DIGEST

OF

BRITISH COLUMBIA CASE LAW

BEING

THE CASES DETERMINED

IN

THE COURTS OF BRITISH COLUMBIA
AND ON APPEAL THEREFROM

IN

THE SUPREME COURT OF CANADA

AND

THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

AND REPORTED IN

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Vye v. *McNeill*, 3 B.C.R. 24; approved in *Yorkshire Guarantee and Securities Corporation* v. *Cooper*, 10 B.C.R. 65.

W.

Ward v. *Clark*, 4 B.C.R. 501; -overruled in *Piper* v. *Burnett*, 14 B.C.R. 209.

Watt v. *Watt*, 13 B.C.R. 281; not followed in *Sheppard* v. *Sheppard*, 13 B.C.R. 486.

Weller v. *Shupe*, 6 B.C.R. 58; approved in *Bradshaw* v. *Saucerman*, 18 B.C.R. at p. 56.

Westfall v. *Stewart*, 13 B.C.R. 111; commented on in *Chapman* v. *Edwards*, 16 B.C.R. 334.

Williams v. *Faulkner*, 8 B.C.R. 197; followed in *Stevenson* v. *Parkes*, 10 B.C.R. 387.

Wood v. *Canadian Pacific Railway Company*, 6 B.C.R. 561, 30 S.C.R. 110; followed in *Hill* v. *Granby Consolidated Mines, Ltd.*, 12 B.C.R. at p. 125.

Woodbury v. *Hudnut*, 1 B.C.R., Pt. II., 39; followed in *Wheelden* v. *Cranston*, 12 B.C.R. at p. 491.

Y.

Youdall v. *Douglas*, 2 B.C.R. 342; overruled in *Harris* v. *Dunsmuir*, 9 B.C.R. 317.

DIGEST

OF

BRITISH COLUMBIA CASE LAW

ABANDONMENT.

1. Of rights.]—Failure to enforce obedience to an order of the Court, duly served on the secretary of a company, for rectification of that company's register, does not constitute an abandonment of the rights acquired under the order. *Ex parte Bibby*, 1 B.C.R., Pt. II., 94.

2. Order of Court.]—An order of the Court may be treated as abandoned, if there be unreasonable delay in taking it out. *Baker* v. *The Province*, 5 B.C.R. 45.

OF APPEALS—*See* APPEAL.

OF MINERAL CLAIMS—*See* MINES AND MINERALS.

OF LIENS—*See* MECHANICS' LIENS.

ABDUCTION.

See CRIMINAL LAW.

ABORTION.

See CRIMINAL LAW.

ABSCONDING DEBTOR.

See ARREST AND IMPRISONMENT FOR DEBT.

ABSTRACT OF TITLE.

See VENDOR AND PURCHASER.

ACCIDENT.

CAUSED BY NEGLIGENCE—*See* NEGLIGENCE.

TO SERVANTS—*See* MASTER AND SERVANT AND WORKMEN'S COMPENSATION ACT.

INEVITABLE—*See* TORT.

TO SHIPS—*See* COLLISION.

ACCORD AND SATISFACTION.

See CONTRACT.

ACCOUNTS AND INQUIRIES.

See PRACTICE.

ACCOUNT STATED.

Promise to pay.]—On the dissolution of a partnership the parties signed a statement showing a certain amount as due to the plaintiff for his share, and declaring that "for the sake of peace and quiet and to avoid friction and bother" the plaintiff waived examination of the firm's books, and agreed that the amount so stated should be deemed to be the amount payable by the defendants to the plaintiff:—Held, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability. *Jackson* v. *Drake, Jackson & Helmcken*, 37 S.C.R. 315.

ACQUIESCENCE.

See EQUITY.

ACTION.

I. Causes of Action, 3.
II. By Whom Maintainable, 3.
A. *The Crown as representing the Province*, 3.
B. *Municipal ratepayers*, 4.
C. *Pre-emptors and purchasers of Crown lands*, 5.
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III. Survival of, 6.

I. Causes of Action.

1. Imperfect.]—A cause of action imperfect at the date of the issue of the writ is not perfected, either at law or equity, by subsequent events. *Peck* v. *Sun Life Assurance Co.*, 11 B.C.R. 215.

2. To set aside judgment.]—An action lies to set aside the judgment in a former action on the ground of fraud. *Harper* v. *Cameron*, 2 B.C.R. 365.

3. Transitory.] — Though every fact arose abroad, and the dispute was between foreigners, the Court will entertain the cause, if in its nature transitory, and if the process of the Court had been served on the defendant when present in British Columbia. *Parshley* v. *Hanson*, 17 B.C.R. 364.

4. Wrong committed abroad.]—Where the wrong complained of was committed in a foreign country, it must be shown to be actionable both in the foreign and the domestic jurisdiction. *Gillis Supply Co.* v. *Chicago, etc., Rly. Co.*, 16 B.C.R. 254.

II. By Whom Maintainable.

A. The Crown as Representing the Province.

1. Crown Franchise Regulation Act—Inapplicable to railways.]—The defendant railway company was originally incorporated in 1897 by a Provincial Act, and in 1898, by a Dominion Act, its objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—Held, by Irving, J., setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company. *The Attorney-General of British Columbia ex rel. The Kettle River Valley Railway Company* v. *The Vancouver, Victoria and Eastern Railway and Navigation Company*, 9 B.C.R. 338.

B. Municipal Ratepayers.

1. Municipal property.]—A ratepayer cannot bring an action to restrain a misuse of municipal property, unless specially injured thereby. *Anderson* v. *City of Victoria*, 1 B.C.R., Pt. II., 107.

2. Misuse of corporate funds.]—A ratepayer may sue on behalf of himself and all other ratepayers to restrain the improper application of corporate funds. *Elworthy* v. *Victoria Corporation*, 5 B.C.R. 123.

3. By-law.]—The breach of a by-law, not designed to benefit or protect a particular class, but passed for the public advantage, does not give a cause of action to an individual injured thereby. *Thacker Singh* v. *Canadian Pacific Railway Company*, 19 B.C.R. 575.

4. By-law.]—Where a municipal corporation passes a by-law for the construction of a particular kind of road, the owners of property assessed for the cost of construction have a right to restrain the corporation from proceeding to construct a different kind of road. *Arbuthnot* v. *City of Victoria*, 15 B.C.R. 209.

5. Tramway—Agreement to run to city limits—Extension of.]—The promoters of a street railway company entered into an agreement with the city 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 its 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 was bound to operate its tram system along Douglas Street to the extended city limits, that the company was not bound to do so. Quære, whether a ratepayer could sue. *Yates* v. *British Columbia Electric Railway Company, Limited*, 7 B.C.R. 323.

C. Pre-emptors and Purchasers of Crown Lands.

1. Pre-emptor.]—A pre-emptor of Crown lands, who has not forfeited his rights, is entitled to maintain an action for such damages as he has sustained in consequence of the destruction of timber growing upon his pre-empted land. *Kerr* v. *Canadian Pacific Railway Company,* 49 S.C.R. 33.

2. Prospective purchaser.]—A prospective applicant to purchase Crown lands who has staked the land he intends to apply for before fire has destroyed the timber thereon, but has not made his application until after the fire, has no right of action for the timber destroyed. *Kerr* v. *Canadian Pacific Railway Company,* 18 B.C.R. 389.

3. Locus standi of suppliant.]—Suppliant applied to be allowed to purchase certain lands under sec. 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to the railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a petition of right to be brought:—Held, dismissing the petition, that the suppliant had no locus standi to obtain any relief. *Hall* v. *The Queen and the Kaslo and Slocan Railway Company,* 7 B.C.R. 89, 480.

4. Trespass — Reservation from settlement—C.S.B.C. 1888, c. 66, secs. 86 and 87.]—A person in possession of waste lands of the Crown, with the consent of the Crown, can maintain trespass against persons having no title. *Nelson and Fort Sheppard Railway Company* v. *Parker,* 6 B.C.R. 1.

5. Trespass.]—A person in possession of Crown lands, with the consent of the Crown, may maintain trespass against a wrongdoer. *Brown* v. *Mother Lode, etc., Co.,* 17 B.C.R. 248.

6. Mineral claim.]—A claimant of the land as distinct from the minerals has no locus standi in curia to question the performance by a free miner of the conditions precedent to his right to a valid mineral claim. *Nelson and Fort Sheppard Railway Company* v. *Jerry,* 5 B.C.R. 396.

D. Miscellaneous.

1. Independence of Parliament Act, 1875.]—Any registered voter in the Province has sufficient interest to maintain an action under the Act. *Barnard* v. *Walkem,* 1 B.C.R., Pt. I., 120.

2. Water rights and records.]—No one is entitled to attack a water record who is not the holder of one himself, or of the equivalent of a record, e.g., a right to water under sec. 29 of the Act (S.B.C. 1904, c. 56). *Brown* v. *Spruce Creek Power Co.,* 11 B.C.R. 243.

3. Water rights and records.]—No one is entitled to complain of the diversion or misuse of water by the holder of a water record unless he himself holds such a record. *Spruce Creek Power Co.* v. *Muirhead,* 11 B.C.R. 68.

4. Receiver of trust estate.] — The receiver of a trust estate cannot sue in his own name to recover funds belonging to the estate. *Shallcross* v. *Garesche,* 5 B.C.R. 320.

III. Survival of.

Actio personatis moritur.]—In an action for a declaration that defendants were trustees for the plaintiff of certain timber licences, or in the alternative for $250,000 damages, it was alleged that the plaintiff had done all things necessary under the Land Act to obtain special timber licences: that before he made his formal application for such licences, the defendants applied and falsely represented to the commissioner that they had performed all the statutory requirements to entitle them to licences for the same limits; that the plaintiff had filed a protest against defendants' application; that before the determination of such protest, or of its having been heard, the defendants fraudulently represented to the commissioner that plaintiff had not complied with the Land Act as to staking or advertising, etc., and that he had withdrawn his protest and was willing that licences should be granted to defendants. Plaintiff died after action brought and his executrix applied to be substituted as plaintiff:—Held, on appeal, that the cause of action did not survive to the executrix. *Wilson* v. *McClure,* 16 B.C.R. 82.

On Foreign Judgment—*See* Conflict of Laws.

Joinder of—*See* Practice.

Notice of—*See* Execution.

For Nuisance—*See* Torts.

By Shareholders—*See* Company.

ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

See ASSIGNMENTS FOR CREDITORS.

ADMIRALTY.

I. JURISDICTION, 7.
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- *C. Wages*, 8.
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- *A. Affidavit to lead warrant*, 17.
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III. LIMITATION OF ACTIONS, 21.

I. JURISDICTION.

A. In General.

1. Extent of.]—This Court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners for an account the ship may be arrested. *Cope* v. *S.S. Raven and Mayhew*, 11 B.C.R. 486.

2. Waiver of objection to.]—Entering an appearance to an action is not a waiver of objections to the jurisdiction. *Rithet* v. *Ship Barbara Boscowitz*, 3 B.C.R. 445.

B. Ownership and Possession.

Accounts.]—In an action between co-owners for an account the ship may be arrested. *Cope* v. *S.S. Raven and Mayhew*, 11 B.C.R. 486.

C. Wages.

1. Lien for.]—A lien of a seaman for wages ranks before a statutory lien for "building, equipping or repairing" a ship under sec. 4 of The Admiralty Court Act, 1861; it also ranks before a lien for necessaries. *The Aurora*, 20 B.C.R. 92.

2. Lay.]—A sailor who engages on a whaling voyage and is to receive a certain sum per month "and lay" (the term "lay" being set out in the ship's articles as an apportionment to the officers and crew of various amounts for various kinds of whales that are taken by the ship) may include the sum due him under "the lay" in an action for wages against the ship; the sum so due is not subject to forfeiture under a clause in the articles providing for the forfeiture of a "bonus" in case the seaman leaves his employment before the final termination of the whaling season. *Farrell* v. *The "White,"* 20 B.C.R. 576.

3. Liability of master.]—Where the master of a fishing boat claimed against the owner for his wages and was met by a counterclaim for the value of missing fishing gear: it was held, that the master was entitled to wages, but was responsible for the value of the missing gear not accounted for. In a small vessel of this description the master must personally account for the property of the owner entrusted to his charge whatever may be said as to his responsibility in larger vessels, where property may be entrusted to the custody of various officers. *Brown* v. *The Alliance (No. 2)*, 19 B.C.R., 529.

4. Loss of ship.]—The rights of seamen entitled to maritime liens are not affected by the loss of the ship after it was sold by a liquidator in a winding-up of the company owning it. *In re Fort George Lumber and Navigation Company*, 18 B.C.R. 473; 48 S.C.R. 593.

D. Building, Equipping and Repairing.

Conditions of action.]—Under sec. 4 of The Admiralty Court Act, 1861, when a creditor finds a ship, or the proceeds thereof under arrest of the Court in pursuance of its valid process, he may bring his action, and the Court acquires immediate jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to show that the original action under which the ship was arrested must eventually succeed. *Momsen* v. *The Aurora*, 18 B.C.R. 353.

E. Necessaries.

1. Domicile.]—A company whose head office is in England and which is licensed and registered to carry on business in British Columbia is not "an owner domiciled within Canada" within the meaning of sub-sec. (*b.*) of Rule 37 of the procedure in Admiralty cases. A plaintiff who has supplied necessaries in British Columbia to a ship which is away from its home port and has no owner domiciled in British Columbia, has acquired a statutory lien for such necessaries when the ship is arrested under the warrant of the Court, and the lien may be enforced either upon the trial or on a subsequent motion. *Victoria Machinery Depot Company, Limited* v. *The Canada and The Triumph*, 18 B.C.R. 511.

2. Adaptation.] — Alterations in the structure and equipment of a fishing vessel for the purpose of making her fit to engage in fishing with dories, instead of as a trawler, are "necessaries," under sec. 5 of The Admiralty Court Act, 1861 (24 Vict., c. 10). *Victoria Machinery Depot Company, Limited* v. *The Canada and The Triumph*, (*No. 2*), 18 B.C.R. 515.

3. Fishing tackle.]—Fishing-stores or fishing-tackle such as hooks, gaffs, nippers, and knives, used in a fishing-boat are "necessaries" for which the ship is liable. *Pichon* v. *The "Alliance No. 2,"* 20 B.C.R. 560.

4. Taking security.]—A party supplying necessaries to a foreign ship, and taking promissory notes in payment, is entitled, if the notes are dishonoured, to sue the ship for the original debt; if the notes are in part payment only, he may sue the ship for the balance owing. *Victoria Machinery Depot Company, Limited* v. *The Canada and The Triumph*, 18 B.C.R. 511.

F. Damage to Cargo.

Where owner in Province.] — The Admiralty Court has no jurisdiction over claims by owner, or consignee of goods, for damages done thereto by negligence or breach of duty by the owner, master, or crew of the ship, if it is shown that, at the time of the institution of the cause, any such owner or part owner is resident within the Province. *Rithet* v. *Ship Barbara Boscowitz and Porter*, 3 B.C.R. 445.

G. Limitation of Liability.

1. Registration.]—It is only ships which are registered as British ships at the time of the accident which are entitled to limit their liability under The Merchant Shipping Act, 1862 (25 and 26 Vict., c. 63). *Sewell* v. *British Columbia Towing, etc., Co.*, 9 S.C.R. 527.

2. Collision.]—The right to limit liability under sec. 12 of 31 Vict., c. 58 (Dom.), does not apply to cases other than those of collision. *Sewell* v. *British Columbia Towing, etc., Co.*, 9 S.C.R. 527.

H. Forfeiture.

1. Under Behring Sea Award Act.

1. Circumstances of suspicion.]—The ship on 27th July, 1895, was given a clearance for Behring Sea on a sealing expedition by the American customs officer at Copper Island, after making a manifest of things on board of her. She was boarded in the Behring Sea on 2nd September by the U.S.S. Rush, and searched for indications of an infraction of the Act, particularly regarding the prohibition against the use of fire arms in the taking of seals, under Article VI. of the schedule. In one seal skin, out of 336 then on board, a hole was discovered which might have been caused by a bullet or buck shot. There was a discrepancy both in number and kind between the ammunition stated in the manifest and that found upon the seizure, and there were fewer loaded shells. The captain of the ship was called as a witness and denied infraction of the Act:—Held, on the evidence, since it was not clear that the hole in the seal skin was caused by a shot, or, if it was, that the shot was from the ship; and since the discrepancy in regard to the ammunition was accounted for as being apparently attributable to error in the manifest, that the action should be dismissed, but as there was circumstances of suspicion warranting the seizure, without costs. In the Vice-Admiralty Court. *The E. B. Marvin*, 4 B.C.R. 330.

2. Penalty.]—The action was for the condemnation of the ship for a contravention of Article V. of the schedule to the Behring Sea Award Act (Imp.), 1894, in that her master did not enter accurately in the official log book the date and place of each fur seal fishing operation, and the number and sex of the seals captured each day, in accordance with the rules for entries in the official log, *i.e.*, "as soon as possible after the occurrence," etc., as required by sec. 281 of the Merchant Shipping Act, 1854 (Imp.), which is made applicable to

every vessel engaged in the fur seal fishing by sub-sec. 3 of sec. 1 of the Award Act, *supra*:—Held, (1) that the contravention charged was not one in which the ship could be said to be "employed" within the meaning of sec. 1, sub-sec. 2, of the Award Act; (2) that the penalty provided for infringement of sec. 281 of the Merchant Shipping Act, relating to the particular subject of keeping a log, alone applies to the offence, and is incompatible with the forfeiture provided by sub-sec. 2 of the Award Act for contraventions thereof in which the ship is employed. The words "as soon as possible" mean within a reasonable time, and, upon the evidence, it did not appear that there had been unreasonable delay. Action dismissed, with reference to assess damages caused by the arrest. *The Beatrice*, 4 B.C.R. 347.

3. Discrepancy in ammunition.]—The arms and ammunition of the ship were inspected by an officer of the U.S.S. Grant, and a record of all those produced was entered in the official log. The ship commenced sealing on 1st August, and on 10th August was boarded by an officer of the U.S.S. Rush, whose attention was called to four skins which had holes in them, apparently caused by gaffs. The officers of the Rush, after examination, concluded that these seals had been shot. The guns and ammunition were again examined and checked, and some small discrepancy was discovered, which was explained afterwards. The ship was ordered to Ounalaska and a further count of the ammunition made. While there two of the crew deserted, taking away one of the boats and some provisions. The captain denied any infraction of the Act:—Held, on the evidence, since it was not clear that the holes in the seal skins were caused by shots, or if they were that the shots were from the ship, and since the discrepancy in regard to the ammunition was accounted for as being apparently attributable to error in the counting, that the action should be dismissed with costs. A counterclaim was made against the Crown for damages for loss of the boat and provisions whilst at Ounalaska under seizure:—Held, that as the master was in command and had full control of the crew, he alone was responsible for the loss, and the counterclaim was dismissed. *The Aurora*, 5 B.C.R. 178.

4. Ignorance of position.]—In an action for condemnation of the ship for infraction of the Act and regulations, it was proved that she captured seals and was also seized within the prohibited zone. To an objection that Article I. of the Schedule of the Act only applies to British subjects, and that there was no proof that the master or any one on board was a British subject:—Held, that the proceedings being for forfeiture of the ship, the fact that she was proved to be a British ship brought her within the Act, and that proof of the master being a British subject would only be necessary to a charge against him for a personal offence under sec. 1. The fact that the master, by reason of insufficient observations, inaccurate chronometers, was unaware of the position of the ship at the time the seals were taken, held no defence, as to catch seals without knowledge where he was could not be considered as taking reasonable precautions. Owners employing ignorant and inefficient navigators cannot plead such ignorance as a defence. *The Viva*, 5 B.C.R. 174.

5. Master's responsibility.] — The ship having been seized, and evidence given that she had taken seals within the prohibited zone:—Held, a master takes upon himself the responsibility of his position, and if through error, want of care, or inability to ascertain his true position, he drifts within the prohibited zone and takes seals there, he thereby commits a breach of the regulations. No attempt to take seals should be made unless the master is certain of his position. *The Beatrice*, 5 B.C.R. 171.

6. Inference of culpability.] — In an action for condemnation of the ship, seized fourteen miles within the prohibited zone with freshly killed seals on board, evidence was given for the defence, that the ship had been carried into the prohibited waters by vis major, and that her master was ignorant of her true position by reason of being unable to obtain observations: — Held, insufficient to discharge the inference of culpable infraction of the Act, and that it was no excuse to say that the state of the weather was such that the master could not ascertain his position. *The Ainoko*, 5 B.C.R. 168.

7. Measure of damages.]—The measure of damages recoverable for a wrongful seizure under colour of an infringement of the Behring Sea Award Act, 1894 (Imp.), is the whole injury caused by such seizure. *The Beatrice*, 5 B.C.R. 110.

8. Onus of proof.]—Defendant schooner was on the 29th of May boarded by an American revenue cutter in pursuance of

the Behring Sea Award Act, 1894, within the prohibited area defined in the Act. She then had among the seal skins on board six skins of freshly killed seals, which the master contended had been killed before the close season commenced (1st of May), and outside the prohibited zone, viz.: on the 27th of April:—Held, on the evidence that, the skins were taken during the close season. Status of an officer "duly commissioned and instructed" by the President of the United States of America to seize a British vessel pursuant to the Behring Sea Award Act, 1894, considered. Remarks on the effect of said Act since the field of pelagic sealing in Behring Sea has been entered by subjects of a power not a party to the agreement between Great Britain and the United States of America under the statute. *The King* v. *The Carlotta G. Cox*, 13 B.C.R. 460.

2. Under Customs and Fisheries Protection Act.

1. Continuous pursuit.]—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. *The King* v. *The Ship North*, 11 B.C.R. 473; 37 S.C.R. 385.

