of belief—Cause of action — Order XI., Rule 2. *Kennedy* v. *O'Brien*, 40 N. S. R. 609.

Appearance—*Motion to withdraw—Attornment to jurisdiction.*]—An application by a defendant resident in Montreal who had been served there with the writ of summons in an action brought in Ontario on two promissory notes payable, if at all, in Montreal, for leave to withdraw his appearance and enter a conditional appearance, was refused, it having been shewn that the defendant had not only appeared but had also successfully resisted a motion for immediate judgment on material alleging his intention to counterclaim to have a partnership between the plaintiff and himself in Ontario wound up. *Croil* v. *McCullough*, 11 O. L. R. 282, 7 O. W. R. 152.

Bill of exchange—*General acceptance—Lex loci—Place of payment.*]—A bill of exchange dated and drawn at Halifax by the Dominion Antimony Co., Ltd., and addressed to the St. Helens Smelting Co., Manchester, England, was accepted at Manchester, payable at the office of the Manchester and Liverpool District Banking Co., London. An order having been made for service out of the jurisdiction, and judgment given refusing to set the same aside:—*Held*, affirming that judgment, that, under the Bills of Exchange Act, 1890, s. 71 (1) b, the interpretation of the acceptance was to be determined by the law of the place where the contract was made, *i.e.*, the place where the bill was accepted, and that as so interpreted the acceptance was not qualified but general, and the acceptor must seek his creditor. The action was thus founded on the breach within the jurisdiction of a contract that ought to be performed within the jurisdiction: O. XI., r. 1 c. *Sanders* v. *St. Helens Smelting Co.*, 1 E. L. R. 56, 39 N. S. R. 370.

Cause of action—Alimony—Support of children—Creditor—Fraudulent conveyance—Action to set aside—Parties—Grantor — Action for alimony in another province — Stay of proceedings on claim for alimony in Ontario. *Eames* v. *Eames*, 3 O. W. R. 42, 65, 351, 377, 409.

Cause of action—Breaches of contract — Delivery of goods — Place of delivery. *Cuthbertson* v. *Canada Radiator Co.* (N. W.T.), 3 W. L. R. 86.

Cause of action—Claim for commission and expenses—Place of payment—Contract. *Dickson* v. *McInnes* (N.W.T.), 3 W. L. R. 60.

Cause of action—Contract—Breach — Discretion—*Forum non conveniens. Baxter* v. *Faulkner*, 6 O. W. R. 198.

Cause of action—Contract — Breach—Fire insurance — Conditional appearance—Undertaking to prove cause of action—Rule 162 (e)—Insurance Act, s. 143. *Burson* v. *German Union Ins. Co.*, 3 O. W. R. 372.

Cause of action — Contract — Correspondence—Rule 162—Forum — Discretion. *Craddock* v. *Bull*, 6 O. W. R. 715, 838.

Cause of action—Contract — Services —Place of payment — Conditional appearance—Motion to set aside writ and service —Material upon—Action against member of foreign partnership—Non-joinder of partners —Foreign co-debtor—Costs. *Craddock* v. *Bull*, 7 O. W. R. 343.

Cause of action — *Conversion — Rule 162 (e).*]—The plaintiff sued two defendants, one of whom, O., lived in the Province of Quebec, for conversion of a picture. The other defendant, W., as the plaintiff stated, in breach of an agreement with the plaintiff in Ontario, delivered the picture to O. in Quebec, and O. wrongfully held it there. O. stated on affidavit that W. pledged the picture to him in Quebec, lawfully and in good faith, for money lent, and denied having any other dealings as to the picture, or any dealings whatever in Ontario:—*Held*, that the cause of action, if any, against O. did not come within the terms of Rule 162 (e), and therefore service of the writ of summons upon him out of the jurisdiction should not be permitted. *Rourk* v. *Wiedenbach*, 21 C. L. T. 292, 1 O. L. R. 581.

Cause of action, when arising — *Contract—Conditional appearance.*] — The contract was not in writing, and a writ had been issued in the Province of Ontario and served in Manitoba, on affidavits setting forth that the contract was to be performed by payment in Ontario:—*Held*, that this satisfied what is required by Rule 1246, and, although defendants by affidavit disputed and said that the contract was made and to be performed in Manitoba, yet the issue could not and should not be determined in a summary way on affidavits, but the proper course for the defendant was under the Ontario Rule 173, providing for conditional appearance, favouring the former equitable practice, which was to enter such appearance and raise the want of jurisdiction by plea or demurrer. *Canadian Radiator Co.* v. *Cuthbertson*, 5 O. W. R. 66, 9 O. L. R. 126.

Contract—*Breach—Place where contract broken — Sale of goods—Place of payment.*] —The plaintiffs sued for breach of contract and for goods sold and delivered. Defend-

ants carried on business and had their head office in Montreal, and the plaintiffs carried on business in Toronto. The defendants at Montreal gave to a travelling agent of the plaintiffs an order for goods to be delivered f. o. b. at Toronto:—*Held*, that the acceptance of the order by post was within the contemplation of the parties, and the contract must be taken to have been made when the plaintiff's letter of acceptance was posted at Toronto; and that the property in the goods passed to the defendants upon a delivery being made at Toronto, and a breach of the contract by non-acceptance was a breach within Ontario of an obligation to be performed within Ontario. The Chief Justice of the Common Pleas (delivering the judgment of the Divisional Court), expressed the view that the omission from the Ontario Rule 162 of the words "according to its terms," which are in the corresponding English Rule, leaves it open, in construing the contract in order to determine whether it is to be performed within Ontario, to apply the rule of law that the debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract. *Phillip* v. *Malone*, 3 O. L. R. 47, 492, 1 O. W. R. 200, followed. *Blackley* v. *Elite Costumes Co.*, 4 O. W. R. 417. Affirmed, 5 O. W. R. 57, 25 C. L. T. 92, 9 O. L. R. 57.

Contract — *Money had and received* — *Place of payment.*]—The defendants, a foreign company, contracted with the plaintiffs, a Victoria firm, to carry coal from Seattle to Alaska, and were paid the amount of the contract price. When the coal arrived at Dyea, the defendants demanded and collected from the plaintiffs' agent an additional sum for taking the coal in lighters from Skagway to Dyea. The defendants' agent promised to repay the amount in Victoria:—*Held*, setting aside an *ex juris* writ, that the claim for this amount really arose out of the contract, and therefore the Court had no jurisdiction. *Shallcross* v. *Alaska S. S. Co.*, 8 B. C. R. 203.

Contract — *Place of performance* — *Quebec law—Discretion.* — An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff, of certain plant and machinery and stock in trade of a business carried on by him at Montreal. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price:—*Held*, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicil of the debtor is the place of payment, and therefore the action was not founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (*e*). The obligation to pay did not arise directly from provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and notice of the election was given by letter received by the defendants in Montreal. A proper discretion was exercised in setting aside an order allowing service of the writ out of Ontario. *Comber* v. *Leyland*, [1898] A. C. 524, referred to. *Phillips* v. *Malone*, 22 C. L. T. 32, 3 O. L. R. 47.

An appeal from above judgment was dismissed with costs by D. C.: — *Held*, *per* Falconbridge, C.J., that if the agreement of the 1st May, 1899, was complete, the contract was made in Quebec; but, if it was to be completed by the subsequent acts of the parties, there was no authority to the plaintiff to use the post office as a means of communication. *Per* Street, J.—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. Their letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract, the onus of shewing which was on the plaintiffs, and was not satisfied. *Phillips* v. *Malone*, 22 C. L. T. 159, 3 O. L. R. 492, 1 O. W. R. 200.

Contract — *Place of performance.*] — Where from the terms of a contract it did not appear that its performance should be within the jurisdiction, and a motion was made to set aside an order for service of a summons out of the jurisdiction, considering that the circumstances disclosed in the affidavits made it appear that the contract was to be performed within the jurisdiction. An appeal from this decision was dismissed with costs. *Pickford* v. *Hamburg-American Packet Co.*, 40 N. S. R. 152.

Contract — Sale of goods—Action for price—Place of payment — Conditional appearance. *Dominion Canister Co.* v. *Lamoureux*, 7 O. W. R. 272, 378.

Contract—Sale of goods—Place of payment. *Burlington Canning Co.* v. *Campbell*, 6 O. W. R. 331.

Contract for sale of land—*Place of making and performance — Completed contract.*]—A contract made by correspondence between a resident purchaser and a non-resident vendor for sale of land in the Territories—the acceptance of the vendor's offer to sell having been mailed in the Territories—is one which, according to the terms thereof, ought to be performed within the Territories.—In an action for damages for breach of such a contract:—*Held*, that service out of the jurisdiction was properly allowed.—The question, where it is doubtful, whether there was a completed contract should not be determined on an application to set aside the order for service *ex juris*. *Bishop* v. *Scott*, 6 Terr. L. R. 54.

Contract of hiring—*Breaches within and without Ontario.*]—The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed-on remuneration, in selling and taking orders for their goods over a prescribed route to British

Columbia and return, his duties on such return requiring him to call at a number of places in Ontario, to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position. The plaintiffs refused to accept his resignation, and, after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for breach thereof:—*Held*, by the Master in Chambers, dismissing an application to set aside an order for service of the writ of summons out of Ontario, that there was a breach of the contract within Ontario for which the plaintiffs were entitled to sue. On appeal to a Judge in Chambers, this order was varied by limiting the action to breaches in Ontario; but reserving to the plaintiffs the right to bring actions for breaches which occurred out of Ontario. *R. J. Lovell Co.* v. *Coles*, 22 C. L. T. 165, 3 O. L. R. 291.

Contract to be performed in Ontario — Rule 162 — Conditional appearance. *Clarkson* v. *Crawford*, 10 O. W. R. 1043.

Foreign administrator—Motion to add defendant—Evidence on motion. *Steadman* v. *Steadman*, 6 O. W. R. 420.

Foreign company—*Transfer of assets in Ontario to Ontario company—Defence.*]—On a motion to set aside a writ of summons, the order permitting service out of the jurisdiction, and the service thereunder, in an action brought in the Province of Ontario, by shareholders resident in the Province of Nova Scotia of a loan company incorporated in and with its head office and assets (real estate mortgages), except $1,200 in mortgages on land in Ontario, in the Province of Quebec, against the loan company and its liquidators, resident in the Province of Quebec, and a loan company incorporated in and with its head office in the Province of Ontario, to set aside an agreement transferring the assets of the Quebec company to the Ontario company, and making the shareholders of the Quebec company shareholders in the Ontario company, and for distribution of the proceeds of the assets, etc., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Rule 162:—*Held*, that the action was not brought with reference to real estate in the same sense as *Henderson* v. *Bank of Hamilton*, 23 S. C. R. 716, and similar cases were; and that the case fell within Con. Rule 162, clauses (g) and (h). Motion dismissed without prejudice to defendants setting up want of jurisdiction as a defence. *Mackey* v. *Colonial Investment and Loan Co.*, 22 C. L. T. 389, 4 O. L. R. 571, 1 O. W. R. 569, 592, 646.

Foreigner — *Notice.*]—The question in what circumstances and to what extent provisions in the Rules under the English Judicature Act are to be held incorporated with the Judicature Ordinance discussed. English Order XI. (Marginal Rules 64-70) is not in force in the Territories. The Judicature Ordinance, 1893, s. 32, authorizes an order for the service of a writ of summons *ex juris*, though the party to be served is not a British subject, and the other should provide for service of the writ of summons, not of a notice thereof. Judgment of Scott, J., 4 Terr. L. R. 322 20 C. L. T. 108, on this and other points, affirmed. *Conrad* v. *Alberta Mining Co.*, 21 C. L. T. 102, 4 Terr. L. R. 412.

Joint cause of action—Rule 162 (g)—One defendant in jurisdiction—Necessary party out of jurisdiction—Joinder of defendants. *Haight* v. *Menzie Wall Paper Co. and T. C. Patillo Co.*, 7 O. W. R. 122.

Leave to issue writ — Affidavit — Intituling—Time for appearance—Vacation—Judgment. *Hamilton* v. *Mutual Reserve Fund Life Assn.*, 2 O. W. R. 155, 806.

Motion to set aside—Grounds — *Res judicata* — One defendant in jurisdiction — Conditional appearance. *McRae* v. *Ballantyne*, 8 O. W. R. 289, 314.

Notice—*Company defendant.*]—The defendant company were incorporated by Act of the Parliament of Canada, and had their head office at Winnipeg. The plaintiffs obtained *ex parte* an order giving them leave to issue a writ of summons against the defendant company and to serve a notice of the same upon the company in Winnipeg. The notice having been served, the defendant company moved to set aside the service as irregular:—*Held*, that Order XI., Rule 4, did not apply. The defendant company were not a foreign company, and therefore the writ and not a notice thereof should have been served. The service of the notice was set aside with costs. *Manley* v. *Great West Life Assurance Co.*, 23 C. L. T. 205.

Order before action—*Parties—Causes of action—Joinder.*]—The proper practice under the Rules as they stand (Rules of 1897, Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction. Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec, and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant and taken to Quebec and prosecuted there upon a criminal charge of which he was acquitted, and that against the fourth defendant, the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario: — *Held*, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other.—*Held*, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec. *Croft* v. *King*, [1893] 1 Q. B. 419, followed. But the order should contain a clause providing that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well. *In re Jones* v. *Bissonnette*, 22 C. L. T. 53, 2 O. L. R. 54.

Order for—Foreign defendant—Service on agent in jurisdiction — Irregularities—Proceedings set aside. *Johnson* v. *Burtis*, 7 O. W. R. 803.

Order for—Judgment for default of appearance—Motion by defendants to set aside proceedings—Deliberate intention of defendants to ignore proceedings. *Gledhill* v. *Telegram Printing Co.*, 12 O. W. R. 195.

Order for—Setting aside—Irregularities—Waiver — Moving for extension of time for appearance—Submitting to jurisdiction — Stay of proceedings — Previous actions pending—Proceedings under Miners Ordinance. *Wilson* v. *Graves* (Y.T.), 2 W. L. R. 504.

Order for leave to issue writ—Fixing time for appearance — Parties — Separate causes of action—Joinder of. *Jones* v. *Bissonette*, 1 O. W. R. 13, 3 O. L. R. 54.

Order for service on defendants resident out of the jurisdiction — Service on agent in Ontario—Substitutional service—Cause of action—Rule 162—Carrying on business in Ontario—Irregularities in service—Conditional appearance. *Collier* v. *Heintz*, 8 O. W. R. 340.

Order permitting — Irregularity — Affidavit—British subject—Right to relief claimed—Omission to verify part of claim—Neglect to state grounds. *Confederation Life Association* v. *Moore*, 2 O. W. R. 941, 1030, 1087, 1120.

Order permitting—Motion to set aside—Waiver. *Chambre* v. *Gundy*, 2 O. W. R. 243, 244.

Parties—*Injunction—Con. Rule 162.*]—An order allowing service of a writ of summons out of the jurisdiction cannot be supported under clause (e) of Con. Rule 162, unless the injunction can properly be asked as against the defendant out of the jurisdiction sought to be served. In proceeding under clause (g) of Con. Rule 162 the defendant within the jurisdiction should be served with the writ and then an order applied for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned. *Collins* v. *North British and Mercantile Ins. Co.*, [1894] 3 Ch. 228, followed. *Livingstone* v. *Sibbald*, 15 P. R. 315, *Mackay* v. *Colonial Investment and Loan Co.*, 4 O. L. R. 571, 22 C. L. T. 389, and *In re Jones* v. *Bissonnette*, 3 O. L. R. 54, 22 C. L. T. 53, considered. *Postlethwaite* v. *McWhinney*, 23 C. L. T. 333, 6 O. L. R. 412, 2 O. W. R. 794, 851, 3 O. W. R. 411, 591, 696.

Place where contract broken—Sale of goods—Place of payment. *Blackley Co.* v. *Elite Costume Co.*, 4 O. W. R. 417.

Powers of territorial legislature — *Judicature Ordinance—Small Debt Procedure.*]—A colony having authority to establish courts of civil jurisdiction and to provide for procedure therein has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction. The legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions. Section 32 of Ordinance 5 of 1894 (amending J. O. 1898), relating to small debt procedure, provides: "The summons shall be returnable: (c) Where the defendant resides in any place in Canada outside the Territories, or in the United States of America, at the expiration of 20 days from the service thereof; (d) Where the defendant resides in any part of the United Kingdom, at the expiration of 30 days from the service thereof; (e) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction:"—*Held*, that neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure. Nor is it necessary that a proper case for service out of the jurisdiction should be shewn by the statement of claim; but semble, if a defendant served out of the jurisdiction can shew affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service. *McCarthy* v. *Brener*, 2 Terr. L. R. 230.

Rule 162—Cause of action where arising—Contract—Place of payment—Conditional appearance. *Davis* v. *Morrison*, 11 O. W. R. 423.

Rule 162 (e)—*Tort committed within Ontario.*]—It is only where the tort for which the plaintiff brings action has been "committed" within Ontario, that Con. Rule 162 (*e*) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.—An order permitting service upon the defendants abroad was set aside where the cause of action alleged against the defendants, a company engaged in the manufacture of explosives in Scotland, was that they were negligent in allowing a fuse, which had been purchased by the plaintiff's employers, and which injured the plaintiff at a place in Ontario, to be manufactured and sold in a defective condition, the manner in which the fuse reached the plaintiff's employers not being alleged or suggested. The manufacture and sale must be deemed to have taken place in Scotland, and, although the invasion of the plaintiff's right of personal security occurred in Ontario, the tort comprises also the wrongful act or omission of the alleged tort-feasor. Order of the Master in Chambers and Mabee, J., affirmed. *Anderson* v. *Nobels Explosive Co.*, 12 O. L. R. 644, 8 O. W. R. 439, 558, 644.

Sale of goods—*Breach of contract — Place of performance—Property passing — Order for service—Affidavit—Forum — Discretion.*]—The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, via Leyland line from Boston, delivered f. o. b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the

goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned:—*Held*, that the property in the goods passed to the purchasers on the delivery on board the vess.l at Boston, and an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in a case of a sale by sample, *prima facie* the place of delivery is the place for inspection, and there was nothing in the contract to rebut the presumption; and therefore the action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed. 2. That it was not necessary for the plaintiffs, in obtaining an *ex parte* order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods, and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained. 3. That a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England. *Atkinson* v. *Plimpton*, 23 C. L. T. 331, 6 O. L. R. 566, 2 O. W. R. 827, 914.

Service on co-defendant in jurisdiction—Partnership—Rule 162 (g) — Action "properly brought" in Ontario. *Sparrow* v. *Rice and Barton*, 6 O. W. R. 559.

Statement of claim — Default judgment—Irregularity—Setting aside. *Lovell* v. *Taylor*, 5 O. W. R. 525.

Unlicensed foreign corporation — *Method of service—Publication — Time for appearance.*]—Section 146 of the Companies Act, R. S. B. C. 1897 c. 44, defines an unlicensed and unregistered extra-provincial company. Section 147 provides that any writ or summons . . . may be served as against the company by delivering the same at Victoria to the registrar of the Supreme Court. Section 148 enacts that it shall be the duty of such registrar to cause to be inserted in four regular issues of the British Columbia Gazette, consecutively following the delivery of such writ of summons to him, a notice of such writ of summons, with a memorandum of the date of delivery, stating generally the nature of the relief sought, the time limited, and the place mentioned for entering an appearance. Section 149 enacts that after such four issues the delivery of such process to the registrar as aforesaid shall be deemed, as against the defendant company, to be good and valid service of such writ or summons: — *Held*, in the case of an issue of an ordinary eight-day writ under part VII., that it is the duty of the registrar to notify the defendant in the publication in the Gazette that the time for appearance is eight days after the fourth publication.—*Per* Irving, J.:—As the writ is a writ for service on a foreign corporation, without the jurisdiction, application to a Judge for leave to issue the writ and proceed under the Act is necessary before any writ is issued. The Judge in giving leave would limit the time within which appearance should be entered. *Youdall* v. *Toronto and British Columbia Lumber Co.*, 12 B. C. R. 72.

Writ of service in Ontario — Setting aside—Costs. *De Luca* v. *Mead-Morrison Manufacturing Co.*, 9 O. W. R. 903.

(c) Substitutional Service.

Extra-provincial company — *Affidavit —New material on application to discharge order—Discretion.*]—An affidavit leading to an order for substituted service is a jurisdictional affidavit. An affidavit leading to an order for substituted service, under s. 130 of the Companies Act, on an extra-provincial company licensed to do business in British Columbia, should shew clearly that the company is an extra-provincial one licensed to do business in the province. On an application to set aside an order for substituted service it is discretional with the Judge to allow the plaintiff to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal declined to interfere. *Centre Star Mining Co.* v. *Rossland Great Western Mines, Limited*, 24 C. L. T. 160, 10 B. C. R. 262.

Fraud—*Foreigner — Judgment—Sale of lands—Title—Leave to defend.*]—In an action by judgment creditors of a company for a declaration that the individual defendants were trustees of certain lands for the company and for a sale of such lands and payment of the plaintiffs' claim out of the proceeds, an order was made for substituted service by mail of the writ of summons upon H., one of the defendants, upon an affidavit of the plaintiffs' solicitor shewing that the writ had been sent to a certain person for service in Alaska, and exhibiting a letter from that person, giving the name of H.'s employer and certain information about him, but not stating definitely where he was. Proof of service in the way directed by the order having been given, and none of the defendants appearing, judgment was entered for the plaintiffs, and the lands sold thereunder:—*Held*, that the order for substituted service had been granted on sufficient material. 2. That no fraud on the part of the plaintiffs had been shewn. 3. Following *Moore* v. *Martin*, 1 N. W. T. Reps., part 2, p. 48, that service of the writ itself upon H., though a foreigner out of the jurisdiction, was neither a nullity nor irregular. 4. That, although H. had no actual notice of the proceedings, the Court had jurisdiction to deal with his interest in the property, and the title of the purchaser should not be interfered with. 5. But, as H. had disclosed a defence on the merits, he should be let in to defend upon terms. *Conrad* v. *Alberta Mining Co.*, 20 C. L. T. 108, 20 C. L. T. 102, 4 Terr. L. R. 322.

Mandate—*Return of service—Contestation—Form—Nullity of service—Prejudice.*] —The service of the writ of summons in an action against a defendant residing outside the province, but who has a place of business in the city of Montreal, cannot be made

upon a third party who manages his business during his absence, without proof that the defendant has given him a mandate, which could authorise creditors to summon him at the domicil of such third party.—2. A defendant may be allowed to contest the *procès-verbal* of the writ of summons in a motion of the nature of an exception to the form.—3. The nullity of the summons involves of itself and by its nature a prejudice towards the person who invokes it and of which the Court is bound to take cognisance. *Fairbanks* v. *Howley*, 10 Que. P. R. 72.

Motion by person served to set aside—Practice — Costs. *Bound* v. *Bell*, 9 O. W. R. 541.

Motion by person served to set aside order and service—Status of applicant—Knowledge of defendant's abode — Defendant out of the jurisdiction—Dismissal of motion — Costs. *Curran* v. *Curran*, 12 O. W. R. 718.

Motion to set aside—*Status of applicant — Solicitor.*]—Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service:—*Held*, that he had no *locus standi*. The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings.—*Semble*, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court, have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent. Decision of Master in Chambers, 23 C. L. T. 335, 6 O. L. R. 356, 2 O. W. R. 921, affirmed on different grounds. *Taylor* v. *Taylor*, 24 C. L. T. 19, 6 O. L. R. 545, 2 O. W. R. 921, 953.

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8. Small Debt Procedure, N. W. T.

Failure to serve—*Alias writ—Limitation of actions.*]—A writ of summons (under the small debt procedure) had been issued in an action on a debt before the period after which it would become barred by the Limitations Ordinance had expired; it was, however, never served; but after the expiry of the period fixed by the Ordinance an alias writ of summons was issued:—*Held*, in view of the provisions of Rule 542 of the Judicature Ordinance (C. O. 1898 c. 21), the issue of the alias writ of summons prevented the operation of the Limitations Ordinance, and that therefore, the Ordinance afforded no defence to the action. *Curry* v. *Brotman*, 4 Terr. L. R. 369.

Meaning of "debt"—*Claim for wrongful dismissal.*]—A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month, does not fall within the meaning of the words "all claims and demands for debt" in Rule 602 of the Judicature Ordinance, 1898, and proceedings to recover the same cannot be taken under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court or a Judge will, under the power given by Rule 538, direct that the writ of summons and the service thereof shall stand, but that the action shall continue as an action under the ordinary procedure. *McNeilly* v. *Beattie*, 20 C. L. T. 292, 4 Terr. L. R. 360.

Place of entering suit.]—In a small debt action where the cause of action arises within the district of a deputy clerk, and the defendant resides within the said district, the writ must be issued out of the office of the deputy clerk of the district, and a writ issued by the clerk of the district from his own office will be set aside as irregular. *Sharples* v. *Powell*, 20 C. L. T. 291, 4 Terr. L. R. 94.

Place of issue.]—In a small debt action, in the N. W. T., where the cause of action arises within the district of the deputy clerk, and the defendant resides within the district, the writ of summons must be issued out of the office of the deputy clerk of the district, and a writ issued by the chief clerk of the judicial district from his own office will be set aside as irregular. *Sharples* v. *Powell*, 20 C. L. T. 291.

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9. Special Indorsement.

Claims for work and labour and goods sold—*Absence of express contract.*]—A claim for reasonable remuneration for work and labour, even in the absence of an express contract as to the rate of remuneration, comes within the description of a "debt or liquidated demand," and may be the subject of a special indorsement; and claims for so many days' labour at so much per day and for goods sold and delivered at a named price, in the absence of an allegation of an express contract in either case, are in the nature of a *quantum meruit* for the labour and a *quantum valebant* for the goods, and, in both cases, equally good as the subject of special indorsements. *Graham* v. *Warwick Gold Mining Co.*, 37 N. S. R. 307.

Company plaintiffs — *Incorporation—Bill of exchange — Notarial fees.*]—Action to recover the amount of a bill of exchange accepted by the defendant as "Dean & Co." The action was begun by a specially endorsed writ of summons. The defendant applied to set aside the writ on the grounds that the plaintiffs being a foreign corporation, the writ should have disclosed how and where the company were incorporated, and that the plaintiffs, claiming notarial fees, must proceed in the ordinary way by declaring:—*Held*, that the writ was good in form. (2) That under s. 57 of the Bills of Exchange Act, the plaintiffs had a right to interest, bank charges, and notarial fees as part of the bill of exchange. *Cowan Co.* v. *Dean*, 21 C. L. T. 574.

Company plaintiffs — *Incorporation—Clerical error — Amendment.*]—Application to set aside the writ of summons on the grounds that in the special endorsement the incorporation of the plaintiff company had not been set out, and that the writ was

issued in the name of Victoria instead of Edward VII.:—*Held*, that the writ was in good form; (2) that the plaintiff should be allowed to amend under 60 V. c. 24, s. 218 (N.B.), on payment of costs. *London House* v. *Puddington & Merritt*, 21 C. L. T. 573.

Company plaintiffs — *Incorporation—Particulars.*]—A specially endorsed writ of summons issued under 60 V. c. 24 by a foreign company need not aver the incorporation of the company. Particulars of claim under a specially endorsed writ may be attached to the writ. *North Packing and Provision Co.* v. *Merrit*, 21 C. L. T. 573.

Covenant.]—An indorsement upon a writ of summons of a claim for principal and interest under a covenant in a mortgage in order to be a good special endorsement within the meaning of Order III., Rule 6, and Order XIV., Rule 1, must allege that the moneys are due under the covenant. *British Columbia Land and Investment Agency Limited* v. *Cum Yow*, 8 B. C. R. 2.

Foreign judgment—*Interest till judgment — Liquidated demand.*]—A claim for interest "until payment or judgment" is not a claim for a liquidated demand within the meaning of Order II., r. 6, except where the cause of action is in respect to negotiable instruments, in which case the interest is, by s. 57 of the Bills of Exchange Act, deemed to be liquidated damages. Interest claimed under a statute cannot be the subject of special endorsement, unless it is stated in the endorsement under what Act the interest is claimed. A specially endorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated. Decision in 9 B. C. R. 27, 22 C. L. T. 154, reversed; Martin, J., dissenting. *Macaulay* v. *Victoria Yukon Trading Co.*, 22 C. L. T. 377, 9 B. C. R. 136.

Foreign judgment — *Summary judgment.*]—In an action on a foreign judgment the statement of claim endorsed on the writ did not allege specifically against whom the judgment was recovered: — *Held*, that the writ was not specially endorsed; and a motion for summary judgment was refused. *Boyle* v. *Victoria Yukon Trading Co.*, 8 B. C. R. 352.

Interest — *Summary judgment—Amendment of endorsement — Re-service.*]—Summons for judgment under Order XIV., in an action for principal and interest due under a covenant in a mortgage. The statement of claim indorsed on the writ, in addition to the claim for principal and interest computed to a certain date previous to issue of writ, contained a claim for interest on the principal until payment or judgment: — *Held*, such claim for interest was not a subject of special indorsement under Order III., r. 6.—*Held*, also, that where, on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to the plaintiff to obtain an amendment and proceed, but a new summons must be taken out. Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary. *Pike* v. *Copley*, 22 C. L. T. 218, 9 B. C. R. 52.

Omission of formal words — *Motion for summary judgment.*]—A motion for summary judgment under Order XIV. was refused on the ground that the writ of summons was not specially indorsed, the indorsement not being headed with the words "statement of claim." *Vancouver Agency* v. *Quigley*, 8 B. C. R. 142.

Promissory note—"*Duly presented*"—*Summary judgment.*]—Appeal from an order giving the plaintiffs leave to sign final judgment under Order XIV. The statement of claim indorsed on the writ stated plaintiffs' claim as being on a note dated . . . payable four months after its date to the order of M. L. Wurzburg & Company, at their office, Halifax, N. S., indorsed . . . and which said note was duly presented for payment and was dishonoured:—*Held*, a good special indorsement. *Cunard* v. *Symon-Kaye Syndicate*, 27 N. S. R. 340, distinguished. *Union Bank of Halifax* v. *Wurzburg & Co., Ltd.*, 22 C. L. T. 402, 9 B. C. R. 160.

Signature of plaintiff's solicitor — *Order XIV.*]—Summons for judgment under Order XIV. Preliminary objection that the writ was not specially indorsed, in that it was not signed by the plaintiff's solicitor:—*Held*, that it was not a good special indorsement. *Oppenheimer* v. *Oppenheimer*, 21 C. L. T. 576, 8 B. C. R. 145.

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10. Miscellaneous.

Action for money demand—*Service of writ without copy of account — Previous receipt—Prejudice.*]—A defendant who has received, before the action, a duplicate of the account sued upon, suffers no prejudice from the non-service of a copy thereof with the writ and declaration, and cannot make such want of service the basis of an exception to the form. *Lidstone* v. *Hamming*, 7 Que. P. R. 431.

Action for revocation of letters probate — Practice—Affidavit verifying indorsement — Citation to custodian of letters — Stay of proceedings. *McLagan* v. *McLagan*, (B.C.), 2 W. L. R. 12.

Address of defendant — *Foreign defendant.*]—The address of the defendant is a necessary part of the writ of summons, and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs. *State Savings Bank* v. *Columbia Iron Works*, 23 C. L. T. 306, 6 O. L. R. 358, 2 O. W. R. 733.

Application to set aside—Irregularity — Intituling of affidavits. *Toronto and British Columbia Lumber Co.* v. *Moore* (B.C.), 2 W. L. R. 239.

Irregularities — *Prejudice — Qui tam action — Reference to Sovereign — Name of plaintiff.*]—In an action *qui tam*, the defendant cannot set up grounds resulting from irregularities of the plaintiff as long as they do not cause prejudice. 2. The word "us" in the words "suing as well as in his own name as for us" contained in form 3 of the Rules of Practice of the Superior Court is sufficient to designate his Majesty the King. 3. It is not necessary to give all the plaintiff's names, provided he is sufficiently designated in the writ. *Ridgeway* v. *Collier*, 5 Que. P. R. 308.

Irregularity—Action in name of next friend — Consent not filed — Application of English Rule — Death of plaintiff—Revivor — Effect on irregularities. *Hourston* v. *Spence* (N.W.T.), 2 W. L. R. 343.

Saisie-revendication — *Declaration—Filing — Time — Record.*]—A writ of summons or of *saisie-revendication* filed without the original declaration is an absolutely void proceeding, and a defendant, who has appeared in the cause, but who has not pleaded, may take advantage of the nullity at any stage of the cause without having recourse to an exception to the form, and have the action dismissed upon motion to that effect even on the day fixed for hearing; for in such case there is really no action before the Court. 2. A declaration placed upon the record outside of the time allowed to the plaintiff for a return of his action and a long time after the return of the writ, without the consent of the opposite party or the permission of a Judge, is irregularly upon the record and will be considered as if it were no declaration at all. *Bouchard* v. *Boivin*, 6 Que. P. R. 41.

Solicitor — *Firm — Practice.*]—It is permissible to issue a writ of summons in the name of a firm of solicitors. English practice followed. *Protestant Orphans' Home* v. *Daykin*, 12 B. C. R. 128.

Summary matter—*Heading of writ.*]—The provisions of the Code of Procedure relating to summary matters do not apply unless the words "summary procedure" are written or printed at the head of each original and copy of the writ of summons. *Bernard* v. *Carbonneau*, 6 Que. P. R. 348.

See PROCESS.

WRONGFUL DISMISSAL.

See MASTER AND SERVANT.

YUKON MINERS' LIEN ORDINANCE.

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TABLE OF CASES

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Abell v. Morrison, 19 O. R. 669.
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Abrath v. North Eastern Rw. Co., 11 Q. B. D. 445; 11 A. C. 247.
Followed in Durrand v. Forrester, 18 Man. L. R. 444, 10 W. L. R. 289.
Referred to in Guardian Fire and Life Assurance Co. v. Quebec Railway, Light, and Power Co., 37 S. C. R. 676.

Abrath v. North Eastern Rw. Co., 11 App. Cas. 247.
Referred to in Hêtu v. Dixville Butter and Cheese Association, 40 S. C. R. 128, 4 E. L. R. 578.

Abrey v. Crux, L. R. 5 C. P. 37.
Followed in Smith v. Squires, 21 Occ. N. 216, 13 Man. L. R. 360.

Acer v. Percy, Q. R. 24 S. C. 232.
Followed in Germano v. Mussen, 6 Q. P. R. 249.

Ackman v. Town of Moncton, 24 N. B. R. 103.
Overruled in Rex v. City of St. John, Ex p. Abbott, 38 N. B. R. 421, 4 E. L. R. 498.

Adams v. Allcroft, 37 N. B. R. 332.
Reversed 36 S. C. R. 365.

Adams v. Bank of Montreal, 8 B. C. R. 314.
Affirmed 32 S. C. R. 719.

Adams v. Cox, 3 O. W. R. 32.
Reversed in Cox v. Adams, 25 Occ. N. 25, 35 S. C. R. 393.

Adams v. Crowe, 25 N. S. R. 510.
Reversed 21 S. C. R. 432.

Adams v. Newbigging, 13 App. Cas. 308.
Followed in Hopkins v. Fuller, 25 Occ. N. 48, 15 Man. L. R. 282.

Adelaide Township, Re, 19 P. R. 188.
Reversed 2 O. L. R. 103.

Adkins v. Metropolitan Tramways Co., 63 L. J. Q. B. 361, 10 Times L. R. 173.
Dissented from in Lougheed v. Hamilton, 7 W. L. R. 204, 1 Alta. L. R. 16.

Ady v. Harris, 9 Man. L. R. 127.
Distinguished Douglass v. Fraser, 17 Man. L. R. 439.

Ætna Life Ins. Co. v. Sharp, 11 Man. L. R. 141.
Discussed and explained in Long v. Barnes, 14 Man. L. R. 427.

Agar v. Ecsott, 3 O. W. R. 421.
Affirmed in S. C., 24 Occ. N. 312, 8 O. L. R. 177, 3 O. W. R. 719.

Agency Co. v. Short, 13 App. Cas. 799.
Followed in Campbell v. Imperial Loan Co., 18 Man. L. R. 144, 8 W. L. R. 502.

Agnew v. Gober, Q. R. 32 S. C. 266.
Reversed in S. C., Q. R. 17 K. B. 508.

Agra Bank v. Barry, L. R. 7 H. L. at pp. 147, 148.
Applied in Bridge v. Johnston, 23 Occ. N. 287, 6 O. L. R. 370.

Agricultural Savings and Loan Co. v. Liverpool and London and Globe Ins. Co., 32 O. R. 369.
Reversed 21 Occ. N. 582, 3 O. L. R. 127.
Restored in S. C., 23 Occ. N. 133, 33 S. C. R. 94.

Ah Guay, In re, 2 B. C. R. 343.
Not followed In re Fong Yuke, 8 B. C. R. 118, 21 Occ. N. 490.

Ahearns v. N. Y. Trust Co., 18 Que. K. B. 82.
Affirmed 42 S. C. R. 267.

"Aikens, W. J." Re The Ship, 7 Ex. C. R. 7.
Not followed Gagnon v. S.S. "Savoy," 9 Ex. C. R. 238, 25 C. L. T. 87.

Ainsworth v. Wilding, [1900] 2 Ch. 315.
Followed in Clergue v. McKay, 22 Occ. N. 148, 162, 3 O. L. R. 478.

Aitkin, Re, 4 B. & Ald. 47.
Followed Re McBrady & O'Connor, 19 P. R. 37.

Alaska Packers' Assn. v. Spencer, 10 B. C. R. 473.
Affirmed in Spencer v. Alaska Packers' Assn., 35 S. C. R. 362.

"Albano," The, v. The "Parisian," 37 S. C. R. 284.
Reversed in S.S. "Albano" v. Allan Line S. S. Co., [1907] A. C. 193.

Aldous v. Hicks, 21 O. R. 95.
Approved in Forester v. Ivey, 20 Occ. N. 402, 32 O. R. 175.

Aldrich v. Aldrich, 21 O. R. 447.
Followed in A. v. A., 15 Man. L. R. 483, 3 W. L. R. 113.

Alexandra Oil Co. v. Cook (1909), 13 O. W. R. 405.
Affirmed 14 O. W. R. 604, 1 O. W. N. 22.

Alexander v. C. P. R., Q. R. 33 S. C. 438.
Affirmed Q. R. 18 K. B. 530.

Alexander v. Miles, 2 O. W. R. 305.
Reversed in S. C., 24 Occ. N. 124, 7 O. L. R. 103, 3 O. W. R. 109.

Algoma Central Rw. Co. v. The King, 7 Ex. C. R. 239.
Referred to in Ross v. The King, 7 Ex. C. R. 287, 23 Occ. N. 33, 32 S. C. R. 532.
Reversed 22 C. L. T. 249; 32 S. C. R. 277.
Affirmed in S. C., [1903] A. C. 478.

Allan v. Pratt, 13 App. Cas. 780.
Followed in Beauchemin v. Armstrong, 24 Occ. N. 111, 34 S. C. R. 285.
Distinguished in Coté v. James Richardson Co., 27 C. L. T. 155, 38 S. C. R. 41.

Allcroft v. Adams, 37 N. B. R. 332.
Reversed in S. C., 27 C. L. T. 239, 38 S. C. R. 365.

Allen v. Allen, [1894] P. 246.
Followed in Carte v. Dennis, 21 Occ. N. 267, 5 Terr. L. R. 30.

Allen v. Evans, Q. R. 9 Q. B. 257.
Reversed in S. C., 20 Occ. N. 371, 30 S. C. R. 416.

Allen v. Flood, [1898] A. C. 1.
Followed in Gibbins v. Metcalfe, 15 Man. L. R. 560, 1 W. L. R. 139.

Allen v. Furness, 20 A. R. 34.
Followed in Taylor v. Macfarlane, 22 Occ. N. 325, 4 O. L. R. 239.

Allen and Nasmith, In re, 20 Occ. N. 39, 31 O. R. 335.
Affirmed in 20 Occ. N. 425, 27 A. R. 536.

Allen v. Taylor, 39 L. J. Ch. 627.
Followed Kerr v. Bowden, 1 W. L. R. 28.

Alliance Nationale v. L'Union Franco-Canadienne, Q. R. 10 K. B. 116.
Not followed in Landry v. Turgeon, Q. R. 17 K. B. 372, 9 Q. P. R. 346.

Allison v. Breen, 20 Occ. N. 103, 19 P. R. 119.
Affirmed in S. C., 20 Occ. N. 207, 19 P. R. 143.

Allison v. Desbrisay, Cochrane 19.
Followed in Watson v. Leukten, 23 Occ. N. 336.

Almon v. Busch, Ritchie's Eq. Dec.
Followed in Ryan v. Caldwell, 32 N. S. Reps. 458.

Almon v. Paley, Russ. Eq. Dec. 6.
Referred to in In re Elmsdale Co., 24 Occ. N. 341.

Almonte Knitting Co. v. C. P. R., 3 Can. Ry. Cas. 441.
Followed in Malkin v. Grand Trunk, 8 Can. Ry. Cas. 183.

Alloway v. Campbell, 7 Man. L. R. 506.
Followed in Alloway v. Rural Municipality of St. Andrews, 3 W. L. R. 13, 16 Man. L. R. 255.

Alpin v. Stone, [1904] 1 Ch. 543.
Followed in In re Maybee, 24 Occ. N. 399, 8 O. L. R. 601, 4 O. W. R. 421.

Alward v. Lewis, [1891] 2 Ch. 81.
Distinguished in Stubbings v. Umlah, 40 N. S. R. 269, 20 Occ. N. 357.

Amer v. Rogers, 31 U. C. C. P. 195.
Overruled in Travis v. Hales, 24 Occ. N. 12, 6 O. L. R. 574, 2 O. W. R. 1037.

American Aristotype Co. v. Eakins, 7 O. L. R. 127, 3 O. W. R. 256, 306.
Followed in Nixon v. Betsworth, 16 Man. L. R. 1.

Ames v. Sutherland, 9 O. L. R. 631, 11 O. L. R. 417, 7 O. W. R. 116.
Affirmed in Sutherland v. Securities Holding Co., 37 S. C. R. 694.

Ames (A. E.) & Co. v. Conmee, 10 O. L. R. 159.
Affirmed in S.C., 12 O. L. R. 435, 8 O. W. R. 337.

Ames (A. E.) & Co. v. Conmee, 12 O. L. R. 435.
Reversed in Conmee v. Securities Holding Co., 27 C. L. T. 484, 38 S. C. R. 601.

Amsden v. Kyle, 9 O. R. 439.
Distinguished in In re Schunk, 19 Occ. N. 361, 31 O. R. 175.

Amyot v. Chauveau, 28 Que. S. C. 54.
Reversed 15 Que. K. B. 22, 11 Can. Cr. Cas. 232.

Ancient Order of United Workmen and Marshall, Re, 12 O. W. R. 153.
Affirmed in S. C., 18 O. L. R. 129, 13 O. W. R. 306.

Anderson v. Bank of B. C., 2 Ch. D. 644.
Followed Savage v. Can. Pac. Rw. Co., 15 Man. L. R. 401.

Anderson v. Goodsall, 7 B. C. R. 404.
Followed in British Columbia Timber and Trading Co. v. Leberry, 22 Occ. N. 273.

Anderson v. Nobles Explosive Co., 12 O. L. R. 644.
Followed in Emperor of Russia v. Proskouriakoff, 7 W. L. R. 766, 8 W. L. 10, 461, 18 Man. L. R. 56.

Anderson v. Norwich Union Insurance Co., Q. R. 17 K. B. 361.
Compared with Montreal Light, Heat and Power Co. v. Dupras, Q. R. 18 K. B. 174.

Anderson, Re, 16 Man. L. R. 177.
Followed in Re Drysdale Estate, 18 Man. L. R. 644, 10 W. L. R. 642.

Anderson v. Ross, 8 O. W. R. 691.
Reversed in S. C., 9 O. W. R. 681, 14 O. L. R. 683.

Anderson Tire Co. of Toronto v. American Dunlop Tire Co., 5 Ex. C. R. 109.
Referred to in Hambly v. Albright, 22 Occ. N. 201, 7 Ex. C. R. 363.

Andreas v. Canadian Pacific R. W. Co., 2 W. L. R. 249.
Reversed in S. C., 26 C. L. T. 72, 37 S. C. R. 1.

Andrew v. Cooper, 45 Ch. D. 447.
Followed Gardner v. Perry, 6 O. L. R. 269.

Andrews v. Forsythe, 7 O. L. R. 188.
Followed in Levi v. Phœnix Insurance Co. of Brooklyn, 6 W. L. R. 17, 17 Man. L. R. 61.

Andrews v. Salt, L. R. 8 Ch. 622.
Followed in In re Slater, 23 Occ. N. 337.

Anglo-American Lumber Co. v. McLellan, 13 B. C. R. 318, 7 W. L. R. 422.
Affirmed in S. C., 14 B. C. R. 93, 9 W. L. R. 469.

Angus v. Dominion Textile Co., Q. R. 30 S. C. 56.
Affirmed in Dominion Textile Co. v. Angers, Q. R. 18 K. B. 63, 41 S. C. R. 185, 6 E. L. R. 127.

Anlaby v. Prætorius, 20 Q. B. D. 764.
Followed in Anthony v. Blain, 23 Occ. N. 50, 5 O. L. R. 48.

Anon., 11 W. R. 293, 32 L. J. N. S. Ex. 88, 7 L. T. N. S. 718.
Followed in Laird v King, 21 Occ. N. 34, 162, 19 P. R. 307, 1 O. L. R. 51.

Apollinaris Co. v. Wilson, 31 Ch. D. 632.
Followed in In re Lang and Smith, 22 Occ. N. 212.

Apothecaries Co. v. Jones, [1893] 1 Q. B. 89.
Followed in City of Victoria v. Belgea, 12 B. C. R. 112.

Appleby v. Meyers, L. R. 2 C. P. 660.
Followed in King v. Low, 22 Occ. N. 107, 3 O. L. R. 234.

Arabin, In re, Cout. Cas. 95.
Referred to Re Hamilton, Cout. Cas. 35.
Referred to Re Tellier, Cout. Cas. 110.

Arcand v. Yon, Q. R. 21 S. C. 48.
Reversed as to costs in S. C., Q. R. 22 S. C. 502.

Archbold v. Scully, 9 H. L. Cas. 388.
Followed in Campbell v. Imperial Loan Co., 18 Man. L. R. 144, 8 W. L. R. 502.

Archer v. Severn, 12 P. R. 472.
Followed in Bonsack Machine Co. v. Falk, Q. R. 9 Q. B. 355.

Archibald v. Handley, 32 N. S. Reps. 1, Affirmed in S. C., 20 Occ. N. 111, 30 S. C. R. 130.

Archibald v. Hubley, 22 N. S. R. 27.
Affirmed 18 S. C. R. 116.

Archibald v. Town of Truro, 33 N. S. R. 401.
Affirmed 31 S. C. R. 380.

Argles v. McMath, 26 O. R., at p. 248.
Followed in Stack v. T. Eaton Co., 22 Occ. N. 322, 4 O. L. R. 335.

Argyle, Rural Municipality of, v. Canadian Pacific R. W. Co., 14 Man. L. R. 382, 23 Occ. N. 159.
Varied in S. C., 25 Occ. N. 102, 35 S. C. R. 550.

Armour and Township of Onondaga, In re, 14 O. L. R. 606, 9 O. W. R. 833.
Affirmed 42 S. C. R. 218.
Not followed in Re Joyce and Township of Pittsburg, 16 O. L. R. 380, 11 O. W. R. 850.
And in In re Local Option By-law of Township of Saltfleet, 16 O. L. R. 293, 11 O. W. R. 356, 545.
Approved by a Divisional Court in In re Duncan and Town of Midland, 16 O. L. R. 132, 10 O. W. R. 345.

Armour v. Kilmer, 28 O. R. 618.
Considered in Armour v. Dinner, 4 Terr. L. R. 30.

Armstrong and Township of Toronto, Re, 17 O. R. 766.
Distinguished in Re Vandyke and Village of Grimsby, 12 O. L. R. 211, 7 O. W. R. 739, 8 O. W. R. 81.

Armstrong v. Armstrong, 18 P. R. 55.
Distinguished in Lang v. Smith, 14 Man. L. R. 258.

Armstrong v. Armstrong (1904), 4 O. W. R. 223, 301, 9 O. L. R. 14.
Followed in Rushton v. Galley (1909), 14 O. W. R. 999, 1 O. W. N. 186.

Armstrong v. Canada Atlantic Rw. Co., 21 Occ. N. 497, 2 O. L. R. 219, 4 O. L. R. 560.
Reversed in S. C., 22 Occ. N. 379, 4 O. L. R. 560.
Applied and followed in O'Connor v. City of Hamilton, 24 Occ. N. 370, 8 O. L. R. 391, 3 O. W. R. 918, and 10 O. L. R. 529, 6 O. W. R. 227.

Armstrong v. James Bay Rw. Co., 7 O. W. R. 715, 12 O. L. R. 137.
Not followed Re Cockerline and Guelph and Goderich Rw. Co., 5 Can. Ry. Cas. 313.

Armstrong v. Johnson, 32 O. R. 35.
Followed in Codville v. Fraser, 22 Occ. N. 123, 14 Man. L. R. 12.

Armstrong v. The King, 11 Ex. C. R. 119.
Affirmed in Rex v. Armstrong, 40 S. C. R. 229, 5 E. L. R. 182.
Followed in Rex v. Desrosiers, 41 S. C. R. 71, 6 E. L. R. 119.

Arnold v. Playter, 22 O. R. 608.
Followed in Abell v. Campbell, 21 Occ. N. 303, 37 C. L. J. 316.

Arnold v. Playter, 14 P. R. 399.
Affirmed Fleet v. Coulter, 4 O. L. R. 714.

Arnold v. Van Tuyl, 30 O. R. 663.
Distinguished in Tanner v. Weiland, 20 Occ. N. 175, 19 P. R. 149.

Arscott v. Lilley, 14 A. R. 283.
Followed in Ing Kon v. Archibald, 17 O. L. R. 484, 12 O. W. R. 592, 997, 14 Can. Crim. Cas. 201.

Asbestos & Asbestic Co. v. Selater, 18 Que. S. C. 360.
Affirmed 10 Que. K. B. 165.

Asbestos and Asbestic Co. v. Durand, 30 S. C. R. 285.
Discussed and approved in Dominion Cartridge Co. v. McArthur, 22 Occ. N. 5, 31 S. C. R. 392.

Ash v. Methodist Church, 21 Occ. N. 21, 27 A. R. 672.
Affirmed in S. C., 22 Occ. N. 3, 31 S. C. R. 497.

Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 653.
Distinguished in Stobart v. Forbes, 20 Occ. N. 446, 13 Man. L. R. 184.

Ashland Co. v. Armstrong, 11 O. L. R. 414.
Followed in Canadian Railway Accident Co. v. Kelly, 5 W. L. R. 412, 16 Man. L. R. 608.

Ashley v. Brown, 17 A. R. 500.
Referred to Swartz v. Winkler, 13 Man. L. R. 493, 37 C. L. J. 825.

Aslin v. Summersett, 1 B. & Ad. 135.
Followed in In re Burrows and Nickelson, 24 Occ. N. 326, 14 Man. L. R. 739.

Assessment Act, In re, 9 B. C. R. 60.
Reversed in S. C., 9 B. C. R. 209.
Restored in Attorney-General of British Columbia v. Ostrum, [1904] A. C. 144.

Assets Co. v. Mere Roihi, 21 Times L. R. 311.
Referred to and approved in Syndicate Lyonnais du Klondyke v. McGrade, 25 Occ. N. 126, 36 S. C. R. 251.

Association Pharmaceutique de Québec v. Livernois, 30 S. C. R. 466.
Distinguished in Carrier v. Sirois, 25 Occ. N. 121, 36 S. C. R. 221.

Association St. Jean-Baptiste v. Brault, 30 S. C. R. 508.
Followed Association St. Jean-Baptiste v. Brault, 31 S. C. R. 172.
Followed Deserres v. Brault, 37 S. C. R. 613.
Referred to Consumers Cordage Co. v. Connolly, 31 S. C. R. 244.

Atkinson v. City of Chatham, 18 Occ. N. 310, 29 O. R. 518.
Varied in S. C., 19 Occ. N. 382, 26 A. R. 521.
Reversed in S. C., sub. nom. Bell Telephone Co. v. City of Chatham, 31 S. C. R. 61.

Atkinson v. Grand Trunk Rw. Co., Q. R. 27 S. C. 227.
Affirmed in Grand Trunk Rw. Co. v. Goudie, 26 C. L. T. 71, 36 S. C. R. 655.

Atkinson v. Newcastle, 2 Ex. D. 441.
Followed in McBean v. Wyllie, 22 Occ. N. 270, 14 Man. L. R. 135.

Atlantic and North-West Rw. Co. v. Turcotté, Q. R. 2 Q. B. 305.
Distinguished in Coté v. James Richardson Co., 27 C. L. T. 155, 38 S. C. R. 41.

Atlantic and Pacific Tel. Co. v. Dom. Tel. Co. (1880), 27 Gr. 502.
Distinguished from Beardmore v. Toronto, Smith v. London (1909), 19 O. L. R. 139, 13 O. W. R. 198, 207, 519, 1148.

Atlas Loan Co., Re, Claims on Reserve Fund, 7 O. L. R. 706.
Affirmed in S. C., 9 O. L. R. 468, 5 O. W. R. 452.

Atlas Metal Co. v. Miller, [1898] 2 Q. B. 506.
Followed in Bauld v. Fraser, 36 N. S. Reps. 21.

Attorney-General v. Day, 1 Ves. Sr. 218.
Referred to in Hackett v. The Blakeley, In re Jones, 8 Ex. C. R. 327, 9 B. C. R. 430.

Attorney-General v. Flint, 16 S. C. R. 707.
Followed in Rex v. Kennedy, 35 N. S. Reps. 266, 6 Can. Cr Cas. 29.

Attorney-General v. London and North-Western R. W. Co., [1892] 3 Ch. 274.
Followed in Brophy v. Royal Victoria Ins. Co., 21 Occ. N. 589, 2 O. L. R. 651.

Attorney-General v. McNulty, 11 Gr. 281.
Followed in Attorney-General v. McGowan, 24 Occ. N. 136.

Attorney-General v. Manchester, [1893] 2 Ch. 87.
Followed in Miller v. Campbell, 23 Occ. N. 233, 14 Man. L. R. 437.

Attorney-General v. Scully, 21 Occ. N. 432, 2 O. L. R. 315.
Affirmed in S. C., 22 Occ. N. 360, 4 O. L. R. 394.
Leave to appeal from refused in S. C., 23 Occ. N. 60, 33 S. C. R. 16.

Attorney-General v. Theobald, 24 Q. B. D. 557.
Distinguished in Attorney-General for Ontario v. Stuart, 21 Occ. N. 527, 2 O. L. R. 403.

Attorney-General for British Columbia v. Canadian Pacific Rw. Co., 11 B. C. R. 289, 1 W. L. R. 299.
Affirmed in S. C., [1906] A. C. 204.

Attorney-General for British Columbia v. Ludgate, 11 B. C. R. 258.
Affirmed in Attorney-General for British Columbia v. Attorney-General for Canada, [1906] A. C. 552.

Attorney-General for Canada v. Attorney-General for Ontario, [1896] A. C. 348.
Referred to Abbott v. City of St. John, 40 S. C. R. 597.

Attorney-General for Canada v. Attorney-General for Ontario, 25 S. C. R. 434.
Affirmed, [1897] A. C. 199.

Attorney-General for Canada v. Attorney-General for Ontario, [1897] A. C. 199.
Followed in Province of Quebec v. Dominion of Canada, 30 S. C. R. 151.
Followed in Yule v. The Queen, 6 Ex. C. R. 102, 19 Occ. N. 371, 30 S. C. R. 24.

Attorney-General for Canada v. Attorney-General for Ontario, [1898] A. C. 701.
Followed in Young v. Harnish, 37 N. S. Reps. 213.

Attorney-General for Canada v. Corporation of Toronto, 23 S. C. R. 514.
Followed in Hamilton Distillery Co. v. City of Hamilton, 10 O. L. R. 280, 6 O. W. R. 143, 12 O. L. R. 75, 7 O. W. R. 655, 38 S. C. R. 239.

Attorney-General for Canada v. Montreal, 13 S. C. R. 352.
Followed Macdonald v. Edmonton, 37 C. L. J. 438.

Attorney-General for Manitoba v. Attorney-General for Canada, 8 Ex. C. R. 337.
Affirmed 24 Occ. N. 163, 34 S. C. R. 287.
Affirmed in S. C., [1904] A. C. 799.

Attorney-General for Manitoba v. Manitoba License Holders' Association, [1902] A. C. 73.
Followed in Rex v. Carlisle, 23 Occ. N. 321, 39 C. L. J. 757, 6 O. L. R. 718.
Referred to in Stark v. Schuster, 24 Occ. N. 187, 14 Man. L. R. 672, 8 Can. Cr. Cas. 354.

Attorney-General for Nova Scotia v. Lovitt, 35 N. S. R. 225.
Affirmed 31 S. C. R. 380.

Attorney-General for Nova Scotia v. Power, 22 Occ. N. 397.
Varied 35 S. C. R. 182, 35 N. S. Reps. 526.

Attorney-General for Nova Scotia v. Reynolds, 27 N. S. R. 184.
Affirmed, [1896] A. C. 240.

Attorney-General for Nova Scotia v. Temple, 29 N. S. R. 279.
Affirmed 27 S. C. R. 355.

Attorney-General for Ontario v. Attorney-General for Canada, 10 Ex. C. R. 292.
Affirmed in S. C., 27 C. L. T. 483, 39 S. C. R. 14.

Attorney-General for Ontario v. Attorney-General for Canada, [1896] A. C. 348.
Referred to in Stark v. Schuster, 24 Occ. N. 187, 14 Man. L. R. 672, 8 Can. Cr. Cas. 354.
Commented on and distinguished in In re The Liquor Act, 21 Occ. N. 212, 13 Man. L. R. 239.
Followed in Attorney-General of Manitoba v. Manitoba License Holders' Association, [1902] A. C. 73.
Followed in Rex v. Carlisle, 23 Occ. N. 321, 39 C. L. J. 757, 6 O. L. R. 718.

Attorney-General for Ontario v. Attorney-General for Quebec, [1903] A. C. 39.
Followed in Quebec v. Ontario (1909), 42 S. C. R. 161.

Attorney-General for Ontario v. Hamilton St. Rw. Co., 24 A. R. 170.
Reversed, [1903] A. C. 524; 7 Can. Cr. Cas. 331.
Followed in In re Sunday Laws, 25 Occ. N. 77, 35 S. C. R. 581.
Followed in Rex v. Yaldon, 12 O. W. R. 384, 17 O. L. R. 179, 13 Can. Cr. Cas. 489.

Attorney-General for Ontario v. Lee, 9 O. L. R. 9, 4 O. W. R. 516.
Affirmed 10 O. L. R. 79, 6 O. W. R. 245.

Attorney-General for Ontario v. Newman, 20 Occ. N. 70, 31 O. R. 340
Affirmed in S. C., 21 Occ. N. 225, 1 O. L. R. 511.

Attorney-General for Ontario v. Woodruff, 15 O. L. R. 416, 11 O. W. R. 82.
Reversed in Woodruff v. Attorney-General for Ontario, [1908] A. C. 508, 12 O. W. R. 611.

Attorney-General for Quebec v. Adams, Q. R. 14 K. B. 115.
Reversed in S. C., 26 C. L. T. 849, 37 S. C. R. 577.

Attorney-General for Quebec v. Fraser, Q. R. 14 K. B. 115.
Reversed in S. C., 26 C. L. T. 849, 37 S. C. R. 577.

Attorney-General for Quebec & Hull v. Scott, 24 Que. S. C. 59, 13 Que. K. B. 164.
Affirmed, 34 S. C. R. 603.
Referred to in Great Northern Rw. Co. v. Canada v. Furness Withy & Co. 40 S. C. R. 455, 5 E. L. R. 309.

Attorney-General for the Straits Settlement v. Wemyss, 13 App. Cas. 195.
Referred to in Paul v. The King, 27 C. L. T. 152, 38 S. C. R. 126.

Attorneys, In re, 26 U. C. C. P. 495.
Followed in In re Johnston, 21 Occ. N. 561, 3 O. L. R. 1.

Attwood v. Small, 6 Cl. & F. 232.
Referred to in Hannah v. Graham, 7 W. L. R. 554, 8 W. L. R. 271, 17 Man. L. R. 532.

Atwood v. Atwood, 15 P. R. 425, 16 P. R. 50.
Referred to in Beatty v. Beatty (1909), 14 O. W. R. 1093, 1 O. W. N. 243.

Aubert v. Maze, 2 B. & P. 371.
Referred to in Cumming v. Cumming, 15 Man. L. R. 640.

Auer Incandescent v. O'Brien, 5 Ex. C. R. 243.
Followed Toronto Auer Light v. Colling, 31 O. R. 18.

Auger v. Magann, 16 Que. S. C. 22.
Reversed 31 S. C. R. 786.

Auger v. Mgann, 2 Que. P. R. 120.
Reversed 31 S. C. R. 191.

Augustinus v. Nerinckx, 16 Ch. D. 13.
Followed in Forbes v. Pearson, 20 Occ. N. 413.

Aurora, Town of, v. Village of Markham, 32 S. C. R. 457, 22 Occ. N. 354.
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Austin v. Simcoe, 22 U. C. R. 73.
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Babcock v. Standish, 19 P. R. 195.
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Followed in McKelvey v. Chilman, 23 Occ. N. 114, 5 O. L. R. 263.

Babcock v. Standish, 19 P. R. 195.
Approved in Stephens v. Toronto R. W. Co., 9 O. W. R. 259, 13 O. L. R. 363.

Bacon's Will, Re, 31 Ch. D. 460.
Considered in Bank of Montreal v. Burns, 22 Occ. N. 342.

Baddeley v. Earl Granville, 19 Q. B. D. 423.
Applied in Love v. New Fairview Corporation, 24 Occ. N. 259, 10 B. C. R. 330.

Badeley v. Consolidated Bank, 38 Ch. D. 238.
Followed in Brand v. Green, 20 Occ. N. 279, 13 Man. L. R. 101.

Baden Machinery Manufacturing Co., Re, 4 O. W. R. 379.
Reversed in Hood v. Eden, 25 Occ. N. 115, 35 S. C. R. 476.

Badgely v. Grand Trunk R. W. Co. (1909), 13 O. W. R. 683.
Reversed in 14 O. W. R. 425.

Badgerow v. Grand Trunk R. W. Co., 13 P. R. 132.
Applied and followed in McWilliams v. Dickson Co. of Peterborough, 10 O. L. R. 639, 6 O. W. R. 424.

Badische v. Basle, [1898] A. C. 207.
Followed in Whitman Fish Co. v. Winnipeg Fish Co., 8 W. L. R. 488, 17 Man. L. R. 620.

Bailey v. Cates, 11 B. C. R. 62, 24 Occ. N. 412.
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Bailey v. King, 21 Occ. N. 19, 27 A. R. 703.
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Bailey v. Reinhart, Q. R. 17 S. C. 387.
Affirmed in S. C., Q. R. 20 S. C. 225.

Bailey v. Vancouver, 25 S. C. R. 62.
Followed in Robinson v. Graham, 3 W. L. R. 135, 16 Man. L. R. 69.

Bain v. Anderson, 28 S. C. R. 481.
Referred to in Canadian Pacific R. W. Co. v. The King, 38 S. C. R. 137.

Bain v. Brand, 1 App. Cas. 762.
Followed in Stack v. T. Eaton Co., 22 Occ. N. 322, 4 O. L. R. 335.

Bain v. Mearns (1878), 25 Gr. 450.
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Baird v. Morphy, Q. R. 23 S. C. 497.
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Baker v. Davey, 1 B. & C. 704.
Followed in Genge v. Wachter, 20 Occ. N. 158, 4 Terr. L. R. 122.

Baldocchi v. Spada, 8 O. W. R. 705.
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Ball v. Grand Trunk R. W. Co., 16 C. P. 252.
Specially referred to in Roy v. Canadian Pacific R. W. Co., 20 Occ. N. 441, Q. R. 9 Q. B. 551.

Ballagh v. Royal Mutual, 5 A. R. 87.
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Balli Coal Co. v. Osborne, [1899] A. C. 351.
Applied and followed in Union Bank of Canada v. Rideau Lumber Co., 23 Occ. N. 11, 4 O. L. R. 721.

Balston Estate, Re, 2 Thom. 195.
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Banister v. Wakeman, 15 L. R. A. 201.
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Bank of British North America v. Warren (1908), 12 O. W. R. 1157.
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Bank of Commerce v. Le Curé et les Marguilliers de la Nativité, 12 S. C. R. 25.
Followed in Carrier v. Sirois, 25 Occ. N. 121, 36 S. C. R. 221.

Bank of England, Governor and Company of, v. Vagliano, [1891] A. C. 107.
Followed in London Life Ins. Co. v. Molsons Bank, 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

Bank of Hamilton v. Anderson, 7 O. L. R. 613.
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Bank of Hamilton v. Gillies, 12 Man. L. R. 495.
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Bank of Hamilton v. Imperial Bank of Canada, 19 Occ. N. 318, 31 O. R. 100.
Affirmed in S. C., 21 Occ. N. 20, 400, 27 A. R. 590, 31 S. C. R. 344.

Bank of Liverpool v. Bigelow, 12 N. S. R. 236.
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Bank of Minnesota v. Page (1887), 14 A. R. 347.
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Bank of Montreal v. Black, 9 Man. L. R. 439.
Distinguished in Shiels v. Adamson, 24 Occ. N. 158, 14 Man. L. R. 703.
Followed in Schwartz v. Winkler, 22 Occ. N. 401, 14 Man. L. R. 197.

Bank of Montreal v. Kirkpatrick, 2 O. L. R. 113.
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Bank of Montreal v. Lingham, 2 O. W. R. 332.
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Bank of Montreal v. The King, 38 S. C. R. 258.
Distinguished in Dominion Bank v. Union Bank of Canada, 40 S. C. R. 366.

Bank of Ottawa v. Harty, 12 O. L. R. 218.
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Bank of Ottawa v. Hood, O. R. 33 S. C. 506.
Reversed in 42 S. C. R. 231.

Bank of Toronto v. Insurance Co. of North America, 18 P. R. 27.
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Bank of Toronto v. McDougall, 15 C. P. 475.
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Bank of Toronto v. St. Lawrence Fire Ins. Co., Q. R. 11 K. B. 251.
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Followed in City of Sorel v. Quebec Southern R. W. Co., 26 C. L. T. 70, 36 S. C. R. 686.

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Referred to in Vigaud v. De Werthemer, Q. R. 30 S. C. 229.