2. Continuous pursuit.]—The defendant ship, a foreign fishing vessel, was seized by a Canadian fisheries protection officer, because of an alleged infraction of sec. 10 of the Customs and Fisheries Protection Act. The ship was first sighted within the three-mile limit, and being suspected of poaching, was, after a "hot pursuit," seized about five miles off shore. There was evidence of the dories and skates of gear having the appearance of being just hauled out of the water, also of live halibut being found in the hold. In an action for forfeiture of the vessel after seizure:—Held, that the ship had, by entry within the three-mile limit for a purpose not permitted, committed a breach of clause (*b*) of sec. 10 of the Act, and was liable to seizure and forfeiture, notwithstanding that she was actually seized outside of the three-mile limit. Held, further, that the Fisheries and Boundaries Convention of 1818, between Great Britain and the United States, respecting fisheries, etc., does not apply to the coast of British Columbia as far as fisheries are concerned. Held, further, that under Article 1 of the Convention of Commerce and Navigation, 1815, between Great Britain and the United States no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively." Sec. 186 of the Canada Customs Act would, therefore, apply, which makes it unlawful for a vessel to enter any place other than a port of entry, unless from stress of weather or other unavoidable cause; as there was no cause justifying the entry of the vessel into the "place" or natural harbour on Cox Island, it was liable to seizure. *The King* v. *The Valiant*, 19 B.C.R. 521.

3. Burden of proof.]—In an action brought in the Supreme Court of British Columbia by His Majesty, on the information of the Attorney-General for Canada, for the forfeiture of the Edrie for contravention of the Customs and Fisheries Protection Act, the statement of claim alleged that the Edrie, being a foreign vessel, was, on the 21st of February, 1911, found fishing within three marine miles of the coast of Canada, namely, within three marine miles of the shore of Cox Island, British Columbia, and that such ship was legally seized by an officer authorized by the Customs and Fisheries Protection Act, and claimed the forfeiture of the Edrie. The statement of defence denied those facts and

alleged that the Edrie was lawfully on the high seas, and was illegally seized by the Canadian cruiser Rainbow. Sec. 10 of the Customs and Fisheries Protection Act, R.S.C. 1906, c. 47, enacts that: "Every ship, vessel or boat which is foreign, or not navigated according to the laws of the United Kingdom or of Canada, which, (a) has been found fishing or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, not included within the limits specified and described in the first article of the aforesaid convention, or in or upon the inland waters of Canada, without a licence then in force granted under this Act; or (b) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force; shall, together with the tackle, rigging, apparel, furniture, stores and cargo thereof, be forfeited"; and sec. 21: "The burden of proving the illegality of any seizure, made for alleged violation of any of the provisions of this Act, or that the officer or person seizing was not by this Act authorized to seize, shall lie upon the owner or claimant." The judgment on the trial determined that the defendant did not discharge the burden of proof resting upon defendant, and adjudged that the Edrie be condemned as forfeited to His Majesty and be sold by public auction:—Held, on appeal, that the trial judge was right. *The King* v. *Chlopeck Fish Company*, 17 B.C.R. 50.

4. Fishing within territorial waters.]—Where the evidence as to the place of the seizure of a vessel for unlawful fishing within Canadian waters is unsatisfactory, and leaves it doubtful whether or not the vessel seized was, at the time of seizure, within the three-mile limit of the Canadian coast, it would be unsafe and unjust to condemn her. *The King* v. *Carlson*, 49 S.C.R. 180.

3. Seal Fisheries (North Pacific) Acts.

1. Evidence—Statement of officer.]—The Court will take judicial cognizance, without further proof, of an Imperial Order-in-Council, upon production of a copy purporting to have been printed by the Queen's Printer in London. The statement of the captain or officer in command of a warship making seizure under sub-sec. 5 of sec. 1 of the Act, purporting to be signed by such officer, is admissible in evidence upon proceedings for condemnation without proof of signature. The Minnie was arrested 22 miles within the 30-mile prohibited zone, fully manned and equipped for taking seals, and with one seal skin on board:—Held, that the evidence for the defence set out in the judgment was insufficient to satisfy the onus cast on the ship by sec. 1, sub-sec. 5 (A) to show that she was not used or employed in contravention of the Act. *The Minnie*, 3 B.C.R. 161.

2. Onus of proof.]—On 30th August, 1891, the ship Oscar and Hattie, a fully equipped sealer, was seized in Gotzleb Harbour in Behring Sea, while taking in a supply of water:—Held, affirming the judgment of the Court below, that when a British ship is found in the prohibited waters of the Behring Sea, the burden of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery (Behring's Sea) Act, 1891, 54 & 55 Vict. (Imp.), c. 19, sec. 1, sub-sec. 5:—Held, also, reversing the judgment of the Court below, that there was positive and clear evidence that the Oscar and Hattie was not used or employed at the time of her seizure in contravention of 54 & 55 Vict., c. 19, sec. 1, sub-sec. 5. *The Ship Oscar and Hattie* v. *Her Majesty the Queen*, 23 S.C.R. 396.

3. Onus of proof.]—The ship having been arrested within the prohibited zone with seals and implements for taking them on board, upon the trial of an action for her condemnation for infraction of the Act, the captain was not called as a witness by the defence, and the only excuse for not calling him was that he had gone fishing. The account and explanation of the conduct of the ship given in evidence by the mate and some of the crew was inconsistent with reasonable inferences against the ship pointed to by entries in the log:—Held, following The Minnie, 3 B.C.R. 161; 4 Exch. (Can.) 151, that under the Act the clearest evidence of bona fides is required to exonerate the master of a ship found in prohibited waters with skins and implements for taking them on board, from the imputation of an infringement of the provisions of the Act. That, on the evidence, the onus was not discharged, and the Court was not satisfied that the ship had not attempted to take seals in prohibited waters, and that she must be condemned:—Held, also, that as no seals appeared to

have been actually caught or killed in prohibited waters, it was a proper case for the exercise of the discretion to release the ship on payment of a fine in lieu of forfeiture. In the Vice-Admiralty Court. *The Shelby,* 4 B.C.R. 342.

4. Stress of weather.] — A sealing schooner, equipped for sealing and with skins on board, was driven into the prohibited waters of the Behring Sea by stress of weather. A current, of which the master was ignorant, had falsified his reckoning, so that he was unaware of his position. The schooner was seized by a Russian war ship for infraction of the Act. Upon action by the Crown to condemn the schooner:—Held, that the presence of the schooner at the point in question was sufficiently accounted for to rebut the statutory presumption that she had infringed the Act. *The Ainoka,* 3 B.C.R. 121.

II. PRACTICE AND PROCEDURE.

A. Affidavit to Lead Warrant.

1. Supplementary affidavit.]—Upon an application to vacate warrants issued against a ship under arrest in an action in rem for necessaries, although it appeared that on the facts disclosed in the affidavits filed before the registrar, the Court would not have justification to issue the warrant for arrest, the plaintiffs were allowed to file supplementary affidavits to show that there was jurisdiction to issue the warrants and that the case was one in which the discretion of the registrar could be properly exercised. *Victoria Machinery Depot Company, Limited* v. *The Canada and The Triumph,* 18 B.C.R. 511.

2. Registrar's discretion.]—Where the registrar has thought fit, under rule 39, to dispense with some particulars in an affidavit to lead to warrant, the Court will not review the exercise of his discretion. *Letson* v. *The Tuladi,* 17 B.C.R. 170.

B. Set-off and Counterclaim.

1. Counterclaim.]—Plaintiffs built a ship in Paisley, Scotland, for a company in Vancouver, B.C. On her way out certain repairs were made, amounting to £3,638. The first instalment of the purchase price not being paid, action was commenced by seizure of the ship. Defendants counterclaimed for the above-mentioned sum, the expenditure of which they alleged was rendered necessary by the defective work and material in her construction and equipment. On a motion to strike out this counterclaim as not being a subject of admiralty jurisdiction:—Held, that, the counterclaim not being one made by the builders of the ship, and not being made against the ship, the motion to strike it out must be allowed. *Bow, McLachlan & Co.* v. *The "Camosun,"* 12 B.C.R. 283.

2. Set-off.] — 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. (See 1909 A.C. 597: Reporter's note.)

C. Preliminary Act.

Amendment.]—It is a settled rule not to allow an application for an amendment of the preliminary act at the instance of the party who filed it. *Pallen* v. *The Iroquois,* 17 B.C.R. 156.

D. Judgment.

Default of appearance.]—In an action in rem for seaman's wages wherein no appearance has been entered, and the ship is in the marshal's hands for sale in another cause, all preliminary proceedings may be waived and judgment entered forthwith. *Nosler* v. *The Aurora,* 18 B.C.R. 449.

E. Custody and Sale.

1. Seizure under fi. fa. of property in hands of receiver.] — Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action in rem in the Exchequer Court to enforce a mortgage of the ship, such property cannot be seized by a sheriff under writ of fieri facias issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no

jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

2. Marshal's sale.]—Where the purchaser of a ship at a marshal's sale refuses to complete his purchase, the ship may be put up for sale again without an order for re-sale, and the defaulting purchaser will be ordered by the Court to pay the deficiency, if any, on such re-sale, and the costs caused by his default. Judicial sales are not within the Statute of Frauds. In the Exchequer Court: In Admiralty. *Hackett* v. *The Ship Blakeley; Ex parte Jones*, 9 B.C.R. 430.

F. References.

Inspection.]—On a reference to the registrar to ascertain the damages caused by a collision he has power of his own motion to inspect the ships and cargoes concerned. *Stockholm* v. *The Spray*, 14 B.C.R. 191.

G. Execution.

Re-arrest.]—A warrant will be issued for the re-arrest of a ship, released on bail, to answer the amount of the claim and costs for which judgment has been recovered and remains unsatisfied. *Momsen* v. *The Aurora (No. 2)*, 18 B.C.R. 355.

H. Rehearing.

Fresh evidence.]—The master of a fishing boat entered a claim against the owners for wages, and the owners counterclaimed against him for the value of missing fishing gear. Judgment was reserved at the close of the hearing, and before delivery of judgment the master applied to re-open the case in order to give further evidence as to the missing gear:—Held, that such an application should only be granted in a very special case, and in circumstances which would not put the other party in an unfair position. The attention of the master was drawn to the point in the pleadings, on the evidence at the trial and during argument. The plaintiff cannot claim that he was taken by surprise in any way, and the application should therefore be refused. *Brown* v. *The "Alliance No. 2,"* 19 B.C.R. 529.

I. Assessors.

Time of appointment.]—Assessors will be appointed in salvage cases where necessary. The proper time to apply for assessors is on the application to fix date of trial. *Vermont Steamship Co.* v. *The Abbey Palmer (No. 1)*, 10 B.C.R. 380.

J. Security for Damages.

Stay of proceedings pending appeal.]—An application by defendant to pay money out of Court, which was 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 partially, 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 Steamship Co.* v. *The Abby Palmer (No. 3)*, 10 B.C.R. 383.

K. Costs and Fees.

1. Both to blame.]—Where both vessels are to blame, the costs of the action are in the discretion of the Court. *Lee* v. *The Olympian*, 2 B.C.R. 84.

2. Fiat.]—An application for increased counsel fees will be refused; rules 222 and 226 give the Court power to reduce fees but not to increase them. *Hewitt* v. *The "Skeena,"* 20 B.C.R. 481.

3. Possession fees.] — Where in an Admiralty action a marshal is in possession of a ship simultaneously under warrants issued in different actions, more than one set of possession fees will not be allowed. *Simback* v. *The Saga*, 6 B.C.R. 522.

4. Mileage.]—No greater sum than ten cents a mile can in any circumstances be allowed for executing a warrant in Admiralty for the arrest of a ship. *Momsen* v. *The Aurora*, 20 B.C.R. 210.

5. Misleading defence.]—Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy, and prolong the trial, the Court will make no order as to costs. *McArthur* v. *The Johnson*, 18 B.C.R. 94.

L. Time.

Court guided by civic time.]—In the service of process, as well as in its sittings

and in the public hours of its registry, the Court will be guided by the civic time in use in the town where the Court sits, unless it is shown that such time is in fact incorrect. *Vermont Steamship Co.* v. *The Abby Palmer* (*No. 2*), 10 B.C.R. 381.

III. LIMITATION OF ACTIONS.

Municipal Act.]—The statutory provision limiting to one year the bringing of actions against a municipality does not apply to actions in rem in the Admiralty Court. *Kennedy* v. *The Surrey*, 11 B.C.R. 499.

COLLISIONS—*See* COLLISION.

CONTRACTS OF CARRIAGE—*See* CARRIERS.

SALVAGE—*See* SALVAGE.

SEAMEN—*See* SHIPPING.

TUG AND TOW—*See* TOWAGE.

ADMISSIONS.

See EVIDENCE.

ADULTERY.

See DIVORCE.

ADVERSE POSSESSION.

See POSSESSION.

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See EVIDENCE.

AFFIRMATION.

See EVIDENCE.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

OF GUARANTEE—*See* GUARANTEE.

OF LEASE—*See* LANDLORD AND TENANT.

FOR SALE OF GOODS—*See* SALE OF GOODS.

FOR SALE OF LAND—*See* VENDOR AND PURCHASER.

ALIENS.

I. NATURALIZATION, 22.
II. ALIEN LABOUR ACT, 22.
III. DISABILITIES AND CAPACITIES, 22.
A. In general, 22.
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I. NATURALIZATION.

Fitness of Applicant.]—By the amendments of 1903 to the Naturalization Act, the scope of the judge's duty, as limited by the decision in *In re Webster* (1870), 7 C.L.J. 39, is changed, and the judge, upon an opposition being filed, or an objection taken in open Court to the granting of the certificate, has power to take any necessary measures to satisfy himself as to the truth of the facts stated by the applicant, and of his fitness to become a British subject. *In re Saddjiro Malsufuro*, 13 B.C.R. 417.

II. ALIEN LABOUR ACT.

Alien Labour Act—Advertisement.]—The Company published in a Seattle newspaper this advertisement: "Wanted. First-class machinists. Apply Vancouver Engineering Works, Limited, Vancouver, B.C.":—Held, the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act, as amended by 1 Edw. VII., c. 13, sec. 4. *Downie* v. *Vancouver Engineering Works, Limited*, 10 B.C.R. 367.

III. DISABILITIES AND CAPACITIES.

A. In General.

Liquor Licence.]—A Japanese is entitled to a liquor licence under the Vancouver Incorporation Act, 1900. *In re Kanamura*, 10 B.C.R. 354.

B. Actions by or Against.

1. Foreign Contract.]—The Supreme Court of British Columbia has jurisdiction

to entertain an action for a breach in British Columbia of a contract between aliens, made and to be performed abroad, and to apply all the remedies open to suitors in this Court. *Baxter* v. *Jacobs*, 1 B.C.R., Pt. II., 373.

2. Alien enemy.]—An alien enemy, resident in Canada, may maintain an action for personal injuries sustained while following his avocation by virtue of the orders in council of August 7th and 15th, 1914. *Topay* v. *Crow's Nest Pass Coal Co.*, 20 B.C.R. 235.

3. Arrest.]—An alien passing through the Province may be arrested on a cause of action which has arisen in a foreign country. *Macaulay* v. *O'Brien*, 5 B.C.R. 510.

IMMIGRANTS—*See* IMMIGRATION.

LEGISLATION WITH REGARD TO—*See* CONSTITUTIONAL LAW.

PROHIBITION OF CHINESE LABOUR—*See* CONSTITUTIONAL LAW.

RIGHT OF VOTING—*See* CONSTITUTIONAL LAW.

WORKMEN'S COMPENSATION — *See* WORKMEN'S COMPENSATION ACT.

ALIENATION.

1. Island Railway Act.]—By the Stat. B.C., 47 Vict., c. 14, sec. 22, certain lands acquired by the company for the construction of the railway, "shall not be subject to taxation unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold or alienated." In January, 1889, the Esquimalt & Nanaimo Railway Company, by agreement, gave to the appellants the right to enter and select 50,000 acres of the said lands, the appellants agreeing to pay $5 per acre in certain instalments, with interest, etc., the lands to be conveyed to the appellants as soon as the purchase money was fully paid, etc. The appellants had entered and surveyed the lands but never occupied the same, nor had they fully paid the purchase money. The Provincial Government assessed the lands for the purpose of taxation, and the Court of Revision confirmed the assessment:—Held, by the Full Court on appeal: That the Esquimalt and Nanaimo Railway Company had not "leased," "sold" or "alienated" the lands within the meaning of the Act, and that the same were not liable to taxation. *Victoria Lumber Company* v. *The Queen*, 3 B.C.R. 16.

2. Island Railway Act.]—On the same state of facts as above, it was held that the transaction was an alienation within the meaning of the Act. *The Queen* v. *Victoria Lumber Co.*, 5 B.C.R. 288.

ALIMONY.

See DIVORCE

ALTERATION OF INSTRUMENTS.

See BILLS AND NOTES.

AMENDMENT.

See PLEADINGS.

ANCIENT LIGHTS.

See PRESCRIPTION.

ANIMALS.

Dog—Mischievous Animals Act.]—In an action for damages for injuries caused by the bite of a dog, sec. 30 of the Mischievous Animals Act (C.S. 1888, c. 5), does not preclude the defendant from showing the peaceful character of the dog, or his ignorance of its vicious disposition, but only raises a rebuttable presumption against him. *Nevill* v. *Laing*, 2 B.C.R. 100.

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I. Jurisdiction.

A. Court of Appeal, of.

1. Previous decision.]—The Court of Appeal is not bound by its own previous decisions. *Noble Five, etc., Co.* v. *Last Chance, etc., Co.,* 9 B.C.R. 516; *In re Rahim,* 17 B.C.R. 279; *Gentile* v. *British Columbia Electric Railway Company,* 18 B.C.R. 309.

2. No jurisdiction to hear motion for judgment.]—The Full Court is an Appellate Court, and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial judge. *McKelvey* v. *Le Roi Mining Company, Limited,* 8 B.C.R. 268.

3. Jurisdiction of, to hear application which may be made before single judge.]—The Full Court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge. *Rex* v. *Tanghe,* 10 B.C.R. 297.

4. No jurisidiction as an Appellate Court in matters of divorce.]—In construing statutes the legislature must be presumed to contemplate dealing only with subjects within its legislative control, and as provincial legislatures have no power to confer divorce jurisdiction upon any Court, the language of the Supreme Court Act, C.S.B.C. (1888), c. 25, sec. 67, providing that "an appeal shall lie to the Full Court from every judgment, decree or order made by a judge of the Supreme Court, whether final or interlocutory, and whether such judgment, decree or order shall be in respect of a matter specified in the Rules of Court or not," cannot be construed to confer upon the Full Court of British Columbia any appellate jurisdiction in divorce matters. The Imperial Act 20 & 21 Vict. c. 25, sec. 55, giving an appeal to the Full (Divorce) Court from all decisions of a single judge thereof, is inapplicable to the Full Court of British Columbia. *Scott* v. *Scott,* 4 B.C.R. 316.

5. Divorce.]—The Full Court of the Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. *Brown* v. *Brown,* 14 B.C.R. 142.

6. Habeas corpus.] — The Court of Appeal has no jurisdiction to hear a motion for a writ of habeas corpus in the first instance. *Rex* v. *Rahmat Ali,* 15 B.C.R. 65.

7. Habeas corpus.] — The Court of Appeal has no jurisdiction to entertain an

appeal in habeas corpus proceedings. *In re Tiderington*, 17 B.C.R. 81.

8. Habeas corpus.]—No appeal lies to the Court of Appeal from an order discharging an accused person on a writ of habeas corpus. *In re Rahim*, 17 B.C.R. 276.

9. Estreatment of bail.]—No appeal lies to the Court of Appeal from an order made in the County Court Judge's Criminal Court ordering the forfeiture of bail for the non-appearance of an accused person in an extradition proceeding. *Rex* v. *Harvie*, 18 B.C.R. 5.

10. Workmen's Compensation Act.]—Where an action is brought under the Employers' Liability Act or at common law or both, and the trial judge dismisses the action, and also finds that the plaintiff is debarred from compensation under the Workmen's Compensation Act by reason of his serious misconduct or wilful neglect, an appeal lies from the latter finding. *Granick* v. *British Columbia Sugar Refining Co.*, 15 B.C.R. 198; 44 S.C.R. 105.

11. Workmen's Compensation Act.]—The Court of Appeal has no power to assess compensation under the Workmen's Compensation Act on the dismissal of an action. *McCormick* v. *Kelliher Lumber Co.*, 17 B.C.R. 422.

12. Extension of time for compliance with order.]—The Court of Appeal has power to, and will, in a proper case, extend the time fixed by an order of the lower Court for the payment of costs or in fault for the dismissal of the action. *Dunlop* v. *Haney*, 6 B.C.R. 320.

13. In regard to appeals to the Supreme Court of Canada.]—The Court cannot make an order in the action controlling proceedings after the perfecting of an appeal to the Supreme Court of Canada. *Foley* v. *Webster*, 2 B.C.R. 251.

B. Supreme Court, of.

1. Ultra vires order of local judge.]—Appeal to Supreme Court judge is the proper proceeding by which to set aside an ultra vires order of a local judge. *Tate* v. *Hennessey*, 7 B.C.R. 262.

2. From assessment—Municipal Clauses Act, sec. 135.]—An appeal lies from a decision of a Court of Revision in relation to the assessment of a private street to a judge of the Supreme Court. *In re Smith*, 6 B.C.R. 154.

3. Appeal from County Courts.]—Under the County Courts Amendment Act, 1892, an appeal, where the amount involved is under $250, is limited to questions of law, and where no question of law is distinctly raised before or referred to by the County Court judge, no such question is open on appeal. *Confederated Life Assurance Co.* v. *McInnes*, 4 B.C.R. 126.

4. Appeal from County Court.]—Where the amount involved is under $250, the Court of Appeal has no power to weigh the evidence, but can only say whether there is evidence to sustain the verdict. *Mason* v. *Oliver*, 2 B.C.R. 328.

C. County Courts, of.

From Justices.]—An appeal lies to the County Court from a conviction by two Justices. *Rex* v. *Wirth*, 5 B.C.R. 114.

II. WHAT APPEALABLE.

A. In General.

1. Order made ultra vires.]—An appeal lies from an order made without jurisdiction. *Brigman* v. *McKenzie*, 6 B.C.R. 56.

2. Order made ultra vires.]—An order made ultra vires should be moved against, not appealed from. *In re Kootenay Brewery Co.*, 7 B.C.R. 131.

3. From an ex parte order.]—The Divisional Court will not entertain an appeal from an ex parte order made by a judge. The proper practice is in the first instance to move before the judge making such an order to rescind same. *Hudson's Bay Company* v. *Hazlett*, 4 B.C.R. 351.

4. From an ex parte order refusing leave to issue concurrent writs.]—There is no appeal to the Divisional Court from the refusal of an ex parte application for leave to issue concurrent writs of summons against defendants, who are citizens and residents of the United States, as such application is not an interlocutory matter within sec. 60, Supreme Court Act. Semble, such application is not a proceeding in an action. *Tai Yun Co.* v. *Blum*, 2 B.C.R. 348.

5. Ex parte order.]—Appeal is not the proper proceeding by which to set aside an ex parte order giving leave to serve notice of a writ out of the jurisdiction. *Garesche, Green & Co.* v. *Holladay*, 1 B.C.R., Pt. II., 83.

6. Chamber order, from.]—An order made in Chambers upon a summons duly sworn, no one appearing contra, is not an ex parte order, and an appeal will lie from

it to the Full Court. *Biggar* v. *Corporation of City of Victoria*, 6 B.C.R. 130.

7. Benefit taken under order appealed from.]—Defendant, having been arrested under a ca. re., applied to a judge for his discharge on the ground that he had not intended to leave the jurisdiction. The judge made the order, imposing as a term that the defendant should bring no action in respect of the arrest. The defendant served the order on the sheriff and was discharged thereunder:—Held, that the defendant, having taken a benefit under the order, could not appeal from the term restraining him from bringing an action in respect of the arrest. *Spencer* v. *Cowan*, 5 B.C.R. 151.

8. Appeal from Benchers of Law Society.]—A barrister and solicitor, who has been disbarred and struck off the roll by the Benchers, is not obliged to apply to the Benchers for reinstatement before appealing to the judges of the Supreme Court as visitors. *In re Blake*, 6 B.C.R. 276.

9. Imprisonment for debt, appeal from order for.]—An appeal lies direct from an order committing a debtor to gaol, and no preliminary motion to the judge for discharge is necessary. *Bullock* v. *Collins*, 8 B.C.R. 23.

10. Assessment.]—An appeal lay from the decision of the Court of Revision under the Municipal Clauses Act, R.S.B.C. 1897, c. 144, sec. 135, to a judge of the Supreme Court. *In re Smith*, 6 B.C.R. 154.

11. Special Commissioner sitting as County Judge.]—The special commissioner appointed under the Bennett-Atlin Commission Act, 1899, cannot confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court judge. *Johnson* v. *Miller*, 7 B.C.R. 46.

12. Order not drawn up.]—It is within the discretion of the Court to vacate an order which has not been drawn up. *Kimpton* v. *McKay*, 4 B.C.R. 196.

13. Supreme Court Act, sec. 67—Order under the Mineral Act, 1891, "In the matter of mineral claim," and not in any pending cause in Court—Appealability.]—The order of a judge extending the 30 days provided by the Mineral Act (1891) Amendment Act, 1892, within which to commence proceedings in a Court of competent jurisdiction to enforce adverse claim, is appealable to the Divisional Court under sec. 67 Supreme Court Act, though not made in any pending cause. *Re The Maple Leaf and Lanark Mineral Claims*, 2 B.C.R. 323.

14. Jurisdiction in matters of divorce.]—In construing statutes the legislature must be presumed to contemplate dealing only with subjects within its legislative control, and as provincial legislatures have no power to confer divorce jurisdiction upon any Court, the language of the Supreme Court Act, C.S.B.C. (1888), c. 25, sec. 67, providing that "an appeal shall lie to the Full Court from every judgment, decree or order made by a judge of the Supreme Court, whether final or interlocutory, and whether such judgment, decree or order shall be in respect of a matter specified in the Rules of Court or not," cannot be construed to confer upon the Full Court of British Columbia any appellate jurisdiction in divorce matters. The Imperial Act, 20 & 21 Vic. c. 85, sec. 55, giving an appeal to the Full (Divorce) Court from all decisions of a single judge thereof, is inapplicable to the Full Court of British Columbia. *Scott* v. *Scott*, 4 B.C.R. 316.

B. Finality of Decision.

1. Compromise.]—Plaintiff counsel, on a motion for judgment after trial, was given the option of having an issue ordered as to a point on which evidence was not sufficiently directed or of taking judgment against one defendant with costs and dismissing the action against the other defendant without costs, and elected to take the latter course:—Held, that such judgment was in effect a compromise and therefore unappealable. *Sun Life* v. *Elliott*, 7 B.C.R. 189.

2. Judge by consent trying issue summarily.]—Where the interested parties in garnishee proceedings agree that a County judge may decide the matter in a summary way, he is in effect an arbitrator, and no appeal lies from his decision. *Harris* v. *Harris*, 8 B.C.R. 307.

3. Assessment.]—No appeal lies from the decision of a Supreme Court judge reviewing the assessment of a Court of Revision. *In re Vancouver Incorporation Act*, 1900, *and B. T. Rogers*, 9 B.C.R. 373.

4. Summary Convictions Act — From County Court sitting as Appellate Court.]—No appeal lies from the County Court sitting as an Appellate Court from the decision of a magistrate under the Provincial Summary Convictions Act. *Re Lambert*, 7 B.C.R. 396.

5. Summary conviction — Appeal to County Court.]—The decision of the County Court on appeal from a summary conviction is final and conclusive, and a Supreme Court judge has no jurisdiction to interfere by habeas corpus. *Rex* v. *Beamish,* 8 B.C.R. 171.

6. Quashing conviction.]—No appeal lies to the Full Court from the decision of a single judge quashing a conviction under the Criminal Code. *Rex* v. *Carroll,* 14 B.C.R. 116.

7. Small Debts Court.]—An appeal from the Small Debts Court either to a judge of the Supreme Court or to the County Court is final. *Larsen* v. *Coryell,* 11 B.C.R. 22.

8. Criminal procedure—53 Vict. (Can.) c. 37, sec. 23.]—No appeal lies to the Divisional Court from an order appointing commissioners to take evidence under sec. 23, sub-sec. 2, Criminal Law Amendment Act, 1890, supra. *Regina* v. *Johnson,* 2 B.C.R. 87.

9. Writ for service ex jurisdiction, setting aside.]—No appeal lies to the Divisional Court from an order setting aside an order giving leave to issue a writ of summons for service out of the jurisdiction. *Fuller* v. *Yerxa,* 1 B.C.R., Pt. II., 330.

10. Interlocutory matter — Leave to issue concurrent writs.]—There is no appeal to the Divisional Court from the refusal of an ex parte application for leave to issue concurrent writs of summons against defendants, who are citizens and residents of the United States, as such application is not an interlocutory matter within sec. 60, Supreme Court Act. Semble, such application is not a proceeding in an action. *Tai Yun Co.* v. *Blum,* 2 B.C.R. 348.

III. Formal Conditions of Appeal.

A. Judgments and Orders.

1. Final and Interlocutory.

1. Final order—Demurrer.]—An order allowing a demurrer to a pleading is a final order for the purpose of an appeal. *The Attorney-General of British Columbia* v. *The Canadian Pacific Railway Co.,* 1 B.C.R., Pt. II., 330.

2. Point of law.]—An order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial is not a final order. *Robert Ward & Co.* v. *Clark,* 4 B.C.R. 71.

3. Point of law.]—On an appeal to the Divisional Court from a judgment dismissing the action upon an argument upon a point of law on the pleading as to the sufficiency of a plea in bar to the whole action:—Held, that the judgment appealed from was not a final judgment, as it would not have been so had the point been decided the other way, and that the Divisional Court had jurisdiction. *Robert Ward & Co.* v. *Clark,* 4 B.C.R. 71.

4. Point of law.]—The order deciding a point of law raised by the pleadings, and the order dismissing the action consequent on the decision of the point of law are both interlocutory. *Edison General Electric Co.* v. *Edmonds,* 4 B.C.R. 354.

5. Final.]—An order setting aside an order for leave to issue a writ for service out of the jurisdiction is a final order. *Fuller* v. *Yerxa,* 1 B.C.R., Pt. II., 330.

6. Liberty to apply.] — A judgment which reserves liberty to apply is not a final judgment. *Wood* v. *Gold,* 3 B.C.R. 281.

7. Order setting aside award and giving leave to apply for further directions.]—Held, overruling an objection to the jurisdiction of the Divisional Court to entertain an appeal from an order setting aside an award, which gave the parties liberty to apply for further directions, that the same was not a final but an interlocutory order. *Wood* v. *Gold,* 3 B.C.R. 281.

8. Reference.]—In an action for damages for trespass, the trial judge found damages, and referred the question to the registrar to take enquiries and assess the amount. The judgment was given on the 30th of March, and the report of the registrar some time later. Notice of appeal was given on the 3rd of July:—Held, that the judgment was final when referred to the registrar, and that the act of inserting the amount of damages was not necessary to complete the judgment. *Laursen* v. *McKinnon,* 18 B.C.R 10.

9. Companies—Liquidation.]—A winding up order is a final order. *In re The Florida Mining Co., Ltd.,* 8 B.C.R. 388.

2. Drawing Up, Entering, Perfecting, etc.

1. Entry of judgment.]—The Court has a discretion to refuse to allow the unsuccessful party to enter up judgment for the purpose of appealing. *Lang* v. *Corporation of Victoria,* 6 B.C.R. 104.

2. Order to be appealed must be issued.]—In order to maintain an appeal from an order, it must have been drawn up

and issued. If the party upon whose summons the order is made refuses to draw it up, the other party may obtain a similar order upon summons on his own account. If the order made is not within the terms of the summons, then the party in whose favour it is made may draw it up. *McColl* v. *Leamy*, 3 B.C.R. 360.

3. Order, when appealable.]—Held, by the Full Court:—A judgment is appealable from the moment that it is pronounced, and an objection to the hearing of an appeal, otherwise regular, that the judgment appealed from had not been entered, overruled. *Lang* v. *Victoria*, 6 B.C.R. 117.

4. Drawing up.]—It is incumbent on a successful party to take care that any order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous record or other competent document, should be given to the party aggrieved. *Belcher* v. *McDonald*, 9 B.C.R. 377.

5. Order appealed from not disclosing irregularities complained of.]—Where an application to rescind an order for a capias on the ground of irergularities in the issue of the writ is dismissed, if the order dismissing is not drawn up so as to disclose the irregularities complained of they will not be considered in appeal. *Tiet jen* v. *Revesbeck*, 1 B.C.R., Pt. II., 365.

B. Time for Appealing.

1. When right arises.]—A judgment may be appealed the moment that it is pronounced, and it is no objection to the hearing of an appeal that the judgment appealed from has not been entered. *Lang* v. *City of Victoria*, 6 B.C.R. 117.

2. Judgment partly final and partly interlocutory.]—In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for that purpose and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action. *Belcher* v. *McDonald*, 9 B.C.R. 377.

3. Time a quo.]—The time for bringing an appeal from a judgment after a trial runs from the date of signing, entering, or perfecting thereof, and not from the date of pronouncement. *Short* v. *Fed. Brand, etc., Co.*, 7 B.C.R. 35.

4. Time a quo.]—The time for bringing an appeal from a judgment after trial in the County Court runs from the date of delivery of the judgment, and not from the date of taking out the final order. *Kirkland* v. *Brown*, 13 B.C.R. 350.

5. From which.]—The time for appealing from a final judgment commences to run when the decree or order for judgment is put into an intelligible shape, so that the parties may clearly understand what they have to appeal from, and not from the entry of the formal judgment upon the order of the Court. *Koksilah Quarry Co.* v. *Reginam*, 5 B.C.R. 600.

6. Time within which.]—A final judgment was pronounced and entered on the 27th of July. Notice of appeal was given on the 24th of October for the January sittings of the Full Court, passing over the November sittings of the Full Court:—Held, that the notice of appeal was given in proper time. *Traders National Bank* v. *Ingram*, 10 B.C.R. 442.

7. Garnishee order.]—An order deciding a garnishee issue was dated the 26th of March, settled by the judge on the 15th of July and entered on the 25th of July. Notice of appeal was given on the 9th of July:—Held, that the appeal was brought in time. *Manley* v. *Mackintosh*, 10 B.C.R. 84.

8. Supreme Court Act Amendment Act, 1899.]—The limitation of time for appealing against interlocutory orders does not apply to an order made before the Act came into force. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 480.

9. Taxation.]—In appeals under the Assessment Act (C.S.B.C. 1888, c. 111, s. 3), the appeal must be brought within the time limited for appealing from final judgments in matters other than actions. *In re Yorkshire Guarantee and Securities Corporation*, 4 B.C.R. 258.

10. Final judgment.]—Section 16 of the Supreme Court Act Amendment Act, 1896, exclusively governs as to the time for bringing an appeal from a final judgment. *Reinhard* v. *McClusky*, 5 B.C.R. 226.

11. Fourteen clear days.]—Under sec. 79 of the Supreme Court Act (R.S.B.C. 1897, c. 56), the provision as to the fourteen clear days applies to the service and not to the filing of the notice of appeal. *Archibald* v. *McDonald*, 7 B.C.R. 125.

C. Extension of Time for Appeal.

1. Jurisdiction.] — Under the Appeal Court Act (R.S.B.C. 1911, c. 51), as it stood before the amendment of 1913, the Court of Appeal had no power to extend the time for appealing after the statutory time had expired. *Laursen* v. *McKinnon*, 18 B.C.R. 10.

2. Jurisdiction of Supreme Court.]—The Supreme Court, or a judge thereof, has the power, under Order LXIV., r. 7, of the Supreme Court Rules, to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed. *Laursen* v. *McKinnon* (*No. 2*), 18 B.C.R. 677.

3. Grounds for relief.]—On an application under sec. 4 of the Court of Appeal Act, 1913, to extend the time for giving notice of appeal owing to a slip of the solicitor in not giving notice until after the expiration of the time allowed under marginal rule 879:—Held, that there was not sufficient ground for granting special leave under said section. *McEwan* v. *Hesson*, 20 B.C.R. 94.

4. Grounds of relief.]—Where there are no special equitable circumstances calling for the intervention of the Court, the time for appealing from an order will not at the hearing be extended to cure an objection that the appeal is out of time. The appearance of counsel to take such an objection is not an appearance upon the appeal so as to waive the objection. *Edison General Electric Company* v. *Westminster and Vancouver Tramway Company, the Bank of British Columbia*, 5 B.C.R. 34.

5. Grounds of relief.]—At the trial judgment was given for the suppliants, and the order for judgment was duly entered. Upon application by the Crown to extend the time of appealing from the judgment on the ground that the solicitor misapprehended the effect of sec. 16 of the Supreme Court Amendment Act, 1896, Drake, J., refused the application, holding that the formal judgment not having been entered on the order for judgment, the time for appealing had not commenced to run; and intimated that the certificate of judgment granted to the suppliants under sec. 16 of the Crown Procedure Act, C.S.B.C. 1888, c. 32, should not have been obtained *ex parte*. Upon motion to the Full Court that the appeal might be brought on notwithstanding the non-entry of the formal judgment, or for a stay of proceedings until it was entered, or in the alternative to extend the time for appealing:—Held, (1) After consulting the other judges. That the time for appealing from a final judgment commences to run when the decree or order for judgment is put into intelligible shape, so that the parties may clearly understand what they have to appeal from, and not from the entry of the formal judgment upon the order of the Court. (2) After examining the manager of the Bank of B.N.A. as to the bona fides of an assignment of the judgment to it: That no grounds had been shown by the Crown to warrant an extension of the time. After the passing of the Supreme Court Amendment Act, 1897, the Crown gave a new notice of appeal to the next Court, and the suppliants moved the Full Court to quash the appeal, the Crown making a cross-motion to extend the time if necessary:—Held, that the former decision of the Full Court had finally determined the rights of the parties, and the appeal should be quashed. *Koksilah Quarry Co.* v. *The Queen*, 5 B.C.R. 600.

6. Grounds of relief—In mining cases.]—Owing to the nature of the subject matter the Court requires stronger ground for extending the time for appealing from judgments in mining cases than in other matters. *Atkins* v. *Coy*, 5 B.C.R. 6.

7. Grounds of relief.]—The appellant was advised by counsel, up to a period considerably beyond the time for appealing from the judgment of an inferior Court, to acquiesce in it, but he had since been advised by other counsel to appeal, and that special hardship would probably result to him if the judgment were allowed to stand:—Held, by the Full Court, insufficient ground for extending the time for appealing. *Trask* v. *Pellent*, 5 B.C.R. 1.

8. Grounds of relief.]—Notice of an appeal from a judgment of Spinks, Co.J., was served on 20th September, 1895. The appeal was never set down for argument in the Supreme Court, and no further step was taken by the appellant for over a year, when respondent served on the appellant's solicitor notice of motion to dismiss the appeal. In answer to the motion the appellant produced an affidavit that the reason for not proceeding with the appeal was that he had been unable to obtain the notes taken at the trial by the learned County Court judge:—Held, dismissing the appeal, that the appellant had no excuse for not setting down the appeal within the

time limited by r. 678. Leave to extend the time for appealing refused. *Gething* v. *Atkins*, 5 B.C.R. 138.

9. Material to support application.]—On the respondent's succeeding on a preliminary objection as to the appeal being out of time, the appellant will not be given an opportunity of procuring material to support an application for an extension of such time. He should be prepared with such material on the argument. *Reinhard* v. *McClusky*, 5 B.C.R. 226.

10. Extension of time—Ex parte order—Extending.]—An order extending the time for appealing to the Divisional Court is irregular if made *ex parte*. The Divisional Court has jurisdiction, and, in a proper case, ought to cure irregularities or want of time in the bringing of an appeal, by making an order at the hearing of the appeal extending the time for appealing and thereupon proceeding to hear same. *Varrelmann* v. *The Phœnix Brewery Company (Limited liability)*, 3 B.C.R. 143.

11. Need for strong circumstances.]—Sec. 16 of the Supreme Court Amendment Act, 1896, (made applicable to County Court appeals by the County Court Act Amendment Act, 1896, s. 6), supersedes Supreme Court Rule 684, and exclusively governs as to the time for bringing appeals from final judgments. The time for bringing such an appeal will not be extended unless strong circumstances in favour of such extension are shown. *Reinhard* v. *McClusky*, 5 B.C.R. 226.

12. Application for.] — Appeal books were not deposited in time and on an application to extend the time, it was:—Held, by the Full Court, that such application should be made as soon as possible to a judge in chambers if the Full Court is not sitting at the time, but if so sitting that the better course is to apply at once to the Full Court. *Haley* v. *McLaren*, 7 B.C.R. 184.

13. Application for.]—An appeal was not entered in time for the sittings of the Full Court for which the notice of appeal had been given, and on an application to the Full Court to extend the time for leave to enter the appeal for next sittings, it was Held:—that when the Full Court is sitting such an application is properly made to it. *Mecredy* v. *Quann*, 9 B.C.R. 117.

14. Jurisdiction.] — The Court has no jurisdiction to extend the time limited by sec. 76 of the Supreme Court Act as amended by B.C. Stat. 1899, c. 20, for giving notice of appeal. A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time. *Sung* v. *Lung*, 8 B.C.R. 423.

15. Jurisdiction.] — Rule 743, providing that a judge may extend the time for doing any act although the application is not made until after the time appointed, is not consistent with C.S.B.C., c. 31, sec. 61, providing that every appeal to the Divisional Court shall be brought within eight days, unless the time shall be extended by a judge, and the Court has power to extend the time for moving for a new trial after the lapse of the eight days provided by the statute. *British Columbia Iron Works Co.* v. *Buse*, 3 B.C.R. 170.

D. Place of Hearing.

1. Supreme Court Act Amendment Act, 1902.]—Under the Supreme Court Act as amended in 1902, an appeal in a Victoria case could be heard by the Full Court sitting in Vancouver without consent. *Raser* v. *McQuade (No. 2)*, 11 B.C.R. 169.

2. Supreme Court Act Amendment Act, 1899.]—In an action commenced in the Vancouver Registry, notice of appeal given after the Act came into force should be given for the sittings of the Court of Appeal in Vancouver. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 480.

3. Special sittings.]—Special sittings of the Court of Appeal may be held either at Victoria or Vancouver to hear appeals in actions irrespectively of where the writs of summons were issued. *Yale Hotel Co.* v. *Victoria, Vancouver and Eastern Railway Co.*, 9 B.C.R. 66.

E. Parties.

Party interested.]—Sec. 12 of the Rivers and Streams Act, provides that if a "party interested" is dissatisfied with the judgment of the County Court judge he may appeal to the Supreme Court:—Held, that "party interested" means one who was a party to the proceedings before the judge appealed from. *In re Smith: In the matter of the Rivers and Streams Act*, 9 B.C.R. 329.

F. Notice of Appeal.

1. In General.

1. Bringing the appeal.]—The giving of notice of appeal is the bringing of the

appeal, and when such notice is given within eight days of the order appealed from, it is no objection that the appeal is not set down or argued within that time. *In re Ellard*, 2 B.C.R. 235.

2. Style of Court.]—A notice of appeal from a judgment of the Supreme Court is properly intituled in that Court. *Hepburn* v. *Beattie*, 16 B.C.R. 209.

3. Style of Court.]—A notice of appeal from a judgment of the Supreme Court intituled in the Court of Appeal is sufficient to enable the latter Court to allow the style of the Court to be amended. *Wilson* v. *Henderson*, 19 B.C.R. 45.

4. Whole or part of order appealed from.]—When an appellant appeals generally from a judgment or order, he is to be deemed to appeal from the whole. *In re False Creek Arbitration*, 20 B.C.R. 453.