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Banque Jacques-Cartier v. Brigham, 16 Que. S. C. 113.
Reversed 30 S. C. R. 429.

Banque Jacques-Cartier v. Gauthier, Q. R. 19 S. C. 93.
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Barber v. Maughan, 42 U. C. R. 134.
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Barber v. McCuaig, 17 C. L. T. 280, 19 C. L. T. 252, 24 A. R. 492, 29 S. C. R. 126.
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Barber v. Nottingham and Granthom R. W. Co., 15 C. B. N. S. 726.
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Barclay v. Lake Erie & D. R. Rw. Co. O. C. A.)
Affirmed 30 S. C. R. 360.

Barclay v. Messenger, 22 W. R. 522, 43 L. J. Ch. 449.
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Barker v. Furlong, [1891] 2 Ch. 172.
Followed in Miller v. McCuaig, 20 Occ. N. 27, 13 Man. L. R. 220.

Barnes v. Ward, 9 C. B. 392.
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Barnard v. Riendeau, 31 S. C. R. 234.
Followed in Doucet v. Clerex, Q. R. 23 S. C. 107.

Barnardo v. McHugh, [1891] A. C. 388.
Followed in In re Slater, 23 Occ. N. 337, 14 Man. L. R. 523.

Barnes v. Ward, 9 C. B. 392.
Distinguished in McShane v. Toronto, Hamilton and Buffalo R. W. Co., 19 Occ. N. 387, 31 O. R. 185.

Barr Cash and Package Carrier Co. v. Hamilton Brass Manufacturing Co., 6 O. W. R. 643.
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Barrack v. McCullough, 3 K. & J. 117.
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Barraclough v. Brown, [1897] A. C. 623.
Referred to in Henry v. The King, 25 Occ. N. 141, 9 Ex. C. R. 417.
Referred to in Rex v. Lovejoy, 25 Occ. N. 141, 7 Ex. C. R. 377.

Barrett v. Associated Newspapers, 23 Times L. R. 666.
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Barrette v. Canadian Bank of Commerce, 7 W. L. R. 659, 8 W. L. R. 927.
Affirmed in Canadian Bank of Commerce v. Barrette, 41 S. C. R. 561.

Barrie v. Weaymouth (1892), 15 P. R. 95.
Followed Barrie P. S. Board v. Barrie, 19 P. R. 33.

Barrie Public School Board v. Town of Barrie, 19 P. R. 33.
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Barry v. Regina, 2 Ex. C. R. 333.
Referred to in McQuade v. Rex, 22 C. L. T. 87, 7 Ex. C. R. 318.

Barsalon v. Royal Institute for Advancement of Learning, Que. 5 Q. B. 383.
Followed in Laramée v. Collin, 16 Que. S. C. 346.

Bartlett v. Pickersgill, 4 East 577.
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Barton v. Hamilton (1909), 13 O. W. R. 1118.
Followed in Hodgins v. Toronto (1909), 14 O. W. R. 642, 1 O. W. N. 31.

Bassett v. Clarke Standard Mining and Developing Co., 12 O. W. R. 584.
Affirmed in S. C., 18 O. L. R. 38, 13 O. W. R. 97.

Bastein v. Filiatrault, 6 Rev. Jur. 13, Q. R. 15 S. C. 445.
Affirmed 31 S. C. R. 129.

Bateman v. Pinder, 11 L. J. Q. B. 281.
Followed in Walsh v. Herman, 7 W. L. R. 388, 13 B. C. R. 314.

Bateman v. Svensson (1909), 18 Man. L. R. 493, 10 W. L. R. 361.
Affirmed 42 S. C. R. 146.

Bathurst v. Macpherson, 4 A. C. 256.
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Battle v. Willox, 10 O. W. R. 732.
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Baudains v. Richardson, [1906] A. C. 185.
Followed Tellier v. Schilemans, 7 W. L. R. 220, 17 Man. L. R. 262.

Baxendale v. Bennett, 3 Q. B. D. 525.
Distinguished Crown Bank of Canada v. London Guarantee and Accident Co., 12 O. W. R. 349, 17 O. L. R. 95.

Baxter v. France, [1895] 1 Q. B. 455.
Referred to Holden v. Grand Trunk Rw. Co., 21 Occ. N. 533, 2 O. L. R. 421.

Baxter v. France (No. 2), [1895] 1 Q. B. 591.
Distinguished Holden v. Grand Trunk R. W. Co., 21 Occ. N. 533, 2 O. L. R. 421.

Baxter v. Gordon, 13 O. L. R. 598.
Followed in Durrand v. Forrester, 18 Man. L. R. 444, 10 W. L. R. 289.

Baxter v. Jones, 22 Occ. N. 372, 4 O. L. R. 541.
Affirmed in S. C., 23 Occ. N. 258, 6 O. L. R. 360.

Baxter v. Phillips, 23 S. C. R. 317.
Referred to in Meloche v. Leguire, 24 Occ. N. 75, 34 S. C. R. 24.

Bayer v. Clarkson (1908), 12 O. W. R. 706.
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Bayley v. Wilkins, 7 C. B. 886.
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Baylis, Re, [1896] 2 Ch. 107.
Followed Re McBrady & O'Connor, 19 P. R. 37.

Beach v. The King, 25 Occ. N. 83, 9 Ex. C. R. 287.
Affirmed in S. C., 26 C. L. T. 246, 37 S. C. R. 259.

Beale's Settlement, In re, [1905] 1 Ch. 256.
Followed in In re Anderson's Estate, 3 W. L. R. 127, 16 Man. L. R. 177.

Beam v. Beatty, 19 P. R. 207.
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Beam v. Beatty, 22 Occ. N. 58, 3 O. L. R. 345.
Reversed in S. C., 22 Occ. N. 381, 4 O. L. R. 554.

Beaton v. Intelligencer Printing and Publishing Co., 22 A. R. 97.
Distinguished in Fulford v. Wallace, 21 Occ. N. 238, 1 O. L. R. 278,
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Beatty v. McConnell, 8 O. W. R. 916.
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Beuce, County of, v. Breakey, Q. R. 15 K. B. 520.
Referred to in Gagné v. Township of Windsor, Q. R. 34 S. C. 119.

Beauchamp v. City of Montreal, M. L. R. 7 S. C. 382.
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Beauchemin v. Armstrong, 24 Occ. N. 111, 34 S. C. R. 285.
Distinguished in Dufresne v. Fee, 35 S. C. R. 8.

Beauchemin v. Cadieux, Q. R. 10 K. B. 255.
Affirmed in S. C. 31 S. C. R. 370.

Beauharnois Election Case, 21 S. C. R. 447.
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Beauharnois Election Case, 32 S. C. R. 111.
Followed in Halifax Election Case, 26 C. L. T. 776, 37 S. C. R. 601.

Beauharnois, Town of, v. Liverpool and London and Globe Ins. Co., Q. R. 28 S. C. 68.
Reversed in S. C., Q. R. 15 K. B. 235.

Beauvais v. City of Montreal, (1909), Q. R. 30 S. C. 427.
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Reversed 42 S. C. R. 211.

Beaudry v. Reed (1907), 10 O. W. R. 622.
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Beck Manufacturing Co. and Valin and Ontario Lumber Co., 16 O. L. R. 21, 9 O. W. R. 99, 193, 10 O. W. R. 711.
Affirmed in S. C., 40 S. C. R. 523.

Becker v. Canadian Pacific R. W. Co., 7 Can. Ry. Cas. 29, 5 W. L. R. 569.
Followed in Clayton v. Canadian Northern R. W. Co., 7 W. L. R. 721, 17 Man. L. R. 426.

Bedford, Duke of, v. Ellis, [1901] A. C. 1.
Referred to in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, 9 O. L. R. 171, 5 O. W. R. 95.

Belcher v. McDonald, 23 Occ. N. 141, 9 Brit. Col. L. R. 377.
Reversed in S. C., 33 S. C. R. 321, and 33 S. C. R. 321.
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Belden v. Freeman, 21 N. S. Reps. 106.
Followed in White v. Hissix, 35 N. S. Reps. 432.

Belfast Ropeworks Co. v. Boyd, 21 L. R. Ir. 560.
Specially referred to in West Kootenay Power and Light Co. v. City of Nelson, 12 B. C. R. 34, 3 W. L. R. 239.

Bell v. Corporation of Quebec, 5 App. Cas. 84.
Followed in Attorney-General for Quebec v. Fraser, 26 C. L. T. 849, 37 S. C. R. 577.

Bell v. Landon, 9 P. R. 100.
Distinguished in Standard Trading Co. v. Seybold, 23 Occ. N. 45, 5 O. L. R. 8.

Bell v. Macklin, 15 S. C. R. 576.
Followed in Nicholson v. Peterson, 8 W. L. R. 750, 18 Man. L. R. 106.

Bell Telephone Co. Assessment, In re, 25 A. R. 351.
Applied in In re London Street Railway Assessment, 20 Occ. N. 62, 27 A. R. 83.
Followed in In re Queenston Heights Bridge Co. Assessment, 21 Occ. N. 112, 1 O. L. R. 114.
Applied In re Stratford Waterworks Co. and City of Stratford, 21 Occ. N. 479.
Applied In re Toronto Electric Light Co. Assessment, 22 Occ. N. 206, 37 C. L. J. 851, 3 O. L. R. 620.

Bell Telephone Co. v. City of Quebec, 20 S. C. R. 230.
Followed in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353.

Bell v. Westmount, 15 Que. S. C. 580.
Affirmed 9 Que. Q. B. 34.

Bell v. Winnipeg Electric Street R. W. Co., 15 Man. L. R. 338.
Affirmed in Winnipeg Electric Street R. W. Co. v. Bell, 37 S. C. R. 515.

Bellagh v. Royal Mutual Fire Ins. Co., 5 A. R. 87.
Followed in Green v. Manitoba Assce. Co., 21 Occ. N. 360, 13 Man. L. R. 395.

Bennett v. Grand Trunk R. W. Co., 2 O. L. R. 425.
Referred to in Barrett v. Canadian Pacific R. W. Co., 3 W. L. R. 132, 16 Man. L. R. 549.

Bentley v. Botsford, 8 B. C. R. 128.
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Bergman v. Smith, 11 Man. L. R. 364.
Discussed and distinguished in Griffiths v. Winnipeg Electric R. W. Co., 5 W. L. R. 149, 371, 16 Man. L. R. 512.

Berkeley's Trusts, Re, 8 P. R. 193.
Followed in In re Williams, 22 Occ. N. 323, 4 O. L. R. 501.

Berlin, Town of, and Township of Waterloo, In re, 24 Occ. N. 89, 7 O. L. R. 64, 3 O. W. R. 145.
Affirmed in S. C. 24 Occ. N. 333, 8 O. L. R. 335, 3 O. W. R. 903.

Bernardin v. North Dufferin, 19 S. C. R. 581.
Applied and followed in Speakman v. City of Calgary, 1 Alta. R. 454, 9 W. L. R. 264.

"Bernina," The, 12 P. D. 89.
Followed in Wallman v. Canadian Pacific R. W. Co., 16 Man. L. R. 83.

Berthier, Commune de, v. Dennis, 27 S. C. R. 147.
Referred to in Delisle v. Arcand, 25 Occ. N. 95, 36 S. C. R. 23.
Discussed in Cully v. Ferdais, 20 Occ. N. 273, 30 S. C. R. 330.
Referred to Lafrance v. Lafontaine, 30 S. C. R. 20.

Bertrand v. Heaman, 11 Man. L. R. at p. 208.
Followed in Brand v. Green, 20 Occ. N. 279, 13 Man. L. R. 101.

Betts v. Armstead, 20 Q. B. D. 771.
Referred to in Rex v. Perras, 6 Terr. L. R. 58.

Bessemer Gas Engine Co. v. Mills (1904), 8 O. L. R. 647.
Followed in Semi-Ready, Ltd. v. Tew (1909), 14 O. W. R. 576, 1 O. W. N. 9, 19 O. L. R. 227.

Bewicke v. Graham, 7 Q. B. D. 400.
Followed in Savage v. Canadian Pacific R. W. Co., 3 W. L. R. 124, 16 Man. L. R. 381.

Bickford v. Grand Junction Rw. Co., 1 S. C. R. 696.
Distinguished in In re Rockwood Agricultural Society, 20 C. L. T. 25, 12 Man. L. R. 655.

Bigelow v. Craigellachie-Glenlivet Distillery Co., 37 N. S. R. 482.
Affirmed in S. C., 26 C. L. T. 186, 37 S. C. R. 55.

Biggs v. Freehold L. & S. Co., 19 Occ. N. 210, 26 A. R. 232.
Reversed in S. C., 21 Occ. N. 222, 31 S. C. R. 136.

Billing v. Summens, 24 Occ. N. 83, 7 O. L. R. 340, 3 O. W. R. 17.
Affirmed in S. C., 8 O. L. R. 540, 4 O. W. R. 218.

Birch v. Cropper, 14 App. Cas. 525.
Followed in Morrow v. Peterborough Water Co., 22 Occ. N. 326, 4 O. L. R. 324.

Birely and Toronto, Hamilton and Buffalo R. W. Co., In re.
Referred to in In re Brennan and Ottawa Electric R. W. Co., 21 Occ. N. 309, 31 S. C. R. 311.

Birkbeck Loan Co. v. Johnston, 22 Occ. N. 160, 3 O. L. R. 497.
Varied in S. C., 6 O. L. R. 258.

Birkett v. Grand Trunk R. W. Co., 3 O. W. R. 892.
Reversed in S. C., 25 Occ. N. 1, 35 S. C. R. 296.

Bircks v. Lewis, Q. R. 8 Q. B. 517.
Affirmed in S. C., 30 S. C. R. 618.
Discussed in Demers v. Gagnon, Q. R. 11 K. B. 498.

Bisnaw v. Shields, 2 O. W. R. 396.
Affirmed in S. C., 24 Occ. N. 120, 7 O. L. R. 210, 3 O. W. R. 112.

Black v. Green, 15 C. B. 262, 3 C. L. R. 38.
Followed in Laird v. King, 21 Occ. N. 34, 162, 19 P. R. 307, 1 O. L. R. 51.

Black v. Imperial Book Co., 23 Occ. N. 68, 5 O. L. R. 184.
Affirmed in S. C., 8 O. L. R. 9, 3 O. W. R. 467.

Blackburn v. Blackburn, 11 Q. L. R. 170.
Referred to in Town of Chicoutimi v. Lavoie, Q. R. 30 S. C. 148.

Blackburn Building Society v. Cunliffe, (1882), 22 Ch. D. 61.
Followed in In re Rockwood Agricultural Society, 20 C. L. T. 25, 12 Man. L. R. 655.

Blackley v. Elite Costume Co., 9 O. L. R. 382.
Followed in Nixon v. Jamieson, 18 O. L. R. 625, 13 O. W. R. 911.

Blackley v. Toronto Rw. Co. (1900), 27 A. R. 44 (note).
Distinguished Davidson v. Stuart, 14 Man. L. R. 74.
Followed in McKeown v. Toronto (1909), 14 O. W. R. 572, 1 O. W. N. 3, 19 O. L. R. 361.
Followed Ricketts v. Markdale, 31 O. R. 610.

Blackwood v. The Queen, 8 App. Cas. 82.
Followed in Woodruff v. Attorney-General for Ontario, [1908] A. C. 508, 12 O. W. R. 611.
Followed in Brand v. Green, 20 Occ. N. 279, 13 Man. L. R. 101.

Blain v. Canadian Pacific R. W. Co., 23 Occ. N. 65, 5 O. L. R. 334.
Affirmed in S. C., 24 Occ. N. 49, Canadian Pacific R. W. Co. v. Blain, 34 S .C. R. 75.

Blair v. Asseltine, 15 P. R. 211.
Followed in McGregor v. Campbell, 19 Man. L. R. 38.

Blair v. Chew, 21 Occ. N. 404.
Followed in Neely v. Peter, 22 Occ. N. 297, 4 O. L. R. 293.

Blakey v. Latham, 43 Ch. D. 23.
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Blight v. Ray, 25 O. R. 415.
Considered in Slattery v. Lillis, 10 O. L. R. 697, 6 O. W. R. 543.

Block v. Carrier, Q. R. 28 S. C. 49.
Referred to in Renaud v. Beauchemin, Q. R. 31 S. C. 156.
Followed in Dill v. Cardinal, 8 Q. P. R. 167.

Block v. Milwaukee, 61 N. W. R. 1101.
Followed in Hinman v. Winnipeg Electric Street R. W. Co., 3 W. L. R. 351, 16 Man. L. R. 16.

Bloomenthal v. Ford, [1897] A. C. 156.
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Blower v. Great Western R. W. Co., L. R. 7 C. P. 655.
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Blue v. Red Mountain R. W. Co., 5 W. L. R. 233, 12 B. C. R. 469; 6 Can. Ry. Cas. 219.
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Bocz v. Spiller, 6 Terr. L. R. 225, 2 W. L. R. 280.
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Bogart v. Robertson, 8 O. L. R. 261, 3 O. W. R. 758.
Reversed in S. C., 11 O. L. R. 295, 6 O. W. R. 896.

Bogart v. Township of King, 20 Occ. N. 384, 32 O. R. 135.
Reversed in S. C., 21 Occ. N. 229, 1 O. L. R. 496.

Bohan v. Galbraith, 9 O. W. R. 95, 13 O. L. R. 31.
Affirmed in S. C., 10 O. W. R. 143, 15 O. L. R. 37.

Boice v. O'Loane, 3 A. R. 167.
Followed in Butler v. McMicken, 21 Occ. N. 71, 32 O. R. 422.
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Boisseau v. Canadian Pacific R. W. Co., Q. R. 11 K. B. 394.
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Boley v. McLean, 41 U. C. R. 271.
Referred to in Township of East Hawkesbury v. Township of Lochiel, 34 S. C. R. 513, 24 Occ. N. 261.

Bolin, Re, 136 N. Y. at p. 180.
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Bollander v. City of Ottawa, 18 C. L. T. 401, 30 O. R. 7.
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Bonbright v. Bonbright, 1 O. L. R. 629.
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Bond v. Conmee, 16 A. R. 398.
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Bond v. Kent, 2 Vern, 281.
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Books v. Battin, 30 N. S. Reps. 386.
Specially referred to in Hamilton v. McIntosh, 20 Occ. N. 16.

Boosey v. Davidson, 13 Q. B. 257.
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Booth v. Toronto (1909), 14 O. W. R. 87.
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Boss v. Litton, 5 C. & P. 407.
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Bostock v. Ramsey Urban District Council, [1900] 1 Q. B. 357, [1900] 2 Q. B. 616.
Distinguished in Ing Kon v. Archibald, 17 O. L. R. 484, 12 O. W. R. 582, 997, 14 Can. Crim. Cas. 201.

Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. D. 339.
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Bouchard v. Bastein, Q. R. 16 S. C. 565.
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Bouchard v. Ouellette, 2 Q. P. R. 253.
Referred to in Hogue v. McConnell, 3 Q. P. R. 387.

Boulter v. Canadian Casualty and Boiler Insurance Co., 9 O. W. R. 809, 4 O. L. R. 166.
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Boulton v. Jones, 2 H. & N. 564.
Distinguished in Wood v. John Arbuthnot Co., 4 W. L. R. 305, 16 Man. L. R. 320.

Bourassa v. Canadian Pacific Rw. Co., 7 Can. Ry. Cas. 41, Q. R. 30 S. C. 385.
Followed in Clayton v. Canadian Northern R. W. Co., 7 W. L. R. 721, 17 Man. L. R. 426.

Bourgogne, La, [1899] P. 1, [1899] A. C. 431.
Considered in Alaska S. S. Co. v. Macaulay, 20 Occ. N. 448, 7 Brit. Col. L. R. 338.

Bow McLachlan & Co., Limited v. The "Camosun" 10 Ex. C. R. 403.
Affirmed in S. C., 11 Ex. C. R. 214.
Affirmed 40 S. C. R. 418.
Reversed, [1909] A. C. 597.

Bowden, In re, Andrew v. Cooper, 45 Ch. D. 447.
Followed in Gardner v. Perry, 23 Occ. N. 295, 6 O. L. R. 269.

Bowden v. Laing (1844), 14 Sim. 113.
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Bowden's Patents Syndicate v. Herbert Smith & Co., [1904] 2 Ch. 86.
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Bowes v. Shand, 2 App. Cas. 455.
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Bower v. Hartley, 1 O. B. D. 656.
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Bowman v. Blyth, 7 E. & B. 26.
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Bowman v. Oram, 26 N. S. Reps. 318.
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Boxsius v. Goblet, [1894] 1 Q. B. 842.
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Boyce, Ex p., 24 N. B. R. 347.
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Boyce v. McDonald, 9 Man. L. R. 297.
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Boyd v. Dominion, 17 P. R. 545.
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Boyer v. Perras, Q. R. 17 S. C. 522.
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Boylan, Re, 15 O. R. 13.
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Boyse v. Rossborough, 6 H. L. Cas. 49.
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Brabant v. King, [1895] A. C. 640.
Referred to in Charrest v. Manitoba Cold Storage Co., 8 W. L. R. 110, 17 Man. L. R. 539.

Bradbury v. Hotten, L. R. 8 Ex. 1.
Followed in Life Publishing Co. v. Rose Publishing Co., 12 O. L. R. 386, 7 O. W. R. 337, 8 O. W. R. 28.

Bradlaugh v. Clark, 8 App. Cas. 354.
Followed in McDonald v. Robertson, 22 Occ. N. 430.

Bradlaugh v. Newdgate, 11 Q. B. D. 1.
Distinguished in Newswander v. Giegerich, 27 C. L. T. 783, 39 S. C. R. 354.

Brandon's Trusts, In re, 13 Ch. D. 773.
Followed in In re W. and In re B., 21 Occ. N. 340, 341.

Bray v. Ford, [1896] A. C. at p. 49.
Followed in Street v. Canadian Pacific R. W. Co., 18 Man. L. R. 334, 9 W. L. R. 558.

Breithaupt v. Marr, 20 A. R. 689.
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Brenner v. Toronto R. W. Co., 9 O. W. R. 198, 13 O. L. R. 423.
Reversed in S. C., 15 O. L. R. 195, 10 O. W. R. 547, 8 Can. Ry. Cas. 100.
Affirmed in S. C., 40 S. C. R. 540, 8 Can. Ry. Cas. 108.

Bret v. Toronto R. W. Co. (1909), 13 O. W. R. 552.
Affirmed 14 O. W. R. 74.

Brett v. Foorsen, 17 Man. L. R. 241.
Followed in Pelekaise v. McLean, 18 Man. L. R. 421, 10 W. L. R. 207.

Brewster v. Hendershot, 19 Occ. N. 218.
Reversed in S. C., 20 Occ. N. 201, 27 A. R. 332.

Bridge v. Johnston, 23 Occ. N. 287, 6 O. L. R. 370.
Affirmed in S. C., 24 Occ. N. 316, 8 O. L. R. 196, 4 O. W. R. 36.

Bridgman v. Hepburn (1908), 13 B. C. R. 389, 8 W. L. R. 28.
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Bridgeman v. Green, 2 Ves. Sr. 627.
Followed in Atkinson v. Borland, 14 Man. L. R. 205.

Bridges v. Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75.
Referred to in Haynen v. Mundle, 22 Occ. N. 152.

Bridgetown, &c., Co. v. Barbadoes, &c., Co., 38 Ch. D. 378.
Distinguished in Ruggles v. M. and V. B. R. W. Co., 22 Occ. N. 432.

Briggs v. Newswander, 8 B. C. R. 402.
Reversed in S. C., 22 Occ. N. 277, 32 S. C. R. 405.
Referred to in Giegerich v. Fleutot, 25 Occ. N. 7, 35 S. C. R. 327.

Briggs v. Wardell, 10 Mass. 356.
Referred to in McIver v. MacGillivray, 24 Occ. N. 142, 237.

Brigham v. Banque Jacques-Cartier, 30 S. C. R. 429.
Followed in Cartier v. Genser, Q. R. 21 S. C. 139.

Brigham v. The Queen, 20 Occ. N. 423, 6 Ex. C. R. 414.
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Bright v. Hutton (1852), 3 H. L. C. 341.
Followed in Garvin v. Elmonson (1909), 14 O. W. R. 435.

Brimstone v. Smith, 1 Man. L. R. 302.
Followed in Roberts v. Hartley, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

Brind v. Dale, 2 C. & P. 207.
Doubted Culver v. Lester, 37 C. L. J. 421.

Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. 616.
Followed in Queen's College v. Jayne, 10 O. L. R. 319, 5 O. W. R. 666.

Britain v. Rossiter, 11 Q. B. D. 123.
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B. C. Cities v. C. P. Rw. Co., 7 Can. Ry. Cas. 125.
Referred to in Kerr v. C. P. Rw. Co., 9 Can. Ry. Cas. 207.

British Columbia Anchor Wire Co. v. Smith, 4 W. L. R. 251.
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British Columbia Towing, &c., Co. v. Sewell, 9 S. C. R. 527.
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British Linen Co. v. McEwen, 8 Man. L. R. 99, discussed in Hickey v. Legresley, 15 Man. L. R. 304, 1 W. L. R. 546.

Brook v. Booker, Q. R. 17 K. B. 193.
Affirmed in S. C., 41 S. C. R. 331, 6 E. L. R. 435.

Brook v. Bradley, L. R. 3 Ch. 672.
Distinguished in Law v. Acton, 22 Occ. N. 419, 14 Man. L. R. 246.

Brook v. Hook, L. R. 6 Ex. 89.
Considered in Grady v. Tierney, 20 Occ. N. 193, 4 Terr. L. R. 133.
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Brook v. Wolf, Q. R. 32 S. C. 467.
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Brooks v. Torquay, [1902] 1 K. B. 601
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Brophy v. North Am. Life Assur. Co., 2 O. L. R. 559.
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Brotherton v. Metropolitan District Railway Joint Committee, [1894] 1 Q. B. 606.
Followed in Murr v. Squire, 20 C. L. T. 388, 19 P. R. 237.

Broughton v. Township of Grey (1897), 27 S. C. R. 495.
Distinguished in In re Township of Orford and Township of Howard, 20 C. L. T. 206, 27 A. R. 323.

Brown v. Cockburn, 37 U. C. R. 592.
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Brown v. Dalby, 7 U. C. R. 160.
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Brown v. Great Western Rw. Co., 26 L. T. N. S. 398.
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Brown v. Hose, 14 P. R. 3.
Distinguished in Lovell v. Phillips, 23 Occ. N. 114, 5 O. L. R. 235.

Brown v. London Street Rw. Co., 21 Occ. N. 369, 2 O. L. R. 53.
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Brown v. McLean, 18 O. R. 533.
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Brown v. Moore, 33 N. S. R. 381.
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Brown v. Sweet, 7 A. R. 725.
Followed in North-West Construction Co. v. Vale, 16 Man. L. R. 201.

Brown v. Toronto General Trusts Corporation, 32 O. R. 319.
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Brown v. Toronto and Nipissing Rw. Co., 26 U. C. C. P. 206.
Considered in Ontario Lands and Oil Co. v. Canada Southern R. W. Co., 21 Occ. N. 188, 1 O. L. R. 215.

Brown v. Waterous Engine Co., 8 O. L. R. 37.
Distinguished from Linden v. Trussed Concrete Steel Co., 18 O. L. R. 540.
Affirmed — S. C. R. (not yet reported).

Bruce v. Smith, 1 Fraser (Ct. of Sess. Cas.) 327.
Referred to in Nagy v. Manitoba Free Press Co., 5 W. L. R. 453, 16 Man. L. R. 619.

Brunelle v. Village of Princeville, Q. R. 30 S. C. 19.
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Brunsdon v. Allard, 2 E. & E. 19.
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Bryant, Re, 44 Ch. D. 219.
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Bryce v. Canadian Pacific R. W. Co., 13 B. C. R. 96, 6 W. L. R. 53.
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Bryce v. Township of Brooke, 22 Occ. N. 255, 4 O. L. R. 97.
Reversed in S. C., 23 Occ. N. 40, 5 O. L. R. 59.

Brydon v. Lutes, 9 Man. L. R. 463.
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Buchnam v. Stewart, 11 Man. L. R. 625.
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Bulli Coal Co. v. Osborne, [1899] A. C. 351.
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Bulmer v. Hunter, L. R. 8 Eq. 46.
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Bunting v. Bell, 23 Gr. 584.
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Burchall v. Wilde, [1900] 1 Ch. 151.
Followed in Smith v. Greer, 24 Occ. N. 226, 7 O. L. R. 332, 3 O. W. R. 135.

Burdick v. Garrick, L. R. 5 Ch. 223.
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Burgough v. Edridge, 1 Sim. 269.
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Burkeley's Trust, Re (1879), 8 P. R. 193.
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Burpee v. American Bobbin Co., N. B. Eq. Cas. 484.
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Burrard Dominion Election, In re, 21 Occ. N. 252, 8 B. C. R. 65.
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Bush v. Trustees of the Town and Harbour of Whitehaven, 52 J. P. 392, 2 Hudson on Building Contracts, 2nd ed., p. 121.
Distinguished in Pigott v. The King, 26 C. L. T. 463, 10 Ex. C. R. 248.
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Byers v. McMillan, 15 S. C. R. 194.
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Cabot v. Carbery, Q. R. 15 K. B. 124.
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Cairns v. Murray, 37 N. S. R. 451.
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Caledonian R. W. Co. v. Walker's Trustees, 7 App. Cas. 259.
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Calgary and Edmonton R. W. Co. v. The King, 33 S. C. R. 673.
Reversed in S. C., [1904] A. C. 765.

Callahan v. Coplen, 7 B. C. R. 422.
Affirmed in S. C., 21 Occ. N. 9, 30 S. C. R. 555.
Specially considered in Manley v. Colloin, 21 Occ. N. 602, 8 B. C. R. 153.

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Calloway v. Stobart Sons & Co., 14 Man. L. R. 650.
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Cambrian Railway Company's Scheme, In re, L. R. 3 Ch. 280n. 1.
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Cameron v. Hutchinson, 16 Gr. 526.
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Cameron v. Walker, 19 O. R. 212.
Referred to in McVity v. Trenouth, 9 O. L. R. 105, 5 O. W. R. 123.

Campbell v. Bank of New South Wales, Torrens Australasian Digest, p. 149.
Not followed in Barnes v. Baird, 25 Occ. N. 29, 15 Man. L. R. 162.

Campbell v. Campbell, 6 P. R. 128.
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Campbell v. Dunn (1893), 22 O. R. 98.
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Campbell v. Fleming, 1 A. & E. 40.
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Appeal quashed in S. C., 26 C. L. T. 847, 37 S. C. R. 672.

Canada Cotton Co. v. Parmalee, 13 P. R. 308.
Not followed in Lake of the Woods Milling Co. v. Collin, 20 Occ. N. 285, 13 Man. L. R. 154.

Canada Co. v. Town of Mitchell, 2 O. W. R. 732.
Affirmed in S. C., 24 Occ. N. 210, 7 O. L. R. 482, 2 O. W. R. 478.

Canada Life Assurance Co. v. London Guarantee and Accident Co., Q. R. 16 S. C. 78.
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Followed in Wallman v. Canadian Pacific R. W. Co., 16 Man. L. R. 83.

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Canadian Bank of Commerce v. Perram, 31 O. R. 116.
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Canadian Coloured Cotton Co. v. Kervin, 29 S. C. R. 478.
Distinguished in Billing v. Semmens, 24 Occ. N. 83, 7 O. L. R. 340, 8 O. L. R. 540, 3 O. W. R. 17, 4 O. W. R. 218.

Canadian Manufacturers' Association v. Canadian Freight Association, 7 Can. Ry. Cas. 302.
Followed in Laidlaw Lumber Co. v. Grand Trunk Rw. Co., 8 Can. Ry. Cas. 192.

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Approved in Re Clarke and Toronto Grey and Bruce R. W. Co., 18 O. L. R. 628, 9 Can. Ry. Cas. 290, 13 O. W. R. 699.

Canadian Oil Fields Co. v. Village of Oil Springs, 8 O. W. R. 480.
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Can. Pac. R. W. Co. v. Little Seminary, 16 S. C. R. 606.
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Canadian Pacific R. W. Co. v. Alexander Brown Milling and Elevator Co., 11 O. W. R. 919.
Reversed in S. C., 18 O. L. R. 85, 13 O. W. R. 301.

Canadian Pacific R. W. Co. and City of Toronto, In re, 23 Occ. N. 218, 5 O. L. R. 717.
Affirmed in part and varied in part in Canadian Pacific R. W. Co. v. City of Toronto, [1905] A. C. 33.

Canadian Pacific R. W. Co. and City of Toronto, In re, 22 Occ. N. 235, 4 O. L. R. 134.
Reversed in part in S. C., 23 Occ. N. 218, 5 O. L. R. 717.

Canadian Pacific R. W. Co. v. Boisseau, 32 S. C. R. 424.
Followed in Lamond v. Grand Trunk R. W. Co., 16 O. L. R. 365, 11 O. W. R. 442.

Canadian Pacific R. W. Co. v. City of Toronto, 9 O. W. R. 785.
Affirmed in City of Toronto v. Canadian Pacific R. W. Co., [1908] A. C. 54.

Canadian Pacific R. W. Co. v. City of Quebec, Q. R. 8 Q. B. 246.
Affirmed in S. C., 30 S. C. R. 73.

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Affirmed and varied in Grand Trunk Rw. Co. v. Canadian Pacific Rw. Co., 27 C. L. T. 652, 39 S. C. R. 220.

Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 12 O. L. R. 320, 7 O. W. R. 814.
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Canadian Pacific R. W. Co. v. Little Seminary of St. Thérèse, 16 S. C. R. 606.
Applied in In re Haskell and Grand Trunk R. W. Co., 24 Occ. N. 232, 7 O. L. R. 429, 3 O. W. R. 377.

Canadian Pacific R. W. Co. v. Macleod School District, 5 Terr. L. 187.
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Canadian Pacific R. W. Co. v. Ottawa Fire Ins. Co., 9 O. L. R. 493.
Affirmed in S. C., 11 O. L. R. 465, 7 O. W. R. 353.
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Canadian Pacific R. W. Co. v. Parish of Notre-Dame de Bonsecours, [1899] A. C. 367.
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Referred to in Canadian Pacific R. W. Co. v. The King, 39 S. C. R. 476.

Canadian Pacific R. W. Co. v. Corporation of Parish of Notre Dame de Bonsecours, [1890] A. C. 367.
Followed in Therrien v. Grand Trunk R. W. Co., 20 Occ. N. 431.

Canadian Pacific R. W. Co. v. Roy, 20 Occ. N. 441, Q. R. 9 Q. B. 551.
Reversed in S. C., [1902] A. C. 220.
Followed in Montreal Street R. W. Co. v. Gareau, 21 Occ. N. 128, Q. R. 10 K. B. 417.
Distinguished in Davie v. Montreal Water and Power Co., Q. R. 23 S. C. 141.
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Canadian Pacific R. W. Co. v. The King, 26 C. L. T. 777, 10 Ex. C. R. 317.
Affirmed in S. C., 27 C. L. T. 223, 38 S. C. R. 211.

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Followed in Cumming v. Cumming, 15 Man. L. R. 640.

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Cape Breton Co., In re, 26 Ch. D. 221, 29 Ch. D. 795.
Approved in Burland v. Earle, [1902] A. C. 83.

"Cape Breton," The, v. Richelieu and Ontario Navigation Co., 36 S. C. R. 564.
Affirmed in Richelieu and Ontario Navigation Co. v. Owners of S.S. "Cape Breton," [1907] A. C. 112.

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Referred to in Hay v. Bingham, 11 O. L. R. 148, 6 O. W. R. 447.

Carey v. Smith, 5 O. L. R. 209.
Referred to in Asseltine v. Shibley, 9 O. L. R. 327, 5 O. W. R. 109.

Carleton Woollen Co. v. Town of Woodstock, 3 N. B. Eq. 138, 26 C. L. T. 315, 37 N. B. R. 545.
Affirmed in S. C., 2 E. L. R. 137, 37 N. B. R. 545.
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Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256.
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Distinguished in Baston v. Toronto Fruit Vinegar Co., 22 Occ. N. 232, 4 O. L. R. 20.

Carpenter v. Pearson, 3 O. W. R. 483.
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Carr v. Foster, 3 Q. B. 581.
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Carr v. Foster, 3 Q. B. 581.
Distinguished in Ternan v. Flinn, 40 N. S. R. 167.

Carr v. Living (1860), 28 Beav. 644.
Doubted in Re Miller (1909), 14 O. W. R. 221, 19 O. L. R. 387.

Carrière v. Sigouin, Q. R. 33 S. C. 423.
Affirmed in S. C., Q. R. 18 K. B. 176.

Carrisbrooke S.S. Co. v. London and Provincial and General Insurance Co., [1901] 2 K. B. 861.
Followed in McNeil v. Fultz, 27 C. L. T. 237, 38 S. C. R. 198.

Carroll v. Golden Cache Mines Co., 6 Brit. Col. L. R. 354.
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Distinguished in Oleson v. Jonasson, 3 W. L. R. 466, 16 Man. L. R. 94.

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Cartwright v. Public School Trustees and Township of Cartwright, In re, 4 O. L. R. 272.
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Case v. Laird, 8 Man. L. R. 461.
Discussed and distinguished in Griffiths v. Winnipeg Electric R. W. Co., 5 W. L. R. 149, 371, 16 Man. L. R. 512.

Cashman & Cobalt & James Mines, Ltd., Re, (1907), 10 O. W. R. 658.
Not followed in Re Smith & Hill (1909), 14 O. W. R. 881, 19 O. L. R. 98.

Casselman v. Ottawa, Arnprior and Parry Sound R. W. Co., 18 P. R. 261.
Followed in Morrison v. Grand Trunk R. W. Co., 22 Occ. N. 149, 162, 4 O. L. R. 43.

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Approved in Huffman v. Township of Bayham, 19 Occ. N. 383, 26 A. R. 514.

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Caston v. City of Toronto, 18 Occ. N. 402, 19 Occ. N. 263, 30 O. R. 16, 26 A. R. 459.
Affirmed in S. C., 20 Occ. N. 321, 30 S. C. R. 390.

Castrique v. Imrie, L. R. 4 H. L. 414.
Referred to in Michado v. The "Hattie and Lottie," 9 Ex. C. R. 11.

Caswell v. St. Mary's Road Co., 28 U. C. R. 247.
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Catheart v. Bacon, 49 N. W. R. 331.
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Catling v. King, 64 L. J. Ch. 384.
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Cavanagh v. Park, 23 A. R. 715.
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Centaur Cycle Co. v. Hill, 4 O. L. R. 493.
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Central Bank v. Ellis, 20 A. R. 364.
Followed in Lake of the Woods Milling Co. v. Collin, 20 Occ. N. 285, 13 Man. L. R. 154.

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Central Press Association v. American Press Association, 13 P. R. 353.
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Chamberlain v. Turner, 31 C. P. 460.
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Chamberlain's Wharf, Limited v. Smith, [1909] 2 Ch. 605.
Considered in Parker v. Toronto Musical Protective Assn., 21 Occ. N. 31, 32 O. R. 305.

Chamberlain v. Fortier, 23 S. C. R. 371.
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Chambers v. Whitehaven Harbour Commissioners, [1899] 2 Q. B. 132.
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Chanter v. Hopkins, 4 M. & W. 399.
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Chapleau v. Laporte, Q. R. 16 S. C. 189.
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Chaplin v. Woodstock Public School Board, 16 O. R. 728.
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Chapman's Case, [1895] 1 Ch. 771.
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Chatillon v. Canadian Mutual Fire Ins. Co., 27 C. P. 450.
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Chaudière Machine and Foundry Co. v. Canada Atlantic R. W. Co., 33 S. C. R. 11.
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Chaz v. Les Cisterciens Reformes, 12 Man. L. R. 330.
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Specially discussed in In re Cochrane and Ancient Order of United Workmen, 16 O. L. R. 328, 11 O. W. R. 956.
Followed in Re Roger, 18 O. L. R. 649.

Chesterfield's Trusts, In re, 24 Ch. D. 643.
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Chevalier v. Bessette, Q. R. 27 S. C. 356.
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Chew v. Caswell (1909), 13 O. W. R. 548.
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Chicoutimi Pulp Co. v. The King and Price, Q. R. 30 S. C. 143.
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Child v. Stenning, 5 Ch. D. 695.
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Chisholm v. Chisholm, 2 E. L. R. 207.
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Church v. Barnett, L. R. 6 C. P. 116.
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Clark v. Bellamy, 19 Occ. N. 174, 30 O. R. 532.
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Clark v. Docksteader, 11 B. C. R. 37.
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Clark v. Town of Palmerston, 6 O. R. 616.
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Clarkson v. Crawford (1908), 12 O. W. R. 706.
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Clarkson v. Musgrave, 9 Q. B. D. 386.
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Coates v. Town of Moncton, 25 N. B. R. 605.
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Coffey v. Scane, 22 A. R. 269.
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Followed in Baxter v. Jones, 23 Occ. N. 258, 6 O. L. R. 360.

Coghlan v. Cumberland, [1898] 1 Ch. 704.
Followed in Creighton v. Pacific Coast Lumber Co., 19 Occ. N. 285, 12 Man. L. R. 546.

Cogswell v. Grant, 34 N. S. R. 540.
Distinguished in Matheson v. McPhee, 42 N. S. R. 220.

Cohen v. Hale, 3 Q. B. D. 371.
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Colbeck v. Ontario (1909), 13 O. W. R. 1027.
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Colchester North, Township of, and Township of Gosfield North, In re, 20 Occ. N. 329, 19 P. R. 188.
Reversed in S. C., 21 Occ. N. 403, 2 O. L. R. 103.

Colchester v. Seaber, 3 Burr. 1870.
Referred to in Pictou (No. 16) Trustees v. Cameron, 40 N. S. R. 156n.

Cole v. Cooke, Q. R. 22 S. C. 25.
Affirmed in S. C., Q. B. 12 K. B. 519.

Cole v. Hall, 13 P. R. 100.
Followed in Robock v. Peters, 20 Occ. N. 262, 13 Man. L. R. 124.

Colebeck v. Girdlers' Co., 1 Q. B. D. 234.
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Coley v. Canadian Pacific R. W. Co., Q. R. 29 S. C., 282.
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Collen v. Wright, 8 E. & B. 647.
Followed in Bank of Ottawa v. Harty, 12 O. L. R. 218, 7 O. W. R. 869.

Collen v. Wright, 8 E. & B. 647.
Followed in Coit v. Bowling, 4 Terr. L. R. 464.

Collett v. Foster, 2 H. & N. 360.
Distinguished in Rex v. Finlay, 21 Occ. N. 419, 13 Man. L. R. 383.

Collins v. North British and Mercantile Ins. Co., [1894] 3 Ch. 228.
Followed in Postlethwaite v. McWhinney, 23 Occ. N. 333, 6 O. L. R. 412.

Collins v. United States, 15 Ct. of Clms. 35.
Referred to in Hargrave v. The King, 22 Occ. N. 427, 8 Ex. C. R. 62.

Collins v. Vestry of Paddington, 5 Q. B. D. 368.
Referred to in Nelson v. Archibald, 40 N. S. R. 152n.

Collom v. Manley, 8 B. C. R. 153.
Reversed in S. C., 22 Occ. N. 278, 32 S. C. R. 371.

Collom v. Manley, 22 Occ. N. 278, 32 S. C. R. 371.
Followed in Cleary v. Boscowitz, 22 Occ. N. 278, 32 S. C. R. 417.

Colonist Printing and Publishing Co. v. Dunsmuir, 9 B. C. R. 275.
Reversed in S. C., 23 Occ. N. 65, 32 S. C. R. 679.

Columbus Fish and Game Club v. W. E. Edwards Co., Limited, Q. R. 32 S. C. 503.
Affirmed in S. C., Q. R. 18 K. B. 8.

Combe v. Corporation of London, 1 R. & C. C. C. 631.
Followed in Diamond Match Co. v. Hawkesbury Lumber Co., 21 Occ. N. 342, 1 O. L. R. 577.

Comber v. Leyland, [1898] A. C. 524.
Referred to in Phillips v. Malone, 22 Occ. N. 32, 3 O. L. R. 47; and in Temple v. Western Assce. Co., 35 N. B. Reps. 171.

Commissioner for Railways v. Brown, 13 App. Cas. 133.
Followed in Atkinson v. Dominion of Canada Guarantee and Accident Co., 16 O. L. R. 619, 11 O. W. R. 449.

Commissioner of Stamps v. Hope, [1891] A. C. 476.
Followed in Brand v. Green, 20 Occ. N. 279, 13 Man. L. R. 101.

Common v. McArthur, 29 S. C. R. 239.
Followed in In re Victoria Montreal Fire Ins. Co., 6 Q. P. R. 302.

Compagnie Financière v. Peruvian Guano Co., 11 Q. B. D. 65.
Followed in Muir v. Alexander, 24 Occ. N. 410.

Comtois v. Dumontier, Q. R. 8 Q. B. 293.
Approved and followed in County of Bonce v. Breakley, Q. R. 15 K. B. 520.

Confederation Life Assn. and Cordingly, In re, 19 Occ. N. 313, 19 P. R. 16.
Reversed in S. C., 20 Occ. N. 32, 19 P. R. 89.

Confederation Life Assn. v. Brown, 35 N. S. Reps. 194.
Reversed in Confederation Life Assn. v. Borden, 34 S. C. R. 338.

Confederation Life Assn. v. Labatt, 18 P. R. 266.
Followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245.

Confederation Life Association v. Miller, 14 S. C. R. 330.
Followed in Metropolitan Life Ins. Co. v. Montreal Coal and Towing Co. 25 Occ. N. 4, 35 S. C. R. 266.

Conley v. Canadian Pacific Rw. Co., 20 Occ. N. 458, 32 O. R. 258.
Affirmed in S. C., 1 O. L. R. 345.

Conn v. Fitzgerald, 22 Occ. N. 345.
Reversed in S. C., 5 Terr. L. R. 346.

Connecticut and Passumpsic Rivers Railroad Co. v. Morris, 14 S. C. R. 319.
Distinguished in Brook v. Booker, 41 S. C. R. 331, 6 E. L. R. 435.

Connecticut Mutual, &c., Co. v. Moore, 6 App. Cas. 644.
Followed in Davidson v. Stuart, 14 Man. L. R. 74.

Connell v. Connell, 4 O. W. R. 360.
Affirmed in S. C., 26 C. L. T. 383, 37 S. C. R. 404.

Connell v. Town of Prescott, 20 A. R. 49, 22 S. C. R. 147.
Followed in Thorn v. James, 23 Occ. N. 124, 14 Man. L. R. 373.

Connolly v. Grenier, Q. R. 34 S. C. 405.
Affirmed in 42 S. C. R. 242.

Connolly v. Montreal Park and Island R. W. Co., Q. R. 22 S. C. 322.
Distinguished in Beaubien v. Ekers, Q. R. 24 S. C. 199.

Connor v. Middagh, 16 A. R. 356.
Followed in Challoner v. Township of Lobo, 21 Occ. N. 29, 32 O. R. 247.

Conrad v. Alberta Mining Co., 20 Occ. N. 108, 4 Terr. L. R. 322.
Affirmed in S. C., 21 Occ. N. 102, 4 Terr. L. R. 412.

Constable v. Bull, 3 DeG. & Sm. 411.
Followed in Re McDonald, 35 N. S. Reps. 500.

Consumers' Cordage Co. v. Converse, Q. R. 8 Q. B. 511.
Affirmed in S. C., 30 S. C. R. 618.

Consumers' Cordage Co. v. Bannerman, Q. R. 34 S. C. 441.
Affirmed in Q. R. 18 K. B. 305.

Consumers' Gas Co. of Toronto v. City of Toronto, 27 S. C. R. 453.
Followed in Calgary Gas and Waterworks Co. v. City of Calgary, 2 Terr. L. R. 447.

Consumers' Gas Co. v. City of Toronto, 27 S. C. R. 453.
Applied in In re London Street Railway Assessment, 20 Occ. N. 62, 27 A. R. 83.

Continental Caoutchouc and Gutta Percha Co. v. Kleinwort Sons & Co., 20 Times L. R. 403.
Followed in Dominion Bank v. Union Bank of Canada, 40 S. C. R. 366.

Cook v. Brisebois, 2 Q. P. R. 162.
Followed in Granda Hermanos y Ca. v. Granda, 23 Occ. N. 118.

Cook v. Noble (1886), 12 O. R. 81.
Distinguished from Re Miller (1909), 14 O. W. R. 221, 19 O. L. R. 381.

Cook v. Thomas, 6 Man. L. R. 286.
Followed in Sumner v. Dobbin, 3 W. L. R. 382, 16 Man. L. R. 491.

Cooke v. Millar, 3 Rev. Leg. 446, 4 Rev. Leg. 260.
Referred to in Schwob v. Farnham, 22 Occ. N. 4, 31 S. C. R. 471.

Cooper v. Cooper, 2 Ch. D. 492.
Followed in Patton v. Alberta Coal Co., 2 Terr. L. R. 294.

Cooper v. Jarman, L. R. 3 Eq. 98.
Distinguished in In re Murray, 22 Occ. N. 373, 4 O. L. R. 418.

Cooper v. Whittingham, 15 Ch. D. 501.
Followed in Anglo-Canadian Music Publishing Assn. v. Somerville, 20 Occ. N. 120, 19 P. R. 113.

Copeland-Chatterson v. Business Systems (1909), 13 O. W. R. 259.
Affirmed 13 O. W. R. 1211.
Leave to appeal to Court of Appeal refused, 14 O. W. R. 128.

Copeland-Chatterson Co. v. Business Systems, Limited, 10 O. W. R. 92.
Reversed in S. C., 16 O. L. R. 481, 11 O. W. R. 762.

Copeland-Chatterson Co. v. Paquette, 10 Ex. C. R. 410.
Affirmed in S. C., 27 C. L. T. 311, 38 S. C. R. 451.

Copeland v. Village of Blenheim, 9 O. R. 19.
Followed in Keech v. Town of Smith's Falls, 11 O. W. R. 309, 15 O. L. R. 300.

Copin v. Adamson, L. R. 9 Ex. 345.
Referred to in New Hamburg Manufacturing Co. v. Shields, 4 W. L. R. 307, 16 Man. L. R. 212.

Coplen v. Callaghan, 30 S. C. R. 555.
Followed in Cleary v. Boscowitz, 22 Occ. N. 278, 32 S. C. R. 417.

Corbin v. Lookout Mining Co., 5 B. C. R. 281.
Approved in Hopper v. Dunsmuir, 10 B. C. R. 17.

Cornell v. Irwin, 2 O. W. R. 460.
Followed in Leach v. Bruce, 9 O. L. R. 380, 4 O. W. R. 441.

Cornwall v. Henson, [1900] 2 Ch. 298.
Followed in Canadian Fairbanks Co. v. Johnston, 18 Man. L. R. 589, 10 W. L. R. 571.

Cornwall & Henson, [1900] 2 Ch. 1028.
Followed in Crawford v. Patterson, 7 W. L. R. 183, 1 Alta. L. R. 27.
Distinguished in Labelle v. O'Connor, 15 O. L. R. 519, 11 O. W. R. 95.
Discussed in Great West Lumber Co. v. Wilkins, 7 W. L. R. 166, 1 Alta L. R. 155.

Cornwall, In re Town of, and Cornwall Waterworks Co., 19 Occ. N. 36, 30 O. R. 81.
Affirmed in S. C., 20 Occ. N. 61, 27 A. R. 48.

Corriveau v. Roy, Q. R. 15 S. C. 90.
Followed in Ferland v. Laflamme, Q. R. 27 S. C. 66.

Coté v. Halliday, 17 C. L. T. Occ. N. 53.
Followed in Norton v. Bertie Public School (Section 6) Trustees, 17 O. L. R. 413, 12 O. W. R. 1249.

Coté v. James Richardson Co., 38 S. C. R. 41.
Distinguished in Canadian Breweries Co. v. Gariépy, 38 S. C. R. 236.

Coté v. Lefebvre, Q. R. 36 S. C. 210.
Reversed in Q. R. 18 K. B. 523.

Cotton v. Wood, 8 C. B. N. S. 568.
Followed in Royle v. Canadian Northern R. W. Co., 23 Occ. N. 25, 14 Man. L. R. 275.

Coulter v. Equity Fire Ins. Co., 7 O. L. R. 180, 24 Occ. N. 88, 3 O. W. R. 194.
Affirmed in S. C., 25 Occ. N. 30, 9 O. L. R. 35, 4 O. W. R. 383.

Counsell v. Livingston, 21 Occ. N. 563, 2 O. L. R. 582.
Affirmed in S. C., 22 Occ. N. 860, 4 O. L. R. 340.

County Courts of British Columbia, In re, 21 S. C. R. 464.
Followed in Rex v. Brown, 41 N. S. R. 293.

Couston v. Chapman, L. R. 2 H. L. Sc. 250.
Followed in Whitman Fish Co. v. Winnipeg Fish Co., 8 W. L. R. 488, 17 Man. L. R. 620.

Couture v. Bouchard, 21 S. C. R. 281.
Followed in Attorney-General for Quebec v. Scott, 24 Occ. N. 110, 34 S. C. R. 282.

Couture v. Couture, 34 S. C. R. 716.
Referred to in Delisle v. Arcand, 25 Occ. N. 95, 36 S. C. R. 23.

Coventry Election Case, 20 L. T. N. S. 405.
Followed in Re Alberta Dominion Election, 1 W. L. R. 486, 6 Terr. L. R. 329.

Cowan v. Allen, 26 S. C. R. 292.
Followed in McLaughlin v. Stewart, 21 Occ. N. 185, 1 O. L. R. 295; and in Vanluven v. Allison, 21 Occ. N. 468, 2 O. L. R. 198.
Referred to in Trial v. The King, 21 Occ. N. 281, 7 Ex. C. R. 98.

Cowan's Trust, In re, 14 Ch. D. 638.
Not followed in Carswell v. Langley, 22 Occ. N. 97, 3 O. L. R. 261.

Cowen v. Evans, 22 S. C. R. 328.
Distinguished in Dufresne v. Fee, 35 S. C. R. 8.

Cowie v. Cowie (1909), 13 O. W. R. 559.
Reversed 14 O. W. R. 226.
Leave to appeal to Court of Appeal granted, 14 O. W. R. 575.

Cowper v. Laidler, [1903] 2 Ch. 337.
Applied in Sandon Waterworks and Light Co. v. Byron N. White Co., 35 S. C. R. 309.

Cox v. Adams, 35 S. C. R. 393.
Distinguished in Sawyer-Massey Co. v. Hodgson, 18 O. L. R. 333, 13 O. W. R. 980.
Followed in Stuart v. Bank of Montreal, 41 S. C. R. 516.

Cox v. English, Scottish and Australian Bank, [1905] A. C. 168.
Referred to in Hétu v. Dixville Butter and Cheese Association, 40 S. C. R. 128, 4 E. L. R. 578.

Cox v. Hakes, 15 App. Cas. 506.
Discussed in Ikezoya v. Canadian Pacific R. W. Co., 12 B. C. R. 454.

Coy v. Arndt, In re, 3 O. W. R. 585.
Affirmed in S. C., 24 Occ. N. 336, 8 O. L. R. 101, 3 O. W. R. 658.

Coyle v. Great Northern R. W. Co., L. R. 20 Ir. 409.
Followed in Wallman v. Canadian Pacific R. W. Co., 16 Man. L. R. 83.

Coyne v. Broddy, 15 A. R. 159.
Distinguished in Ross v. Robertson, 24 Occ. N. 228, 7 O. L. R. 413, 3 O. W. R. 158.

Coyne v. Ryan, 21 Occ. N. 498.
Affirmed in S. C., 22 Occ. N. 12.

Craddock v. Piper, 14 Sim. 310.
Referred to in Hartt v. Wishard-Langan Co., 18 Man. L. R. 376, 9 W. L. R. 519.

Cradock v. Piper, 1 Macn. & G. 664.
Commented on in In re Williams, 22 Occ. N. 323, 4 O. L. R. 501.
Distinguished in Turriff v. McDonald, 21 Occ. N. 545, 13 Man. L. R. 577.

Craig v. Beardmore, 2 O. W. R. 985.
Affirmed in S. C., 24 Occ. N. 308, 7 O. L. R. 674, 3 O. W. R. 547.

Craig v. Cromwell, 20 Occ. N. 255, 32 O. R. 27.
Affirmed in S. C., 21 Occ. N. 13, 27 A. R. 585.

Crawford v. Tilden, 8 O. W. R. 548, 18 O. L. R. 169.
Affirmed in S. C., 9 O. W. R. 781, 14 O. L. R. 572.

Creen v. Wright, 2 C. P. D. 354.
Referred to in Bartlett v. Nova Scotia Steel Co., 25 Occ. N. 130.

Creighton v. Pacific Coast Lumber Co., 12 Man. L. R. 546.
Followed in Gordon v. Hanford, 4 W. L. R. 241, 16 Man. L. R. 292.

Creighton v. Reid, 27 N. S. Reps. 72.
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Cripp v. Walcott, 4 Madd. 11.
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Crockewitt v. Fletcher, 1 H. & N. 893.
Followed in Manitoba Farmers' Mutual Hail Ins. Co. v. Fisher, 22 Occ. N. 303, 14 Man. L. R. 157.

Croft v. King, [1893] 1 Q. R. 419.
Followed in In re Jones v. Bisconnette, 22 Occ. N. 53, 2 O. L. R. 54.

Crompton and Knowles Loom Works v. Hoffman, 5 O. L. R. 554, 2 O. W. R. 273.
Followed in Mawhinney v. Porteous, 6 W. L. R. 633, 17 Man. L. R. 184.

Cross and Town of Gladstone, In re, 15 Man. L. R. 528.
Referred to in Little v. McCartney, Johnston v. Wright, 18 Man. L. R. 323, 9 W. L. R. 448.

Crossett v. Haycock, 23 Occ. N. 285, 6 O. L. R. 259.
Affirmed in S. C., 24 Occ. N. 310, 7 O. L. R. 655, 3 O. W. R. 616.

Crothers v. Crothers, 1 P. & D. 568.
Specially referred to in Rae v. Rae, 19 Occ. N. 34, 20 Occ. N. 64, 31 O. R. 321.

Crowder v. Sullivan, 24 Occ. N. 17, 6 O. L. R. 708, 2 O. W. R. 1129.
Reversed in S. C., 25 Occ. N. 31, 9 O. L. R. 27, 4 O. W. R. 397.

Cuba, The, v. McMillan, 26 S. C. R. 661.
Referred to in Hamburg Packet Co. v. Desrochers, 23 Occ. N. 214, 8 Ex. C. R. 263.

Cullen, In re, 24 Occ. N. 141, 36 N. S. Reps. 482.
Affirmed in McNeil v. Cullen, 25 Occ. N. 54, 35 S. C. R. 510.

Cullin v. Rinn, 5 Man. L. R. 8.
Followed in Brough v. McClelland, 18 Man. L. R. 279, 9 W. L. R. 6.

Cully v. Ferdais, 30 S. C. R. 322.
Distinguished in Delisle v. Arcand, 25 Occ. N. 95, 36 S. C. R. 23.
Followed in City of Hull v. Scott, 34 S. C. R. 617.

Culverwell v. Birney, 11 O. R. 265.
Followed in Davidson v. Manitoba and North-West Land Corporation, 22 Occ. N. 305, 23 Occ. N. 26, 14 Man. L. R. 232.

Cummings v. Town of Dundas, 10 O. L. R. 300.
Reversed in S. C., 9 O. W. R. 107, 13 O. L. R. 384.

Cunard v. Symon-Kaye Syndicate, 27 N. S. Reps. 340.
Distinguished in Union Bank of Halifax v. Wurzburg & Co. (Ltd.), 22 Occ. N. 402, 9 B. C. R. 160.

Cundy v. Lindsay, 3 App. Cas. 459.
Applied in Eby-Blain Co. v. Frankel, 23 Occ. N. 173.

Cunningham v. Tomey Homma, [1903] A. C. 151.
Distinguished in In re Coal Mines Regulation Act, 24 Occ. N. 342, 10 B. C. R. 408.

Curle v. City of Brandon, 15 Man. L. R. 122.
Followed in Iveson v. City of Winnipeg, 5 W. L. R. 118, 16 Man. L. R. 352.

Curless v. Town of Grand Falls, 37 N. B. R. 227.
Followed in McKay v. City of St. John, 38 N. B. R. 393, 4 E. L. P. 529.

Currie v. Misa, L. R. 10 Ex. 153, 1 App. Cas. 554.
Discussed in Canadian Bank of Commerce v. Wait, 7 W. L. R. 255, 1 Alta. L. R. 68.

Currier v. Freidrick, 22 Gr. 243.
Followed in Fairclough v. Smith, 21 Occ. N. 447, 13 Man. L. R. 509.

Curtis v. Price, 12 Ves. 103.
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Cutler v. Powell, 2 Sm. L. C. 1.
Followed in Knox v Munro, 20 Occ. N. 141, 13 Man. L. R. 16.

Cutter v. Powell, 6 T. R. 320.
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"D. C. Whitney," The, 38 S. C. R. 303.
Distinguished in Dunbar and Sullivan Dredging Co. v. The "Milwaukee," 11 Ex. C. R. 179.

Dagenham (Thames) Dock Co., In re, L. R. 8 Ch. 1022.
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Dagenham (Thames) Dock Co., In re, L. R. 8 Ch. 1022.
Followed in Canadian Fairbanks Co. v. Johnston, 18 Man. L. R. 589, 10 W. L. R. 571.
Followed in Crawford v. Paterson, 7 W. L. R. 183, 1 Alta. L. R. 27.
Distinguished in Labelle v. O'Connor, 15 O. L. R. 519, 11 O. W. R. 95.

Dakins, Ex p., 16 C. B. 77.
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Dale's Case, 6 Q. B. D. 376.
Followed in Re Royston, 18 Man. L. R. 539, 10 W. L. R. 513.

Daley, Ex p., 27 N. B. R. 129.
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Dallas v. Town of St. Louis, Q. R. 11 K. B. 117.
Affirmed in S. C., 22 Occ. N. 194, 32 S. C. R. 120.

Dalton v. Angus, 6 App. Cas. 829.
Followed in Mitchell v. City of Winnipeg, 6 W. L. R. 31, 7 W. L. R. 120, 17 Man. L. R. 166.

Dalton Time Lock Co. v. Dalton, 66 L. T. R. 704.
Followed in Red Deer Mill and Elevator Co. v. Hall, 1 Alta. L. R. 530.

Daly v. Amherst Park Land Co., Q. R. 13 S. C. 516.
Affirmed in S. C., Q. R. 16 S. C. 570.

Daly, In re, 1 E. L. R. 487.
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Followed in Merchants Bank v. Sussex, 22 Occ. N. 387, 4 O. L. R. 524.

Dand v. Kingscote, 6 M. & W. 174.
Distinguished in Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co., 12 O. L. R. 320, 7 O. W. R. 814.

Danger v. London Street R. W. Co., 30 O. R. 493.
Applied in O'Hearn v. Town of Port Arthur, 22 Occ. N. 255, 4 O. L. R. 209.

Daniel v. Canadian Pacific R. W. Co., 6 W. L. R. 538.
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Daniel v. Metropolitan R. W. Co., L. R. 3 C. P. 216, L. R. 5 H. L. 45.
Followed in Newell v. Canadian Pacific R. W. Co., 12 O. L. R. 21, 7 O. W. R. 771.
Distinguished in McKeegan v. Cape Breton Coal, etc. Co., 40 N. S. R. 566.

Danjou v. Marquis, 3 S. C. R. 258.
Referred to in Svensson v. Bateman, 42 S. C. R. 146.

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Followed in Valentinuzzi v. Lenarduzzi, 16 Man. L. R. 121.

Darrow v. Millard, 33 N. S. Reps. 334.
Varied in S. C., 21 Occ. N. 255, 31 S. C. R. 196.

Davey v. Bentinck, [1893] 1 Q. B. 185.
Followed in McLaughlin Carriage Co. v. Oland, 20 Occ. N. 409.

Davidson v. Georgian Bay Navigation Co., 8 Ex. C. R. 1.
Reversed in S. C., 23 Occ. N. 79, 33 S. C. R. 1.

Davidson v. Hill, [1901] 2 K. B. 617.
Followed in Merritt v. Copper Crown Mining Co., 22 Occ. N. 239.

Davidson v. Manitoba and North-West Land Corporation, 23 Occ. N. 26, 14 Man. L. R. 233.
Reversed in S. C., 24 Occ. N. 51; Manitoba and North-West Land Corporation v. Davidson, 34 S. C. R. 255.

Davidson v. Stuart, 22 Occ. N. 266, 14 Man. L. R. 74.
Affirmed in S. C., 24 Occ. N. 113, 34 S. C. R. 215.

D'Avignon v. Jones, 23 Occ. N. 71, 9 B. C. R. 359.
Affirmed in S. C., 32 S. C. R. 650.

Davis v. C. P. R. W. Co., 12 A. R. 724.
Referred to in McLeod v. Can. Nor. R. W. Co., 18 O. L. R. 616, 9 Can. Ry. Cas. 39, 13 O. W. R. 378.

Davis v. Grand Trunk R. W. Co., 24 Occ. N. 134, 7 O. L. R. 186, 3 O. W. R. 312.
Affirmed in S. C., 24 Occ. N. 311, 7 O. L. R. 658, 3 O. W. R. 663.

Davis v. Henderson, 29 U. C. R. 344.
Distinguished in Huffman v. Rush, 24 Occ. N. 217, 7 O. L. R. 346, 3 O. W. R. 43.

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Distinguished in Delisle v. Arcand, 25 Occ. N. 95, 36 S. C. R. 23.

Daw v. Ackerill, 25 A. R. 37.
Distinguished in In re Kirkby and Churchwardens of All Saints, Collingwood, 24 Occ. N. 358, 8 O. L. R. 385, 4 O. W. R. 142.

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Commented on in Canadian Moline Plow Co. v. Clement, 6 Terr. L. R. 252, 5 W. L. R. 32.

Dawson v. Thurston, Q. R. 31 S. C. 225.
Reversed in Thurston v. Dawson, Q. R. 17 K. B. 148.

Day v. Crown Grain Co. and Cleveland, 3 W. L. R. 545, 16 Man. L. R. 366.
Reversed in S. C., 27 C. L. T. 664, 39 S. C. R. 258.
Affirmed in Crown Grain Co. v. Day, [1908] A. C. 504.

Day, In re, [1898] 2 Ch. 510.
Distinguished in In re Murray, 22 Occ. N. 373, 4 O. L. R. 418.

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Referred to in In re Young, 22 Occ. N. 31.

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Dominion Bank v. Heffernan, 11 P. R. 504.
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Dreger v. Canadian Northern Rw. Co., 15 Man. L. R. 386.
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Drysdale v. Dominion Coal Co., 34 S. C. R. 332.
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Drysdale v. Dugas, 26 S. C. R. 20.
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Dunsmuir v. Lowenberg, Harris & Co., 9 B. C. R. 303.
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Earle v. Holderness, 4 Bing. 462.
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Earle v. Kingscote, [1900] 2 Ch. 585.
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Eastern Townships Bank v. De Kérangat, Q. R. 17 K. B. 232.
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Eastern Townships Bank v. Vaughan, 13 B. C. R. 77.
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Eckhardt v. Lancashire Ins. Co., 18 Occ. N. 361, 29 O. R. 695.
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Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 5 O. W. R. 349, 9 O. L. R. 569.
Affirmed in S. C., 11 O. L. R. 330, 7 O. W. R. 109.

Elgin Loan and Savings Co. v. National Trust Co., 7 O. L. R. 1.
Affirmed in S. C., 10 O. L. R. 41, 5 O. W. R. 466.

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Elk Lumber Co. v. Crow's Nest Pass Coal Co., 12 B. C. R. 433.
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Elliott v. Quebec Bank, Q. R. 16 S. C. 393.
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Followed in Emperor of Russia v. Proskouriakoff, 7 W. L. R. 766, 8 W. L. R. 10, 461, 18 Man. L. R. 56.

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Erb v. Dresden Public School Board, 12 O. W. R. 864.
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Erskine v. Adeane, L. R. 8 Ch. 756.
Followed in McKenzie v. McMullen, 3 W. L. R. 460, 16 Man. L. R. 11.

Esdaile v. Payne, 40 Ch. D. 520.
Distinguished in Challoner v. Township of Lobo, 21 Occ. N. 201, 1 O. L. R. 292.

Esdaile v. Stephenson, 6 Mad. 366.
Referred to in Hartt v. Wishard-Langan Co., 18 Man. L. R. 376, 9 W. L. R. 519.

Esquimalt and Nanaimo Rw. Co. v. New Vancouver Coal Co., 6 B. C. R. 306.
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Esquimalt Waterworks Co. v. City of Victoria, 5 W. L. R. 173.
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Esquimalt Waterworks Co. v. City of Victoria, 4 W. L. R. 59.
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Essex Terminal Rw. Co. v. Windsor, Essex and Lake Shore Rapid Rw. Co., 7 Can. Ry. Cas. 109.
Affirmed in S. C., 40 S. C. R. 620.

Evans v. Hoare, [1892] 1 Q. B. 593.
Followed in McIvride v. Mills, 16 Man. L. R. 276.

Evans v. Jaffray, 1 O. L. R. 614.
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Evans v. Skelton, M. L. R. 3 Q. B. 325, 16 S. C. R. 637.
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Eves v. Booth, 19 Occ. N. 244, 30 O. R. 689.
Affirmed in S. C., 20 Occ. N. 346, 27 A. R. 420.

Excelsior Life Ins. Co. v. Employers' Liability Assurance Corpn., In re Faulkner, 21 Occ. N. 332, 2 O. L. R. 301.
Affirmed in S. C., 22 Occ. N. 94, 3 O. L. R. 93.
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Considered In re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, 21 Occ. N. 595, 2 O. L. R. 585.

Exchange Banking Co., In re—Flitcoft's Case, 21 Ch. D. 519.
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Fahey v. Jephcott, 21 Occ. N. 143, 1 O. L. R. 18.
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Fair v. McCrow, 31 U. C. R. 599.
Followed in Municipality of Louise v. Canadian Pacific Rw. Co., 22 Occ. N. 124, 14 Man. L. R. 124.

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Falconer v. Langley, 6 B. C. R. 444.
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Falle & Township of Tilsonburg, In re, 23 C. P. 167.
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Fane v. Fane, L. R. 20 Eq. 698.
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Farhall v. Farhall, L. R. 7 Ch. 123.
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Farley, Re, 9 O. L. R. 517, 5 O. W. R. 530.
Affirmed in S. C., 10 O. L. R. 540, 6 O. W. R. 78.

Farley v. Sanson, 23 Occ. N. 13, 5 O. L. R. 105.
Affirmed in S. C., 24 Occ. N. 303, 7 O. L. R. 639, 3 O. W. R. 460.

Farlington v. Ingraham, 36 N. S. R. 467.
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Farmers' Loan and Savings Co. v. Patchett, 23 Occ. N. 285, 6 O. L. R. 255.
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Farquharson v. Imperial Oil Co., 30 S. C. R. 188.
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Farquharson v. Imperial Oil Co., 18 Occ. N. 135, 29 O. R. 206.
Reversed in S. C., 19 Occ. N. 372, 30 S. C. R. 188.

Farquharson v. Morgan, [1894] 1 Q. B. 552.
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Farrell v. Bowman, 12 App. Cas. 643.
Referred to in Paul v. The King, 27 C. L. T. 152, 38 S. C. R. 126.

Farrell v. Portland Rolling Mills Co., 38 N. B. R. 364, 4 E. L. R. 500.
Reversed in Farrell v. Manchester, 40 S. C. R. 339, 5 E. L. R. 293.

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Faulds v. Faulds, 17 P. R. 480.
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Faulds v. Harper, 11 S. C. R. 639.
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Faulkner v. City of Ottawa, 10 O. W. R. 807.
Affirmed in S. C., 41 S. C. R. 190.

Faulkner v. Greer, 16 O. L. R. 123, 11 O. W. R. 198.
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Fawcett v. Canadian Pacific Rw. Co., 22 Occ. N. 244, 8 B. C. R. 393.
Affirmed in S. C., 32 S. C. R. 721.

Fawkes v. Swayzie, 31 O. R. 256, dictum min.
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Fearnside v. Flint, 22 Ch. D. 579.
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Federal Life Assurance Co. v. Stinson, 8 O. W. R. 929, 13 O. L. R. 127.
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Fell v. Lutwidge Barnardiston, Ch. 319.
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Fellowes v. Lord Gwydyr, 1 Sim. 63.
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Fenelon Falls v. Victoria Rw. Co., 29 Gr. 4.
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Fennell and Corporation of Guelph, In re, 24 U. C. R. 238.
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Fenton v. McWain, 41 U. C. R. 239.
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Ferguson v. County of Elgin, 15 P. R. 399.
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Field v. Great Northern Rw. Co., 3 Ex. D. 262.
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Field v. Hart, 22 A. R. 449.
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Fisher v. Bradshaw, 21 Occ. N. 378, 2 O. L. R. 128.
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Fitzgerald v. Barbour, 17 O. L. R. 254.
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Fitzjohn v. Mackinder (1861), 9 C. B. N. S. 505.
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Fletcher v. Bealey, 28 Ch. D. 688.
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Fletcher v. Rylands, L. R. 1 Ex. 265, L. R. 3 H. L. 330.
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Flewelling v. Grand Trunk R. W. Co. 6 Can. Ry. Cas. 47.
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Floer v. Michigan Central Rw. Co., 19 Occ. N. 194, 30 O. R. 635.
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Florence Mining Co. v. Cobalt Lake Mining Co., 12 O. W. R. 297.
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Flynn v. Toronto Industrial Exhibition Association, 9 O. L. R. 582.
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Foden v. Foden, [1894] P. 307.
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Ford v. Alden, L. R. 3 Ex. at p. 463.
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Forrest v. Turnbull (1909), 14 O. W. R. 478.
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Forster v. Ivey, 20 Occ. N. 402, 32 O. R. 175.
Affirmed in S. C., 21 Occ. N. 550, 2 O. L. R. 480.

Foster v. Anderson, 15 O. L. R. 362.
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Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q. B. 504.
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Fraser, In, re, Lowther v. Fraser, [1904] 1 Ch. 726.
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Frechette v. Simoneau, 31 S. C. R. 13.
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Freeman v. Cooke, 18 L. J. Ex. 119.
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Freeman v. Pope, L. R. 5 Ch. 538.
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Freeman v. Stewart, 1 N. B. Eq. Reps. 365, 451.
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Geddis v. Proprietors of Bann Reservoir, 3 App. Cas. 430.
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General Engineering Co. of Ontario v. Dominion Cotton Mills Co., 20 Occ. N. 474, 6 Ex. C. R. 357.
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Followed in Quebec and Levis Ferry Co. v. Jess, 35 S. C. R. 693.

Gereau v. Montreal Street Rw. Co., 1 Q. P. R. 566.
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Gerow and Township of Pickering, Re, 12 O. L. R. 545.
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Gesman v. Regina, 1 Sask. L. R. 39, 10 W. L. R. 136.
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Gibbons v. Darvill, 12 P. R. 478.
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Referred to in Benallack v. Bank of British North America, 36 S. C. R. 120.

Gibbins v. Metcalfe, 15 Man. L. R. 583.
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Gibson v. Midland Rw. Co., 2 O. R. 658.
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Followed in In re Canadian Pacific Rw. Co. and Lechtzier, 23 Occ. N. 339, 14 Man. L. R. 566.

Gibson v. Township of North Easthope, 21 A. R. 504, 24 S. C. R. 707.
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Giegerich v. Fleutot, 35 S. C. R. 327.
Referred to in Newswander v. Giegerich, 27 C. L. T. 785, 39 S. C. R. 354.

Giegerich v. Fleutot, 10 B. C. R. 309.
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Gilbert Blasting and Dredging Co. v. The King, 22 Occ. N. 82, 7 Ex. C. R. 221.
Affirmed in S. C., 23 Occ. N. 59, 23 S. C. R. 21.

Gilbert v. Endean, 9 Ch. D. 259.
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Gilbert v. The King, 38 S. C. R. 207.
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Giles v. McEwen, 11 Man. L. R. 150.
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Gilhula, Re, 10 O. L. R. 469, 6 O. W. R. 124.
Reversed in Attorney-General for Canada v. Gilhula, [1906] A. C. 542.

Gillard v. Milligan, 28 O. R. 645.
Followed in Thordarson v. Jones, 18 Man. L. R. 223, 9 W. L. R. 233.

Gillard v. Milligan, 28 O. R. 645.
Followed in Elliott v. Hamilton, 22 Occ. N. 412, 4 O. L. R. 585.

Gillen v. Haynes, 33 U. C. R. 516.
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Gilles v. Smith (1909), 13 O. W. R. 1108.
Affirmed 14 O. W. R. 205.

Gillespie, Re, (1892), 19 A. R. 713.
Affirmed by Supreme Court.
Followed in Hodgins v. Toronto (1909), 14 O. W. R. 642, 1 O. W. N. 31.

Gillett v. Lumsden, 4 O. L. R. 300.
Reversed in S. C., 23 Occ. N. 259, 6 O. L. R. 66.
Affirmed in S. C., 24 Occ. N. 345, 8 O. L. R. 168, 3 O. W. R. 851.

Gilmor v. McPhail, 16 P. R. 151.
Followed in Reekie v. McNeil, 20 Occ. N. 73, 31 O. R. 444.

Gilmour v. Simon, 15 Man. L. R. 205, 1 W. L. R. 417.
Affirmed in S. C., 26 C. L. T. 456, 37 S. C. R. 422.

Gilroy v. Proe, 8 W. L. R. 81, 1 Sask. L. R. 111.
Reversed in S. C., 8 W. L. R. 777.

Gingras v. Richard, Q. R. 34 S. C. 62.
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Ginn v. Laurin, Q. R. 32 S. C. 521.
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Girouard v. Fitzgerald, 37 W. R. 55.
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Gledhill v. Telegram Print. Co. (1909), 13 O. W. R. 1060.
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Glengarry Case, 14 S. C. R. 453.
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Glengoil S. S. Co. v. Pilkington, 28 S. C. R. 146.
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Glenwood v. Phillips, [1904] A. C. 405.
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Glover v. Coleman, L. R. 10 C. P. 108.
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Glover v. Southern L. & S. Co., 20 Occ. N. 66, 31 O. R. 552.
Affirmed in S. C., 21 Occ. N. 105, 1 O. L. R. 59.

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Gold Medal Furniture Mfg. Co. v. Lumbers, 19 Occ. N. 62, 26 A. R. 78.
Reversed in S. C., 19 Occ. N. 375, 30 S. C. R. 55.

Goldie and McCullough Co. v. Bank of Hamilton, 19 Occ. N. 389, 31 O. R. 142.
Affirmed in S. C., 21 Occ. N. 18, 27 A. R. 619.

Goldstein v. Harris (1908), 12 O. W. R. 797.
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Goné v. Lespérance, Q. R. 14 K. B. 168.
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Good v. Toronto, Hamilton and Buffalo Rw. Co., 19 Occ. N. 131, 26 A. R. 133.
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Goodall v. Clark (1909), 14 O. W. R. 785, 1 O. W. N. 95.
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Goode v. Downing (1904), 5 Terr. L. R. 505.
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Gould v. Gillies, 42 N. S. R. 28, 3 E. L. R. 541.
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Graham v. Laird (1909), 14 O. W. R. 497.
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Grant v. Acadia Coal Co., 34 N. S. Reps. 319.
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Grant v. Dupont, 8 B. C. R. 7.
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Affirmed in S. C., 22 Occ. N. 172, 3 O. L. R. 697.
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Specially referred to in Carson v. Village of Weston, 21 Occ. N. 145, 1 O. L. R. 15.

Gray v. Richford, 2 S. C. R. 431.
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Grenier v. Lacourse, Q. R. 2 Q. B. 445.
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Groves v. Wimborne, [1898] 2 Q. B. 419.
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Hamilton v. Groesbeck, 19 O. R. 76.
Distinguished in Wilson v. Owen Sound Portland Cement Co., 20 Occ. N. 299, 27 A. R. 328.

Hamilton Brewing Association v. City of Hamilton, 12 O. L. R. 75.
Affirmed in City of Hamilton v. Hamilton Brewing Association, 38 S. C. R. 239.

Hamilton Brewing Association v. City of Hamilton, 10 O. L. R. 280.
Affirmed in S. C., 12 O. L. R. 75, 7 O. W. R. 655.

Hamilton, City of, v. Hamilton Brewing Association, 38 S. C. R. 239.
Followed in Carleton Woollen Co. v. Town of Woodstock, 27 C. L. T. 316, 38 S. C. R. 411.

Hamilton, City of, v. Hamilton Street Rw. Co., 10 O. L. R. 575.
Affirmed in Hamilton Street Rw. Co. v. City of Hamilton, 27 C. L. T. 154, 38 S. C. R. 106.

Hamilton, City of, v. Hamilton Street Rw. Co., 10 O. L. R. 594, 6 O. W. R. 207.
Affirmed in Hamilton Street Rw. Co. v. City of Hamilton, 39 S. C. R. 673.

Hamilton, City of, v. Hamilton Street Rw. Co., 25 Occ. N. 15, 8 O. L. R. 642, 4 O. W. R. 311, 411.
Affirmed in S. C., 10 O. L. R. 594, 6 O. W. R. 207.

Hamilton, City of, v. Hamilton Street Rw. Co., 8 O. L. R. 455.
Affirmed in S. C., 10 O. L. R. 575, 6 O. W. R. 206.

Hamilton Distillery Co. v. City of Hamilton, 10 O. L. R. 280.
Affirmed in S. C., 12 O. L. R. 75, 7 O. W. R. 655.

Hamilton Distillery Co. v. City of Hamilton, 12 O. L. R. 75.
Affirmed in City of Hamilton v. Hamilton Distillery Co., 38 S. C. R. 239.

Hamlyn v. Wood, [1891] 2 Q. B. 491.
Followed in Dunsford v. Webster, 23 Occ. N. 290, 14 Man. L. R. 529.

Hammersmith Rw. Co. v. Brand, L. R. 4 H. L. 215.
Followed in Canadian Pacific Rw. Co. v. Roy, [1902] A. C. 220.

Hanbury v. Chambers, 14 Occ. N. 321, 10 Man. L. R. 167.
Followed in Fox v. Allen, 23 Occ. N. 28, 14 Man. L. R. 358.
Followed in Hughes v. Chambers, 22 Occ. N. 333, 14 Man. L. R. 163.

Hansen v. Canadian Pacific Rw. Co., unreported.
Followed in Jordan v. McMillan, 21 Occ. N. 192, 8 B. C. R. 27.

Hanson v. Canadian Pacific Rw. Co., 4 W. L. R. 385.
Affirmed in Canadian Pacific Rw. Co. v. Hansen, 40 S. C. R. 194.

Hanson v. Village of Grand Mère, 33 S. C. R. 50.
Affirmed in S. C. [1904] A. C. 789.

Harbin v. Masterman, [1896] 1 Ch. 351.
Followed in In re McIntyre, 22 Occ. N. 90, 3 O. L. R. 212.

Harkness, Re, 8 O. L. R. 720.
Followed in Re Roger, 18 O. L. R. 649, 14 O. W. R. 267.

Harris v. Dustin, 1 Terr. L. R. 404.
Distinguished in Hopkins v. Danroth, 7 W. L. R. 303, 1 Sask. L. R. 225.

Harris v. Great Western Rw. Co. 11876), 1 Q. B. D. 515.
Discussed in Lamont v. Can. Transfer Co. (1909), 13 O. W. R. 1181, 19 O. L. R. 291.

Harris v. London Street Rw. Co., 10 O. W. R. 302.
Affirmed in S. C., 39 S. C. R. 398.

Harris v. Mudie, 7 A. R. 414.
Considered in Huffman v. Rust, 24 Occ. N. 217, 7 O. L. R. 346, 3 O. W. R. 43.

Harris v. Perry, [1903] 2 K. B. 219.
Distinguished in Nightingale v. Union Colliery Co. of British Columbia, 35 S. C. R. 65.

Harris v. Rankin, 4 Man. L. R. 129.
Followed in Merchants Bank v. McKenzie, 18 Occ. N. 367, 20 Occ. N. 90, 13 Man. L. R. 19.

Harris Campbell and Boyden Furniture Co. of Ottawa, Re 5 O. W. R. 649.
Considered and explained in Re Cornwall Furniture Co. Limited, 18 O. L. R. 101, 13 O. W. R. 137.

Harrison v. Armour, 11 Gr. 303.
Followed in Bridge v. Johnston, 23 Occ. N. 287, 6 O. L. R. 370.

Harrison, In re, 31 O. R. 314.
Followed in Gillie v. Young, 21 Occ. N. 165, 1 O. L. R. 368.

Harrison v. Village of Grand Mère, Q. R. 11 K. B. 77.
Affirmed in S. C., 33 S. C. R. 50.

Harrison v. Western Assurance Co., 35 N. S. Reps. 488.
Reversed in Western Assurance Co v. Harrison, 33 S. C. R. 473.

Hart v. Griffin, 21 Occ. N. 567.
Referred to in Harrington v. Meloney, 21 Occ. N. 598.

Hart v. MacIlreith, 41 N. S. R. 351, Hart v. City of Halifax, 2 E. L. R. 118, 158, 468.
Affirmed in MacIlreith v. Hart, 39 S. C. R. 657, 4 E. L. R. 468.

Hart v. Parsons, Q. R. 10 K. B. 555.
Reversed in S. C., 20 Occ. N. 372, 30 S. C. R. 473.

Hart v. Rainville, Q. R. 15 S. C. 17.
Followed in Adami v. City of Montreal, Q. R. 25, S. C. 1.

Harvey v. Facey, [1893] A. C. 552.
Followed in Little v. Hanbury, 14 B. C. R. 18, 9 W. L. R. 115.

Harvey v. Facey, [1893] A. C. 552.
Followed in Bohan v. Galbraith, 8 O. W. R. 559, 9 O. W. R. 95, 13 O. L. R. 301, 10 O. W. R. 143, 15 O. L. R. 37.

Harvey v. Tebbutt, 1 J. & W. 197.
Followed in Winters v. McKinstrey, 22 Occ. N. 213, 23 Occ. N. 54, 14 Man. L. R. 294.

Harvie v. Snowdon, 9 Man. L. R. 313.
Discussed and distinguished in Griffiths v. Winnipeg Electric Rw. Co., 5 W. L. R. 149, 371, 16 Man. L. R. 512.

Harwich and Raleigh, In re Townships of, 21 A. R. 677.
Distinguished in In re Township of Orford and Township of Howard, 20 Occ. N. 206, 27 A. R. 223.

Hastings v. Le Roi No. 2. Limited, 23 Occ. N. 273, 10 B. C. R. 9.
Affirmed in S. C., 24 Occ. N. 116, 24 S. C. R. 177.

Hatch Mansfield & Co. v. Weingott, 22 Times L. R. 366.
Followed in Crown Bank of Canada v. London Guarantee and Accident Co., 12 O. W. R. 349, 17 O. L. R. 95.

Hattin v. Copeland-Chatterson Co., 10 Ex. C. R. 224.
Affirmed in S. C., 26 C. L. T. 846, 37 S. C. R. 651.

Hawley v. Wright, 34 N. S. Reps. 365.
Affirmed in S. C., 22 Occ. N. 198, 32 S. C. R. 40.

Hawthorne v. Canadian Casualty and Boiler Insurance Co., 9 O. W. R. 816, 14 O. L. R. 166.
Affirmed in Canadian Casualty and Boiler Insurance Co. v. Hawthorne, 39 S. C. R. 558.

Hay v. Bissonnette (1909), 14 O. W. R. 279.
Appeal dismissed, 14 O. W. R. 1231, 1 O. W. N. 287.

Haycroft Gold Reduction Co., Re, 69 L. J. Ch. 497.
Distinguished in Red Deer Mill and Elevator Co. v. Hall, 1 Alta L. R. 530.

Hayes v. Day, 1 Alta L. R. 441, 8 W. L. R. 143.
Reversed in S. C., 41 S. C. R. 134.

Hayes v. Thompson, 9 B. C. R. 249.
Followed in Re Moloney and City of Victoria, 6 W. L. R. 627, 13 B. C. R. 194.

Hayward v. Mutual Reserve Association, [1891] 2 Q. B. 236.
Followed in Hill v. Hambly, 12 B. C. R. 253.

Hazeldine v. Heaton, Cab. & El. 40.
Followed in O'Connor v. Peltier, 8 W. L. R. 576, 18 Man. L. R. 91.

Head v. Tattersall, L. R. 7 Ex. 7.
Followed in Moore v. Scott, 5 W. L. R. 8, 381, 16 Man. L. R. 492.

Head's Trustees, Re, 45 Ch. D. 310.
Followed in Hartt v. Wishard-Langan Co., 18 Man. L. R. 376, 9 W. L. R. 519.

Heald v. Kenworthy, 10 Ex. 739.
Followed in Arbuthnot v. Dupas, 15 Man. L. R. 634, 2 W. L. R. 445.

Heard v. Pilley, L. R. 4 Ch. 548.
Discussed in Hull v. Allen, 22 Occ. N. 138.

Rébert v. Banque Nationale, Q. R. 16 K. B. 191.
Reversed in S. C., 40 S. C. R. 458, 5 E. L. R. 271.

Heiminck v. Town of Edmonton, 2 Terr. L. R. 462.
Reversed in S. C., 28 S. C. R. 501.

Helby v. Matthews, [1895] A. C. 471.
Distinguished and applied in Mason v. Lindsay, 22 Occ. N. 371, 4 O. L. R. 365.

Helm v. Town of Port Hope, 22 Gr. 273.
Distinguished in Little v. McCartney, Johnston v. Wright, 18 Man. L. R. 323, 9 W. L. R. 448.
Followed in King v. City of Toronto, 23 Occ. N. 92, 5 O. L. R. 163.

Helsham v. Blackwood, 11 C. B. 111.
Approved and followed in Patterson v. Edmonton Bulletin Co., 1 Alta. L. R. 477, 8 W. L. R. 672.

Heacheliffe v. Banrick, 5 Ex. D. 177.
Followed in Hamilton v. Northey Mfg. Co., 20 Occ. N. 178, 31 O. R. 468.

Henderson v. Bank of Hamilton, 23 S. C. R. 716.
Distinguished in Mackay v. Colonial Investment and Loan Co., 22 Occ. N. 389, 4 O. L. R. 571.

Henderson v. Canada Atlantic Rw. Co., 25 A. R. 437.
Followed in Geiger v. Grand Trunk Rw. Co., 10 O. L. R. 511, 5 O. W. R. 434, 6 O. W. R. 482.

Henderson v. Corner, 3 U. C. L. J. O. S. 29.
Followed in Johnston v. Ryckman, 24 Occ. N. 221, 7 O. L. R. 511, 3 O. W. R. 198.

Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q. B. 434.
Not followed in Ottawa Gas Co. v. City of Ottawa, 22 Occ. N. 408, 4 O. L. R. 656.

Henderson v. Mfg. Natural Gas Co. (1909), 14 O. W. R. 313.
Time for appealing extended, 14 O. W. R. 575.

Henderson v. Stevenson (1875), L. R. 2 H. L. Sc. 470.
Discussed in Lamont v. Can. Transfer Co. (1909), 13 O. W. R. 1181, 19 O. L. R. 291.

Henderson v. The Queen, 6 Ex. C. R. 47.
Distinguished in Ross v. The King, 22 Occ. N. 86, 7 Ex. C. R. 287.

Henkel v. Pape, L. R. 6 Ex. 7.
Followed in Flynn v. Kelly, 12 O. L. R. 440, 8 O. W. R. 120.

Henning v. Maclean, 21 Occ. N. 434, 2 O. L. R. 169.
Affirmed in S. C., 22 Occ. N. 405, 4 O. L. R. 666.
Affirmed in S. C., 23 Occ. N. 180, 33 S. C. R. 305.

Henry v. Smith, 39 Sol. J. 559.
Followed in Smith v. Squires, 21 Occ. N. 216, 13 Man. L. R. 360.

Hereron v. Christian, 4 B. C. R. 246.
Dissented from in In re Bessette, 12 B. C. R. 228.

Hertel v. Goddard, 66 L. J. P. C. 90.
Distinguished in Prévost v. Lamarche, 38 S. C. R. 1.

Hess Manufacturing Co., Re 23 S. C. R. 644.
Considered and explained in Re Cornwall Furniture Co. Limited, 18 O. L. R. 101, 13 O. W. R. 137.

Hess Manufacturing Co., Re 23 S. C. R. 644.
Distinguished in In re Jones and Moore Electric Co., Jones and Moore's Case, 18 Man. L. R. 549, 10 W. L. R. 210.

Hess Manufacturing Co., In re, 23 S. C. R. at pp. 665-6.
Explained in Re Pakenham Pork Packing Co., 24 Occ. N. 18, 6 O. L. R. 582, 2 O. W. R. 951.

Hesse v. St. John Rw. Co., 35 N. B. Reps. 1.
Reversed in S. C., 20 Occ. N. 113, 30 S. C. R. 218.

Hesselbacher v. Ballantyne, 17 Occ. N. 17, 28 O. R. 182.
Approved in Goldie and McCulloch Co. v. Harper, 20 Occ. N. 4, 31 O. R. 284.

Hétu v. Dixville Butter and Cheese Association, Q. R. 16 K. B. 16 K. B. 333, 3 E. L. R. 120.
Affirmed in S. C., 40 S. C. R. 128. 4 E. L. R. 578.

Hevé v. Royal Electric Co., 21 Occ. N. 442, Q. R. 11 K. B. 436.
Affirmed in S. C., 22 Occ. N. 358, 32 S. C. R. 462.

Hewison v. Township of Pembroke, 6 O. R. 170.
Commented on in Re Taylor and Village of Belle River, 18 O. L. R. 330, 13 O. W. R. 778.

Hewitt v. Cane, 26 O. R. 133.
Distinguished in Rex v. Scully, 21 Occ. N. 432, 2 O. L. R. 315.

Hewson v. Macdonald, 32 C. P. 407.
Followed in Anthony v. Blain, 23 Occ. N. 50, 5 O. L. R. 48.
Distinguished in Doyle v. Diamond Flint Glass Co., 10 O. L. R. 567, 6 O. W. R. 207.

Hewson v. Ontario Power Co. of Niagara Falls, 23 Occ. N. 227, 6 O. L. R. 11.
Affirmed in S. C., 24 Occ. N. 332, 8 O. L. R. 88, 3 O. W. R. 865.
Affirmed in S. C., 25 Occ. N. 137, 36 S. C. R. 596.

Hibbins v. Lee, 4 F. & F. 243.
Approved and followed in Patterson v. Edmonton Bulletin Co., 1 Alta. L. R. 477, 8 W. L. R. 672.

Hickey v. Legresley, 15 Man. L. R. 304.
Referred to in New Hamburg Manufacturing Co. v. Shields, 4 W. L. R. 307, 16 Man. L. R. 212.

Hicks v. Ross, [1891] 3 Ch. 499.
Referred to in In re McIntyre, 22 Occ. N. 90, 3 O. L. R. 212.

Higgins v. Central Co., 155 Mass. 176.
Approved in Merritt v. Copper Crown Mining Co., 22 Occ. N. 239.

Higgins v. Trusts Corporation of Ontario, 19 Occ. N. 280, 30 O. R. 684.
Affirmed in S. C., 20 Occ. N. 347, 27 A. R. 432.

Highway Advertising Co. v. Ellis, 2 O. W. R. 151.
Affirmed in S. C., 24 Occ. N. 208, 7 O. L. R. 504, 3 O. W. R. 505.

Hildreth v. McCormick Manufacturing Co., 26 C. L. T. 782, 10 Ex. C. R. 378.
Affirmed in S. C., 39 S. C. R. 499.

Hildreth v. McCormick Manufacturing Co., 10 Ex. C. R. 378.
Reversed in S. C., 41 S. C. R. 246.

Hill v. Broadbent, 25 A. R. 159.
Considered in Fraser v. Mutchmore, 25 Occ. N. 17, 8 O. L. R. 613, 4 O. W. R. 290.

Hill v. Hill, 21 Occ. N. 525, 2 O. L. R. 289.
Affirmed in S. C., 21 Occ. N. 560, 2 O. L. R. 541.

Hilton v. Guyot, 159 U. S. 113.
Not followed in Johnston v. Barkley, 10 O. L. R. 724, 6 O. W. R. 549.

Hime v. Lovegrove, 9 O. L. R. 607, 5 O. W. R. 706.
Affirmed in S. C., 11 O. L. R. 252, 7 O. W. R. 4.

Hinds v. Town of Barrie, 6 O. L. R. 656.
Followed in Baines v. City of Woodstock, 10 O. L. R. 694, 6 O. W. R. 601.

Hinds v. Town of Barrie, 6 O. L. R. 656.
Followed in Levi v. Phœnix Insurance Co. of Brooklyn, 6 W. L. R. 17, 17 Man. L. R. 61.

Hindson v. Ashby, [1896] 1 Ch. 78, [1896] 2 Ch. 1.
Followed in Williams v. Pickard, 15 O. L. R. 655, 11 O. W. R. 475.

Hipwell v. Knight, 1 Y. & C. 401.
Followed in Barlow v. Williams, 4 W. L. R. 253, 16 Man. L. R. 164.

Hislop v. Lester (1909), 14 O. W. R. 624.
Affirmed 14 O. W. R. 1054, 1 O. W. N. 197.

Hobson v. Gorringe, [1897] 1 Ch. 182.
Followed in Seeley ve. Caldwell, 18 O. L. R. 472, 12 O. W. R. 1245.

Hobson v. Gorringe, [1897] 1 Ch. 182.
Followed in Stack v. T. Eaton Co., 22 Occ. N. 322, 4 O. L. R. 335.

Hochelaga Bank v. Stevenson, Q. R. 14 S. C. 473.
Affirmed in S. C., Q. R. 9 Q. B. 282; [1900] A. C. 600.

Hockley v. Grand Trunk Rw. Co., 24 Occ. N. 134, 7 O. L. R. 186, 3 O. W. R. 312.
Affirmed in S. C., 24 Occ. N. 311, 7 O. L. R. 658, 3 O. W. R. 663.

Hodge v. The Queen, 9 App. Cas. 117.
Followed in In re Foster and City of Hamilton, 20 Occ. N. 40, 31 O. R. 292.

Hodgins v. McNeil, 9 Gr. 305.
Approved in Kidd v. Harris, 22 Occ. N. 25, 3 O. L. R. 60.

Hodginson, In re, [1895] W. N. 85.
Followed in McClune v. Botsford, 22 Occ. N. 340, 9 B. C. R. 129.

Hodgson, In re, 31 Ch. D. 177.
Followed in Doidge v. Mimms, 20 Occ. N. 90, 13 Man. L. R. 48.

Hodgson v. Halford, 11 Ch. D. 959.
Distinguished in Renaud v. Lamothe, 20 Occ. N. 443.

Hoeffler v. Irwin, 2 O. W. R. 714.
Reversed in S. C., 25 Occ. N. 32, 4 O. W R. 172.

Hoffe, Re, 82 L. T. 556.
Distinguished in Bennett v. Gilmour, 4 W. L. R. 196, 16 Man. L. R. 304.

Hoffnung v. Porter, 7 L. C. J. 301.
Followed in Hashburger v. Gutman, Q. R. 13 K. B. 360.

Hogan v. City of Montreal, 31 S. C. R. 1.
Distinguished in Fairman v. City of Montreal, 21 Occ. N. 330, 31 S. C. R. 210.

Hogarth v. Latham, 47 L. J. Q. B. 339.
Distinguished in First National Bank of Minneapolis v. McLean, 3 W. L. R. 227, 16 Man. L. R. 32.

Hogg v. Township of Brooke, 2 O. W. R. 139.
Affirmed in S. C., 24 Occ. N. 171, 7 O. L. R. 273, 3 O. W. R. 120.