2. Grounds of Appeal.

1. Particularity.] — Grounds of appeal should be particularized that the opposite party will know beforehand what he has to meet, and where misdirection is alleged, particulars should be stated. *Warmington* v. *Palmer*, 8 B.C.R. 344.

2. Not raised.]—A matter not raised by the pleadings nor in the notice of appeal will not be considered in the Appellate Court. *Manley* v. *Collom*, 8 B.C.R. 165.

3. Point of law.]—On an appeal to the Divisional Court from a judgment dismissing the action upon an objection duly set out to the sufficiency of a plea in bar to the action, the grounds of appeal were not set out in the notice of appeal:—Held, that as the point of law for argument on the appeal fully appeared on the face of the objection in point of law raised on the pleadings, it was not necessary to set it forth in the notice of appeal. *Robert Ward & Co.* v. *Clark*, 4 B.C.R. 73.

4. Summary conviction.]—A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house" is insufficient. *Rex* v. *Mah Yin*, 9 B.C.R. 319.

5. Amendment of notice.]—Where the grounds of appeal are omitted from the notice of appeal, the Court will permit the notice to be amended on terms. *Bevilockway* v. *Schneider*, 3 B.C.R. 88.

6. Amendment.—Where it appears that an appellant is standing on his strict legal rights and there is no merit in his case, a Court of Appeal will not assist him on an application to add a ground of appeal to his notice. *Fordham* v. *Hall*, 19 B.C.R. 80.

7. Omission of grounds.]—The non-statement in a notice of appeal of the Court intended to be appealed to is an irregularity. The attendance of respondent's counsel in the proper Court upon the notice is a waiver of such irregularity, though he takes preliminary objection to it. The omission to state the grounds of the appeal in a notice to the Divisional Court is fatal to the notice. Amendment, by inserting the grounds allowed on terms. *Bevilockway* v. *Schneider*, 3 B.C.R. 88.

3. Filing of Notice.

Time for.]—Under sec. 79 of the Supreme Court Act, the provision as to the fourteen clear days applies to the service, and not to the filing of the notice of appeal. *Archibald* v. *McDonald*, 7 B.C.R. 125.

G. Consolidation of Appeals.

Similar orders.]—Where there are numerous appeals in regard to the same order, the proper practice is to apply to have the appeals consolidated. *Bodi* v. *Crow's Nest Pass Coal Co.*, 9 B.C.R. 332.

H. Cross-Appeal.

Withdrawing notice of cross-appeal.]—A cross motion to an appeal applying for a new trial, having been served by respondent, and adjournments obtained by her to obtain affidavits in support of it, which were subsequently filed, the Court on objection by defendants, refused to permit the plaintiff to withdraw such application. *Atkins v. Coy*, 5 B.C.R. 6.

I. Setting Down.

1. Failure to set down.]—The omission to set down the appeal two days before the day for hearing, is an irregularity only, and should be relieved against. *Cowan* v. *Macaulay*, 5 B.C.R. 495; *Baker* v. *Kilpatrick*, 7 B.C.R. 127.

2. Supreme Court Act Amendment Act, 1896—Sec. 16.]—The provisions for set-

ting down appeals are imperative, and an appeal set down for the sittings of the Full Court next after the entry of the order appealed from, being more than twelve days thereafter, is out of time and will be struck out. *Tollemache* v. *Hobson*, 5 B.C.R. 223.

3. Supreme Court Act Amendment Act, 1896—Sec. 16, B.C.S.C.R. 678.]—An appeal from an interlocutory order which has not been set down two days before the time appointed for the hearing will be treated as abandoned and dismissed on motion by the respondent. *Reg.* v. *Aldous*, 5 B.C.R. 220.

4. Abandonment.] — An interlocutory appeal which has not, pursuant to the Supreme Court Amendment Act, 1896, sec. 16, as read with r. 678, been set down two days before the day for the hearing of the appeal, will be treated as abandoned. *Fraser River Co.* v. *Gallagher*, 5 B.C.R. 82.

5. Abandonment.] — Defendants gave notice of appeal from a judgment of a County Court in a mining cause rendered 11th of March, 1896, within the time provided by sec. 29 of the Mineral Act (C.S.B.C. 1888, c. 82), for the next Court, but being unable to procure the notes of the trial judge, did not set it down for that Court. In December, 1896, they obtained the notes, and in January, 1897, gave notice of moving the Full Court to extend the time for setting down the appeal, showing that the Registrar refused to enter the appeal without appeal books containing the judge's notes being filed:—Held, that the appellants were bound to set the appeal down for argument at the next Full Court, or to move that Court for an extension of time for setting it down, and that the neglect to take either course constituted an abandonment. *Kinney* v. *Harris*, 5 B.C.R. 229.

J. Appeal Books.

1. Depositing.

Extending time for depositing appeal books — How application for should be made.]—Appeal books were not deposited in time, and on an application to extend the time, it was held, by the Full Court, that such applications should be made as soon as possible to a judge in chambers if the Full Court is not sitting at the time, but if so sitting that the better course is to apply at once to the Full Court. *Haley* v. *McLaren*, 7 B.C.R. 184.

2. Contents of.

1. Judge's notes — Evidence omitted from.]—Where a party desires to introduce on an appeal, evidence alleged to have been omitted from the judge's notes of evidence, he should first apply to the judge appealed from to amend his notes. *Rendell* v. *McLellan*, 9 B.C.R. 328.

2. Procuring written reasons.]—Where, on an appeal from an order made in Chambers, there are no written reasons and the counsel cannot agree as to what took place in Chambers, the Court may refer the motion back to Chambers for report and re-argument. *Beaven* v. *Fell*, 3 B.C.R. 362.

3. Amended pleadings.]—Where pleadings have been amended, the original pleadings should not be put in the appeal books except in cases where it is important that the Court should know what position a party had taken in the litigation. *Fry* v. *Botsford*, 9 B.C.R., at p. 245, Reporter's note.

4. Ex post facto judgments.]—Judgments written after delivery are ineffectual for any purpose and should not form part of the case on appeal. *Sun Life Assurance Co.* v. *Elliott*, 31 S.C.R. 91.

3. Preparation of.

1. Evidence in.]—It is the duty of a party who intends to appeal to have the evidence so taken at the trial that on appeal it can be properly brought before the Court. *Stancliffe & Co.* v. *City of Vancouver*, 18 B.C.R. 629.

2. Paging.]—Appeal books should be numbered at the top of pages. *Haggarty* v. *The Lenora Mount Sicker Copper Co.*, 9 B.C.R. 6.

3. One volume.] — All appeal books should be in one volume except where they are too voluminous, in which event the paging in the second book should follow along consecutively. *Picard* v. *Revelstoke Sawmills Co., Ltd.*, 18 B.C.R. 416.

4. Preparation of.]—No costs will be allowed for the preparation of appeal books unless prepared in accordance with the rules, and the registrar will not receive the books unless so prepared. *Morgan* v. *The British-Yukon Navigation Co.*, 10 B.C.R. 112.

5. Evidence omitted.]—Where a party desires to introduce on an appeal, evidence alleged to have been omitted from the

judge's notes of evidence, he should first apply to the judge appealed from to amend his notes. *Rendell* v. *McLellan*, 9 B.C.R. 328.

6. Form of case on appeal from Mining Courts.]—The provision in the Mineral Act (C.S.B.C. 1888, c. 82, sec. 29), that appeals from the judgment of mining courts may be in the form of a case settled and signed by the parties is not imperative, and such appeals may be brought in the same form as in ordinary cases. *Atkins* v. *Coy*, 5 B.C.R. 6.

K. Service of Documents.

1. Appeal books.]—The respondent is entitled to a copy of the appeal book. *Banks* v. *Woodworth*, 7 B.C.R. 385.

2. Liquidator, on.]—Service on the liquidator of a notice of appeal on behalf of the company from an order for its compulsory winding up is not necessary. *In re Oro Fino Mines, Ltd.*, 7 B.C.R. 388.

3. Adverse claim.]—Service of a notice of appeal from an order refusing an application to extend the time for filing an adverse claim upon the agent of the solicitor for the proposed defendants is good service. *Kilbourne* v. *McGuigan*, 5 B.C.R. 233.

4. Summary conviction — Notice of appeal from.]—A notice of appeal from a summary conviction served upon the convicting magistrate is not invalidated by not being addressed to and served upon the respondent. *Rex* v. *Jordan*, 9 B.C.R. 33.

5. Solicitor—Service on after termination of engagement.]—While a summons to review a taxation of costs under an order otherwise worked out was still pending, a summons to abridge the time for setting down an appeal from the final judgment in the matter was served on the solicitor who took out the first summons: —Held, good service notwithstanding the fact that the solicitor's engagement with the client had terminated, and that he had so informed the party effecting the service. *Arthur* v. *Nelson*, 6 B.C.R. 316.

IV. Preliminary Motions.

A. In General.

Peremptory list.]—An application to take a case off the peremptory list of appeals for the day will be refused. The proper time to apply is when the peremptory list is being arranged at the close of the sitting of the Court for the following day. *Scott-Elliott* v. *Hatzic Prairie Co.*, 18 B.C.R. 668.

B. Preliminary Objections.

1. Want of jurisdiction.]—An objection that the Court has no jurisdiction is not a preliminary objection within the meaning of sec. 83 of the Supreme Court Act (R.S.B.C. 1897, c. 56). *In re Rogers*, 9 B.C.R. 373.

2. Defective appeal books.]—An objection to the hearing of an appeal on the ground that the appeal books are defective and erroneous is not a preliminary objection within sec. 83 of Supreme Court Act. *Rogers* v. *Reid*, 7 B.C.R. 139.

3. Quashing.]—Semble, that a motion to quash the appeal is in order. *Reg. v. Aldous*, 5 B.C.R. 220.

4. Striking out.]—A single judge has power to order a notice of appeal to be struck out. *Raser* v. *McQuade*, 11 B.C.R. 169.

5. Notice.]—Notice of a preliminary objection must be served at least one clear day before the time set for the beginning of the sittings. *McGuire* v. *Miller*, 9 B.C.R. 1.

6. Notice.] — No preliminary objection will be heard unless proper notice has been given. Failure to set down an appeal is an irregularity only, within sec. 83 of the Supreme Court Act. *Baker* v. *Kilpatrick*, 7 B.C.R. 127.

7. Evidence to rebut.]—Appellant must be prepared with his evidence to rebut preliminary objection that his appeal is out of time. *Reinhard* v. *McClusky*, 5 B.C.R. 226.

8. Extension of time—Grounds of.]—Preliminary objection being taken that the appeal was out of time, the Court, without deciding the point, directed the argument on the merits to proceed so that their discretion might be informed with a view of extending the time in order to cure the objection if justice required. *Wilson* v. *Marvin*, 3 B.C.R. 327.

9. Time to take.]—At the close of the appellant's argument, counsel for the respondents moved to quash the appeal on the ground that notice thereof was given before the signing or entry of the order for judgment. The order had been entered since giving of the notice of appeal:—

Held, that this was a preliminary objection, and should have been taken before the appellant opened, and that notice thereof should have been given in pursuance of the Supreme Court Act Amendment Act, 1897, sec. 12. *MacDonald* v. *Trustees of the Pandora Street (Victoria) Congregation of the Methodist Church*, 5 B.C.R. 521.

C. Abandonment.

1. Notice abandoning before order drawn up.]—After judgment allowing the appeal and adjournment of the Court, but before the order was drawn up, the matter was spoken to before the Court upon a subsequent day, in presence of counsel for both parties, by special leave, and it appearing that a notice (of which respondents' counsel was not instructed) abandoning the appeal had been served by appellants' solicitor upon respondents' solicitor on the morning of, but before the argument of the appeal:—Held, that the appeal was at an end upon the giving of the notice abandoning it, and the order allowing the appeal not having been drawn up no order would be issued, but the appeal should stand as if struck out of the paper. *Re The Maple Leaf and Lanark Mineral Claims*, 2 B.C.R. 323.

2. Failure to set down.]—Defendants gave notice of appeal from a judgment of a County Court in a mining cause, rendered 11th March, 1896, within the time provided for the next Court, but being unable to procure the notes of the trial judge, did not set it down for that Court. In December, 1896, they obtained the notes, and in January, 1897, gave notice of moving the Full Court to extend the time for setting down the appeal, showing that the registrar refused to enter the appeal without appeal books containing the judge's notes being filed:—Held, that the appellants were bound to set the appeal down for argument at the next Full Court, or to move that Court for an extension of time for setting it down, and that neglect to take either course constituted an abandonment. *Kinney* v. *Harris*, 5 B.C.R. 229.

3. Failure to set down.]—An interlocutory appeal which has not been set down two days before the day for the hearing of the appeal will be treated as abandoned, and will be dismissed on motion by the respondents. *Reg.* v. *Aldous*, 5 B.C.R. 220.

4. Not argued.]—Points not argued though included in the notice of appeal will be treated as abandoned. *Warmington* v. *Palmer*, 8 B.C.R. 344.

D. Withdrawal.

Cross-motion.] — A cross-motion to the appeal applying for a new trial having been served by respondent, and adjournments obtained by her to obtain affidavits in support of it, which were subsequently filed, the Court, on objection by defendants, refused to permit the plaintiff to withdraw such application. *Atkins* v. *Coy*, 5 B.C.R 6.

E. Dismissal.

1. Obeying mandatory order—Whether waiver of right of appeal.]—A party obeying a mandatory injunuction, for disobedience of which he is liable to attachment, cannot be said to have exercised any election, or thus to have waived his right of appeal. *Consolidated Railway Co.* v. *Victoria Corporation*, 5 B.C.R. 266.

2. Summary conviction.]—A person by paying the fine imposed loses any right of appeal he might otherwise have had. *R.* v. *Neuberger*, 9 B.C.R. 272.

F. Waiver of Defects and Irregularities.

1. Defective notice of appeal.]—The omission in the notice of appeal to state the Court intended to be appealed to is an irregularity which may be waived; and the attendance of respondent's counsel in the proper Court upon such notice is a waiver of such irregularity, though he take a preliminary objection to it. *Bevilockway* v. *Schneider*, 3 B.C.R. 88.

2. Expiration of time for appeal.]—The appearance of counsel for the purpose of objecting that an appeal is out of time is not an appearance upon the appeal so as to waive the objection. *Edison General Electric Co.* v. *Westminster & Vancouver Tramways Co., Ltd.*, 5 B.C.R. 34.

3. Failure to set down.]—The appearance of counsel to object that the appeal has not been set down in time is not an appearance on the appeal so as to waive the irregularity. *Tollemache* v. *Hobson*, 5 B.C.R. 223.

4. Applying for security for costs.]—A respondent by applying for security for

the costs of appeal does not waive his right to object that the appeal was not brought in time. *Sung* v. *Lung*, 8 B.C.R. 423.

5. Applying for security for costs.]—The respondent in an appeal from a winding-up order, after the time limited by sub-sec. 3 of sec. 27 of the Companies' Winding-up Act, 1898, for furnishing security, had expired, demanded security for the costs of the appeal:—Held, that respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time. *In re The Florida Mining Company, Limited*, 8 B.C.R. 388.

6. Security for costs not furnished in time.] — A respondent by applying to increase the amount of the security for costs waives his right to object that the security was not originally furnished in time. *In re Oro Fino Mines, Limited*, 7 B.C.R. 388.

7. Objection to status of appeal for want of solicitor bringing same—Waiver.]—Held, overruling an objection that the defendant, whose solicitor had been elevated to the bench, had no status on the appeal for want of notice to plaintiffs of appointment of a new solicitor to bring the appeal: that the plaintiffs, by serving D. with the original summons for judgment, and, as it appeared they had done, writing H. and L. D. for the grounds of appeal, had waived the objection. *Denny* v. *Sayward*, 4 B.C.R. 212.

V. Hearing and Determination.

A. In General: Rules of Decision.

1. Previous decisions.]—The Court of appeal is not bound to perpetuate error and may therefore set aside a former decision. *Noble Five, etc., Co.* v. *Last Chance, etc., Co.*, 9 B.C.R. at p. 516. *In re Rahim*, 17 B.C.R. 279; *Gentile* v. *B.C.E. Ry.*, 18 B.C.R. 309.

2. Points not argued.] — Points not argued, although included in the notice of appeal, will be considered as abandoned. *Warmington* v. *Palmer and Christie*, 8 B.C.R. 344.

B. Evidence: Amendment: Trial de Novo.

1. Hearing de Novo.

1. Small Debts Court.] — An appeal from the Small Debts Court is by way of a rehearing, and witnesses may be called, although not called at the trial. *Malkin* v. *Tobin; Martin, Garnishee*, 7 B.C.R. 386.

2. Summary conviction.]—An appeal from a conviction is a proceeding de novo. *In re Kwong Wo*, 2 B.C.R. 336.

3. Water Act.]—The appeal under sec. 36 of the Water Clauses Consolidation Act (R.S.B.C. 1897, c. 190), from the decision of the Gold Commissioner is a trial de novo. *Ross* v. *Thompson, etc.*, 10 B.C.R. 177.

2. Fresh Evidence on Appeal.

1. Grounds for leave — Practice.]—A party moving the Court of Appeal for leave to adduce fresh evidence, must give notice and serve affidavits in support:—Held, in this instance, that, the party having knowledge of a fraud, and not having been reasonably diligent in exposing it at the time, he should not be assisted in doing so on appeal. A strong and clear case must be made out in order to gain such an indulgence. *Woodford* v. *Henderson*, 15 B.C.R. 495.

2. Practice.]—An application to admit further evidence which might have been adduced at the trial must be supported by an affidavit of the applicant indicating the evidence desired to be used and setting forth when and how the applicant came to be aware of its existence, what efforts were made to have it adduced at the trial, and that the applicant is advised and believes that if it had been so adduced, the result would probably have been different. *Marino* v. *Sproat*, 9 B.C.R. 335; 1 M.M.C. 481.

3. Evidence on trial for perjury.]—For perjury alleged to have been committed at the trial, the defendant was tried and acquitted before the trial, and on the appeal, his counsel moved for leave to read the verdict in the criminal trial:—Held, that such evidence was not admissible. *Borland* v. *Coote*, 10 B.C.R. 493.

4. Rejected at trial.]—Where documentary evidence is rejected at the trial, and the propriety of the rejection is not made a ground of appeal, the Court will not allow that evidence to be read on appeal as fresh evidence. *Harper* v. *Cameron*, 2 B.C.R. 365.

5. Election petition.]—On the hearing of an appeal from an application to strike out an election petition, the petitioners were allowed to adduce fresh evi-

dence to prove their locus standi. *Jardine* v. *Bullen*, 7 B.C.R. 471.

C. What Reviewable Generally.

1. Taking Benefit Under Order.

Waiver by taking benefit under order appealed from.]—Defendant having been arrested under a ca. re., applied to a judge for his discharge on the ground that he had not intended to leave the jurisdiction. The judge made the order imposing as a term that the defendant should bring no action in respect of the arrest. The defendant served the order on the sheriff, and was discharged thereunder:—Held, that the defendant having taken a benefit under the order, could not appeal from the term restraining him from bringing an action in respect of the arrest. *Spencer* v. *Cowan*, 5 B.C.R. 151.

2. Interlocutory Matters.

1. Interlocutory order—Action decided pending appeal.] — Where, pending an appeal from an interlocutory order the action itself has been decided, the Full Court will not hear the appeal. *Fawcett* v. *Canadian Pacific Railway Co.*, 8 B.C.R. 219.

2. Trial pending when appeal brought on.]—Where a motion to dissolve an interlocutory injunction has been refused and notice of appeal given before trial, but not brought on to be heard until after the trial has commenced, but not concluded, the Full Court will not interfere. *Dunlop* v. *Haney*, 7 B.C.R. 455.

3. Dismissal.]—The Full Court dismissed an appeal from orders refusing injunctions on the ground that there were several points of importance which should be decided at the trial. *Yale Hotel Co.* v. *V.V.E.*, 9 B.C.R. 66.

4. Res judicata.]—The Divisional Court is not concluded by a prior judgment of that Court given upon an interlocutory appeal in the same case. An action in the Supreme Court can only be finally determined in the last resort in this Province by a decision of the highest Court of final resort therein, namely, the Full Court, from which an appeal lies, as of right, to the Supreme Court of Canada. *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

D. Discretionary Matters.

1. Refusal to review.]—Where the judge has absolute discretion, and it is not or cannot be shown that he has exercised it improperly, the Court of Appeal will not readily interfere. Where, therefore, through a slip in the solicitor's office, counsel was not notified in time to appear at the trial, and judgment was entered on default of appearance, and, as a term of being allowed in to defend, defendant was required to pay all costs and also pay into Court the amount of the judgment:—Held, that it would be inadvisable for the Court of Appeal to interfere with the ruling. *Royal Bank of Canada* v. *Fullerton Lumber and Shingle Company, Limited*, 17 B.C.R. 11.

2. Striking out pleadings.]—When a judge to whom an application has been made to strike out a statement of claim, on the ground that it discloses no reasonable cause of action, has exercised a discretion and made an order refusing the application, that order ought not to be interfered with on appeal unless the judge below decided the case upon an erroneous principle or omitted to take into consideration something which ought to have influenced his judgment. *Cooper* v. *The Yorkshire Guarantee and Securities Corporation, Limited*, 11 B.C.R. 97.

3. Jury.]—Where the judge of first instance has exercised his discretion in refusing a jury, the Court of Appeal will not interfere. *McArthur* v. *Rogers*, 17 B.C.R. 48.

4. Costs of adjournment.]—Defendants got an order at the trial for inspection of a vein in the plaintiff's 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 this property with a view to furnishing evidence to rebut that which might be adduced by reason of plaintiff's inspection, and therefore an adjournment for that purpose, were allowed the adjournment, but only on 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 B.C.R. 66.

E. Questions Not Raised Below.

1. In General

1. Summary conviction.]—A defendant is precluded from appealing on the merits who pleaded guilty before the magistrate. *Reg.* v. *Bowman*, 6 B.C.R. 271.

2. Questions of fact and law.]—Where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first time unless the Court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such, for instance, as the construction of a statute, it may be raised for the first time on appeal subject to such terms, if any, as the court may see fit to impose. *Stone* v. *Rossland Ice and Fuel Company*, 12 B.C.R. 66.

3. Objection not taken in Court below.]—An objection that a denial is insufficient cannot be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the denial was sufficient. *Jackson* v. *Mylius*, 3 B.C.R. 149; 23 S.C.R. 485.

4. New defence.]—The Full Court will not allow a defence to be raised for the first time based on non-compliance with the directions of the Mineral Laws relating to location. *Hogg* v. *Farrell*, 6 B.C.R. 387.

5. Summary conviction.]—A defendant convicted of an infraction of a municipal bylaw is precluded from contending on appeal that the bylaw is ultra vires unless the objection was taken before the magistrate. *Reg.* v. *Bowman*, 6 B.C.R. 271.

6. Excess of powers by joint stock company.]—The question of ultra vires not having been raised in the Court below, is not open on appeal. *McKay Bros.* v. *Victoria Yukon Trading Company*, 9 B.C.R. 37.

2. Jurisdiction.

1. Jurisdiction—Point not taken in Court below.]—Unless objection is taken to the jurisdiction of the Court below at the trial, it will not be considered in appeal. *Gelinas* v. *Clark*, 8 B.C.R. 42.

2. Jurisdiction.]—Where an action for malicious prosecution is tried in the County Court without objection on the part of either person and judgment given for the plaintiff, the question of jurisdiction cannot be raised on appeal. *Robitaille* v. *Mason*, 9 B.C.R. 499.

3. As to Evidence.

Documentary evidence — Rule 674 — Attempt to introduce as fresh evidence on appeal, evidence rejected at the trial.]—Documentary evidence was rejected at the trial, and the propriety of the rejection was not made a ground of the appeal:—Held, that the Court would not allow the evidence to be read on the appeal as fresh evidence under r. 874. *Harper* v. *Cameron*, 2 B.C.R. 365.

F. Review of Facts.

1. In General.

1. Reversing trial judge.]—An Appellate Court will not interfere with the findings of fact of the trial judge, in cases where the demeanour of witnesses or the observation of incidents at the trial may have an important effect on the estimate to be placed upon the evidence, unless the Appellate Court is satisfied that the trial judge is clearly wrong. *McKay Bros* v. *Victoria Yukon Trading Co.*, 9 B.C.R. 37.

2. Rehearing.]—On an appeal from a judgment by a trial judge, sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial judge as to the credibility of particular witnesses the weight which is justly due to such views, the Court of Appeal cannot reconcile his decision with the inferences to be drawn from admitted facts, or from facts proved by credible witnesses or documents, that Court should not generally regard itself as bound by his conclusions. *Voigt* v. *Groves and others*, 12 B.C.R. 170.

3. Inference.]—A finding of fact, based entirely upon the inference which the trial judge has drawn from the evidence before him, may be freely reviewed by the Court of Appeal. *Sayward* v. *Dunsmuir and Harrison*, 11 B.C.R. 375.

4. Overruling judgment of Court below.]—In considering appeals on questions of fact, the Court of Review must make up its mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from reversing it if, after a full consideration, it comes to the conclusion that the Court appealed from was wrong. *Ericcson* v. *Marlatt*, 18 B.C.R. 120.

2. Drawing Inferences of Fact.

Right to draw inferences.]—The Court of Appeal, notwithstanding an apparent

misdirection of the jury, can draw such inferences of fact as are not inconsistent with the verdict. *Harris* v. *Brunette Saw Mill Co.*, 3 B.C.R. 172.

G. What Errors Warrant Reversal.

1. Wrong Inference of Fact.

1. Evidence taken on commission.]—In an action in the Yukon for damages for breach of contract tried before a judge without a jury, the evidence for the defence being evidence taken on commission, the Court held that the contract sued on was made with defendant company, and not with one Munn, as alleged by the defence, and gave judgment for plaintiffs. On appeal:—Held, reversing the finding and allowing the appeal, that the Court had failed to appreciate the evidence. *McKay Bros.* v. *Y.Y.T. Co.*, 9 B.C.R. 37.

2. Positive in preference to negative testimony.] — Where the trial judge accepts positive in preference to the negative testimony, the Full Court will not interfere unless he is clearly wrong. *Milton* v. *The Corporation of the District of Surrey*, 10 B.C.R. 296.

2. Alteration of Verdict.

Amending verdict.] — 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*, 8 B.C.R. 396.

3. Facts Not Disclosed to the Court Below.

Non-disclosure of material fact—Effect of — Whether objection available on appeal.]—It appeared that a writ endorsed to prosecute an adverse claim under the Mineral Act, 1891, in the Supreme Court, had been issued before an application for an order extending the time for bringing action in the County Court was made; but that fact was not disclosed to the judge upon the application:—Held, allowing an appeal, that the fact of the issue of the Supreme Court writ was material to the original application and should have been disclosed. Such a circumstance can be taken advantage of upon an appeal from, as well as upon a motion to rescind, the order. *Re The Maple Leaf and Lanark Mineral Claims*, 2 B.C.R. 323; 1 M.M.C. 68.

H. Case Made: Argument of Counsel.

1. Opening case.]—On appeal, counsel should exhaust his case in opening. *Warmington* v. *Palmer and others*, 8 B.C.R. 344.

2. Unargued points.] — Points not argued, although included in the notice of appeal, will be considered abandoned. *Warmington* v. *Palmer & Christie*, 8 B.C.R. 344.

VI. JUDGMENT.

1. Entering judgment for the plaintiff.]—Where judgment has been entered for the defendant on motion after the rendering of the verdict, and the Court of Appeal is of opinion that upon the evidence and the findings of the jury the plaintiff's case is made out, and that it has all the necessary material before it, it will enter judgment for the plaintiff, and not grant a new trial. *Scott* v. *B.C. Milling Co.*, 3 B.C.R. 221.

2. Entering judgment.]—The Divisional Court, on a motion for new trial, has power to enter a final judgment for defendant when there is no evidence to sustain the verdict. *Kerr & Begg* v. *Cotton*, 2 B.C.R. 246.

3. Entering judgment.]—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, by the Full Court, allowing an appeal and entering judgment for plaintiffs, 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 Corporation* v. *Fullbrook & Innes*, 9 B.C.R. 270.

4. Action for work done.]—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 considera-

tions:—Held, on appeal, that on the findings, as they stood, the plaintiffs could not recover any amount other than the one allowed. *Galbraith & Sons* v. *Hudson's Bay Company*, 7 B.C.R. 431.

5. Damages—Further enquiry as to.]—The Divisional Court, upon a motion for a new trial, being of opinion that there was no evidence upon which damages assessed could be calculated, directed a further enquiry as to such damages, and adjourned the motion in the meantime. *Parks* v. *Blackwood*, 2 B.C.R. 346.

6. Entering judgment for the plaintiff.]—Where on the findings of the jury the trial judge had entered judgment for the defendants, and the Privy Council had held, in cases arising out of the same state of facts, that the defendants were liable, the Court of Appeal entered judgment for the plaintiff. *Gordon* v. *City of Victoria*, 7 B.C.R. 342.

7. Modified judgment.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereot, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that this Court doth of its own motion and without adjudicating as between the plaintiff and defendant on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:—Held, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 10 B.C.R. 449.

8. Vacating order.]—It is in the discretion of the Court to vacate an order before it is drawn up, and to hear the matter re-argued. *Kimpton* v. *McKay*, 4 B.C.R. 196.

9. Abandonment of appeal.] — After judgment allowing an appeal, and adjournment of the Court, but before the order was drawn up, it was brought to the attention of the Court, by special leave, that a notice of which respondents' counsel was not instructed, abandoning the appeal, had been served upon respondents' solicitor on the morning of, but before the argument of the appeal:—Held, that the appeal was at an end upon the giving of the notice abandoning it, and the order allowing the appeal not having been drawn up no order would be issued, but the appeal should stand as if struck out of the paper. *Re Maple Leaf Claim*, 2 B.C.R. 323; 1 M.M.C. 68.

VII. Costs.

A. In General.

1. Dismissal for want of jurisdiction.]—Although the Court of Appeal has no jurisdiction to hear an appeal, it may award costs in dismissing it. *In re Rogers*, 9 B.C.R. 373.

2. Appeal from award of arbitrators under the Railway Act.]—An appeal from the award of arbitrators appointed under the Railway Act is an independent proceeding and the costs of the appeal are not governed by the provisions of the Railway Act, but by those of the Court of Appeal Act. *Vancouver, Westminster and Yukon Railway Co.* v. *Sam Kee*, 12 B.C.R. 1.

3. Test case.]—Where there is a test case, and the appellant could, had he chosen not to waive them, have defeated the respondent upon some preliminary points, there will be no costs. *Reg.* v. *Boscowitz*, 4 B.C.R. 132.

4. Offer of settlement.]—Where a judgment is reduced on appeal and pending the disposition of the appeal the respondent offers to accept in settlement an amount smaller than the original judgment but greater than the amount as reduced, the appellant will be allowed the costs of the appeal. *Dallin* v. *Weaver*, 8 B.C.R. 241.

5. Appeal allowed in part.]—The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive an appellant who is substantially successful of the costs of the appeal. *Centre Star Mining Co.* v. *Rossland Miners' Union and others*, 9 B.C.R. 531.

6. Collision — Where both ships to blame.]—Where both ships are found in

fault by a Court of Appeal, the rule is to give no costs to either party in the Court of Appeal or below. *Canadian Development Co.* v. *Le Blanc,* 8 B.C.R. 173.

7. Where succeeds on point not taken below.]—No costs of appeal will be given to the appellant who succeeds on a point not taken below. *Aldous* v. *Hall Mines,* 6 B.C.R. 394.

8. Not specifically dealt with.] — The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment. *Kickbush* v. *Cawley,* 11 B.C.R. 151.

9. Certiorari proceedings—Costs of.] —The old rule that the Crown neither pays nor receives costs is no longer in force, and the Court will grant the costs of a successful appeal to the Crown if asked for. *Reg.* v. *Little,* 6 B.C.R. 321.

10. Where decision varied — Appeal allowed in part.]—Where the appeal was only partly successful, no costs were allowed. *In re Yorkshire Guarantee, etc., Corporation,* 4 B.C.R. 258.

11. New trial.] — The costs of the appeal, where a new trial is granted, abide the result of the new trial. *Robson* v. *Suter,* 1 B.C.R., Pt. II., 375.

12. Reduction of damages awarded.]—Where the Court of Appeal orders a new trial on the ground of excessive damages and the jury increases the amount of damages on the second trial and on a second appeal the Court reduces the amount of the damages, and the plaintiff is practically in the same condition at the time of both trials, the defendant is entitled to the costs of both appeals. *Taylor* v. *British Columbia Electric Railway Company,* 16 B.C.R. 420.

13. Conceding the appeal.]—Where the respondents give notice to the appellants that they are prepared to concede the appellants' case, the appellants are entitled to the costs of the appeal up to the time of the service of the notice, and the respondents to the costs subsequently incurred. *Oppenheimer* v. *Sperling,* 9 B.C.R. 166.

14. Supporting wrong judgment.] — Where the respondent supports, on appeal, a judgment pronounced mero motu by the trial judge, which is subsequently reversed, he must bear the costs of the appeal. *Guilbault* v. *Brothier,* 10 B.C.R. 449.

15. Point not taken below.]—Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed: but as the appellant should have succeeded at the trial, he will be allowed the costs of the trial. *The Byron N. White Co.* v. *The Sandon Water Works, etc., Co.,* 10 B.C.R. 361.

16. Company in liquidation.] — Where an action is brought against a company in liquidation, but no steps are taken by the liquidator until the case comes before the Court of Appeal, when he appears and impugns the validity of the proceedings, he is only entitled to such costs as he could have obtained on an application in chambers. *The Charles H. Lilly Co.* v. *The Johnston Fisheries Company,* 14 B.C.R. 174.

17. Refund of paid costs.] — The plaintiff recovered a judgment which on appeal was reversed, with costs payable to the defendant, which the plaintiff paid: The Supreme Court of Canada restored the original judgment, with costs, but made no order to refund the costs paid by the plaintiff. On an application to a judge of the Supreme Court of the Province, an order was made for the defendant to refund the costs. *Davies* v. *McMillan,* 3 B.C.R. 72.

B. Following the Event.

1. Deprivation of discretion.]—By sec. 100 of the Supreme Court Act, 1904, the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specific exceptions set out in the said sec. 100. *Hopper* v. *Dunsmuir,* 12 B.C.R. 18.

2. Event.]—The word "event" in enactments providing that costs shall follow the event may be read distributively. *Vancouver, Westminster and Yukon Railway Company* v. *Sam Kee,* 12 B.C.R. 1.

3. Issue.]—The question as to the correct rate of interest on an award is not an "event," but merely an issue. *Ibid.*

C. Good Cause for Depriving of.

1. Jurisdiction.]—The discretion as to costs in an action tried with a jury is exerciseable by the Court of first instance; and the Court of Appeal will only consider whether, where the successful party has been deprived of costs, there could have been good cause to do so. *Gibson* v. *Cook,* 5 B.C.R. 534.

2. Unreasonable action.] — Where a party acts unreasonably in refusing a liberal offer of his opponent, he will not be given the costs of an appeal. *Foley* v. *Webster*, 2 B.C.R. 251.

3. Point not raised.]—Where an appellant succeeds on a point not raised in the Court below, no costs of the appeal will be allowed. *In re Thunder Hill, etc., Co.*, 5 B.C.R. 21; *Aldous* v. *Hall Mines*, 6 B.C.R. 394.

4. Excessive damages.]—Precise directions should be given to a jury as to the measure of damages, and where the case is allowed to go to the jury without such directions without objection by the defendant, no costs of appeal will be allowed. *Murray* v. *Royal Insurance Co.*, 11 B.C.R. 212.

5. Failure to give notice of motion to dismiss appeal.]—Failure to give notice of a preliminary objection to an appeal is not a sufficient ground for depriving of costs a respondent who succeeds on a motion to dismiss the appeal. *Tollemache* v. *Hobson*, 5 B.C.R. 223.

D. Abandoned Appeals.

1. Demand.]—Costs of an abandoned appeal will not be allowed unless the respondent has made a previous demand in writing for payment which has not been complied with. *Macbeth* v. *Vandall*, 15 B.C.R. 377.

2. Taxation.] — The production of the notice of the abandonment of an appeal is sufficient authority to the taxing master to tax the respondent's costs of the appeal, and an order for costs is unnecessary. *Fry and others* v. *Botsford*, 9 B.C.R. 165.

3. Taxable fees.]—On taxation of the costs of an abandoned appeal, the respondents may be entitled to tax fees for briefs and for counsel. *Fry* v. *Botsford*, 9 B.C.R. 207.

E. When Payable.

1. Interlocutory.] — In appeals from interlocutory orders when a party is given the costs of the appeal, they are payable forthwith. *Star Mining, etc., Co.*, v. *Byron N. White Co.*, 9 B.C.R. 9; 1 M.M.C. 468.

2. Interolcutory.]—A successful appellant from an interlocutory order is as a rule entitled to the costs of the appeal forthwith after taxation and to the costs below in any event of the cause. *Malkin Co., Ltd.* v. *McGoghran*, 20 B.C.R. 479.

F. Taxation of.

1. Briefs and evidence.]—The cost of briefs on appeal may be allowed under the item "copies of pleadings, briefs, and other documents, where no other provision is made": And the fees of the official stenographer for the transcript of evidence may be allowed as for copies. *Edison, etc., Co.* v. *Westminster, etc., Co.*, 5 B.C.R. 34.

2. Appeal books.]—No costs will be allowed for appeal books unless they are prepared in accordance with the rules. *Morgan* v. *The British Yukon Navigation Co.*, 10 B.C.R. 113.

3. Settlement.] — After an appeal had been commenced, it was adjourned at the suggestion of the Court to allow the parties to attempt to reach a settlement: The negotiations were unsuccessful and the appeal was ultimately dismissed, with costs. The successful party was allowed counsel fee on the first day's hearing and the costs of the negotiations for a settlement. *Milton* v. *District of Surrey (No. 2)*, 10 B.C.R. 325.

VIII. Security for Costs.

A. In General.

1. Ex debito justitiae.] — Upon an appeal to the Divisional or Full Court, the respondent is entitled, as of right, and without showing special circumstances, to an order for security for the costs of the appeal. *Robert Ward & Co.* v. *Clarke*, 4 B.C.R. 501.

2. Amounts.]—Security for the costs of an appeal will as a rule be ordered to be given in the following sums: (1) Appeals, generally, $150; (2) Appeals, interlocutory from both the Supreme and County Courts, $75; (3) Appeals, County Court, $100. *Rogers* v. *Reid*, 7 B.C.R. 79.

2a. Insolvent company.]—The amount of the security for costs of an appeal to be given by an insolvent company is limited to the sum of $200 by the Supreme Court Act (S.B.C. 1904, c. 15, s. 101), notwithstanding the language of the Companies Act (R.S.B.C. 1897, c. 44, s. 114). *Star Mining & Milling Co.* v. *Byron N. White Co.*, 12 B.C.R. 355.

3. Order for security should provide for a stay of proceedings.]—An order for security of costs of an appeal to the Full Court should provide for a stay of proceedings until security is given. *Kettle River Mines, Limited* v. *Bleasdell*, 8 B.C.R. 350.

4. Two appeals included in one notice of appeal.]—Where appeals were taken from an order allowing an amendment of the writ and an order dismissing an application to set aside the writ, and both appeals were included in one notice of appeal, security for costs as of one appeal was held insufficient. *Sehl* v. *Tugwell*, 7 B.C.R. 359.

5. New trial.]—An application to the Divisional Court for a new trial is an appeal within the meaning of Order LVIII., r. 15, and a judge has, under it, jurisdiction to order the applicant to give security for costs of the motion. *Wilson* v. *Perrin*, 2 B.C.R. 350.

6. Foreign corporation.] — A foreign corporation appealing to the Full Court from a judgment against it at the trial, cannot be ordered to give security for payment of the costs of the action found against it by the judgment appealed from, as well as security for the costs of the appeal. *Nelson and Fort Sheppard Railway* v. *Jerry*, 5 B.C.R. 166.

7. Undertaking for.] — Plaintiffs resident outside the jurisdiction lodged in Court an undertaking as security for costs. At the trial the plaintiffs succeeded and defendants appealed, but before the determination of the appeal plaintiffs applied for a release of the undertaking:—Held, by Martin, J., that the security should stand pending the appeal. *Bird* v. *Vieth*, 7 B.C.R. 511.

8. Motion to Divisional Court.]—A motion to the Divisional Court is an appeal within the meaning of Order LVIII., r. 15, and the Court has power to order the applicant to give security for costs. *Wilson* v. *Perrin*, 2 B.C.R. 350.

9. County Court.]—Sec. 9 of the Court of Appeal Act, 1907, which provides that after notice of appeal given, all further proceedings in relation to the Court of Appeal shall be had in the Court of Appeal, excludes the operation of sec. 120 of the County Courts Act. *Fyffe* v. *Loo Gee Wing*, 15 B.C.R. 388.

10. Waiver.]—A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time. *Sung* v. *Lung*, 8 B.C.R. 423.

B. Application For.

1. How made.] — Applications for security for costs should be made to a judge of the Court of Appeal and not to the Court. *Rogers* v. *Reed*, 7 B.C.R. 183.

2. Promptness.] — A respondent must make application for security for costs with due promptness, and it is too late to apply when the appeal is set down and about to be heard. *Piper* v. *Burnett*, 14 B.C.R. 209.

IX. Stay of Execution.

1. Pending appeal to the Privy Council.]—A judge of the Supreme Court has no power to stay proceedings under a judgment of the Court of Appeal pending a further appeal to the Privy Council. *Huson* v. *Haddington Island Quarry Co.*, 16 B.C.R. 264.

2. Pending appeal to Privy Council.]—Execution upon a judgment of the Supreme Court of Canada, made on order of this Court, will be stayed pending an appeal to the Privy Council upon terms. The terms imposed were to pay the costs of the appeal to the Supreme Court of Canada with an undertaking to refund, if the judgment be reversed; to give security for the amount of the judgment appealed from; money in Court to stand for such security pro tanto. *Davies* v. *McMillan*, 3 B.C.R. 35.

3. Pending appeal to Supreme Court of Canada.]—The Court of Appeal cannot make an order controlling proceedings under its judgment after the perfecting of an appeal to the Supreme Court of Canada. *Foley* v. *Webster*, 2 B.C.R. 251.

4. Supreme Court of Canada.]—Neither the Court of Appeal nor a judge thereof has any jurisdiction to stop the operation of a judgment of the Supreme Court of Canada, and where that Court has awarded the costs of the Courts below, any application for a stay of taxation should be made to a judge of that Court. *Merchants Bank* v. *Houston*, 9 B.C.R. 158.

5. Certificate of judgment, registration of.]—The registration of a certificate of the judgment appealed from is not a proceeding by way of execution, and is not superseded by the giving of security. *Foley* v. *Webster*, 2 B.C.R. 251.

X. Leave to Appeal to the Privy Council.

1. Special sittings for leave to appeal.]—The Court of Appeal, in the exercise of the authority which has been delegated to it by the Privy Council, to grant leave to

appeal, is, strictly speaking, acting as a matter of judicial comity and assistance, and not in discharge of its statutory duty as a Canadian Court, and the power to hold such sittings is not affected by sec. 14 of the Court of Appeal Act, since that only applies to the hearing of appeals. A special sitting of the Court of Appeal for a hearing of a motion for leave to appeal to the Privy Council, should only be granted by a judge upon proof to his satisfaction of urgency and of special circumstances, rendering the holding of such special sittings necessary in the interests of justice; the rule that the Court must grant leave "as of right" where the amount in dispute is £500 or upwards only applies when the Court is sitting in term. *In re Assessment Act and Heinz (No. 2)*, 20 B.C.R. 149.