Hoggan v. Esquimalt and Nanaimo Rw. Co., [1894] A. C. 429.
Distinguished in Esquimalt and Nanaimo Rw. Co. v. McGregor, 12 B. C. R. 257.

Hoght v. Tottenham, [1892] W. N. 88.
Referred to in Ruggles v. M. and V. B. Rw. Co., 22 Occ. N. 432.

Holden v. Grand Trunk Rw. Co., 2 O. L. R. 421.
Considered in Donn v. Toronto Ferry Co., O. L. R. 16, 6 O. W. R. 939, 973.

Holden v. Langley, 11 C. P. 407.
Followed in Turner v. Tymchorak, 8 W. L. R. 484, 17 Man. L. R. 687.

Holland, Re, 3 O. L. R. 406.
Approved in Re Bolster, 10 O. L. R. 591, 6 O. W. R. 300.

Holland v. Hodgson, L. R. 7 C. P. 328.
Followed in Stack v. T. Eaton Co., 22 Occ. N. 322, 4 O. L. R. 335.

Holland v. Wallace, In re, 8 P. R. 186.
Considered in Lented v. Congdon, 21 Occ. N. 160, 1 O. L. R. 1.

Holleran v. Bagnell, 4 L. R. Ir. 740.
Explained and followed in Mummery v. Grand Trunk Rw. Co., 21 Occ. N. 343, 1 O. L. R. 622.

Hollinger v. Canadian Pacific Rw. Co., 21 O. R. 705.
Not followed in Harris v. The King, 24 Occ. N. 388, 9 Ex. C. R. 206.

Hollins v. Verney, 13 Q. B. D. 308.
Followed in Huddleston v. Love, 21 Occ. N. 447, 13 Man. L. R. 432.

Hollis Hospital, In re Trustees of, and Hague's Contract, [1899] 2 Ch. 540.
Followed in Re St. Patrick's Market (1909), 14 O. W. R. 794.

Holman v. Green, 6 S. C. R. 707.
Followed in Kennedy v. Dominion Coal Co., 24 Occ. N. 93, 36 N. S. Reps. 495.

Holme v. Guppy, 3 M. & W. 387.
Followed in Grey v. Stephens, 4 W. L. R. 201, 16 Man. L. R. 189.

Holmes v. Godson, 8 DeG. M. & G. 152.
Followed in Corning v. Bent, 23 Occ. N. 336.

Holmes v. Taylor, 31 N. S. Reps. 191.
Specially referred to in Hamilton v. McIntosh, 20 Occ. N. 16.

Home Life Association of Canada v. Randall, 30 S. C. R. 97.
Followed in Atkinson v. Dominion of Canada Guarantee and Accident Co., 16 O. L. R. 619, 11 O. W. R. 449.

Homewood v. City of Hamilton, 21 Occ. N. 206, 1 O. L. R. 266.
Considered in Minns v. Village of Omemee, 21 Occ. N. 561, 2 O. L. R. 579.

Honan v. Bar of Montreal, Q. R. 8 Q. B. 26.
Affirmed in S. C., 19 Occ. N. 377, 30 S. C. R. 1.

Honduras Rw. Co. v. Tucker, L. R. 2 Ex. 365.
Referred to in Hart v. Bissett, 23 Occ. N. 335.

Hood v. Conkrite, 4 P. R. 279.
Referred to in Leach v. Bruce, 9 O. L. R. 380, 4 O. W. R. 441.

Hood v. Eden, 36 S. C. R. 476, 483.
Referred to in Sayward v. Dunsmuir, 11 B. C. R. 375, 2 W. L. R. 319.
Distinguished in In re Jones and Moore Electric Co., Jones and Moore's Case, 18 Man. L. R. 549, 10 W. L. R. 210.

Hoole v. Great Western Rw. Co., L. R. 3 Ch. 262.
Followed in Schrimpton v. City of Winnipeg, 30 Occ. N. 248, 13 Man. L. R. 211.

Hoole v. Smith, 17 Ch. D. 434.
Referred to in Campbell v. Imperial Loan Co., 18 Man. L. R. 144, 8 W. L. R. 502.

Hooley, Ex p., 6 Mans. 44.
Followed in Guest v. Knowles, Re. Robertson, 17 O. L. R. 416, 12 O. W. R. 1201.

Hopkin v. Hamilton Electric Light and Cataract Power Co., 21 Occ. N. 440, 2 O. L. R. 240.
Affirmed in S. C., 22 Occ. N. 284, 4 O. L. R. 258.

Hopkins v. Hopkins, 9 P. R. 71.
Not followed in Smith v. Smith, 21 Occ. N. 238, 1 O. L. R. 404.

Hopkins v. Smith, 1 O. L. R. 659.
Followed in Attorney-General for Ontario v. Toronto Junction Recreation Club, 24 Occ. N. 172, 7 O. L. R. 248, 3 O. W. R. 287.

Hopkins v. United States, 171 U. S. R. 594.
Followed in Rex. v. Gage, 18 Man. L. R. 175, 7 W. L. R. 564.

Hopper v. Harrison, 28 Gr. 22.
Followed in Campbell v. Imperial Loan Co., 15 Man. L. R. 614, 2 W. L. R. 327.

Horrell v. Witts, L. R. 1 P. & D. 133.
Followed in Tellier v. Schilemans, 5 W. L. R. 467, 17 Man. L. R. 303.

Horrigan v. Port Arthur (1909), 14 O. W. R. 973, 1 O. W. N. 169.
Affirmed 14 O W. R. 1087, 1 O. W. N. 216.

Horsman v. City of Toronto, 20 Occ. N. 11, 31 O. R. 301.
Affirmed in S. C., 20 Occ. N. 349, 27 A. R. 475.

Hosking v. Le Roi No. 2, Limited, 23 Occ. N. 300, 9 B. C. R. 551.
Reversed in S. C., 24 Occ. N. 117, 34 S. C. R. 244.

Howard v. Gunn, 32 Beav. 462.
Followed in Warren v. D. W. Karn Co., 10 O. W. R. 516, 15 O. L. R. 115.

Howard v. Patent Ivory Manufacturers Co., 38 Ch. D. 156.
Followed in Re Red Deer Milling and Elevator Co., Stratford Mill Building Co.'s Claim, 7 W. L. R. 284, 1 Alta. L. R. 237.

Howe v. Finch, 17 Q. B. D. 187.
Distinguished in McKeegan v. Cape Breton Coal, etc., Co., 40 N. S. R. 566.

Howe v. Martin, 6 Man. L. R. 616.
Followed in Turner v. Tymchorak, 8 W. L. R. 484, 17 Man. L. R. 687.

Howell v. Metropolitan District Rw. Co., 19 Ch. D. 508.
Followed in Lake of the Woods Milling Co. v. Collin, 20 Occ. N. 285, 13 Man. L. R. 154.

Howell v. Metropolitan District Rw. Co., 51 L. J. Ch. 158.
Referred to in Cicognia v. McHeather, 22 Occ. N. 309.

Howland v. Dominion Bank, 15 P. R. 56.
Distinguished in Canadian Bank of Commerce v. Tennant, 22 Occ. N. 202, 5 O. L. R. 524.

Hoyt v. Stockton, 13 N. B. R. 60.
Considered in Clark v. Green, 1 E. L. R. 552, 37 N. B. R. 525.

Hubbock v. Helms, 56 L. J. Ch. 539.
Followed in Lee v. Gallagher, 15 Man. L. R. 677, 2 W. L. R. 305.

Hubert v. Payson, 36 N. S. Reps. 211.
Reversed in S. C., 24 Occ. N. 168, 34 S. C. R. 400.

Hudon Cotton Co. v. Canada Shipping Co., 13 S. C. R. 401.
Followed in Citizens Light and Power Co. v. Town of St. Louis, 24 Occ. N. 165, 34 S. C. R. 495.

Hudson's Bay Co. v. Macdonald, 4 Man. L. R. 327.
Followed in Canadian Fairbanks Co. v. Johnston, 18 Man. L. R. 589, 10 W. L. R. 571.

Hudson's Bay Co. v. Town of Kenora, 13 O. L. R. 237, 8 O. W. R. 369.
Varied in S. C., 16 O. L. R. 184, 11 O. W. R. 266.

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Hull v. Donohoe, 13 Occ. N. 472.
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Hull v. Donohue, 24 S. C. R. 683.
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Hull, City of, v. Scott, Q. R. 24 S. C., 59 Q. B. 13 K. B. 164.
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Hull Electric Co. v. Ottawa Electric Co., Q. R. 10 K. B. 35.
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Humberstone v. Dinner, 2 Terr. L. R. 106.
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Humphreys v. Humphreys, 3 P. Wms. 349.
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Hunt v. Harlow, 1 Old. 709.
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Hunt v. Luck, [1902] 1 Ch. 428.
Followed in MacArthur v. Hastings, 15 Man. L. R. 500, 1 W. L. R. 285.

Hunt v. Tensham, 28 Sol. J. 253.
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Hunt v. Trusts and Guarantee Co., 10 O. L. R. 147, 5 O. W. R. 405.
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Hunt v. United States, 166 U. S. 424.
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Hunter v. Grand Trunk Rw. Co., 16 P. R. 385.
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Hunter and City of Toronto, In re, 3 O. W. R. 170.
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Huot v. Bienvenu, Q. R. 21 S. C. 341, Q. R. 12 K. B. 44.
Affirmed in S. C., 33, S. C. R. 370.

Huson and South Norwich, In re, 19 A. R. 343.
Followed in In re Salter and Township of Beckwith, 22 Occ. N. 182, 4 O. L. R. 51.

Hussey v. Horne-Payne, 4 App. Cas. 311.
Followed in Queen's College v. Jayne, 10 O. L. R. 319, 5 O. W. R. 666.

Hutchings v. National Life Assurance Co. of Canada, 38 N. S. R. 15.
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Ianson v. Paxton, 22 C. P. 505.
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Iler v. Nolan, 21 U. C. R. 309.
Distinguished in Oleson v. Jonasson, 3 W. L. R. 466, 16 Man. L. R. 94.

Illingworth v. Spaulding, 43 Fed. Rep. 827.
Approved in MacLaughlin v. Lake Erie and Detroit River Rw. Co., 21 Occ. N. 466, 2 O. L. R. 190.

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Imperial Bank v. Bank of Hamilton, 21 Occ. N. 400, 31 S. C. R. 344.
Affirmed in S. C., [1903] A. C. 49.

Imperial Bank v. Hull, 4 Terr. L. R. 498.
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Imperial Bank v. Tuckett (1905), 6 O. W. R. 121, 161.
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Inglis v. Beaty, 2 A. R. 453.
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Inglis v. Halifax Electric Tramway Co., 32 N. S. Reps. 117.
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Followed in Pigeon River v. Mooring (1909), 14 O. W. R. 639.

International Bridge Co. v. Village of Bridgeburg, 12 O. L. R. 314.
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International Financial Society v. City of Moscow Gas Co., 7 Ch. D. 241.
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Iredale v. Loudon, 8 O. W. R. 963, 14 O. L. R. 17.
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Iredale v. Loudon, 15 O. L. R. 286, 10 O. W. R. 725.
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Irons v. Smallpiece, 2 B. & Ald. 551.
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Irving v. Grimsby Park, 16 O. L. R. 386.
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Irwin v. Freeman, 13 Gr. 465.
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Isa Mining Co. and Francey, Re, 10 O. W. R. 31.
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Iveson v. Moore, 1 Ld. Raym. 495.
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Iveson v. Winnipeg, 16 Man. L. R. 352.
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Jackson v. Canadian Pacific Rw. Co., 6 Terr. L. R. 423.
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Jackson v. Drake, 2 W. L. R. 379.
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Jackson v. Grand Trunk Rw. Co., 22 Occ. N. 12, 2 O. L. R. 689.
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Jackson v. Hyde, 28 U. C. R. 294.
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Jackson v. Normanby Brick Co., [1899] 1 Ch. 438.
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Jacobs v. Booth's Distillery Co. (1901), 50 W. R. 49.
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Jamieson v. London and Canadian L. and A. Co., [1909] A. C. 624.
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Jamieson v. London and Canadian L. & A. Co., 19 Occ. N. 132, 26 A. R. 116.
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Jay v. Johnstone, [1893] 1 Q. B. 25, 189.
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Jenkins v. Coomber, [1898] 2 Q. B. 168.
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Jenkins v. Jackson, [1891] 1 Ch. 89.
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Jennings v. Grand Trunk Rw. Co., 11 P. R. 309.
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Jewell v. Broad (1909), 14 O. W. R. 269, 19 O. L. R. 1.
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Johnson v. Hope, 17 A. R. 10.
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Johnston v. Boyes, [1899] 2 Ch. 73.
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Johnston v. Consumers' Gas Co., 27 O. R. 9, 23 A. R. 566, [1898] A. C. 477.
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Johnston v. Dominion of Canada Guarantee and Accident Insurance Co., 11 O. W. R. 363.
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Johnson v. Ramberg, 51 N. W. Rep. 1043.
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Jones v. Bank of Upper Canada, 13 Gr. 74.
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Jones v. Bird, 5 B. & Ald. 837.
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Jones v. Chappell, L. R. 20 Eq. 539.
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Jones v. City of St. John, 21 Occ. N. 52.
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Jones v. Gordon, 2 App. Cas. 616.
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Jones v. Grand Trunk Rw. Co., 3 O. W. R. 705.
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Jones v. Imperial Bank (1876), 23 Gr. 262.
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Kearney v. Desmoyers, Q. R. 19 S. C. 270.
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Kearney v. London, Brighton, etc., Rw. Co., L. R. 6 Q. B. 759.
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Kearsley v. Phillips, 10 Q. B. D. 36.
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Followed in Burch v. Flummerfelt (1909), 14 O. W. R. 929, 1 O. W. N. 133.

Kent v. Les Sœurs de la Providence, 72 L. J. C. P. 62.
Followed in Stephenson v. McPhail, 9 Q. P. R. 199.

Keohan v. Cook, 1 Terr. L. R. 125.
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Kerouack v. Gauthier, Q. R. 20 S. C. 320.
Reversed in S. C., Q. R. 12 K. B. 295.

Kerr, In re, 5 Terr. L. R. 297.
Overruled in North British Canadian Investment Co. v. Trustees of St. John School District No. 16, N. W. T., 35 S. C. R. 461.

Kerr v. Roberts, 17 Occ. N. 337.
Overruled in Rogers v. Marshall, 24 Occ. N. 172, 7 O. L. R. 291, 3 O. W. R. 332.

Kerrison v. Smith, [1897] 2 Q. B. 445.
Followed in Connor-Ruddy Co. v. Robinson-White Co. (1909), 14 O. W. R. 284, 19 O. L. R. 133.

Kersterman v. McLellan, 10 P. R. 122.
Distinguished in Beam v. Beatty, 20 Occ. N. 305, 19 P. R. 207.

Kerstein v. Cohen, 8 O. W. R. 934, 13 O. L. R. 144.
Affirmed in S. C., 27 C. L. T. 653, 39 S. C. R. 286.

Kervin v. Canadian Coloured Cotton Mills Co., 28 O. R. 73.
Distinguished in Wilson v. Lincoln Paper Mills Co., 25 Occ. N. 14, 9 O. L. R. 119, 4 O. W. R. 521.

"Kestrel," The, 6 P. D. 182, 189.
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Kettlewell v. Kettlewell, [1898] P. 138.
Followed in Bugg v. Bugg (1909), 14 O. W. R. 1014, 1 O. W. N. 210.

Kettlewell v., Watson, 21 Ch. D. 685.
Referred to in Commercial Bank of Windsor v. Morrison, 22 Occ. N. 190, 32 S. C. R. 98.

Kieffer v. Ecclésiastiques du Séminaire des Missions Etrangères, Q. R. 11 K. B. 173.
Varied in S. C., Q. R. 13 K. B. 89, [1903] A. C. 85.

Kidd v. Henderson, 20 N. S. Reps. 441.
Followed in Balcom v. Croft, 20 Occ. N. 412.

Kilbride v. Cameron, 17 C. P. 373.
Followed in Massey-Harris Co. v. Moore, 6 Terr. L. R. 75, 1 W. L. R. 215.

Kilpin v. Ratley, [1892] 1 Q. B. 583.
Followed in Tellier v. Dujardin, 16 Man. L. R. 423.

Kimpton v. Kimpton, 16 Rev. Leg. 361.
Followed in Renaud v. Lamothe, 20 Occ. N. 443.

Kincaid v. Lamb, 4 W. L. R. 167.
Affirmed in Lamb v. Kincaid, 27 C. L. T. 489, 38 S. C. R. 516.

King v. City of Toronto, 5 O. L. R. 163.
Distinguished in Little v. McCartney, Johnston v. Wright, 18 Man. L. R. 323, 9 W. L. R. 448.

King v. Dupuis, 28 S. C. R. 388.
Followed in Coté v. James Richardson Co., 27 C. L. T. 155, 38 S. C. R. 41.

King v. McHendry, O. R. 9 Q. B. 44.
Reversed in S. C., 20 Occ. N. 373.

King v. McHendry, Q. R. 9 Q. B. 44.
Reversed in S. C., 20 Occ. N. 373, 30 S. C. R. 450.

King v. Rogers, 20 Occ. N. 209, 31 O. R. 573.
Affirmed in S. C., 21 Occ. N. 106, 1 O. L. R. 69.

King v. Stewart, 32 S. C. R. 483.
Referred to in Wilkes v. Maxwell, 24 Occ. N. 150, 14 Man. L. R. 599.

King v. Toronto Rw. Co., 8 O. W. R. 507.
Reversed in Toronto Rw. Co. v. King, 12 O. W. R. 40, [1908] A. C. 260.

Kinghorn v. Larue, 22 S. C. R. 347.
Distinguished in Coté v. James Richardson Co., 27 C. L. T. 155, 38 S. C. R. 41.

Kinghorne v. Montreal Telegraph Co., 18 U. C. R. 60.
Followed in Flynn v. Kelly, 12 O. L. R. 440, 8 O. W. R. 120.

King's Asbestos Mines v. Municipality of South Thetford, Q. R. 17 K. B. 566.
Reversed in S. C., 41 S. C. R. 585.

Kingston v. Salvation Army, 23 Occ. N. 329, 6 O. L. R. 406.
Affirmed in S. C., 24 Occ. N. 309, 7 O. L. R. 681, 3 O. W. R. 556.

Kingston, City of, v. Canada Life Assce. Co., 19 O. R. 453.
Distinguished in In re Edinburgh Life Ins. Co., 21 Occ. N. 38.

Kingston, City of, and Kingston Light, Heat and Power Co., 3 O. L. R. 637.
Affirmed in S. C., 23 Occ. N. 151, 5 O. L. R. 348.

Kingston, City of, v. Kingston, etc., Electric Rw. Co., 28 O. R. 399, 25 A. R. 462.
Distinguished in City of Hamilton v. Hamilton Street Rw. Co., 25 Occ. N. 15, 8 O. L. R. 642, 4 O. W. R. 311, 411, 10 O. L. R. 594, 6 O. W. R. 207.
Specially referred to in City of Toronto v. Toronto Rw. Co., 11 O. L. R. 103, 6 O. W. R. 871.

Kinnaird v. Trollope, 39 Ch. D. 636.
Followed in Ryan v. Caldwell, 32 N. S. Reps. 458.

Kinnis v. Graves, 67 L. J. Q. B. 584.
Followed in Durrand v. Forrester, 18 Man. L. R. 444, 10 W. L. R. 289.

Kinny, Re, 6 O. L. R. 457.
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Kinsey v. Roche, 8 P. R. 515.
Approved in Kreutziger v. Brox, 21 Occ. N. 139, 32 O. R. 418.

Kirchoffer v. Clement, 11 Man. L. R. 460.
Followed in Meighen v. Armstrong, 16 Man. L. R. 5.

Kirk v. Kirkland, 7 Brit. Col. L. R. 12.
Affirmed in S. C., 20 Occ. N. 294, 30 S. C. R. 344.

Kirkwood v. Smith, [1896] 1 Q. B. 582.
Applied in Frank v. Gazelle Live Stock Association, 5 W. L. R. 573, 6 Terr. L. R. 392.

Kleinwort Sons & Co. v. Dunlop Rubber Co., 23 Times L. R. 696.
Followed in Dominion Bank v. Union Bank of Canada, 40 S. C. R. 366.

Knight v. Engle, 61 L. T. R. 780.
Followed in Gambell v. Heggie, 24 Occ. N. 91, 2 O. W. R. 1174, 3 O. W. R. 49, 412; A. v. B., 7 O. L. R. 73.

Knight v. Grand Trunk Rw. Co., 13 P. R. 386.
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Knight v. Hanson, 3 W. L. R. 412.
Referred to in Hayes v. Day, 1 Alta. L. R. 441, 8 W. L. R. 143.

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Followed in MacLean v. Kingdon Printing Co., 18 Man. L. R. 274, 9 W. L. R. 370.

Kny-Scheerer Co. v. Chandler and Massey, 4 O. W. R. 187.
Affirmed in S. C., 25 Occ. N. 106, 36 S. C. R. 130.

Koosen v. Rose, [1897] W. N. 25, 76 L. T. 145, 45 W. R. 137, 13 Times L. R. 257.
Distinguished in Dickerson v. Redcliffe, 20 Occ. N. 390, 19 P. R. 223.

Kreutziger v. Brox, 32 O. R. 418.
Not followed in McCormick Harvesting Machine Co. v. Warnica, 22 Occ. N. 158, 3 O. L. R. 427.
Referred to in Leonard v. Burrows, 24 Occ. N. 219, 7 O. L. R. 316, 3 O. W. R. 186.

Krug Furniture Co. v. Berlin Union, 5 O. L. R. at p. 469.
Followed in Cotter v. Osborne, 18 Man. L. R. 471, 10 W. L. R. 354.

Krutz v. Spence, 36 Ch. D. 770.
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Laberge v. Equitable Life Assurance Society, 24 S. C. R. 59.
Followed in Dufresne v. Fee, 35 S. C. R. 8.
Distinguished in Donohue v. Donohue, 23 Occ. N. 147, 33 S. C. R. 134.

Lachance v. Can. Pac. Rw. Co. (1909), Q. R. 35 S. C. 494.
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Lachance v. Societè de Prêt et des Placements, 26 S. C. R. 200.
Distinguished in Dufresne v. Fee, 35 S. C. R. 8.

Laforce v. Town of Sorel, M. L. R. 6 Q. B. 109.
Followed in Greenwood v. Dent, Q. R. 9 Q. B. 11.

Laframboise v. Rolland, M. L. R. 2 S. C. 75.
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Lafrance v. Lafrance, 18 P. R. 62.
Referred to in Beatty v. Beatty (1909), 14 O. W. R. 1093, 1 O. W. N. 243.

Laidlaw v. Crow's Nest Southern, 14 B. C. R. 169.
Affirmed in 42 S. C. R. 355.

Laine v. The Queen, 5 Ex. C. R. 128.
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Lair v. Authier, Q. R. 31 S. C. 112.
Affirmed in S. C., Q. R. 33 S. C. 64.

Laird v. Adams, 7 W. L. R. 312, 1 Sask. L. R. 35.
Affirmed in S. C., 7 W. L. R. 881.

Laird v. Adams, 1 Sask. L. R. 35, 7 W. L. R. 312.
Affirmed in S. C., 1 Sask. L. R. 352, 7 W. L. R. 881.

Laird v. King, 21 Occ. N. 34, 19 P. R. 307.
Affirmed in S. C., 21 Occ. N. 162, 1 O. L. R. 51.

Laird v. Pim, 7 M. & W. 474.
Distinguished in Clerque v. Vivian (H. H.) & Co., 41 S. C. R. 607.

Laishley v. Goold Bicycle Co., 22 Occ. N. 372, 4 O. L. R. 350.
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Lajoir v. Dean, 3 Dor. Q. B. 69.
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Lake Erie Rw. Co. v. Sales, 23 S. C. R 663.
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Lakeman v. Mountstephen, L. R. 7 H. L. 17.
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Lamb (William) Manufacturing Co., Re, 32 O. R. 243.
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Lambe v. Donaldson Steamship Line and Navigation Co., Q. R. 22 S. C. 510.
Affirmed in S. C., Q. R. 23 S. C. 469.

Lambe v. Manuel, 21 Occ. N. 250, Q. R. 18 S. C. 184.
Affirmed in S. C., [1903] A. C. 68.

Lamirande, Ex p., 10 L. C. Jur. 280.
Specially considered in In re Bartels, 10 O. W. R. 553, 15 O. L. R. 205.

Lamoureux v. Fournier dit Larose, 33 S. C. R. 675.
Discussed and distinguished in Royal Electric Co. v. Paquette, 25 Occ. N. 3, 35 S. C. R. 202.

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Lampman v. Township of Gainsborough, 17 O. R. 191.
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Lancaster Division Case, 5 O'M. & H. 39.
Distinguished in In re Lisgar Dominion Election, 21 Occ. N. 487, 13 Man. L. R. 478.

Lancaster v. Shaw, 10 O. L. R. 604.
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Landry v. Turgeon, Q. R. 33 S. C. 477, 9 Q. P. R. 206.
Reversed in S. C., Q. R. 17 K. B. 372, 9 Q. P. R. 346.

Lane v. Jackson, 20 Beav. 535.
Referred to in Wilkes v. Maxwell, 24 Occ. N. 150, 14 Man. L. R. 599.

Langevin v. Les Commissaires d'Ecole de St. Mare, 18 S. C. R. 599.
Discussed in Cully v. Ferdais, 20 Occ. N. 273, 30 S. C. R. 330.

Langley v. Kahnert, 7 O. L. R. 356, 24 Occ. N. 225, 3 O. W. R. 9.
Affirmed in S. C., 25 Occ. N. 69, 114, 9 O. L. R. 164, 4 O. W. R. 396, 36 S. C. R. 114.

Langley v. Law Society of Upper Canada, 3 O. L. R. 345.
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Langley v. Van Allen, 20 Occ. N. 437, 32 O. R. 216, 21 Occ. N. 551, 3 O. L. R. 5.
Affirmed in S. C., 22 Occ. N. 222, 32 S. C. R. 174.

Lapitre v. Citizens' Light and Power Co., 29 S. C. R. 1.
Referred to in McDougall v. Montreal Park and Island Rw. Co., 25 Occ. N. 98; Montreal Park and Island Rw. Co. v. McDougall, 36 S. C. R. 1.

Laplante and Peterborough, Re, 5 O. R. 634.
Followed in Alloway v. Rural Municipality of St. Andrews 3 W. L. R. 13, 16 Man. L. R. 255.

Lasell v. Thistle Gold Co. and Hannah, 11 B. C. R. 406. 3 W. L. R. 149.
Affirmed in Lasell v. Hannah, 26 C. L. T. 384, 37 S. C. R. 324.

Laramée v. Ferron, Q. R. 17 K. B. 215.
Affirmed in S. C., 41 S. C. R. 391.

Larochelle v. Lavoie, Q. R. 27 S. C. 534.
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Larose v. Aubertin, Q. R. 33 S. C. 430.
Affirmed in Q. R. 34 S. C. 422.

Larose v. The King, 20 Occ. N. 424, 6 Ex. C. R. 425.
Affirmed in S. C., 21 Occ. N. 327, 31 S. C. R. 206.

Larue v. Poulin, 9 Q. P. R. 157.
Followed in Demers v. Forcier, 10 Q. P. R. 211.

Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495.
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Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495.
Followed in Crate v. McCallum, 11 O. L. R. 81, 6 O. W. R. 825.

Laurentide Mica Co. v. Fortin, Q. R. 15, K. B. 432.
Affirmed in S. C., 39 S. C. R. 680.

Laurentide Paper Co. v. Baptist, Q. R. 16 K. B. 471.
Affirmed in 41 S. C. R. 105.

Laurin v. Guin, Q. R. 32 S. C. 521.
Reversed in Q. R. 18 K. B. 116.

Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 262.
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Lawlor v. Lawlor, 10 S. C. R. 194.
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Lawson v. McGeoch, 22 O. R. 474, 20 A. R. 464.
Followed in Kirby v. Rattibun Co., 20 Occ. N. 333, 32 O. R. 9.
Followed in Craig v. McKay, 12 O. L. R. 121, 7 O. W. R. 507.
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Lawr v. Parker, 7 B. C. R. 418.
Affirmed in S. C., 8 B. C. R. 223.

Lawrence v. Town of Owen Sound, 10 W. R. 559.
Affirmed in S. C., 23 Occ. N. 138, 5 O. L. R. 369.

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Followed in Elmira v. Engineering (1909), 14 O. W. R. 911.

Leacock v. McLaren, 9 Man. L. R. 599.
Followed in Valentinuzzi v. Lenardazzi, 16 Man. L. R. 121.

Leadley v. McGregor, 11 Man. L. R. 9.
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Leak and City of Toronto, In re, 19 Occ. N. 263, 26 A. R. 351.
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Lean v. Huston, 8 O. R. 521.
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Leahy and Village of Lakefield, Re, 8 O. W. R. 743.
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Learoyd v. Halifax Joint Stock Banking Co., [1895] 1 Ch. 686.
Followed in Township of Elmsley v. Miller, 10 O. L. R. 343, 5 O. W. R. 651, 717.

Leather v. Simpson, L. R. 11 Eq. 398.
Distinguished in Union Bank v. Dominion Bank, 6 W. L. R. 217, 17 Man. L. R. 68.

Le Bell v. Norwich Union Fire Ins. Co., 34 N. B. Reps. 515.
Reversed in S. C., 19 Occ. N. 239, 29 S. C. R. 470.

Lecavalier v. Commissioners of Schools, Q. R. 27 S. C. 521.
Referred to in Grégoire v. St. Charles de Bellechasse School Commissioners, Q. R. 29 S. C. 215.

Leclerc v. Beaudry, 10 L. C. Jur. 20.
Referred to in Meloche v. Deguire, 24 Occ. N. 75, 34 S. C. R. 24.

Lee v. Abdy, 17 Q. B. D. 309.
Followed in National Trust Co. v. Hughes, 22 Occ. N. 101, 14 Man. L. R. 41.

Lee v. Canadian Mutual Loan and Investment Co., 22 Occ. N. 60, 3 O. L. R. 191.
Reversed in S. C., 23 Occ. N. 165, 5 O. L. R. 471.

Lee v. Friedman (1909), 14 O. W. R. 457.
Affirmed 1139, 1 O. W. N. 235.

Lee v. Hopkins, 20 O. R. 566.
Approved in Traviss v. Hales, 24 Occ. N. 12, 6 O. L. R. 574, 2 O. W. R. 1037.

Lee v. Logan, Q. R. 31 S. C. 469, 3 E. L. R. 132.
Affirmed in Logan v. Lee, 27 C. L. T. 781, 39 S. C. R. 311.

Leggott v. Great Northern Rw. Co., 1 Q. B. D. 599.
Followed in Mummery v. Grand Trunk Rw. Co., 21 Occ. N. 343, 1 O. L. R. 622.

Lehain v. Philpot, L. R. 10 Ex. 242.
Followed in Smith v. Haight, 4 Terr. L. R. 387.

Leib v. Leib, 6 Terr. L. R. 308, 6 W. L. R. 392.
Affirmed in S. C., 1 Sask. L. R. 363, 7 W. L. R. 824.

Leighton v. Hale, 3 N. B. Eq. 68.
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Considered in Clarke v. Rutherford, 21 Occ. N. 189, 1 O. L. R. 275.
Followed in Bank of British Columbia v. Oppenheimer, 7 B. C. R. 448.

Lellis v. Lambert (1897), 24 A. R. 653.
Followed in Lawry v. Tuckett-Lawry, 2 O. L. R. 162.
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Leizert v. Township of Matilda, 26 A. R. 1.
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Lemesurier v. Lemesurier, [1895] A. C. 517.
Followed in Rex v. Woods, 23 Occ. N. 220, 6 O. L. R. 41.

Lennox, Re, 4 O. L. R. 378.
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Lepitre v. King, 2 Q. P. R. 429.
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Leprohon v. Corporation of Ottawa, 2 A. R. 522.
Distinguished in Rucke v. City of London, 10 O. L. R. 628, 6 O. W. R. 406.

Letourneux v. The King, 21 Occ. N. 277, 7 Ex. C. R. 1.
Reversed in S. C., 33 S. C. R. 335.
Followed in Price v. The King, 26 C. L. T. 462, 10 Ex. C. R. 105.

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Levi v. Reed, 6 S. C. R. 432.
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Levinson v. Lane, 13 C. B. N. S. 278.
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Levy v. Gleason, 13 B. C. R. 357.
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Levy v. Rice, L. R. 5 C. P. 119.
Followed in O'Hearn v. Keith, 21 Occ. N. 572.

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Lewis v. Clay, 77 L. T. 653.
Followed in Alloway v. Hrabi, 24 Occ. N. 253, 14 Man. L. R. 627.

Lewis v. Dempster, 1 O. W. R. 602.
Affirmed in S. C., 23 Occ. N. 179, 33 S. C. R. 292.

Lewis v. Gordon, 15 O. R. 252.
Specially referred to in McCarthy v. McCarthy, 20 Occ. N. 211.

Lewis v. Old, Re, 17 O. R. 610.
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Lewis v. Read, 13 M. & W. 834.
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Ley, In re, 7 B. C. R. 94.
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Lichfield Division Case, 5 O'M. & H. 34.
Distinguished in In re Lisgar Dominion Election, 21 Occ. N. 487, 14 Man. L. R. 478.

Liggett v. Viau, Q. R. 14 S. C. 396.
Affirmed in S. C., Q. R. 18 S. C. 201.