2. Constitution of Court granting leave.]—Leave to appeal to the Privy Council from a judgment of the Supreme Court of British Columbia may be granted by any quorum of the Full Court, although not constituted of the same judges as those who delivered the judgment proposed to be appealed from. *Queen* v. *Victoria Lumber Company*, 5 B.C.R. 305.

3. Amount in controversy.]—Judgment was given for the defendant company in an action for damages for the death of plaintiff's horses, caused, as alleged, by the non-fencing of the defendant's railway line, and an appeal by the plaintiff to the Full Court was dismissed. The value of the horses was proved at $110. The action was based on the 54 Vict. (B.C.), c. 1, providing that Dominion railways should be liable in damages to the owner of any cattle killed by their engines or trains unless their line was fenced as provided by the Provincial Fence Act, 1888. The judgment held the Act to be unconstitutional. The plaintiff applied for leave to appeal to the Privy Council under the P.C. Rules, 1887, r. 1 (*a*) on the ground that the judgment indirectly involved a claim respecting a civil right of the value of £300:—Held, that the expression "civil right" required to found an appeal, as being indirectly involved, contemplates such rights as easements and franchises, and other rights of a similar nature. (2) That the plaintiff's only interest in the matter was the $110 damages. *Madden* v. *The Nelson & Fort Sheppard Railway Company*, 5 B.C.R. 670.

4. Amount in controversy.]—In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the Court, on a motion for leave to appeal, will look at the judgment as it affects the parties, and where it appeared from affidavits in support of the motion that defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal. *Centre Star Mining Company, Limited* v. *Rossland-Kootenay Mining Company, Limited (No. 2)*, 11 B.C.R. 509.

5. Same question already under appeal.]—The Court will not grant leave (except in special circumstances) to appeal to Her Majesty, when the same question is already under appeal to Her Majesty in another proceeding, though not between the same parties. *Reg.* v. *Little*, 6 B.C.R. 321.

6. Divisional Court — Leave when granted.]—The Divisional Court will not in its discretion allow an appeal to be brought from that Court to the Privy Council except in a matter of general public interest. *Gordon* v. *Cotton*, 3 B.C.R. 287.

7. Provincial Elections Act.]—Leave will be granted to appeal from a decision under the Provincial Elections Act. *In re Tomey Homma*, 8 B.C.R. 76.

MINERAL ACT—*See* MINES AND MINERALS.

NEW TRIAL—*See* NEW TRIAL.

SUBSTANTIAL WRONG OR MISCARRIAGE—*See* CRIMINAL LAW.

WATER ACT—*See* WATERS AND WATER COURSES.

WORKMEN'S COMPENSATION ACT—*See* MASTER AND SERVANT.

APPEARANCE.

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OF PAYMENTS—*See* CONTRACT.

ARBITRATION.

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I. In General.

Abortive proceedings.]—In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive, it is the duty of the Court to supply the defect by itself ascertaining the amount due. *Cuddy* v. *Cameron,* 16 B.C.R. 451; 1914, A.C. 651.

II. Submissions.

1. Scope of submission.]—The question whether a particular matter was within the scope of a submission is for the jury. *Macadam* v. *Kickbush,* 10 B.C.R. 358.

2. Award by majority.]—Where there is a written submission for reference to three arbitrators an award cannot be made by a majority. *McLeod* v. *Hope,* 14 B.C.R. 56.

III. Staying Arbitration.

Injunction.]—Where an arbitrator has been appointed by a judge of the Supreme Court to ascertain the compensation for land compulsorily taken, the arbitration will not be restrained by injunction where there is no evidence that the party applying is likely to suffer damage. *City of Victoria* v. *Healy,* 17 B.C.R. 345.

IV. Staying Action.

After delivery of defence.]—The plaintiff commenced action upon a contract containing a provision for reference to arbitrators of any dispute arising under the contract, and the defendants, who had appointed one arbitrator under a previous agreement for arbitration of the matters in dispute, made application, after filing their defence in the action, for the appointment of the second arbitrator:—Held, that the defence having been delivered, the Court has seisin of the dispute, and it is by its decisions alone that the rights of the parties can be settled. The Court should not, under such circumstances, make an order under sec. 8, sub-sec. (*c*) of the Arbitration Act:—Held, further, that the rule applies whether such action relates to the whole or a part of the matters in dispute. *In re Hudson's Bay Insurance Company and Walker,* 19 B.C.R. 87.

V. Arbitrators: Umpire.

A. Appointment of, by the Court.

1. In general.

1. Appointment after award.] — An award for misconduct of the umpire having been set aside by the Court, which refused to refer it back to the arbitrators, the umpire afterward sent in a purported resignation to the Registrar of the Court:—Held, that the arbitrators were functi officio on making their award, and that an order could not be made for the appointment of a new umpire. *In re Joseph Bros. & I. Miller,* 1 B.C.R., Pt. II., 38.

2. Arbitrator guilty of misconduct.]—There is no power in the Court after the making of the award to appoint a fresh arbitrator in place of one guilty of misconduct. *Wood* v. *Gold,* 3 B.C.R. 281.

2. Under the Municipal Act.

1. Mandamus.]—If there is an inconsistency between a general and a subsequent special Act, the latter must prevail. Accordingly, the provisions of sec. 8 of the Arbitration Act, R.S.B.C. 1911, c. 11, providing for the appointment of an arbitrator by the Court on the default of the opposite party to make an appointment, do not apply in the case of an arbitration of the claim of an owner against a municipality for damages to his property owing to the regrading of a street. In the case of default by a municipality to name an arbitrator under sec. 394 of the Municipal Act, R.S.B.C. 1911, c. 170, the proper procedure is by way of mandamus against the municipality. *In re Walker and Municipality of South Vancouver,* 18 B.C.R. 480.

2. Power to appoint.]—Where, in an arbitration to assess damages under sec. 394 of the Municipal Act, a municipality

fails to appoint an arbitrator, the provisions of the Arbitration Act in respect thereto apply. *In re Jackson and the Corporation of North Vancouver*, 19 B.C.R. 147.

3. Direct appointment by the Court.]—Where, upon a Corporation failing to appoint an arbitrator to ascertain the compensation payable for damages arising from municipal improvements, under sec. 394 of the Municipal Act, an order is made by a judge, under sec. 8 of the Arbitration Act, upon the application of a party suffering damage, in terms ordering the Corporation to appoint an arbitrator:—Held, on appeal, that the order was made without jurisdiction, and should be set aside. *In re North Vancouver and Loutet*, 19 B.C.R. 157.

B. Resignation.

After award.]—After the award is made there can be no resignation of an office which has ceased to exist. *In re Joseph*, 1 B.C.R., Pt. II., 38.

VI. AWARD.

A. In general.

1. Alteration.]—An award cannot be altered by a judge on an application to set it aside, but if the arbitrators have exceeded their powers by awarding interest when there was no jurisdiction to do so, the award must be set aside. *Humphreys* v. *City of Victoria*, 17 B.C.R. 258.

2. Award of majority.]—Where a reference authorizes two out of three arbitrators to make an award, and after notice of the final meeting the third arbitrator fails to attend, on account of personal inconvenience and private affairs, but both parties appear at the time appointed and raise no objection on account of the absence of the third arbitrator, the remaining two have jurisdiction to decide whether or not, in the exercise of a judicial discretion, they shall delay further or proceed to make the award. *Doberer* v. *Megaw*, 10 B.C.R. 48; 34 S.C.R. 125.

B. Effect and Enforcement Of.

Compensation.]—The right to compensation cannot be determined by arbitrators appointed under sec. 133 of the Vancouver Incorporation Act, 1900, their jurisdiction is limited to the finding of the amount of compensation. An award of such arbitrators cannot be enforced summarily under sec. 13 of the Arbitration Act. *In re Northern Counties Investment Trust, Limited, and the City of Vancouver*, 8 B.C.R. 338.

C. Remitting.

1. Under Railway Act.]—There is no jurisdiction to remit an award in an arbitration held under the British Columbia Railway Act. *In re The Canadian Northern Pacific Railway Company and P. Finch*, 20 B.C.R. 87.

2. Functus officio.]—Where a case is stated by arbitrators, and the judge to whom the questions are submitted finds that they are questions of fact he may refer the matter back to the arbitrators with instructions to proceed with the arbitration, as arbitrators are not functi officio till the award is made. *Armstrong* v. *St. Eugene Mining Co.*, 13 B.C.R. 385.

3. Revival of powers.]—On a motion to vary or set aside an award, the Court may refer the matters submitted back to the arbitrators, whose original powers will thereupon be revived. *In re Joseph*, 1 B.C.R., Pt. II., 38.

4. Revival of powers.]—Where an award has been set aside on the ground of misconduct on the part of one of the witnesses, there is no power to refer back the award, and appoint a fresh arbitrator in place of the one found guilty of misconduct. *Wood* v. *Gold*, 3 B.C.R. 281.

D. Time for Applying to Set Aside.

Compensation — Land covered with water—Construction of Crown grants—Setting aside award—Time within which application should be made—Imp. 9 & 10 Wm. III., c. 15.] — The arbitrators appointed under the "Victoria Water Works Act, 1873," in making an award of damages to be allowed to W. for lands required for the water works, took into consideration, in their award and estimate, the value of certain land covered with water (Beaver Lake):—Held, without deciding that the Imperial Stat. 9 & 10 Wm. III., c. 15, was in force in British Columbia, that the time limited by sec. 2 of that Act was the time within which

applications to this Court to set aside awards should be made. *In re Ward and The Victoria Water Works,* 1 B.C.R., Pt. I., 114.

E. Grounds for Setting Aside.

1. Award by majority.]—Although a third arbitrator has previously suggested some further audit of certain accounts already examined by the arbitrators, it is not necessarily misconduct for the other two to make an award in his absence. *Doberer* v. *Megaw,* 10 B.C.R. 48; 34 S.C.R. 125.

2. Proof of partiality or unfairness.]—Where it does not appear that an arbitrator is in a position with regard to the parties or the matter in dispute, such as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award. *Ibid.*

3. Mistake in law.]—An award being good on its face, cannot be set aside on the ground that the arbitrators have made a mistake in law. *In re Laursen and Corporation of the District of South Vancouver* (No. 2), 18 B.C.R. 532.

4. Review of points of law.]—The parties to an arbitration, even by mutual consent, cannot re-open the matter before the Court to review rulings on points of law after the arbitrators have made and published their award. *Ibid.*

5. Under Municipal Act.]—Sec. 396 of the Municipal Act limits the grounds upon which an award can be set aside to misconduct and compensation on a wrong principle. *Ibid.*

6. Separate awards.]—In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators being unable to agree, drew up and rendered three separate awards. Two of the arbitrators agreed in their findings. Morrison, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to sec. 10. sub-sec. 36 of the Interpretation Act:—Held, on appeal, per Irving and Clement, JJ., that said sub-sec. 36 does not apply to the construction of a document inter partes, as here, but to something done pursuant to statute. Per Hunter, C.J.: The arbitrators having acted separatim in making their award, an objection to a finding so made is fatal. *McLeod* v. *Hope and Farmer,* 14 B.C.R. 56.

7. Misdirection.]—When it appears on the face of an award that the arbitrator has misdirected himself as to the law relating to the valuation of lands proposed to be expropriated, the award should be set aside. *In re False Creek Reclamation Act and City of Vancouver,* 20 B.C.R. 453.

8. Wrong basis of compensation.]—An award is bad upon its face, and should be set aside, which allows for land not vested in the owners or for rights or interests which do not attach to the lands expropriated and cannot in the future be acquired. *Ibid.*

9. Alternative awards.]—In constructing their line of railway on a tidal flat conveyed to them by a municipality, the Railway Company cut off the access of abutting owners to the water. In an arbitration to ascertain the amount of damage done such owners, the Company submitted that the increased value which the land of the abutting owners acquired by reason of the construction of the railway should be set off against any damage suffered: sec. 198 of the Railway Act. To this submission the owners replied that that provision of the Railway Act did not apply, as the Railway Company had not taken, or "passed through or over" their lands. The arbitrators, after having taken evidence, promised to set out in their award the respective amounts found as damages and increased value. In the result this was not done, as the arbitrators failed to agree on the point, although they were agreed that the increased value more than offset the damage, and, on the request of the Company, made an award of one dollar damages. On an application to Gregory, J. to set aside the award, he was of opinion that the owners had been misled by the promise of the arbitrators to make alternative awards, and, although unintentional, the failure to make the award as indicated constituted misconduct sufficient to justify the setting aside of the award. On appeal the Court was evenly divided. *In re False Creek Flats Arbitration,* 17 B.C.R. 282.

10. Hearing evidence separately—Referring back award.]—On an application to set aside an award made upon an arbitration to ascertain the value of cer-

tain property for the purpose of assessment, it appeared that certain of the arbitrators respectively heard evidence in the absence of each other and of the witnesses, and that they took into consideration the financial ability of the owners as an element in their determination:—Held, that such conduct invalidated the award, but that same should not be set aside but referred back for consideration under sec. 10 of the Arbitration Act, 1893. *Re Trythall*, 5 B.C.R. 50.

11. Taking evidence in absence of parties.]—An arbitrator nominated by one of the parties permitted a witness to make statements to him with reference to the matters in dispute in the absence of the parties and of the other arbitrators:—Held, that the award was invalid for such misconduct. *Wood* v. *Gold*, 3 B.C.R. 281.

12. Waiver of objection to misconduct.]—A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious, and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. Where two out of three arbitrators go on and hold a meeting and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards. Per Hunter, C.J.—It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was fair in the conduct of the arbitrators. *Doberer* v. *Megaw*, 10 B.C.R. 48; 34 S.C.R. 125.

VII. Stating Case.

Based on proven facts.]—The words "special case" in sec. 22 of the Arbitration Act have the same meaning as in marginal r. 389 of the Supreme Court Rules, and a "stated case" thereunder must be based on a statement of fact, either admitted or judicially ascertained. It is not the province of a Court to advise parties what their rights would be under a hypothetical case. All the facts must be stated, as facts admitted or ascertained necessary to raise the question of law upon which the opinion of the Court is asked. *In re Laursen and the Corporation of the District of South Vancouver* (No. 1), 18 B.C.R. 528.

VIII. Costs Of.

Deduction from amount of award.]—A judge sitting in Chambers has no jurisdiction to order the costs of the successful party in an arbitration proceeding under B.C. Acts, 1873, No. 20, and 1892, c. 64, s. 3 (1), to be deducted from the amount awarded by the arbitrators. *Re Dwyer and the Victoria Waterworks Arbitration*, 6 B.C.R. 165.

Expropriation—*See* Compulsory Purchase.

Workmen's Compensation Act—*See* Master and Servant.

ARCHITECT.

1. Estimates, reasonable care required in preparation of.]—In making his estimates of the cost of a building an architect is only required to use a reasonable degree of care and skill, and if he does this he is not liable for any loss caused by error in the estimates. *Grant* v. *Dupont*, 8 B.C.R. 7; affirmed 8 B.C.R. 223.

2. Accounts.]—An architect is bound to render to the building owner an account of all moneys expended under the architect's certificate, notwithstanding that the certificate is made final as between the building owner and contractor. *McDermott* v. *Coates*, 18 B.C.R. 439.

ARREST AND IMPRISONMENT FOR DEBT.

I. Arrest Before Judgment, 73.
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A. Affidavits, 74.
B. Bail, 76.
C. Dissolutions: Dismissal: Discharge, 76.
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I. ARREST BEFORE JUDGMENT.

1. Temporary absence animo revertendi.]—A. O., a government contractor, arrested on a capias, deposited a sum of money in lieu of bail and for costs, which was paid into Court. On an application to have the money delivered up to him, he showed that his intended absence was for a two months' visit to Ottawa and New York on business, in connection with his contract with the Dominion Government; that he intended to return to this Province; that the exact amount of the debt could be ascertained; that he had signed a cheque for a large part of the debt, and the balance, as soon as ascertained, would be paid:—Held, that the security must be delivered up to the defendant, as his absence was merely for some temporary purpose, and without any intention to delay or defraud his creditors, and he had every intention of returning to the Province. *Hartney* v. *Onderdonk*, 1 B.C.R., Pt. II., 88.

2. Denial of permanent absence.]—A defendant arrested under a writ of ca. sa., admits by implication his intention of leaving the province by denying his intention to leave it permanently. *Robertson* v. *Beers*, 7 B.C.R. 76.

II. ARREST AFTER JUDGMENT.

1. Incurring debt by fraud.]—Defendant received from plaintiff several sums of money, part of which were to be invested and part expended on plaintiff's farm. Defendant placed these moneys to his wife's credit, made no investment, kept no accounts and could not account at all for a large portion, although he said it had been expended on the farm. Before the plaintiff got judgment and while the action was pending defendant allowed his wife and sister-in-law to get judgment against him:—Held, that the defendant had not incurred the debt by fraud or false pretences within the meaning of s. 15 of the Arrest and Imprisonment for Debt Act. *Bullock* v. *Collins*, 8 B.C.R. 23.

2. Effect of, in satisfaction of judgment.]—Plaintiffs having recovered judgment in an action against defendant, J.C., brought this action on behalf of themselves, and his other creditors against him, J. C., Jr., and H., to set aside prior judgments recovered by the two latter against him upon the ground that there were fraudulent and collusive as against the plaintiff's judgment. Pending this action the plaintiffs arrested J. C. on a ca. sa., under their judgment, and defendants herein pleaded such arrest, and that J. C. remained in custody thereunder, as a satisfaction of that judgment and bar to this action. Upon issue in law and argument of the point:—Held, per Walkem, J., dismissing the action: That though the arrest and detention of J. C. on the ca. sa. did not extinguish the debt, it operated meanwhile as a satisfaction of the judgment, and was a good defence to the present action, the object of which was to establish a remedy by fi. fa., which was suspended. On appeal to the Divisional Court:—Held (1) That the disability of the plaintiff was limited to this, that he could not resort to any mode of execution on the judgment other than the ca. sa., or any charge under 1 & 2 Vict. (Imp.) c. 110, but that he had a status to impeach the prior judgments as interfering with other remedies left to him under his judgment, e.g., registration thereof under the Execution Act against the judgment debtor's lands, which is not an execution. (2) That the right of execution might be restored by the death or escape of J. C., or his taking gaol limits under sec. 12 of the Execution Act, and that the action might be maintained for a declaration of right independently of any claim to present relief. *Robert Ward & Co.* v. *John Clark, Jr., and Hennigar*, 4 B.C.R. 71.

III. DISCOVERY IN AID OF EXECUTION.

Supreme Court Rules.]—Sec. 19 of the Arrest and Imprisonment for Debt Act (R.S.C. 1897, c. 10) has not been superseded by order XLII., r. 32 of the Rules of the Supreme Court, 1906. *Jackson* v. *Drake, Jackson & Helmcken*, 13 B.C.R. 62.

IV. PROCEDURE.

A. Affidavit.

1. Particulars of claim in.]—An affidavit to hold to bail stated the facts constituting the plaintiff's cause of action, setting out the amounts in respect of the different matters sued for, and, in a separate paragraph, stated "that the defendant is justly and truly indebted to the plaintiff in the sum of $2,447.81":—Held, bad, that it would not be inferred that such indebtedness was in respect of the causes of action previously set forth. A state-

ment of a cause of action in respect of premiums which the plaintiff was compelled to pay for the defendant upon a policy of insurance deposited by him with plaintiff as collateral security, held bad, for want of allegation that such payment was made by defendant's request. An objection that the affidavit to hold to bail did not show that the writ of summons had been issued overruled. *Williams* v. *Richards*, 3 B.C.R. 510.

2. Statement of cause of action — Sufficiency of.]—An affidavit to hold to bail in an action for money lent and goods sold and delivered did not show that the money lent was due and unpaid, or that the goods were delivered:—Held, insufficient. *Mee Wah* v. *Chin Gee*, 1 B.C.R., Pt. II., 367.

3. Sufficiency of.]—K. in 1895 gave two promissory notes to the firm of Lenz & Leiser, and in 1896 one member of the firm died, and the partnership business was continued under the same firm name by the surviving partner, and the dead partner's widow. In 1898 the firm sued K. on the notes, and he was arrested on a writ of ca. re., the affidavit leading to the order being made by the surviving partner, who swore that he was a member of the firm of Lenz & Leiser, and that K. was indebted to the firm on the notes, but no mention was made of the notes having been given to the old firm:—Held, on summons to discharge the defendant from custody, that the affidavit was insufficient, as it did not disclose that the firm of Lenz & Leiser is a new and different firm from that in existence when the cause of action accrued. *Lenz & Leiser* v. *Kirschberg*, 6 B.C.R. 533.

4. Sufficiency of particulars of claim in.]—The plaintiff's cause of action should appear in the affidavit leading to an order for a writ of ca. re., and a statement in the affidavit that the defendant is indebted to plaintiff in a sum as appears in an exhibit to the affidavit, is insufficient. *Walt* v. *Barber*, 6 B.C.R. 461.

5. Sufficiency—Affidavit required for.]—Under sec. 7 of the Execution Act, the provisions of 1 and 2 Vict. (Imp.) govern the form of the affidavit for ca. re., and an affidavit to hold defendant to bail to answer an action for an ordinary debt is sufficient without the allegations required by sec. 10 in an affidavit for a ca. sa. Sec. 9 of the Act providing that "No person shall be arrested or held to bail for non-payment of money unless a special order for the purpose be made on an affidavit establishing the same circumstances as are necessary for obtaining a writ of ca. sa. under this Act, and in such case the arrest, when allowed, shall be made by a writ of attachment corresponding as nearly as may be to a writ of ca. sa.," has relation only to arrests for non-payment under judgments and orders of the Court analogous to process for contempt, and does not apply to ordinary bailable process for debt. Upon appeal to the Divisional Court (Crease, Walkem and Drake, J.J.):—Held, affirming Davie, C.J., upon the same grounds, that the affidavit required by 1 and 2 Vict. c. 10, ca. re., was sufficient to support that writ and the ca. sa. *Kimpton* v. *McKay*, 4 B.C.R. 196.