Lighthall v. O'Brien, Q. R. 6 S. C. 159.
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Liles v. Terry, [1895] 2 Q. B. 679.
Followed in Trusts and Guarantee Co. v. Hart, 20 Occ. N. 65, 31 O. R. 414.

Lindop v. Martin (1883), 3 C. L. T. 312.
Distinguished from Rathbone v. Michael (1909), 14 O. W. R. 389, 19 O. L. R. 428.

Liquor Act of Manitoba, In re, 21 Occ. N. 212, 13 Man. L. R. 239.
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Lirette v. City of Moncton, 36 N. B. R. 475.
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Liscombe Falls Gold Mining Co. v. Bishop, 36 N. S. Reps, 395.
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Littlejohn v. Soper, 21 Occ. N. 111, 1 O. L. R. 172.
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Liverpool General Brokers' Assn. v. Commercial Press Telegraph Assn., [1897] 2 Q. B. 1.
Followed in Morang v. Publishers' Syndicate, 21 Occ. N. 77, 32 O. R. 393.

Livingston v. Livingston, 7 O. W. R. 830.
Affirmed in S. C., 9 O. W. R. 273, 13 O. L. R. 604.

Livingstone v. Sibbald, 15 P. R. 315.
Considered in Postlethwaite v. McWhinney, 23 Occ. N. 333, 6 O. L. R. 412.

Livingstone v. Western Ins. Co., 16 Gr. 9.
Followed in Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 21 Occ. N. 582, 3 O. L. R. 127.

Lloyd, In re, [1903] 1 Ch. 385.
Distinguished in British Canadian Loan and Agency Co. v. Farmer, 15 Man. L. R. 593, 24 Occ. N. 273.

Lloyd v. Gilbert, L. R. 1 Q. B. 115.
Followed in Inverness Rw. and Coal Co. v. Jones, 40 S. C. R. 45, 5 E. L. R. 1.

Lloyd v. Matthews, 51 N. Y. 125.
Distinguished in Elvin v. Clough, 7 W. L. R. 762, 8 W. L. R. 590; Locators v. Clough, 17 Man. L. R. 659.

Lloyd v. Matthews, 51 N. Y. 124.
Followed in Hughes v. Houghton Land Co., 18 Man. L. R. 686, 9 O. L. R. 646.

Locators v. Clough, 17 Man. L. R. 659.
Referred to in Hughes v. Houghton Land Co., 18 Man. L. R. 686, 9 W. L. R. 646.

Lochiel, Township of, v. Township of East Hawkesbury, 1 O. W. R. 64.
Affirmed in S. C., 24 Occ. N. 261; Township of East Hawkesbury v. Township of Lochiel, 34 S. C. R. 513.

Locke v. Reid (1842), 6 U. C. O. S. 295.
Overruled by statute in Lehigh Cobalt v. Heckler, 18 O. L. R. 615, 12 O. W. R. 854.

London and Blackwall Rw. Co. v. Cross, 31 Ch. D. 354.
Distinguished in Farley v. Sanson, 24 Occ. N. 303, 7 O. L. R. 639, 3 O. W. R. 460.

London and Lancashire Life Assurance Co. v. Fleming, [1897] A. C. 499.
Referred to in Hutchings v. National Life Assurance Co. of Canada, 26 C. L. T. 187, 37 S. C. R. 124.

London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7.
Considered in Bank of Hamilton v. Imperial Bank of Canada, 21 Occ. N. 20, 27 A. R. 590.

London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7.
Dissented from in Union Bank v. Dominion Bank, 6 W. L. R. 217, 17 Man. L. R. 68.

London and Western Trusts Co. v. Lake Erie, etc., Rw. Co., 7 O. W. R. 571.
Followed in Wallman v. Canadian Pacific Rw. Co., 16 Man. L. R. 83.

London and Western Trusts Co. v. Canadian Fire Insurance Co., 13 O. L. R. 540, 8 O. W. R. 872.
Affirmed in S. C., 16 O. L. R. 217, 17 O. W. R. 781.

London Celluloid Co., In re, 39 Ch. D. 190.
Followed in In re Jones and Moore Electric Co., Jones and Moore's Case, 18 Man. L. R. 549, 10 W. L. R. 210.

London, Chatham and Dover Rw. Co., v. South-Eastern Rw. Co., [1892] 1 Ch. 120.
Followed in Sinclair v. Preston, 21 Occ. N. 97, 13 Man. L. R. 228.

London Co. Council v. Dundas, [1904] P. 1.
Discussed in Connor-Ruddy Co. v. Robinson White Co. (1909), 14 O. W. R. 284, 19 O. L. R. 133.

London Life Ins. Co. v. Molsons Bank, 23 Occ. N. 155, 5 O. L. R. 407.
Affirmed in S. C., 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

London Street Rw. Co. Assessment, In re, 27 A. R. 83.
Applied in In re Queenston Heights Bridge Co. Assessment, 21 Occ. N. 112, 1 O. L. R. 114; also in In re Stratford Water Works Co. and City of Stratford, 21 Occ. N. 479.

London Water Commissioners v. Saunby, 24 Occ. N. 201, 34 S. C. R. 650.
Reversed in Sounby v. London Water Commissioners, [1906] A. C. 110.

Long Point Co. v. Anderson, In re, 18 A. R. 401.
Followed in Re Township of Ameliasburg v. Pitcher, 8 O. W. R. 915, 13 O. L. R. 417.

Longaker, Re (1908), 12 O. W. R. 1193.
Affirmed (1909), 14 O. W. R. 321.

Lott v. Sydney & Glace Bay Rw. Co. (1907), 41 N. S. R. 153, 2 E. L. R. 307.
Affirmed 42 S. C. R. 220.

Louden Manufacturing Co. v. Milmine, 9 O. W. R. 829, 14 O. L. R. 532.
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Louden Manufacturing Co. v. Milmine, 10 O. W. R. 474, 15 O. L. R. 53.
Followed in Great West Implement Co. v. Grams, 7 W. L. R. 190, 1 Alta. L. R. 11.
Distinguished in Great West Implement Co. v. Grams, 1 Alta. L. R. 411, 8 W. L. R. 160.

Love v. Webster, 26 O. R. 453.
Followed in Waechter v. Pinkerton, 6 O. L. R. 241.
Distinguished in Kennan v. Turner, 23 Occ. N. 195, 5 O. L. R. 560.

Lovell v. Lovell, 5 O. W. R. 640.
Followed in Theakstone v. Theakstone, 10 O. L. R. 386, 6 O. W. R. 400, 436.

Lovell v. Lovell, 13 O. L. R. 569.
Distinguished in Willey v. Willey, 18 Man. L. R. 298, 9 W. L. R. 166.

Lovell v. Lovell, 7 O. W. R. 308, 11 O. L. R. 547.
Affirmed in S. C., 8 O. W. R. 517, 13 O. L. R. 569.

Lovely, Ex p., 37 N. B. R. 586n.
Followed in Ex p. Demmings, Re License Commissioners for Victoria County, 2 E. L. R. 292, 37 N. B. R. 586.

Lovitt v. Attorney-General for Nova Scotia, 35 N. S. Reps. 223.
Affirmed in S. C., 23 Occ. N. 212, 33 S. C. R. 350.

Lovitt v. The "Calvin Austin," 9 Ex. C. R. 160.
Affirmed in The "Calvin Austin" v. Lovitt, 25 Occ. N. 78, 35 S. C. R. 616.

Lowe v. Adams, [1901] 2 Ch. 589.
Discussed in Connor-Ruddy Co. v. Robinson-White Co. (1909), 14 O. W. R. 284, 19 O. L. R. 133.

Lowth v. Ibbotson, [1899] 1 Q. B. 1003.
Referred to in Paul v. The King, 27 C. L. T. 152, 38 S. C. R. 126.

Lowther v. Heaven, 41 Ch. D. 248.
Followed in Barlow v. Williams, 4 W. L. R. 233, 16 Man. L. R. 164.

Lucas v. De la Cour, 1 M. & S. 249.
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Lucas v. Godwin, 3 Bing. N. C. 744.
Followed in Adams v. McGreevy, 6 W. L. R. 188, 17 Man. L. R. 115.

Lucas v. Moore, 3 A. R. 602.
Followed in Curle v. City of Brandon, 24 Occ. N. 279.

Lucas v. Moore, 3 A. R. at p. 614.
Followed in Street v. Canadian Pacific Rw. Co., 18 Man. L. R. 334, 9 W. L. R. 558.

Lucas v. Tarleton, 3 H. & N. 116.
Followed in McDonald v. Fraser, 24 Occ. N. 101, 14 Man. L. R. 582.

Lucas v. Williams, [1892] 2 Q. B. 117.
Considered in Carte v. Dennis, 21 Occ. N. 68, 267, 5 Terr. L. R. 30.

Ludlam-Ainslie v. Fallis (1908), 12 O. W. R. 1270.
Reversed (1909), 14 O. W. R. 273, 19 O. L. R. 419.

Luke v. Perry, 12 C. P. 424.
Followed in Parslow v. Cochrane, 4 Terr. L. R. 312.

Lumsden v. Temiskaming and Northern Ontario Railway Commission, 10 O. W. R. 115.
Affirmed in S. C., 15 O. L. R. 469, 11 O. W. R. 78.

Lyon v. Knowles, 3 B. & S. 556, 560.
Followed in Bradd v. Whitney, 9 O. W. R. 656, 14 O. L. R. 415.

Lyell v. Kennedy, 14 App. Cas. 437.
Distinguished in Ross v. Robertson, 24 Occ. N. 228, 7 O. L. R. 413, 3 O. W. R. 158.

Lyons v. Wilkins, [1899] 1 Ch. 255.
Followed in Cotter v. Osborne, 18 Man. L. R. 471, 10 W. L. R. 354.

Lyric Syndicate, In re, 7 Times L. R. 162.
Followed in Munroe v. Heubach, 18 Man. L. R. 547, 10 W. L. R. 416.

Lysaght v. Edwards, 2 Ch. D. 506.
Followed in Canadian Fairbanks Co. v. Johnston, 18 Man. L. R. 589, 10 W. L. R. 571.

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McArthur v. Dominion Cartridge Co., [1905] A. C. 72.
Followed in Hainer v. Grand Trunk Rw. Co., 25 Occ. N. 93; Grand Trunk Rw. Co. v. Hainer, 36 S. C. R. 180.
H. 34, distinguished in In re Lisgar Dominion Election, 21 Occ. N. 487, 13 Man. L. R. 478.

McArthur Export Co. v. Klock, Q. R. 15 K. B. 481.
Reversed in S. C., Q. R. 17 K. B. 356.

McArthur v. Northern and Pacific Junction Rw. Co., 15 O. R. 733, 17 A. R. 86.
Followed in Lumsden v. Temiskaming and Northern Ontario Railway Commission, 15 O. L. R. 469, 11 O. W. R. 78.

McBean v. Carlisle, 19 L. C. Jur. 276.
Followed in Tanguay v. Canadian Electric Light Co., 40 S. C. R. 1, 4 E. L. R. 438.

McCall v. Cane & Co. (1909), 14 O. W. R. 789, 1 O. W. N. 95.
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McCallum v. Morgan, Q. R. 32 S. C. 67.
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McCarron v. Metropolitan Life Ins. Co., 19 Occ. N. 230.
Followed in Reekie v. McNeil, 20 Occ. N. 73, 31 O. R. 444.

McCleave, Ex p., 35 N. B. Reps. 100.
Distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438.

McCleave v. City of Moncton, 35 N. B. R. 296, 32 S. C. R. 106.
Followed in Woodforde v. Town of Chatham, 37 N. B. R. 21.
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McClellan v. Powassan Lumber Co., 15 O. L. R. 67.
Affirmed in S. C., 12 O. W. R. 473, 17 O. L. R. 32.

McClure v. Township of Brooke, 22 Occ. N. 255, 4 O. L. R. 97.
Reversed in S. C., 23 Occ. N. 40, 5 O. L. R. 59.

McConnell v. Wright, [1903] 1 Ch. 546.
Followed in Rosen v. Lindsay, 5 W. L. R. 546, 7 W. L. R. 115, 17 Man. L. R. 251.

McConnell v. Wright, [1903] 1 Ch. at p. 554.
Followed in Steele v. Pritchard, 5 W. L. R. 263, 7 W. L. R. 108, 17 Man. L. R. 226.

McCord v. Harper, 26 C. P. at p. 104.
Followed in Parent v. Bourbonnière, 20 Occ. N. 358, 13 Man. L. R. 172.
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McCormick v. Simpson, Q. R. 15 K. B. 515.
Affirmed in S. C., [1907] A. C. 494.

McCormick v. Simpson, Q. R. 16 K. B. 515.
Affirmed in S. C., [1907] A. C. 494.
Q. R. 16 K. B. 523.

McCormick v. Toronto Rw. Co., 13 O. L. R. 656.
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McCosh v. Barton, 21 Occ. N. 186, 1 O. L. R. 229.
Reversed in S. C., 21 Occ. N. 371, 2 O. L. R.

McCrae and Village of Brussels, In re, 24 Occ. N. 129, 7 O. L. R. 146, 3 O. W. R. 233.
Reversed in S. C., 24 Occ. N. 346, 8 O. L. R. 156, 3 O. W. R. 868.

McCulloch v. Township of Caledonia, 25 A. R. 417.
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McCully v. McCully (1909), 14 O. W. R. 788, 1 O. W. N. 95.
Affirmed 14 O. W. R. 1012, 1 O. W. N. 187.

McDermid v. McDermid, 15 A. 287.
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McDermott v. Hickling, 22 Occ. N. 59.
Reversed in S. C., 23 Occ. N. 40, 1 O. W. R. 768.

McDermott v. McDermott, 3 Ch. Ch. 38.
Approved in Challoner v. Township of Lobo, 21 Occ. N. 201, 1 O. L. R. 292.

McDonald v. Dawson (1904), 8 O. L. R. 773, 3 O. W. R. 773.
Followed in Doherty v. Macdonell (1909), 14 O. W. R. 638.

McDonald v. McDonald, 35 N. S. Reps. 205.
Affirmed in S. C., 23 Occ. N. 135, 33 S. C. R. 145.

McDonald v. McIsaac, 38 N. S. R. 163.
Affirmed in McIsaac v. McDonald, 37 S. C. R. 157.

McDonald v. Park (1903), 2 O. W. R. 812, 972.
Followed in McGuire v. Burk's Falls (1909), 14 O. W. R. 569, and in Clemens v. Faulkner (1909), 14 O. W. R. 637.

McDougall v. Campbell, 41 U. C. R. 332.
Followed in Armour v. Dinner, 4 Terr. L. R. 30.

McDougall v. McMillan, 25 C. P. 75, 92.
Followed in Sawers v. City of Toronto, 22 Occ. N. 25, 380, 2 O. L. R. 717, 4 O. L. R. 624.

McDougall v. Windsor Water Commissioners, 21 Occ. N. 14, 27 A. R. 566.
Affirmed in S. C., 21 Occ. N. 366, 31 S. C. R. 326.

McDowell v. Ulster Bank, 60 Alb. L. J. 346.
Distinguished in Haynen v. Mundle, 22 Occ. N. 152.

McEntire v. Crossley, [1895] A. C. 457, 464.
Explained and distinguished in Utterson Lumber Co. v. H. W. Petrie Limited, 17 O. L. R. 570, 13 O. W. R. 104.

McEwen v. North-West Coal and Navigation Co., 1 Terr. L. R. 203.
Followed in Davis v. Patrick, 2 Terr. L. R. 9.

McFadden v. Brandon, 6 O. L. R. 247.
Affirmed in S. C., 24 Occ. N. 393, 8 O. L. R. 610, 4 O. W. R. 349.

McFarran v. Montreal Park and Island Rw. Co., Q. R. 9 Q. B. 367.
Affirmed in S. C., 20 Occ. N. 323, 373, 30 S C. R. 410.

McGarry, Re (1909), 13 O. W. R. 982.
Affirmed 14 O. W. R. 244.

McGibbon v. Abbott, 10 App. Cas. 653.
Followed in Brosseau v. Doré, 25 Occ. N. 2, 35 S. C. R. 205.

McGoey v. Leamy, 27 S. C. R. 193, 545.
Discussed in Cully v. Ferdais, 20 Occ. N. 273, 30 S. C. R. 330.

McGraw v. Toronto Rw. Co., 12 O. W. R. 587.
Affirmed in S. C., 18 O. L. R. 154, 13 O. W. R. 129.

McGregor v. Canadian Consolidated Mines Limited, 12 B. C. R. 116.
Affirmed in S. C., ib. 373.

McGregor v. Esquimalt and Nanaimo Rw. Co., 12 B. C. R. 257.
Reversed in S. C., [1907] A. C. 462.

McGuire v. Fraser, Q. R. 17 K. B. 449.
Affirmed in S. C., 40 S. C. R. 577.

McHenry v. Lewis (1882), 22 Ch. D. 397.
Distinguished from Hamilton Bridge Works v. Gen. Contracting Co. (1909), 14 O. W. R. 646, 1 O. W. N. 34.

McHugh v. Grand Trunk Rw. Co., 20 Occ. N. 437, 32 O. R. 234.
Reversed in S. C., 21 Occ. N. 581, 2 O. L. R. 600.

McIlroy v. Miles, 9 O. W. R. 542.
Followed in Rushton v. Galley (1909), 14 O. W. R. 999, 1 O. W. N. 186.

McInnes v. Ferguson, 32 N. S. Reps. 516.
Followed in McCurdy v. Grant, 32 N. S. Reps. 520.

McIntosh v. Firstbrook Box Co., 8 O. L. R. 419.
Affirmed in S. C., 10 O. L. R. 526, 6 O. W. R. 237.

McIntosh v. The Queen, 23 S. C. R. 180.
Followed in Gilbert v. The King, 27 C. L. T. 240, 38 S. C. R. 284.

McIntyre, In re, 21 Occ. N. 350.
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McIntyre v. Belcher, 14 C. B. N. S. 654.
Followed in Dunsford v. Webster, 23 Occ. N. 290, 14 Man. L. R. 529.

McIntyre v. McBean, 13 U. C. R. 534.
Dissented from in Crate v. McCallum, 11 O. L. R. 81, 6 O. W. R. 825.

McIntyre, Re, McIntyre v. London and Western Trusts Co., 7 O. L. R. 548.
Affirmed in S. C., 9 O. L. R. 408, 5 O. W. R. 137.

McIsaac v. County of Inverness, 38 N. S. R. 76.
Affirmed in County of Inverness v. McIsaac, 26 C. L. T. 187, 37 S. C. R. 75.

McIsaac v. Inverness Rw. and Coal Co., 38 N. S. R. 80.
Reversed in Inverness Rw. and Coal Co. v. McIsaac, 26 C. L. T. 189, 37 S. C. R. 134.

McKain and Canadian Birkbeck Investment and Savings Co., 3 O. W. R. 156.
Affirmed in S. C., 24 Occ. N. 128, 7 O. L. R. 241, 3 O. W. R. 335.

McKay v. Grand Trunk Rw. Co., 23 Occ. N. 136, 5 O. L. R. 313.
Reversed in S. C., 24 Occ. N. 49; Grand Trunk Rw. Co. v. McKay, 34 S. C. R. 81.

McKay v. Southern Bell Telephone Co., 19 Sou. R. 695.
Followed in Hinman v. Winnipeg Electric Street Rw. Co., 3 W. L. R. 351, 16 Man. L. R. 16.

McKay v. Township of Hinchinbrooke, 24 S. C. R. 55.
Referred to in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353.

McKay v. Wabash Rw. Co., 10 O. W. R. 416.
Affirmed in Wabash Rw. Co. v. McKay, 40 S. C. R. 251.

McKellar v. Canadian Pacific Rw. Co., 14 Man. L. R. 614.
Followed in Hunt v. Grand Trunk Pacific Rw. Co., 18 Man. L. R. 603, 10 W. L. R. 581.

McKelvey v. Le Roi Mining Co., 9 B. C. R. 62.
Reversed in S. C., 23 Occ. N. 61, 32 S. C. R. 664.

McKenzie v. Champion, 12 S. C. R. 649.
Followed in Boyle v. Grassick, 6 Terr. L. R. 232, 2 W. L. R. 99, 284.

McKenzie v. Champion, 4 Man. L. R. 158.
Followed in Brydges v. Clement, 24 Occ. N. 96, 14 Man. L. R. 588.

McKenzie v. Fletcher, 11 Man. L. R. 544.
Followed in Blanchard v. Muir, 20 Occ. N. 140, 13 Man. L. R. 8.

McKenzie v. Grand Trunk Rw. Co., 7 O. W. R. 798.
Affirmed in S. C., 9 O. W. R. 778, 14 O. L. R. 671.

McKenzie v. Lamont, 2 R. & C. 517.
Not followed in Burchell v. Bigelow, 40 N. S. R. 493.

McKeown v. Toronto (1908), 12 O. W. R. 1297.
Affirmed (1909), 14 O. W. R. 572, 1 O. W. N. 3, 19 O. L. R. 361.

McKercher v. Sanderson, 15 S. C. R. at p. 301.
Followed in Gordon v. Hanford, 4 W. L. R. 241, 16 Man. L. R. 292.

McKim v. Bixel (1909), 13 O. W. R. 726.
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McKinnon v. Spence (1909), 13 O. W. R. 86.
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McLardy v. Slateum, 24 Q. B. D. 504.
Followed in German American Bank v. Keystone Sugar Co., 12 O. L. R. 555, 8 O. W. R. 634.
Not followed in Victoria Lumber Co., v. Magee, 6 Terr. L. R. 187, 2 W. L. R. 1.

McLauchlin v. Grand Trunk Rw. Co., 12 O. R. 418.
Distinguished in Deys v. Kingston and Pembroke Rw. Co., 24 Occ. N. 393, 8 O. L. R. 588, 4 O. W. R. 182.

McLaughlin v. Mayhew, 6 O. L. R. 177.
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McLean and Township of Ops, Re, 45 U. C. R. 325.
Dismissed and followed in Elliott v. City of St. Catharines, 18 O. L. R. 57, 13 O. W. R. 89.

McLean v. McKay, L. R. 5 P. C. 327.
Followed in McLean v. Gray, 40 N. S. R. 111.

McLean v. The King, 10 Ex. C. R. 390.
Reversed in S. C., 27 C. L. T. 483, 38 S. C. R. 542.

McLellan v. Assiniboia, 5 Man. L. R. 265.
Distinguished in Alloway v. Rural Municipality of Morris, 18 Man. L. R. 363, 8 W. L. R. 726, 9 W. L. R 392.

McLennan v. Nova Scotia Steel, Q. R. 34 S. C. 446
Affirmed Q. R. 18 K. B. 317.

McLennan v. McKinnon, 1 O. R. 219.
Not followed in Regina v. Tebo, 1 Terr. L. R. 196.

McLeod v. Noble, 28 O. R. 528.
Distinguished in Dunn v. Toronto Board of Education, 24 Occ. N. 223, 7 O. L. R. 451, 3 O. W. R. 393.

McLeod v. Power, [1808] 2 Ch. 295.
Followed in McDonald v. Gillis, 33 N. S. Reps. 244.

McLeod v. St. Aubyn, [1899] A. C. 549.
Followed in Guest v. Knowles, Re Robertson, 17 O. L. R. 416, 12 O. W. R. 1201.

McMeekin v. Furry, 13 B. C. R. 20, 5 W. L. R. 487.
Affirmed in S. C., 39 S. C. R. 378.

McMillan v. Bentley, 16 Gr. 387.
Followed in McIlvride v. Mills, 16 Man. L. R. 276.

McMillan v. Grand Trunk Rw. Co., 16 S. C. R. 543.
Followed in Ferris v. Canadian Northern Rw. Co., 15 Man. L. R. 134, 1 W. L. R. 177.

McMillan v. McMillan, 21 Gr. 594.
Followed in In re Thomas, 21 Occ. N. 594, 2 O. L. R. 660.

McMillan v. McMillan, 19 Occ. N. 227, 30 O. R. 627.
Affirmed in S. C., 20 Occ. N. 199, 27 A. R. 209.

McMullin v. Nova Scotia Steel and Coal Co., 41 N. S. R. 514.
Reversed in S. C., 39 S. C. R. 593.

McNeil v. Corbett, 41 N. S. R. 110.
Reversed in S. C., 39 S. C. R. 608.

McNeil v. McPhee, 31 N. S. Reps. 140.
Followed in Conrad v. Corkum, 35 N. S. Reps. 288.

McNeil v. Stewart (1908), 11 O. W. R. 162.
Affirmed 11 O. W. R. 868.
Reversed (1909), 14 O. W. R. 651, 1 O. W. N. 19.

McNeil's Case, 10 O. L. R. 219.
Followed in In re Jones and Moore Electric Co., Jones and Moore's Case, 18 Man. L. R. 549 10 W. L. R. 210.

McNevin v. Canadian Railway Accident Ins. Co., 21 Occ. N. 76, 32 O. R. 284.
Affirmed in S. C., 21 Occ. N. 553, 2 O. L. R. 521.
Affirmed in S. C., 22 Occ. N. 233, 32 S. C. R. 194.

McNish v. Munro, 25 C. P. 290.
Considered in Fraser v. Mutchmor, 25 Occ. N. 17, 8 O. L. R. 613, 4 O. W. R. 290.

McNutt Estate, In re, 24 N. S. Reps. 264.
Distinguished in In re Wheelock Estate, 33 N. S. Reps. 357.

McSheffrey v. Lanagan, 20 L. R. Ir. 528.
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McSorley v. Mayor, &c., of St. John, 6 S. C. R. 531.
Distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438.

McSorley v. St. John, 6 S. C. R. 531.
Followed in Garbutt v. City of Winnipeg, 18 Man. L. R. 345, 9 W. L. R. 550.

McSorley v. St. John, 6 S. C. R. 544.
Followed in Alloway v. Rural Municipality of Morris, 18 Man. L. R. 363, 8 W. L. R. 726, 9 W. L. R. 392.

McVeain v. Ridler, 17 P. R. 353.
Discussed in Phair v. Phair, 20 Occ. N. 34, 19 P. R. 67.

McVity v. Trenouth, 9 O. L. R. 105.
Affirmed in S. C., 25 Occ. N. 114, 36 S. C. R. 455.

McVity v. Tranouth, 36 S. C. R. 355.
Reversed in S. C., [1908] A. C. 60.

McWhirter v. Corbett, 4 C. P. 203.
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McWillie v. North Shore Rw. Co., 17 S. C. R. 571.
Considered in Findlay v. Canadian Pacific Rw. Co., 21 Occ. N. 461, 5 Terr. L. R. 143.

Macarthur v. Leckie, 9 Man. L. R. 110.
Followed in Sword v. Tedder, 21 Occ. N. 546, 13 Man. L. R. 572.

Macauley v. Rumball, 19 C. P. 284.
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Macauley v. Victoria Yukon Trading Co., 22 Occ. N. 154, 9 B. C. R. 27.
Reversed in S. C., 22 Occ. N. 377, 9 B. C. R. 136.

Macbeth v. Maritime Insurance Co., [1908] A. C. 144.
Followed in Sedgwick v. Montreal Light Heat and Power Co., 41 S. C. R. 639.

MacCrimmon v. Smith, 3 W. L. R. 154.
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Merchants Bank of Canada v. Henderson, 28 O. R. 360.
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Mineral Products Co. v. Continental Trust Co., 37 N. B. R. 140.
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Mineral Water Bottle, etc., Socy v. Booth, 36 Ch. D. 465.
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Monro v. Toronto Rw. Co., 22 Occ. N. 231, 4 O. L. R. 36.
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Monson v. Tussaud, [1894] 1 Q. B. 671.
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Montreal, City of, v. Montreal Street Rw. Co., Q. R. 19 S. C. 504.
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Montreal Gas Co. v. Cadieux, Q. R. 11 K. B. 93.
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Montreal Light Heat and Power Co. v. Archambault, Q. R. 16 K. B. 410.
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Montreal Light Heat and Power Co. v. Dumphy, Q. R. 15 K. B. 11.
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Montreal Light Heat and Power Co. v. Regan, Q. R. 16 K. B. 246, 3 E. L. R. 1.
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Montreal Street Rw. Co. v. Sedgewick, Q. R. 34 S. C. 127.
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Montreal Water and Power Co. v. Davie, Q. R. 23 S. C. 141.
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Montreal Rolling Mills Co. v. Corcoran, Q. R. 8 Q. B. 488.
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Morgan v. Leach, 10 M. & W. 558.
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Morgan v. Metropolitan Rw. Co., L. R. 4 C. P. 97.
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Morgan v. Western Assurance Co., Q. R. 24 S. C. 88.
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Morley, In re, [1895] 2 Ch. 738.
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Morley v. Attenborough, 3 Ex. 500.
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Morley v. Loughoran, [1893] 1 Ch. 736.
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Morris v. Bethel, L. R. 5 C. P. 47.
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Murphy, In re, 26 O. R. 163, 23 A. R. 386.
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Murphy v. Nolan, 18 L. R. Ir 468.
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Murphy v. Phillips, 35 L. T. N. S. 477.
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Murphy v. Phœnix Bridge Co., (1899) 18 P. R. 495.
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Mutual Reserve Insurance Co. v. Dillon, 34 S. C. R. 141.
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Mutual Reserve Life Insurance Co. v. Foster, 20 Times L. R. 715.
Referred to in Metropolitan Life Ins. Co. v. Montreal Coal and Towing Co., 25 Occ. N. 4, 35 S. C. R. 266.
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Myers v. Sault Ste. Marie Pulp Co., 22 Occ. N. 203, 3 O. L. R. 600.
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Mytton v. Duck, 26 U. C. R. 61.
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Nagy v. Manitoba Free Press Co., 5 W. L. R. 20, 453, 16 Man. L. R. 619.
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Natal Land Co. v. Pauline, [1904] A. C. 120.
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National Arms Co., In re, 28 Ch. D. 474.
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National Mercantile Bank v. Hampson, 5 Q. B. D. 177.
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National Stationery Co. v. Br.-Am. Assce. Co., and National Stationery Co. v. Traders Fire Ins. Co. (1909), 13 O. W. R. 367.
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Nell v. Longbottom, [1894] 1 Q. B. 767.
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Reversed in S. C., 22 Occ. N. 382, 4 O. L. R. 481.

Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481.
Followed in Re Provincial Grocers Limited, Calderwood's Case, 10 O. L. R. 705, 6 O. W. R. 744.

New Brunswick Rw. Co. v. Armstrong, 23 N. B. R. 193.
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New Glasgow, Town of, v. Brown, 41 N. S. R. 542.
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New Old Coast Exploration Co., In re, [1901] 1 Ch. 860.
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New London Credit Syndicate v. Neale, [1908] 2 Q. B. 487.
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New Prance and Garrard's Trustee v. Hunting, [1897] 2 Q. B. 19.
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Nightingale v. Union Colliery Co. of British Columbia, 9 B. C. R. 453.
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Noble v. Blanchard, 7 B. C. R. 62.
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Noble v. Edwards, 5 Ch. D. 378.
Followed in Moodie v. Young, 8 W. L. R. 310, 1 Alta. L. R. 337.

Noel v. Bewley, 3 Sim. 103.
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Noel v. Chevrefils, 30 S. C. R. 327.
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Norfolk Voters' Lists, Re, 15 O. L. R. 108, 10 O. W. R. 743.
Applied in Re Knox (S. H.) & Co. Assessment, 12 O. W. R. 499, 17 O. L. R. 175.

North American Life Assce. Co. v. Brophy, 21 Occ. N. 557, 2 O. L. R. 559.
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North London Rw. Co. v. Great Northern Rw. Co., 11 Q. B. D. 30.
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North of Scotland Mortgage Co., In re, 31 C. P. 552.
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North Perth, Re, Hessin v. Lloyd, 21 O. R. 538.
Distinguished in In re West Algoma Voters' Lists, 24 Occ. N. 397, 8 O. L. R. 533, 4 O. W. R. 229.