6. Sufficiency of.]—The affidavits leading to an order for ca. re. must show that there is a debt due from the defendant to the plaintiff. It is not sufficient to show that there is a debt due from the defendant to one who bears the same name as the plaintiff. A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant without stating in what action the writ was issued, is not sufficient to show that plaintiff and deponent are one and the same person. *Wehrfritz* v. *Russell and Sullivan*, 9 B.C.R. 79.

B. Bail.

1. Waiver of irregularities by giving bail.]—By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ. *Robertson* v. *Beers*, 7 B.C.R. 76.

2. Waiver of irregularities by giving bail.]—By the giving of special bail a defendant arrested on a capias waives his right to object to the writ. *Tanaka* v. *Russell*, 9 B.C.R. 24.

C. Dissolution: Dismissal: Discharge.

1. Aliens—Liability of, to process.]—No alteration as to the parties to the record after the writ of capias ad respondendum has issued entitles the person capiased to have the order set aside unless he has been prejudiced by such alteration. There is no rule requiring a plaintiff who has amended the writ of summons by adding parties to serve any defendant who

has appeared with the amendment. In the absence of agreement ad hoc with his obligee, a party is liable at the latter's suit on a good cause of action to all the remedies, including arrest and imprisonment, allowed by law, and it is immaterial that the parties are aliens, or that the particular remedy sought is not allowed in the foreign jurisdiction. *Baxter* v. *Jacobs, Moss, etc.* (2), 1 B.C.R., Pt. II., 373.

2. Appearance — Necessity of entry before applying for discharge.]—A writ of ca. re. must state the nature of the action. It is not necessary for a person arrested under a writ of ca. re. to enter an appearance before applying for his discharge. The defendant having asked for costs the order for his discharge provided that no action should be brought against the plaintiff or the sheriff by reason of the capias or the arrest. *Wehrfritz* v. *Russell and Sullivan,* 9 B.C.R. 50.

3. Discharge—Motion for—Maintenance money.]—On a motion to discharge defendant from arrest under a writ of ca sa. for non-payment by the plaintiff of the weekly sum of $3.50 in advance to the sheriff for defendant's maintenance money under r. 976, it appeared that the plaintiff had offered to pay the amount to the sheriff, who refused to accept it on the ground that he had money of plaintiff's in his hands sufficient to cover it:—Held, a sufficient answer to the application. *Ward* v. *Clark,* 3 B.C.R. 609.

4. Discharge—Application—Mode of.]—Defendant applied to the Court upon affidavits denying his intention to leave the province, for an order setting aside a judge's order for a writ of ca. re., and the writ of ca. re. issued thereunder upon which he had been arrested:—Held, 1. The application should have been to discharge the defendant under sec. 6 of 1 & 2 Vict. c. 110, but an amendment of the notice of motion was allowed. 2. A proposed transit through foreign territory on a journey from one part of the province to another does not constitute a leaving of the province sufficient to warrant an arrest. Semble: An application to discharge a party arrested under a writ of ca. re. need not be made by order nisi, but may be made by notice of motion. *Coursier* v. *Madden,* 6 B.C.R. 125.

5. Statement of cause of action—Particulars contained in exhibit to affidavit—Whether sufficient.]—Proceedings to discharge from custody a person arrested under a writ of capias should be by summons, and where objections are taken to the proceedings on the ground of irregularity, the specific irregularities should be set out. *Walt* v. *Barber,* 6 B.C.R. 461.

6. Execution—Failure to file praecipe for writ of.]—Per Davie, C.J.: r. 463, providing "No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose." is imperative, and the plaintiff was not absolved from compliance by tendering a præcipe for a writ of ca. sa. to the officer of the Court and accepting his statement that it was not necessary. Under sec. 7 of the Execution Act the provisions of 1 & 2 Vict. (Imp.) govern the form of the affidavit for ca re., and an affidavit to hold defendant to bail to answer an action for an ordinary debt is sufficient without the allegations required by sec. 10 in an affidavit for a ca. sa. Sec. 9 of the Act, providing that "No person shall be arrested or held to bail for non-payment of money unless a special order for the purpose be made on an affidavit establishing the same circumstances as are necessary for obtaining a writ of ca. sa. under this Act, and in such case the arrest, when allowed, shall be made by a writ of attachment corresponding as nearly as may be to a writ of ca. sa.," has relation only to arrests for non-payment under judgments and orders of the Court analogous to process for contempt, and does not apply to ordinary bailable process for debt. On appeal to the Divisional Court (Crease, Walkem and Drake, JJ.): The Court held the defendant was entitled to be discharged on a point not taken by counsel, and delivered a verbal judgment dismissing the appeal without costs. The next day, before the order was drawn up, counsel for plaintiff brought authorities to the attention of the Court contrary to the view upon which the appeal was dismissed, and asked leave to re-argue:—Held, that it is in the discretion of the Court to vacate an order before it is drawn up. Upon re-argument:—Held, affirming Davie, C.J., upon the same grounds, that the affidavit required by 1 & 2 Vict., c. 10, for ca. re. was sufficient to support that writ, and the ca. sa. (2) Overruling Davie, C.J., that the non-filing of the præcipe for the ca. sa. was an omission attributable to the act of the officer of the Court, and should be relieved against under Supreme Court Rule

950, and the appeal from order discharging defendant allowed with costs. *Kimpton* v. *McKay*, 4 B.C.R. 196.

7. Maintenance money.]—The language of r. 977 is imperative, and if the maintenance money of a judgment debtor imprisoned on a ca. sa. is not paid by the judgment creditor as therein provided, he is entitled to his discharge as of right. *Jensen* v. *Sheppard*, 3 B.C.R. 126.

8. Writ of ca. re.—Motion to set aside for irregularities.]—Upon motion to set aside a writ of ca. re., and the arrest of defendant thereunder for irregularity:—Held: 1. A statement of the plaintiff's cause of action, in his affidavit to hold the defendant to bail, that the defendant "is justly and truly indebted to me in the sum of $1,323.80, as follows, namely: $2,000 for money received by him to my use, being the price of eight kegs of whiskey, of my property, which he sold for $2,000, and received the said sum, less the amount of $676.20, due by me to the said T. O'B.," was sufficient, as the defendant was liable whether the plaintiff authorized or requested the sale or not, as, if the defendant converted the whiskey, it was open to the plaintiff to waive the tort and sue for the proceeds. 2. The amount due was not uncertain by reason of the credit of $676.20, without saying "and no more." 3. It is not necessary to serve on the defendant a copy of an order for a ca. re. 4. Rule 979 requiring service of affidavits on which an ex parte order is obtained, only applies when the ex parte order itself has to be served. 5. The non-cancellation of the law stamps on the process by the officers of the Court, is not fatal to the process: Smith v. Logan, 17 P.R. 219, distinguished. 6. A variation in the statement of defendant's address, viz.: as "Yukon" in the writ, and "Victoria" in the affidavit to hold to bail, is immaterial. 7. An alien passing through the jurisdiction may be arrested on a ca. re. upon a cause of action arising in a foreign country. 8. In the absence of proof it will be assumed that the law of the foreign country is the same as that here. 9. It is not necessary in an affidavit for ca. re. to show that the defendant is leaving the country with intent to defraud creditors. *McCaulay* v. *O'Brien*, 5 B.C.R. 510.

D. Appeal.

1. Appeal—Lies direct from committal order.]—An appeal lies direct from an order committing a debtor to gaol and no preliminary motion to the judge for discharge is necessary. *Bullock* v. *Collins*, 8 B.C.R. 23.

2. Setting out irregularities.]—Where an application to rescind an order for a capias on the ground of irregularities in the issue of the writ is dismissed, if the order dismissing is not drawn up so as to disclose the irregularities complained of, they will not be considered on appeal. *Tietjen* v. *Revesbeck*, 1 B.C.R., Pt. 11., 365.

ASSAULT.

See TORT.

ASSESSMENT.

See MUNICIPAL CORPORATIONS.

See TAXATION.

ASSESSMENT WORK.

See MINES AND MINERALS.

ASSESSORS.

See ADMIRALTY.

ASSIGNMENT.

I. WHAT ASSIGNABLE, 80.
II. EQUITABLE ASSIGNMENTS, 81.
III. NOTICE, 82.
IV. RIGHTS AND LIABILITIES OF PARTIES, 83.
A. Priority, 83.
B. Subject to all equities, 83.
C. Right to sue, 84.

I. WHAT ASSIGNABLE.

1. Order to pay money—Whether bill of exchange.]—An order to pay money in which the drawee is mentioned is a bill of exchange, and by sec. 7, C.S.B.C. 1888, c. 19 (Assignment of Choses in Action Act), is excepted from the operation of the Act, and does not operate as an assignment. When the drawee is not mentioned, the order is not a bill of exchange and is an assignment within the Act. *McPherson* v. *Johnston and Glaholm*, 3 B.C.R. 465.

2. Salary of public officer.]—The salary of a Government officer, paid for the per-

formance of a public duty, is not assignable. *Cane* v. *Macdonald*, 10 B.C.R. 444.

3. Possibility of reverter — Whether interest assignable.]—On the grant of a fee simple, defeasible on breach of a condition, no estate is left in the grantor, but only a possibility of a reverter, and, therefore, before breach there is nothing capable of assignment. After breach, where the deed does not provide for ipso facto forfeiture, the fee does not re-vest automatically, and until re-vesting by suit or otherwise there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and re-convey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—Held, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. *Clark* v. *The Corporation of the City of Vancouver*, 10 B.C.R. 31.

II. Equitable Assignment.

1. Appropriation by parol assignment.]—Defendant, under contract to build for one Walker, purchased the materials from plaintiffs, who subsequently got judgment against him, and who garnisheed the moneys due from Walker to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect Grant. Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker, to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270, and charge the same to my account for plastering Place Block, Hastings Street W., in full to date," which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my acocunt on contract for Robert Walker Block on Hastings Street City":—Held, that apart from the order there was a parol assignment specifically appropriating to the assignment the sum in question, of the moneys to arise out of the contract. *B.C. Mills Lumber and Trading Co.* v. *Mitchell Walker, Garnishee, and Champion & White, Claimants*, 8 B.C.R. 71.

2. Equitable assignment.]—A money order containing expressions showing the account upon which the payment is to be made, is an equitable assignment and not a bill of exchange. *Johnson* v. *Braden*, 1 B.C.R., Pt. II., 265.

3. Oral equitable assignment.] — An oral equitable assignment of a chose in action is valid, and takes priority of a subsequent attaching order of the debt so assigned. *Todd & Son* (Judgment Creditors) v. *Phœnix* (Judgment Debtor), *The United Fire Insurance Co.* (Garnishees) *and Lowenberg, Harris & Co.* (Claimants), 3 B.C.R. 302.

III. Notice.

1. Express notice in writing.]—It is necessary to the validity of an assignment in writing of a chose in action under C.S.B.C. 1888, c. 19, that express notice thereof shall have been given to the debtor, trustee or other person, from whom the assignor would have been entitled to receive or claim the chose in action. *The Meriden Britannia Co.* v. *Bowell*, 4 B.C.R. 520.

2. Constructive.]—K. by deed assigned to plaintiff a proportion of certain sums to be earned and received by him from the City of Vancouver under a certain contract. He afterwards, to secure advances, made to him by defendant, assigned to her all sums due or to become due to him under the same contract. The plaintiff gave verbal notice of the deed to her to the chairman of the board of works and to the city solicitor of Vancouver. The defendant subsequently gave formal written notice of her assignment to the city clerk, and plaintiff afterwards gave a similar notice of her deed:—Held, per Bole, Co.J., giving judgment for defendant, that priority of notice governs the priority of right. 2. That neither the notice of the plaintiff's assignment to the city solictor nor that to the chairman of the board of works, was notice to the City. Per McCreight and Walkem, JJ., on appeal: That by his deed to plaintiff, K. made himself a trustee for the plaintiff of the proportion of earnings to be received by him from the city, which he thereby assigned to her, and that the plaintiff had therefore an equity thereto which over-rode the subsequent assignment thereof to the defendant, and that the priority of notice of the latter assignment

was immaterial. Per McCreight, J.: That, upon the evidence, the defendant having had actual notice of the existence of the deed to the plaintiff, had constructive notice of its terms. 2. That the fact that the solicitor whom she employed to draw up the assignment to her also drew the deed to the plaintiff, fixed the defendant with constructive notice of such deed through the knowledge of the solicitor, though acquired in a different and previous transaction. *Clark* v. *Kendall*, 4 B.C.R. 503.

IV. Rights and Priorities of Parties.

A. Priority.

1. Garnishment.] — The fact that the judgment debtor has assigned the debt sought to be attached to a third person, though no notice has been given to the party owing the assigned debt, is a good answer to a garnishee order. *Gray* v. *Hoffas*, 5 B.C.R. 56.

2. Money order—Indorsement of—Parol assignment.]—Defendant, under contract to build for one, Walker, purchased the materials from plaintiffs, who subsequently got judgment against him, and who garnisheed the moneys due from Walker to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect, Grant. Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker, to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270, and charge the same to my account for plastering Place Block, Hastings Street, W., in full to date"; which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my account on contract for Robert Walker Block on Hastings Street, City":—Held, that apart from the order there was a parol asignment specifically appropriating to the assignees the sum in question of the moneys to arise out of the contract. *B.C. Mills Lumber and Trading Co.* v. *Mitchell; Walker, garnishee, and Champion & White, claimants*, 8 B.C.R. 71.

B. Subject to All Equities.

Set-off—Estoppel.]—The assignee of an agreement for sale, even in the event of the payments under the agreement not having matured at the time of the assignment, is only entitled to recover the moneys due and enforce the agreement subject to any equities existing between the purchaser and vendor. Where an assignee of an agreement for sale has an acknowledgment of the debt under such agreement and comes to trial with full knowledge of the fact that the purchaser intends to set up by way of equitable defence a claim against the assignee for defective construction of a building on the land comprised in the agreement, but fails to specially plead estoppel, the purchaser is entitled to set up a claim in connection with the construction of the building as against the assignee, in the same manner, and to the same extent, as she could against the original vendor if he were taking proceedings under the agreement. *British Pacific Trust Company* v. *Baillie*, 20 B.C.R. 199.

C. Right to sue.

1. Notice.]—Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in the assignor. *Okell Morris & Co.* v. *Dickson*, 9 B.C.R. 151.

2. Notice.]—A limited company sold lots to S. under an agreement of sale. After payment of an instalment on the purchase price, the limited company assigned to M. all its interest in the lots subject to the agreement of sale to S. On S. being in default in his payments, M. brought action for cancellation of the agreement and applied for an order nisi of foreclosure on default of delivery of a statement of defence:—Held, that as there was no allegation in the statement of claim of the service on the debtor of notice of an assignment by the original vendor to the plaintiff as required by the Laws Declaratory Act, the application should be dismissed:—Held, further, that without such notice the assignment must be regarded as an equitable assignment of a legal chose in action, in which case the assignor should be made a party to the action either as plaintiff or defendant. *Murray* v. *Stentiford*, 20 B.C.R. 162.

3. Oral assignment.]—An assignment of the benefit of a covenant for payment in a contract for the sale of land must be in writing to enable the assignee to sue upon the covenant in his own name. *Dell* v. *Saunders*, 19 B.C.R. 500.

See Contract.

See Garnishment.

See Mechanics' Liens.

ASSIGNMENTS FOR CREDITORS.

I. WHAT CONSTITUTES AN ASSIGNMENT, 85.
II. CONSTRUCTION AND EFFECT OF ASSIGNMENT, 85.
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I. WHAT CONSTITUTES AN ASSIGNMENT.

Assignment of partnership assets only for benefit of creditors.]—An assignment by a firm for benefit of creditors which was construed by the Court to be an assignment of partnership assets only, may be a good and valid asignment within the meaning of the Creditors' Trust Deeds Act. *Eastman* v. *Pemberton,* 7 B.C.R. 459.

II. CONSTRUCTION AND EFFECT OF ASSIGNMENT.

1. Exemption.]—It is too late for the assignor to claim the statutory exemption after the property assigned has been converted into money. *Pilling* v. *Stewart,* 4 B.C.R. 94.

2. Exemption.]—Debtors assigned, under the Creditors' Trust Deeds Act, all their personal property, credits and effects that might be seized and sold under execution, and afterwards claimed, as exempt, chattels to the amount of $500:—Held, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption. *In re Ley,* 7 B.C.R. 94.

3. Interpretation of.]—Under a trust deed assigning the assets of a partnership business upon trust to sell the same and divide the proceeds "into and among all the creditors of the parties of the first part" (viz., the assignors), without any words of distribution such as "or either of them" being added:—Held, that the deed provided only for the payment of the joint creditors, and not the separate creditors of the partners, and, in the absence of any satisfactory arrangement being agreed upon, the deed must be set aside on the ground that it constituted a preference. *Cunningham* v. *Curtis,* 5 B.C.R. 472.

4. Partnership.] — The firm of O. Brothers comprised three partners. One of them died, leaving L., his executrix. Three months afterwards, the surviving partners executed an assignment for the benefit of their creditors. Immediately thereupon, H., a general creditor who had not signed or acquiesced in the deed, brought an action for an account, not only against the two surviving partners, but also against L., as representing the estate of the deceased partner:—Held, that H. was entitled to an order for an injunction and receiver against the surviving partners and the trustees of the deed of assignment. *The Hudson Bay Company* (for themselves and all the creditors of Oppenheimer Bros.), plaintiffs v. *A. R. Green and G. A. Sargison, Lina Oppenheimer, the Executrix of Godfrey Oppenheimer, deceased, and Oppenheimer Bros*, defendants, 1 B.C.R., Pt. I., 247.

III. PRIORITY.

1. Dividend on shares in a company.]—Where a company has assigned for the benefit of its creditors, a former shareholder is entitled to recover from the assignee that portion of the dividend on the shares formerly held by him which had been retained by the company. *Savage* v. *Shaw,* 17 B.C.R. 343.

2. Attachment of debts.]—The persons refererd to in sub-sec. (2) of sec. 3 of the Creditors' Trust Deeds Act, 1901, Amendment Act, 1902, c. 18, as execution creditors are those having processes upon which execution can be levied. Therefore an attaching order giving a person who had not yet obtained judgment a lien on moneys in Court, was set aside. *Williamson* v. *Woolliams and Naismith,* 16 B.C.R. 346.

3. Money in Court.]—On an appeal from a judgment in favour of the plaintiffs a new trial was ordered upon the defendant paying into Court $4,000 to abide the result of the new trial. On the new trial judgment was again given in favour of the plaintiff, the judge adding that the payment out of moneys must be spoken to. Subsequently the defendants assigned for the benefit of creditors. On application for payment out:—Held, that as the money was paid in as against the happening of a contingency which eventuated before the assignment, namely, the securing of a judgment, the plaintiff was entitled to payment out. Neither the Fraudulent Preferences Act nor the Creditors' Trust Deeds Act

applies in this case. *Doctor* v. *People's Trust Company*, 18 B.C.R. 111.

IV. ASSIGNEE OR TRUSTEE.

A. In General.

1. Corporation.]—An incorporated company cannot be an assignee for the benefit of creditors under the Creditors' Trust Deeds Act. An application on the hearing of an appeal to substitute the name of a creditor for the present plaintiff, the invalid assignee, was refused. *Colonial Development Company* v. *Beach*, 19 B.C.R. 247.

2. Removal of trustees.] — There is inherent jurisdiction in Courts of Equity to remove trustees and appoint new ones in proper cases. A trustee for creditors who is also employed as solicitor to manage an insolvent estate, is a person whose interest conflicts with his duty to the creditors as trustee. *Re Dickinson*, 2 B.C.R. 262.

B. Remuneration.

Assignee's remuneration.]—In the circumstances the assignee's remuneration was fixed at five per cent. *In re Ley*, 7 B.C.R. 94.

C. Actions By and Against.

1. Position of assignee as to impeachment of conveyance by assignor.]—Apart from statutory provision, an assignee for the benefit of creditors is in no better position than his assignor to impeach previous conveyances by the assignor, and cannot be treated as occupying the place of the creditors for that purpose. *McKenzie* v. *Bell Irving*, 2 B.C.R. 241.

2. Counterclaim.]—Notwithstanding the rule that a defendant may not set up by way of counterclaim against the claim of a plaintiff, suing in a personal character claims against him in a representative capacity, this does not prevent such a counterclaim when the whole transaction was not carried on by the party in his representative character. *W. G. Scrim Lumber Co.* v. *Ross*, 20 B.C.R. 89.

V. PROPERTY INCLUDED.

Creditors' Trust Deeds Act—Exemption—Onus of proof.]—A deed of assignment of the estate and effects of insolvents for the benefit of their creditors executed on 26th March, 1896, pursuant to the Creditors' Trust Deeds Act, 1890, excepted "such personal property as may be selected by the said debtors, under the Homestead Act and Homestead Amendment Act, 1890":—Held, that the onus was on the claimant to show that the claim was not within the exception to the right of exemption provided by s. 10 of the Homestead Act, 1890, as amended by the Act of 1893, s. 2, in regard to goods seized in "satisfaction of a debt contracted for or in respect of such identical goods," and in the absence of evidence upon the point the claim was disallowed. *In re Sharp*, 5 B.C.R. 117.

VI. PREFERENTIAL CLAIMS.

A. Landlord.

Surrender.]—A landlord is not entitled to a preferential claim for rent accrued after the assignment, where there has been a surrender by operation of law. *Gold* v. *Ross*, 10 B.C.R. 80.

B. Wages and Salaries.

1. Salary and piece work.] — The plaintiff contracted with cannery proprietors (*a*) to supply labour and pack salmon at a stated price per case, i.e., by piece work, and (*b*) to act as foreman of the laborers supplied by him at a salary of $50 per month. The proprietors having assigned for the benefit of creditors, plaintiff sought to enforce the preference given by s. 36 of the Creditors' Trust Deeds Act in respect to both the salary and the piece work:—Held, that the preference must be restricted to the salary. *Tam* v. *Robertson*, 9 B.C.R. 505.