North Renfrew Provincial Election, In re, 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300.
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North-West Electric Co. v. Walsh, 29 S. C. R. 33.
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Northumberland Avenue Hotel Co., Re, 33 Ch. D. 16.
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Northwest Transportation Co. v. Beatty, 12 App. Cas. 596.
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O'Brien v. Cogswell, 17 S. C. R. 420.
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O'Brien v. Mackintosh, 10 B. C. R. 84.
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O'Dell v. Gregory, 24 S. C .R. 661.
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O'Donnell v. Guinane, 28 O. R. 389.
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Ocean Accident and Guarantee Corporation v. Fowlie, 22 Occ. N. 280, 4 O. L. R. 146.
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Ogston v. Aberdeen District Tramways Co., [1897] A. C. 111.
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Ontario Bank v. O'Reilly, 12 O. L. R. 420.
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Ontario Lands and Oil Co. v. Canada Southern Rw. Co., 21 Occ. N. 188, 1 O. L. R. 215.
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Ontario Mining Co. v. Seybold, 20 Occ. N. 110, 31 O. R. 386, 21 Occ. N. 23, 32 O. R. 301.
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Oriental Island Steam Co., In re, L. R. 9 Ch. 557.
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Ottawa Electric Co. v. St. Jacques, 21 Occ. N. 105, 1 O. L. R. 73.
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Pearce v. Gardner, [1897] 1 Q. B. 688.
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Pinsonnault v. Coursol, Q. R. 33 S. C. 429.
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Plomley v. Felton, 14 App. Cas. 61.
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Plouffe v. Canada Iron Furnace Co., 10 O. L. R. 37.
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R. ex rel. McKenzie v. Martin, 28 O. R. 523.
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Rassam v. Budge, [1893] 1 Q. B. 571.
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Rogers v. Carroll, 30 O. R. 328.
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Rosebaum v. Nelson, [1900] 2 Ch. 207.
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Rosher, In re, 26 Ch. D. 801.
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Ross v. Thompson, 10 B. C. R. 177.
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Rousseau v. Town of Levis, 14 Q. L. R. 376.
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Rowan v. Toronto Rw. Co. (1899), 29 S. C. R.
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Royal Electric Co. v. Davis Q. R. 16 S. C. 377.
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Royal Victoria Life Insurance Co. v. Richards, 31 O. R. 483.
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Ruggles v. Middleton and Victoria Beach Rw. Co., 22 Occ. N. 432.
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Russell v. Cambefort, 23 Q. B. D. 526.
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Russell v. City of Toronto, 11 O. W. R. 23, 15 O. L. R. 484.
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Russell v. Smith, 12 Q. B. 217.
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Russell v. The Queen, 7 App. Cas. 829.
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Ruthven v. Ruthven, 8 U. C. R. 12.
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Rutledge v. United States Savings and Loan Co., 2 W. L. R. 471.
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Ruttan v. Burk, 1 O. W. R. 560.
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Ryan v. Bank of Montreal and Montgomery, 9 O. W. R. 572.
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Ryan v. Clarkson, 17 S. C. R. 251.
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Ryan v. McIntosh (1909), 14 O. W. R. 482.
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Ryan v. McNichol, 1 N. B. Eq. Reps. 487.
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Ryckman v. Randolph (1909), 14 O. W. R. 908, 1 O. W. N. 150.
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Ste. Agathe-des-Monts, Village of, v. Reid, Q. R. 24 S. C. R. 461.
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St. Catharines Milling Co. v. The Queen, 14 App. Cas. 46.
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St. Francois Hydraulic Co. v. Continental Heat and Light Co., Q. R. 16 K. B. 406.
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St. Henri, City of, v. Coursol, Q. R. 15 S. C. 417.
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St. James Election Case, 33 S. C. R. 137
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St. Jean, City of, v. Molleur, Q. R. 16 K. B. 559.
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St. John, City of, v. Christie, 21 S. C. R. 1.
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St. John v. Rykert, 10 S. C. R. 278.
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St. Lawrence Steel and Wire Co. v. Leys, 6 O. L. R. 235.
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St Louis, Town of, v. Citizens' Light and Power Co., Q. R. 21 S. C. 241.
Reversed in S. C., Q. R. 13 K. B. 19.

St. Mary's Creamery Co. v. Grand Trunk Rw. Co., 23 Occ. N. 226, 5 O. L. R. 742.
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Distinguished in Mercer v. Canadian Pacific Rw. Co., 17 O. L. R. 585, 12 O. W. R. 1212, 8 Can. Ry. Cas. 372.

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St. Sulpice de Montreal, Les Ecclésiastiques du Seminaire du v. Jacobs, Q. R. 33 S. C. 68, 4 E. L. R. 340.
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Followed in Sharpe v. Dick, Q. R. 22 S. C. 527.

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Samson v. City of Montreal, Q. R. 23 S. C. 256.
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Sandberg v. Ferguson, 10 B. C. R. 123.
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Saunby v. London Water Commissioners, [1906] A. C. 110.
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Saunders v. The King, 38 S. C. R. 382.
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Sawyer v. Baskerville, 10 Man. L. R. 652.
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Schwoob v. Michigan Central Rw. Co., 9 O. L. R. 86, 5 O. W. R. 157.
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Scott and County of Peterborough, In re, 26 U. C. R. 36.
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Scott v. Hyde, Q. R. 34 S. C. 432.
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Sewell v. Clark (1909), 14 O. W. R. 732, 1 O. W. N. 75.
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Seymour, Re Voters' List of Township of, 2 Ont. Elec. Cas. 69.
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Shallow v. Gazette Printing Co., Q. R. 31 S. C. 338.
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Shallow v. Gazette Printing Co., 4 E. L. R. 343, Q. R. 17 K. B. 309.
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Sharp v. Jackson, [1899] A. C. 419.
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Sharpe v. Willis, Q. R. 29 S. C. 14; 11 Rev. de Jur. 538.
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Sharpe v. White (1908), 12 O. W. R. 311.
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Sharter v. Groves, 6 Ha. 162.
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Shaw v. Foster, L. R. 5 H. L. 350.
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Shaw v. Jones-Ford, 6 Ch. D. 1.
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Shaw v. McKenzie, 6 S. C. R. 181.
Followed in Phair v. Phair, 20 Occ N. 34, 19 P. R. 67.

Shaw v. Morley, L. R. 3 Ex. 137.
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Shawinigan Carbide Co. v. St. Onge, Q. R. 15 K. B. 5.
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Simpson v. Palliser, 29 S. C. R. 6.
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Simpson v. Toronto and York Radial Rw. Co., 10 O. W. R. 33.
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Sims v. Grand Trunk Rw. Co., 10 O. L. R. 330.
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Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, In re, 21 Occ. N. 595, 2 O. L. R. 585.
Approved in Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, In re Faulkner, 23 Occ. N. 215, 5 O. L. R. 609.

Suffield v. Watts, In re, 20 Q. B. D 693.
Followed in Munro v. Heubach, 18 Man. L. R. 547, 10 W. L. R. 416.

Sullivan, Re (1862), 8 U. C. L. J. O. S. 276.
Followed in Swanwick v. Kotinsky (1909), 14 O. W. R. 537, 19 O. L. R. 407.

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Followed in Canadian Fire Ins. Co. v. Robinson, 22 Occ. N. S, 31 S. C. R. 488.

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Sumner v. Cole, 32 N. S. Reps. 179.
Reversed in S. C., 20 Occ. N. 324, 30 S. C. R. 379.

Sumpler v. Hedges, [1898] 1 Q. B. 673.
Followed in Black v. Wiebe, 15 Man. L. R. 260, 1 W. L. R. 75.

Sun Life Assce. Co. v. Elliott, 7 B. C. R. 189.
Reversed in S. C., 21 Occ. N. 154, 31 S. C. R. 91.

Sung v. Lung, 8 B. C. R. 423.
Considered in Noble Five Mining Co. v. Last Chance Mining Co., 23 Occ. N. 252, 9 B. C. R. 514.

Sutherland v. Mannix, 8 Man. L. R. 541.
Considered in Western Milling Co. v Darke, 2 Terr. L. R. 40.

Sutherland-Innes Co. v. Township of Romney, 19 Occ. N. 381, 26 A. R. 495.
Reversed in S. C., 21 Occ. N. 1, 30 S. C. R. 495.

Sutherland-Innes Co. v. Township of Romney, 21 Occ. N. 1, 30 S. C. R. 495.
Considered and followed in In re Townships of Mersea and Gosfield North and Township of Rochester, 21 Occ. N. 558, 2 O. L. R. 435.

Sutherland-Innes Co. v. Township of Romney, 18 Occ. N. 342.
Affirmed in S. C., 19 Occ. N. 381, 26 A. R. 495.

Sutton v. Grey [1894] 1 Q. B. 285.
Discussed and applied in Simpson v. Dolan, 16 O. L. R. 495, 11 O. W. R. 590.

Sutton v. Town of Dundas, 11 O. W. R. 501.
Affirmed in S. C., 17 O. L. R. 556, 13 O. W. R. 126.

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Followed in Cogswell v. Grant, 21 Occ. N. 351, 34 N. S. Reps. 340.
Distinguished in Wilson v. Graham, 3 W. L. R. 517, 16 Man. L. R. 101.

Swanson v. Mollison, 6 W. L. R. 678.
Followed in Gorman & Co. v. Archibald, Anderson v. Archibald, 1 Alta. L. R. 524, 8 W. L. R. 916.

Swaine v. Wilson, 24 Q. B. D. 252.
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Followed in Rex v. Gage, 18 Man. L. R. 175, 7 W. L. R. 564.

Swaizie v. Swaizie, 19 Occ. N. 281, 31 O. R. 81.
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Followed in A. v. A., 15 Man. L. R. 483, 3 W. L. R. 113.

Switzer v. Laidman, 18 O. R. 420.
Distinguished in Vansycle v. Parish, 21 Occ. N. 128, 1 O. L. R. 13.

Switzer v. Switzer (1907), 10 O. W. R. 949, 1116, (1908), 11 O. W. R. 143.
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Switzer v. Switzer (1907), 10 O. W. R. 406.
Followed in McCully v. McCully (1909), 14 O. W. R. 788, 1 O. W. N. 95.
Affirmed, 14 O. W. R. 1012, 1 O. W. N. 187.

Sydenham School Sections, In re, 6 O. L. R. 417, 7 O. L. R. 49.
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Sydenham School Section, In re, 23 Occ. N. 305, 6 O. L. R. 417.
Affirmed in S. C., 24 Occ. N. 88, 7 O. L. R. 49, 3 O. W. R. 227.

Sydenham School Sections, In re, 7 O. L. R. 49.
Distinguished in In re Mersea School Section No. 3, 12 O. W. R. 88, 16 O. L. R. 617.

Sykes v. North Eastern Rw. Co., 44 L. J. C. P. 191.
Followed in Davidson v. Stuart, 22 Occ. N. 266, 14 Man. L. R. 74.

Sykes v. Sykes, [1897] P. D. 306.
Followed in Bugg v. Bugg (1909), 14 O. W. R. 1014, 1 O. W. N. 210.

Sykes v. Sykes, 1869, L. R. 4 C. P. 645.
Followed in Kruz v. Crow's Nest Pass Coal Co., 14 B. C. R. 385.

Symons v. Leaker, 15 Q. B. D. 629.
Followed in Eisenhaur v. Whynaught, 35 N. S. Reps. 295.

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Taeger v. Rowe, 1 Sask. R. 466.
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Taff Vale Rw. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426.
Referred to in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet-Metal Workers' International Association, 9 O. L. R. 171, 5 O. W. R. 95.
Followed in Le Roi Mining Co. v. Rossland Miners' Union, 8 B. C. R. 370.

Talbot v. Guilmartin, 30 S. C. R. 482.
Followed in Lapointe v. Montreal Police Benevolent and Pension Society, 35 S. C. R. 5.

Talbot's Bail, Re, 23 O. R. 65.
Followed in In re McArthur's Bail (No. 1), 2 Terr. L. R. 413.

Tamplin v. James, 15 Ch. D. 215.
Followed in Slouski v. Hopp, 15 Man. L. R. 548, 2 W. L. R. 363.

Tandy v. Tandy, 9 Dowl. 1044.
Referred to in Blakeston v. Wilson, 23 Occ. N. 27, 14 Man. L. R. 271.

Tanguay v. Canadian Electric Light Co., Q. R. 16 K. B. 48.
Affirmed in S. C., 40 S. C. R. 1, 4 E. L. R. 438.

Tanguay v. Price, 37 S. C. R. 657.
Followed in Tanguay v. Canadian Electric Light Co., 40 S. C. R. 1, 4 E. L. R. 438.

Tanguay v. Price, Q. R. 14 K. B. 513.
Reversed in S. C., 26 C. L. T. 851, 37 S. C. R. 657.

Tanner v. Bissell, 21 U. C. R. 553.
Referred to in Township of East Hawkesbury v. Township of Lochiel, 34 S. C. R. 513, 24 Occ. N. 261.

Tanner v. Welland (1900), 19 P. R. 149.
Followed in Heatherly v. Knight (1909), 14 O. W. R. 684.

Tate v. Natural Gas and Oil Co. of Ontario, 18 P. R. 82.
Followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245.
Distinguished in Baines v. City of Woodstock, 10 O. L. R. 694, 6 O. W. R. 601.

Tattersall v. People's Life Ins. Co., 9 O. L. R. 611, 5 O. W. R. 307, 11 O. L. R. 326, 6 O. W. R. 756.
Affirmed in People's Life Ins. Co. v. Tattersall, 37 S. C. R. R. 690.

Taylor, Ex p., (1886), 18 Q. B. D. 295.
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Taylor v. Caldwell, 3 B. & S. 826.
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Taylor v. Cummings, 27 S. C. R. 592.
Distinguished in Roberts v. Hartley, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

Taylor v. Robertson, 21 Occ. N. 270, 4 Terr. L. R. 474.
Reversed in S. C., 22 Occ. N. 80, 31 S. C. R. 615.

Taylor v. Scott (1899), 30 O. R. 475.
Distinguished in Rex v. Robinson, 10 O. W. R. 338, 14 O. L. R. 519.
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Taylor v. Smith, [1893] 2 Q. B. 65.
Followed in Creighton v. Pacific Coast Lumber Co., 18 Occ. N. 425, 19 Occ. N. 285, 12 Man. L. R. 546.

Taylor v. Taylor, 23 Occ. N. 335, 6 O. L. R. 356, 2 O. W. R. 921.
Affirmed in S. C., 24 Occ. N. 19, 6 O. L. R. 545, 2 O. W. R. 953.

Taylor v. Taylor, L. R. 20 Eq. 297.
Specially considered in Morris v. Cairncross, 9 O. W. R. 918, 14 O. L. R. 544.

Teetzel v. Dominion Construction Co., 18 P. R. 16.
Followed in Trusts and Guarantee Co. v. Hart, 21 Occ. N. 494.

Temiscouata Rw. Co. v. Clair, 1 E. L. R. 524.
Reversed in S. C., 38 S. C. R. 230.

Temple v. Nicholson, Cass. Sup. Ct. Dig. 114.
Followed in Roper v. Scott, 5 W. L. R. 341, 16 Man. L. R. 594.

Temperton v. Russell, [1893] 1 Q. B. 435.
Not followed in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, 9 O. L. R. 171, 5 O. W. R. 95.

Tennant v. Trenchard, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661.
Followed in Hutton v. Justin, 22 Occ. N. 23, 2 O. L. R. 713.

Teolo v. Cardasco, 9 Q. P. R. 414.
Affirmed in S. C., 10 Q. P. R. 54.

Thacker v. Hardy, 4 Q. B. D. 687.
Followed in Murphy v. Butler, 9 W. L. R. 82, 16 Man. L. R. 111.

Theo Noel Co. v. Vita & Ore Co., 17 Man. L. R. 319.
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Theriault v. Corporation of St. Alexandre, 8 Rev. de Jur. 527.
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Thibault v. Robinson, Q. R. 3 Q. B. 280.
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Thomas, Re, 2 O. L. R. 660.
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Thompson v. Coulter, 2 O. W. R. 356.
Reversed in S. C., 24 Occ. N. 48, 34 S. C. R. 261, 3 O. W. R. 82.

Thompson v. Equity Fire Insurance Co., Thompson v. Standard Mutual Fire Insurance Co., 17 O. L. R. 214, 12 O. W. R. 373.
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Thompson v London County Council, [1899] 1 Q. B. 840.
Followed in Quigley v. Waterloo Mfg. Co., 21 Occ. N. 240, 336, 1 O. L. R. 606.
Distinguished in Langley v Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245.
Referred to in Hart v. Bissett, 23 Occ. N. 335.

Thompson v. Marsh, 2 O. S. 389.
Followed in Dick v. Winkler, 19 Occ. N. 330, 12 Man. L. R. 624.

Thompson v. Ontario Sewer Pipe Co., 11 O. W. R. 32.
Affirmed in S. C., 40 S. C. R. 396.

Thompson v. Pearson, 18 P. R. 420.
Distinguished in Evans v. Chandler, 20 Occ. N. 200, 19 P. R. 160.

Thompson v. Simard, Q. R. 18 K. B. 24.
Affirmed in 41 S. C. R. 217.

Thompson v. Trevanian, Skin, 402.
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Thompson's Estate, In re, 14 Ch. D. 263.
Followed in Re McDonald, 35 N. S. Reps. 500.

Thorne v. Parsons, 22 Occ. N. 379, 4 O. L. R. 682.
Affirmed in S. C., 23 Occ. N. 180, 33 S. C. R. 309.

Thorne v. Perry, 2 N. B. Eq. Reps. 146.
Affirmed in Perry v. Thorne, 35 N. B. Reps. 398.

Thornhill v. Manning, 1 Sim. N. S. 451.
Followed in Scottish American Investment Co. v. Brewer, 21 Occ. N. 522, 2 O. L. R. 369.

Thornton v. France, [1897] 2 Q. B. 143.
Referred to in McVity v. Trenouth, 9 O. L. R. 105, 5 O. W. R. 123.

Thornton-Smith Co. v. Woodruff (1909), 14 O. W. R. 84.
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Thurlow v. Mackeson, L. R. 4 Q. B. 97.
Followed in Campbell v. Imperial Loan Co., 18 Man. L. R. 144, 8 W. L. R. 502.

Thuresson, In re, 3 O. L. R. 271.
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Thuresson v. Thuresson, 19 Occ. N. 169, 30 O. R. 504.
Reversed in S. C., 21 Occ. N. 350, 2 O. L. R. 637.

Tilson v. Warwick Gas Light Co., 4 B. & C. 962.
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Tinsley v. Toronto Rw. Co., 15 O. L. R. 438, 10 O. W. R. 1077, 8 Can. Ry. Cas. 69.
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Titchmarch v. McConnell (1909), 14 O. W. R. 277, 619, 690.
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Tobey Furniture Co. v. Macmaster, Q. R. 21 S. C. 336.
Affirmed in S. C., Q. R. 12 K. B. 34.

Tobey v. Wilson (1878), 43 U. C. R. 230.
Referred to in Re Dale & Blanchard (1909), 14 O. W. R. 704, 1 O. W. N. 65.

Tobin v. McGillis, 12 P. R. 60 n.
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Todd v. Union Bank, 6 Man. L. R. 457.
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Toke v. Andrews, 8 Q. B. D. 432.
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Toll v. Canadian Pacific Rw. Co., 1 Alta. L. R. 244.
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Toll v. Canadian Pacific Rw. Co., 1 Alta. L. R. 244.
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Tomey Homma, In re, 21 Occ. N. 62, 7 B. C. R. 368.
Affirmed in S. C., 21 Occ. N. 424, 8 B. C. R. 76.
Reversed in Cunningham v. Tomey, Homma, [1903] A. C. 151.

Tomlinson, Ex p., 20 L. T. 324.
Followed in Re Western Co-operative Construction Co. and Brodsky, 15 Man. L. R. 981.

Tomville v. Dansereau, Q. R. 29 S. C. 126.
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Tooke v. Bergeron, 27 S. C. R. 567.
Followed in Quebec and Levis Ferry Co. v. Jess, 35 S. C. R. 693.
Distinguished in Paquet v. Dufour, 27 C. L. T. 779, 39 S. C. R. 332.
And referred to in Bloval v. Clinton Fireproofing Co. of Canada, Q. R. 29 S. C. 481.

Toomey v. Tracey, 4 O. R. 708.
Distinguished in In re Scadding, 22 Occ. N. 409, 4 O. L. R. 632.

Toothe v. Frederick, 14 P. R. 287.
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Toronto v. Toronto Rw. Co., [1907] A. C. 315, 76 L. J. P. C. 57.
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Toronto, City of, v. Bell Telephone Co. of Canada, 22 Occ. N. 142, 3 O. L. R. 465.
Reversed in S. C., 23 Occ. N. 277, 6 O. L. R. 335.
Affirmed in S. C., [1905] A. C. 52.

Toronto, City of, v. Grand Trunk Rw. Co., 4 O. W. R. 491.
Affirmed in Grand Trunk Rw. Co. v. City of Toronto, 26 C. L. T. 248, 37 S. C. R. 210.

Toronto, City of, v. Lorsch, 24 O. R. 227.
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Toronto, City of, v. Toronto Rw. Co., 5 O. W. R. 130.
Affirmed in Toronto Rw. Co. v. City of Toronto, [1906] A. C. 117.

Toronto, City of, v. Toronto Rw. Co., 10 O. L. R. 657, 6 O. W. R. 677.
Varied in Toronto Rw. Co. v. City of Toronto, 26 C. L. T. 454, 37 S. C. R. 430.

Toronto, City of, v. Toronto Rw. Co., 5 O. W. R. 130.
Followed in City of Toronto v. Toronto Rw. Co., 11 O. L. R. 103, 6 O. W. R. 871.

Toronto, City of, v. Toronto Rw. Co., 9 O. L. R. 333, 10 O. L. R. 657.
Followed in City of Toronto v. Toronto Rw. Co., 11 O. L. R. 103, 6 O. W. R. 871.

Toronto, City of v. Toronto Rw. Co., 11 O. L. R. 103, 6 O. W. R. 871.
Varied in S. C., 12 O. L. R. 534, 8 O. W R. 179.

Toronto, City of, v. Toronto Rw. Co., 12 O. L. R. 534.
Followed in Black v. Winnipeg Electric Rw. Co., 6 W. L. R. 238, 17 Man. L. R. 77.

Toronto, City of, v. Toronto Rw. Co., 2 O. W. R. 225.
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Affirmed in S. C., 18 O. L. R. 214, 13 O. W. R. 312.

Toronto General Hospital Trustees v. Denham, 31 C. P. 203.
Followed in McMahon v. Coyle, 23 Occ. N. 225, 5 O. L. R. 618.

Toronto General Trusts Corporation v. Central Ontario Rw. Co., 6 O. L. R. 534, 24 Occ. N. 14.
Affirmed in S. C., 24 Occ. N. 392, 8 O. L. R. 604, 4 O. W. R. 357.

Toronto General Trusts Corporation v. Central Ontario Rw. Co., 7 O. L. R. 669.
Reversed in S. C., 10 O. L. R. 347, 5 O. W. R. 600.

Toronto General Trusts Corporation v. Central Ontario Rw. Co., 6 O. L. R. 1.
Affirmed in S. C., 24 Occ. N. 365, 8 O. L. R. 342, 3 O. W. R. 910.
Affirmed in Central Ontario Rw. Co. v. Trusts and Guarantee Company, [1905] A. C. 576.

Toronto General Trusts Co. v. Sewell, 17 O. R. 442.
Followed in National Trust Co. v. Hughes, 22 Occ. N. 101, 14 Man. L. R. 41.

Toronto General Trusts Corporation v. White, 22 Occ. N. 178, 3 O. L. R. 519.
Varied in S. C., 23 Occ. N. 10, 5 O. L. R. 21.

Toronto Public School Board and City of Toronto, In re, 22 Occ. N. 15, 2 O. L. R. 727.
Affirmed in S. C., 22 Occ. N. 279, 4 O. L. R. 468.

Toronto Railway Co. Assessment, In re, 25 A. R. 135.
Applied in In re London Street Railway Assessment, 20 Occ. N. 62, 27 A. R. 83.

Toronto Rw. Co. v. City of Toronto, 37 S. C. R. 430.
Varied in City of Toronto v. Toronto Rw. Co., [1907] A. C. 315.

Toronto Rw. Co. v. City of Toronto, 37 S. C. R. 430.
Followed in City of Toronto v. Toronto Rw. Co., 12 O. L. R. 534, 8 O. W. R. 179.

Toronto Rw. Co. v. City of Toronto, [1905] A. C. 809.
Followed in Re International Bridge Co. and Village of Bridgeburg, 12 O. L. R. 314, 7 O. W. R. 497.

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Toussignant v. County of Nicolet, 32 S. C. R. 353.
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Toussignant v. County of Nicolet, 32 S. C. R. 353.
Followed in Carrier v. Sirois, 25 Occ. N. 121, 36 S. C. R. 221.

Towle v. White, 21 W. R. 465, 29 L. T. N. S. 78.
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Townend v. Hunter, 3 C. L. T. 310.
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Townsend v. Crowdy, 8 C. B. N. S. 493.
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Tracey v. Toronto Rw. Co. and Grand Trunk Rw. Co. (1908), 13 O. W. R. 15.
Distinguished from Rachar v. Grand Trunk Rw. Co. & Wabash (1909), 14 O. W. R. 548.

Traplin v. Canadian Woollen Mills (Limited), 3 O. W. R. 416.
Affirmed in Canadian Woollen Mills (Limited) v. Traplin, 25 Occ. N. 26, 35 S. C. R. 424.

Travers v. Casey, 36 N. S. Reps. 229.
Affirmed in S. C., 24 Occ. N. 169, 34 S. C. R. 419.

Trecothic Marsh, In re, 38 N. S. R. 23.
Affirmed in Dominion Cotton Mills Co. v. Trecothic Marsh Commissioners, 26 C. L. T. 185, 37 S. C. R. 79.

Trice v. Robinson, 16 O. R. 433.
Applied and followed in Doyle v. Diamond Flint Glass Co., 24 Occ. N. 368, 8 O. L. R. 499, 3 O. W. R. 510, 921.
Considered in Dini v. Farquier, 25 Occ. N. 11, 8 O. L. R. 712, 4 O. W. R. 295.

Trimble v. Hill, 5 App. Cas. 342.
Referred to in Jacobs v. Beaver Silver Cobalt Mining Co., 17 O. L. R. 496, 12 O. W. R. 803.

Truman v. London and Brighton Rw. Co., 11 App. Cas. 45.
Followed in Bennett v. Grand Trunk Rw. Co., 21 Occ. N. 564, 2 O. L. R. 425.

Truro, Town of, v. Archibald, 33 N. S. Reps. 401.
Affirmed in S. C., 31 S. C. R. 380.

Trust and Loan Co. v. McKenzie, 23 A. R. 167.
Dictum of MacLennan, J.A., in, Dissented from in Forster v. Ivey, 20 Occ. N. 402, 32 O. R. 175.

Trust and Loan Co. v. Kerouack, Q. R. 12 K. B. 281.
Affirmed in Trust and Loan Co. of Canada v. Gauthier, [1904] A. C. 94.

Trustees, etc., Co. v. Short, 13 App. Cas. 793.
Followed in British Canadian Loan and Agency Co. v. Farmer, 15 Man. L. R. 593, 24 Occ. N. 273.

Trusts and Guarantee Co. v. Hart, 20 Occ. N. 65, 31 O. R. 414.
Reversed in S. C., 21 Occ. N. 493, 2 O. L. R. 251.
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Tuck & Sons v. Priester, 19 Q. B. D. 629.
Approved in Granes v. Gorrie, [1903] A. C. 496.

Tucker, Re, Tucker v. Tucker, [1894] 3 Ch. 429.
Applied in Nickle v. Kingston and Pembroke Rw. Co., 12 O. L. R. 349, 8 O. W. R. 158.

Tucker v. Linger, 21 Ch. D. 18.
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Tucker v. The King, 22 Occ. N. 201, 7 Ex C. R. 351.
Affirmed in S. C., 32 S. C. R. 722.

Tuckett-Lawry v. Lamoureaux, 21 Occ. N. 187, 1 O. L. R. 364.
Affirmed in S. C., 22 Occ. N. 174, 3 O. L. R. 577.

Turcotte v. Dansereau, 27 S. C. R. 583.
Followed in Marion v. Brien dit Desrochers, Q. R. 23 S. C. 45, 52.

Turcotte v. Dansereau, 26 S. C. R. 578.
Followed in Coté v. James Richardson Co., 27 C. L. T. 155, 38 S. C. R. 41.

Turcotte v. Ryan, Q. R. 15 K. B. 472.
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Turner v. Cowan, 9 B. C. R. 301.
Reversed in S. C., 24 Occ. N. 115, 34 S. C. R. 160.

Turner v. Hellard, 30 Ch. D. 390.
Considered in Bank of Montreal v. Burns, 22 Occ. N. 342.

Turner v. London and South Western Rw. Co., L. R. 17 Eq. 561.
Followed in Gunn v. Harper, 22 Occ. N. 208, 225, 3 O. L. R. 693.

Turner v. Tourangeau, 3 O. W. R. 74.
Reversed in S. C., 24 Occ. N. 350, 8 O. L. R. 221, 4 O. W. R. 12.

Turner v. Walsh, 6 App. Cas. 636.
Applied in Heiminick v. Town of Edmonton, 2 Terr. L. R. 462.

Twigg, In re, [1892] 1 Ch. 579.
Followed in In re Harrison, 21 Occ. N. 478, 2 O. L. R. 217.

Tyrell v. Painton, [1894] P. 151.
Distinguished in Tellier v. Schilemans, 7 W. L. R. 220, 17 Man. L. R. 262.

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Underwood v. Maguire, Q. R. 6 Q. B. 237.
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Union Assurance Co. v. Quebec Railway, Light and Power Co., Q. R. 28 S. C. 289.
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Union Bank of Canada v. Rideau Lumber Co., 22 Occ. N. 114, 3 O. L. R. 269.
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Union Bank v. Clark (1908), 12 O. W. R. 532.
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Union Bank v. Code, 20 Occ. N. 300, 27 A. R. 396.
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Union Bank v. Dominion Bank, 17 Man. L. R. 68, 6 W. L. R. 217.
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Union Bank v. Morris, 20 Occ. N. 300, 27 A. R. 396.
Affirmed in S. C., 22 Occ. N. 45, 31 S. C. R. 594.

Union Colliery Co. v. Bryden, [1899] A. C. 580.
Applied in In re Coal Mines Regulation Act, 24 Occ. N. 342, 19 B. C. R. 408.
Followed in Stark v. Schuster, 24 Occ. N. 187, 14 Man. L. R. 672.

Union Colliery Co. v. The Queen, 31 S. C. R. 81.
Referred to in Gilbert v. The King, 27 C. L. T. 240, 38 S. C. R. 284.

Union Investment Co. v. Wells, 41 S. C. R. 244.
Overruled by Peters v. Perras, 42 S. C. R. 361.

Union Investment Co. v. Wells, 39 S. C. R. 625.
Followed in Peters v. Perras, 8 W. L. R. 162, 1 Alta. L. R. 201.

Union Investment Co. v. Wells, 5 W. L. R. 409.
Reversed in S. C., 39 S. C. R. 625.

United Land Co. v. Great Eastern Rw. Co., L. R. 17 Eq. 158, L. R. 10 Ch. 586.
Distinguished in Canadian Pacific Rw. Co. v. Grand Trunk Rw. Co., 12 O. L. R. 320, 7 O. W. R. 814.

United Shoe Machinery Co. of Canada v. Brunet, Q. R. 17 K. B. 435.
Reversed in S. C., [1909] A. C. 330.

United States v. Joint Traffic Association, 171 U. S. R. 568.
Followed in Rex v. Gage, 18 Man. L. R. 175, 7 W. L. R. 564.

Upmann v. Forester, 24 Ch. D. 231.
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Upson-Walton Co. v. The "Brian Boru," 10 Ex. C. R. 176.
Affirmed in S. C., 27 C. L. T. 341, 11 Ex. C. R. 109.

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Vadala v. Lawes, 25 Q. B. D. 310.
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Valiquette v. Fraser, 9 O. L. R. 57, 4 O. W. R. 543.
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Vallée v. Grand Trunk Rw. Co., 1 O. L. R. 224.
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Valpy v. Gibson, 4 C. B. 837.
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Van Brocklin v. Brantford, 20 U. C. R. 327.
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Van Grutten v. Foxwell, [1897] A. C. 658.
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Van Norman v. McNaught, 22 Occ. N. 341, 9 B. C. R. 131.
Affirmed in S. C., 23 Occ. N. 63, 32 S. C. R. 690.

Van Sandatt v. Turner, 6 Q. B. 783.
Followed in In re Thomas, 21 Occ. N. 503.

Vancouver Incorporation Act, 1900, and R. T. Rogers, In re, 9 B. C. R. 373.
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Vane v. Vane, 2 Ch. D. 124.
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Vanier v. City of Montreal, Q. R. 15 K. B. 479.
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Vanier v. Kent, Q. R. 11 K. B. 373.
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Vantin, In re (1900), 7 Mans Bank, 291.
Followed in McDonald v. Curran (1909), 14 O. W. R. 838, 1 O. W. N. 121.

Varley v. Coppard, L. R. 7 C. P. 505.
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Vaughan v. Eastern Townships, 13 B. C. R. 77.
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Vaughan v. Richardson, 17 S. C. R. 703.
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Vaughan v. Taff Valley Rw. Co., 5 H & N. 59.
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Vere v. Ashby, 10 B. & C. 288.
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Verreries de l'Etoile, Société Anonyme des, Re, 10 Pat. Cas. 290.
Distinguished in Sinclair v. Campbell, 21 Occ. N. 382, 2 O. L. R. 1.

Verulam v. Bathurst, 13 Sim. 374.
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Vézina v. The Queen, 17 S. C. R. 1.
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Considered in Ontario Lands and Oil Co. v. Canada Southern Rw. Co., 21 Occ. N. 188, 1 O. L. R. 215.

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Victoria-Montreal Fire Insurance Co. v. Home Insurance Co., 35 S. C. R. 208.
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Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222.
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Vogel v. Grand Trunk Rw. Co., 11 S. C. R. 612.
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Vulcan Iron Works v. Rapid City, 9 Man. L. R. 577.
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Wakefield v. Wakefield, 20 Occ. N. 255, 32 O. R. 36.
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Wakelin v. London and South Western Rw. Co., 12 App. Cas. 41, [1896] 1 Q. B. 196n.
Distinguished in Billing v. Semmens, 24 Occ. N. 83, 7 O. L. R. 340, 8 O. L. R. 540, 3 O. W. R. 17, 4 O. W. R. 218.
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Walker v. Bradford Old Bank, 12 Q. B. D. 511.
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Walker v. City of Halifax, 16 N. S. Reps. 371, Cass. Dig. 175.
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Walker v. Clay, 49 L. J. Q. B. 500.
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Walker v. Lamoureux, Q. R. 21 S. C. 492.
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Wallace v. Temiskaming and Northern Ontario Railway Commission, 12 O. L. R. 126, 7 O. W. R. 665.
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Walmsley v. Griffith, 11 P. R. 139.
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