2. Computation of time.] — By the Creditors' Trust Deeds Act, 1901, an assignee is required to pay in priority to the claims of ordinary creditors the wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." The assignment was made on 27th November, 1901:—Held, that a workman who was in the employ of the assignor previous to and including 26th October, 1901, was not entitled to a preference. *In re Clayoquot Fishing and Trading Co.*, 9 B.C.R. 80.

ASSIZE.

See CRIMINAL LAW.

ATTACHMENT OF DEBTS.

See GARNISHMENT.

ATTACHMENT OF PERSON.

1. Breach of injunction.]—Committal, and not attachment, is the appropriate remedy for breach of a prohibitory injunction. *The Golden Gate Mining Co.* v. *The Granite Creek Mining Co.*, 5 B.C.R. 145.

2. Breach of injunction.] — Where a party has committed a breach of an injunction of which he has received telegraphic notice, he will be attached for the purpose of being brought before the Court. *Canadian Pacific Navigation Co.* v. *Vancouver Corporation*, 2 B.C.R. 298.

See CONTEMPT OF COURT.

See INJUNCTION.

ATTORNEY.

See MUNICIPAL CORPORATIONS.

See SOLICITOR.

ATTORNEY-GENERAL.

Duties.]—It is the duty of the Attorney-General, in cases of disputed rights, which cannot be vindicated by private individuals, to remove all obstacles in the way of the assertion of these rights, by permitting the use of his name as plaintiff in any proceeding, receiving a proper indemnity as to costs. *Anderson* v. *Victoria Corporation*, 1 B.C.R., Pt. II., 107.

See CONSTITUTIONAL LAW.

See MINES AND MINERALS.

See NUISANCE.

AUCTIONEER.

Warranty of title.]—An auctioneer who sells goods, not as owner but as auctioneer only, though not naming his principal, does not, without more, warrant the title to the goods sold: he does no more than engage that he is in fact instructed and authorized by his principal to sell. *Trapp* v. *Prescott*, 17 B.C.R. 298; 50 S.C.R. 263.

AWARD.

See ARBITRATION.

See MASTER AND SERVANT.

BAIL.

See ARREST AND IMPRISONMENT FOR DEBT.

See CRIMINAL LAW.

BAILMENT.

Duty and liability of bailee.]—A person retaining goods under an inn-keeper's lien for board must take reasonable care of them. Defendant, an inn-keeper, detained plaintiff's trunk for the amount owed by him for board and lodging. Plaintiff assisted in carrying his trunk to the reading room, the ordinary baggage room being full. The trunk was broken open and several articles lost:—Held, that the fact that the plaintiff had assisted to place the trunk in the reading room, there being no evidence that he requested that it should be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care. *Frank* v. *Berryman*, 3 B.C.R. 506.

See CARRIERS.

BANKING.

I. CUSTOMER'S ACCOUNTS, 90.
A. Duty to customers, 90.
B. Lien, 91.
II. SECURITIES UNDER THE BANK ACT, 91.
III. INTEREST, 92.

I. CUSTOMER'S ACCOUNTS.

A. Duty to Customer.

Refusal to pay cheque.] — Where a cheque is presented at the bank on which it is drawn to a clerk in charge of the A to K ledger, who instructs the holder of the cheque to present it to the clerk in charge of the L to Z ledger, who is the only clerk who has charge of the particular account on which the cheque is drawn, but the holder fails to so present it, there is no refusal to honour the cheque; and the fact that the holder, which is a presenting bank, informs the payee that the drawer of the

cheque has no account at the bank on which it is drawn is immaterial. *Rear* v. *Imperial Bank of Canada,* 13 B.C.R. 345; 42 S.C.R. 222.

B. Lien.

Partnership.] — Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts. *Richards* v. *Bank of B.N.A.,* 8 B.C.R. 143, 209.

II. Securities under the Bank Act.

1. Mortgage of chattels to secure past debt.]—The mere fact that a mortgage of chattels, given to secure a past debt, is taken over amongst the securities, in pursuance of an agreement for the purchase of a banking business, is not a contravention of sec. 76 of The Bank Act. *Royal Bank of Canada* v. *Ball,* 20 B.C.R. 242.

2. Advance under sec. 74.]—H. held a mortgage on a sawmill belonging to G., with the machinery and lumber therein and all lumber that might at any time thereafter be brought on the premises. The mortgage not being registered gave H. no priority over subsequent encumbrancers. Two months later G. gave H. a second mortgage on the same property to secure a note for $794. Shortly after this a contractor applied to G. for a large quantity of lumber for building purposes. G., being unable to purchase the logs, asked the Merchant's Bank for an advance. The Bank, knowing G. to be financially embarrassed, refused the advances to him, but agreed to make them if some reliable person would purchase the logs, which was done by G.'s bookkeeper, and in consideration of an advance of $3,500 G. assigned the contractor's order to the bookkeeper and agreed to cut the logs at a price fixed and deliver them to the bookkeeper at the mill site. The latter then assigned to the Bank all moneys to accrue in respect of the contract, which assignment was assented to by the contractor, and a day or two after also assigned to the Bank three booms of logs by numbers, in addition to one assigned previously. This purported to be done under sec. 74 of the then Bank Act. Two or three days later G. made an assignment for the benefit of his creditors, previously to which the logs had arrived at the mill and been mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage:—Held, that no property in the logs assigned to the Bank had passed to G., and H., having no higher right than his mortgagee, could not seize them under his mortgage. *Merhant's Bank of Halifax* v. *Houston,* 7 B.C.R. 465; 31 S.C.R. 361.

3. Liability of bank for wages.]—The plaintiffs brought action for wages against the defendant Company at common law, and sought also to recover in debt from the defendant Bank under the Bank Act. The defendant Company not having entered an appearance, judgment by default was entered by the plaintiffs against the Company and they proceeded with the action against the Bank. The point was raised by the Bank at the trial that the plaintiffs had elected their remedy by entering judgment against the Company, and were thereby debarred from enforcing their action against the Bank. The plaintiffs thereupon applied for an order vacating their judgment against the Company, which was granted, and they then sought to recover solely from the Bank:—Held, that asuming the judgment was not properly set aside by the order made at the trial, it nevertheless did not operate as a conclusive election and a bar to the plaintiff's right to recover:—Held, further, that the defence that the plaintiffs had elected was open to the Bank without being specially pleaded. Semble, that the statute might be construed as placing the Bank in the position of a guarantor, or a surety for the employer, and the employer could be sued and judgment recovered against him without releasing the Bank. *Edborg* v. *Imperial Timber and Trading Company, Limited, and the Royal Bank of Canada,* 19 B.C.R. 514.

III. Interest.

1. Invalid as to excess.]—In an action to recover principal and interest on certain promissory notes, bearing interest at twelve per centum "as well after as before maturity," defendant pleaded sec. 80 of the Bank Act:—Held, reading secs. 80 and 81 together, such a contract between the Bank and the creditor is merely invalid insofar as it stipulates for more than seven per cent. *Bank of Montreal* v. *Hartman,* 12 B.C.R. 375.

2. Voluntary payment.]—Sec. 80 of the Bank Act does not prevent a bank from entering into a contract to be paid a higher

rate of interest than 7 per cent.; and if, under such contract, interest is paid in excess of said rate, it cannot be recovered back. *Williams* v. *Canadian Bank of Commerce,* 13 B.C.R. 70.

BANKRUPTCY.

See ASSIGNMENTS FOR CREDITORS.

See COMPANY WINDING-UP.

BARBED WIRE.

Fence.]—A company maintained along its line of railway a barbed wire boundary fence without any pole, board or other copping connecting the posts; plaintiff's horse, picketed in the field adjoining, became frightened from some cause unexplained, and ran into the fence, receiving injuries on account of which it had to be killed:—Held, that the fence was not inherently dangerous and therefore the company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. *Plath and Ballard* v. *The Grand Forks & Kettle River Ry. Co.,* 10 B.C.R. 299.

BARRISTER.

I. PERIOD OF STUDENTSHIP, 93.
II. FEES, 94.
III. MISCONDUCT, 94.

I. PERIOD OF STUDENTSHIP.

1. University graudate—Legal Professions Act, sec. 37, sub-sec. 5.]—To come within the exception in sub-sec. 5 of sec. 37 of the Legal Professions Act, the applicant must have had his term of study or service shortened because he was a graduate. *King* v. *The Law Society of British Columbia,* 8 B.C.R. 356.

2. University graudate—Legal Professions Act, sec. 37, sub-sec. 5.]—To come within the exception in sub-sec. 5 of sec. 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of service was shortened because he was a graduate. An applicant who obtained his degree after call or admission would come within the exception. *Calder* v. *The Law Society,* 9 B.C.R. 56.

II. FEES.

1. Fees.]—A barrister's fees being in the nature of an honorarium, the acceptance of employment as counsel in an arbitration by a barrister was not the acceptance of such an office as to disqualify a member of Legislature from sitting and voting. *Barnard* v. *Walkem,* 1 B.C.R., Pt. I., 120.

2. Fees—Right of barrister to sue for counsel fee.]—Counsel in this Province have the right to maintain an action for their fees. Where a solicitor, contrary to his client's expectations, does not pay over to a counsel, fees received from his client, the client is still liable to the counsel. *British Columbia Land and Investment Agency, Limited* v. *Wilson,* 9 B.C.R. 412.

III. MISCONDUCT.

Striking off rolls—Appeal from decision of Benchers—Reinstatement.]—B., a barrister and solicitor, was suspended from practice for six months by the Benchers in 1894, for wrongfully retaining the moneys of a client. On the expiration of the period of suspension the client, not having yet received her money from B., again complained to the Law Society, and on the hearing of the complaint in 1896 B. was disbarred and struck off the roll of solicitors:—Held, on appeal to the judges of the Supreme Court, as visitors of the Law Society: (1) That B. was not obliged to apply to the Benchers for reinstatement under sec. 48 of the Legal Professions Act before bringing his appeal; (2) That the Benchers by suspending B. in 1894 had not exhausted their powers, but that they had power to disbar and strike B. off the rolls if they found that he was still wrongfully retaining his client's money, and not a fit and proper person to remain on the roll; (3) That the judges will not allow an appeal which would have the effect of reinstating a barrister or solicitor while still in default in respect to the transaction for which he was debarred or struck off. *In re Blake,* 6 B.C.R. 276.

See SOLICITOR.

BEHRING SEA AWARD ACT.

See ADMIRALTY.

BENCHERS.

See SOLICITOR.

BENEFIT SOCIETY.

Claim for sick benefits.]—In an action for sick benefits against an I.O.O.F. lodge, it appearing that plaintiff followed no occupation, being a retired merchant, a nonsuit was entered. *Bone* v. *Columbia Lodge (No. 2)*, 1 B.C.R., Pt. II., 349.

BENNETT-ATLIN COMMISSION ACT.

Appeal by consent from commissioner purporting to sit as County Court judge —Whether competent.]—The special commissioner appointed under the Bennett-Atlin Commission Act, 1899, cannot confer the right of appeal to parties to a dispute tried before him by purporting to sit as a County Court judge. *Johnson* v. *Miller*, 7 B.C.R. 46.

BILLS OF EXCHANGE.

I. FORM, 95.
A. What constitutes, 95.
B. Perfecting incomplete bill, 96.
II. INDORSEMENT AND TRANSFER, 96.
A. Liability of indorser, 96.
B. Effect of indorsement, 97.
III. PRESENTMENT: NOTICE, 97.
A. In general, 97.
B. Waiver, 98.
IV. HOLDER IN DUE COURSE, 98.
V. PAROL EVIDENCE TO VARY INSTRUMENT, 99.

I. FORM.

A. What Constitutes.

1. Money order.]—A money order containing expressions showing the account upon which the payment is to be made, is an equitable assignment and not a bill of exchange. *Johnson* v. *Braden*, 1 B.C.R., Pt. II., 265.

2. Order naming the drawee.] — An order to pay money due the drawee in which the drawee is mentioned is a bill of exchange, and by s. 7, C.S.B.C. 1888, c. 19 (Assignment of Choses in Action Act), is excepted from the operation of that Act, and does not operate as an assignment. When the drawer is not mentioned, the order is not a bill of exchange, and is an assignment within the Act. *McPherson* v. *Johnson & Glaholm*, 3 B.C.R. 465.

B. Perfecting Incomplete Bill.

1. Alteration.] — Where a promissory note is signed or endorsed, leaving a blank space for the rate of interest in an existing clause providing for interest, any party in possession of the note has under s. 20 of the Bills of Exchange Act, 1890, made applicable to promissory notes by s. 88, prima facie authority to fill in any rate of interest; but if the note when signed and endorsed had no clause providing for interest, the addition of such a clause, requiring interest, is an alteration not contemplated when the note was made or endorsed, and avoids it:—Held, on the facts, that the note in question, when made and endorsed, contained an interest clause leaving a blank for the rate, and that the plaintiffs were entitled to recover the amount of the note with interest at eighteen per cent. as charged. *The British Columbia Land and Investent Agency, Limited* v. *Ellis*, 6 B.C.R. 82.

2. Blank spaces on bill—Alteration after endorsement.] — A promissory note, containing spaces for the name of the payee and the rate of interest, was endorsed for the accommodation of the maker and handed to him in that condition. The maker inserted the name of the payee, and 12 per cent. as the rate of interest:—Held, that the endorsers were estopped from denying that they had given the maker authority to fill in the blanks, and that the insertions by the maker were not alterations avoiding the note. *Burton* v. *Goffin*, 5 B.C.R. 454.

II. INDORSEMENT AND TRANSFER.

A. Liability of Indorser.

1. Order of indorsement.]—The promissory note as set out in the special indorsement showed the name of Wilson, one of the defendants, sued as endorser, indorsed under that of the plaintiff, the payee of the note:—Held, prima facie evidence that Wilson was not liable on the note to the plaintiff, and that the plaintiff was not the holder of the note. *Tai Yune* v. *Blum*, 3 B.C.R. 21.

2. Order of indorsement.]—The rule as to the liabilities inter se of successive

indorsers of a bill or note, in the absence of all evidence to the contrary, is that a prior indorser must indemnify a subsequent one. *Wickwire & Wickwire* v. *Passage & Tomlin*, 20 B.C.R. 485.

3. Discharge of indorsers.] — If the holder of a promissory note grants an extension of time for payment at maturity, without obtaining the assent of the accommodation indorsers to the extension, or reserving his rights against them as sureties, they are relieved from liability. *Ibid.*

4. Aval.]—Under sec. 131 of the Bills of Exchange Act, a person who endorses a promissory note not indorsed by the payee may be liable as an indorser to the latter. *Johnson* v. *McRae*, 16 B.C.R. 473.

B. Effect of Indorsement.

1. Company with no power to indorse.] —A company which under its charter has no power to indorse, give or accept negotiable instruments, can indorse over to a third party any negotiable instrument made in its favour, so as to enable such third party to enforce payment against the maker or acceptor. *Merchants Bank of Canada* v. *McLeod & Leeson*, 15 B.C.R. 290.

2. Fraudulent indorsement.]—Sec. 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act. The Candian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques and promissory notes. A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank:—Held, the Bank of Montreal was liable to the company for the amount of the cheques so cashed. *Hinton Electric Co.* v. *Bank of Montreal*, 9 B.C.R. 545.

III. Presentment: Notice.

A. In General.

1. Payable at particular place.]—Where a promissory note is made payable at a particular place, presentment for payment must be made at that place. *Croft* v. *Hamlin*, 2 B.C.R. 333.

2. Notice of dishonour.]—It is necessary before action to give notice of dishonour to an indorser of a demand note. *Royal Bank of Canda* v. *Kirk and Rumball*, 13 B.C.R. 4.

B. Waiver.

1. Notification of stoppage of payment.] —Where the drawer of a cheque notifies the payee that he has stopped payment, he thereby waives presentment. *Trapp* v. *Prescott*, 17 B.C.R. 298.

2. Of demand.]—The object of presentment being to demand payment, waiver of demand is also waiver of presentment. *Burton* v. *Goffin*, 5 B.C.R. 454.

3. Promise to pay.]—A promise to pay a promissory note after it has fallen due is prima facie evidence of presentment. *Sparrow* v. *Corbett*, 18 B.C.R. 356.

IV. Holder in Due Course.

1. Notice of defect of title.]—Plaintiff, who was a confidential clerk of a director of the defendant Company, and had been himself director of the Company, accepted from the said director a cheque of the Company for $2,663.59. The cheque had been issued on the understanding that it was to be used only for the purpose of exhibiting it to a tax collector to secure to the said director further time for the payment of taxes on his own property. On the disappearance of the director the defendant Company stopped payment of the cheque, and plaintiff brought action, claiming he was a holder in due course:—Held, that plaintiff had given no value for the cheque and that he had notice of the defect in title when the cheque was indorsed over to him. *Campbell* v. *National Construction Company*, 14 B.C.R. 444.

2. Fraud of illegality.]—Defendants, in certain transactions with an insurance company who under their charter had no power to indorse, give or accept negotiable instruments, gave the company a promissory note, which the company indorsed to the plaintiff Bank. They did not pay the note when it fell due. The company was heavily indebted to the Bank which held this and other notes for advances to the company. The practice was for the company to sell shares and take notes therefor, which were discounted with the plaintiff

Bank. On suit being brought, defendants set up that the note was given for the accommodation of the company who took and held it without consideration; that the Bank, having knowledge of the circumstances under which the note was given, and of the company's legal position as to negotiable instruments, was not a holder in due course, and that the note was therefore tainted with fraud and illegality:—Held, that defendants had failed to prove under sec. 58 of the Bills of Exchange Act that there was such fraud or illegality in the issue or negotiation of the note as to deprive the plaintiff Bank of its status as holder in due course and therefore entitled to recover. *Merchants Bank of Canada* v. *McLeod and Leeson*, 15 B.C.R. 290.

V. Parol Evidence to Vary Instrument.

1. Stipulation against liability.]—Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement. *Emerson* v. *Erwin*, 10 B.C.R. 101.

2. Failure of condition.]—In an action upon a promissory note the maker raised the defence that the note was given to cover a first payment upon an agreement for sale of land and was handed over to the plaintiff on the express condition that if he failed to obtain the money for the first payment which he contemplated raising through the sale of other property, the note was to be returned or not used. The trial judge held that the condition under which the note was given having failed, the action should be dismissed. The Court being equally divided, the appeal was dismissed. *West* v. *Browning*, 19 B.C.R. 407.

BILL OF LADING.

See Carrier.

BILLS OF SALE.

I. Transactions Affected by the Act, 100.
A. *In general*, 100.
B. *Change of possession*, 101.
II. Form, 101.
A. *In general*, 101.
B. *Description of property*, 101.
III. Apparent Possession, 101.
IV. Sale, 102.
V. Filing, 103.
A. *Time within which*, 103.
B. *Affidavits, sufficiency of*, 103.
VI. Priority, 103.

I. Transactions Affected by the Act.

A. In General.

1. Verbal sale not prohibited by the Act.]—B. made a verbal sale of the goods in question to the plaintiff, who paid him part of the price in two instalments, and took from him written receipts therefor. Plaintiff then executed a lease of the goods to B., who continued in apparent possession thereof. The goods having been seized by the sheriff under a fi. fa. upon a judgment obtained by the defendants against B., the plaintiff claimed them, and, upon the trial of an interpleader issue:—Held, that verbal sales of goods are not prohibited by the Act, which contains no provision requiring written evidence of such sales to be made or registered. That such verbal sales, if bona fide, are good against subsequent execution creditors of the vendor, though the chattels are suffered to remain in his apparent possession. That the lease in question was not a contract of sale, or a memorandum thereof, but was a subsequent independent transaction, and that neither it nor the other writings were documents requiring registration under the Act. *Esnouf* v. *Gurney*, 4 B.C.R. 144.

2. Construction contracts.]—The provisions in building and construction contracts whereby the plant, machinery and materials provided for the work are to become the property of the building owner until the completion of the work, do not constitute such contracts bills of sale within the Act. *Clancy* v. *G.T.P. Ry. Co.*, 15 B.C.R. 497.

3. Stock in trade.]—A sale of the stock in trade of a business is included in the expression "transfer of goods in the ordinary course of business" and is therefore not within the Act. *Greenburgh* v. *Lenz*, 12 B.C.R. 395.

4. Equitable interest in ore to be mined.]—An agreement creating an equitable interest in ore to be mined is not an instrument requiring registration under the Bills of Sale Act. *Forrest* v. *Traves*, 14 B.C.R. 183; 42 S.C.R. 514.

B. Change of Possession.

1. Possession taken before time for filing elapsed.]—Where the goods comprised in a bill of sale are, within 21 days after execution of the bill of sale, taken possession of by the grantee honestly, the Bills of Sale Act does not apply, and it is immaterial that the bill of sale was given subject to a defeasance not contained in it. *McClary Manufacturing Co.* v. *Howland and others*, 9 B.C.R. 479.

2. Actual delivery.]—Although a bill of sale absolute in form is invalid where the transaction is really one of mortgage, where there is actual delivery and change of possession, the transaction is not affected. *Matheson* v. *Pollock*, 3 B.C.R. 74.

II. Form.

A. In General.

1. Condition dehors the instrument.]—A bill of sale given subject to a condition not appearing therein is void as against creditors. *Doll* v. *Hart*, 2 B.C.R. 32.

2. Absolute in form.]—A bill of sale absolute in form is invalid, where the transaction is really one of mortgage, for not setting forth the true consideration. *Matheson* v. *Pollock*, 3 B.C.R. 74.

B. Description of Property.

1. Book debts.]—V. and C. sold their grocery business, including all their stock in trade and book debts, to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business, and also all book debts due to H. & B. in the business carried on by them as grocers:—Held, that the book debts originally due to V. & C., and assigned by them to H. & B., were covered by the chattel mortgage. *Robinson* v. *Empey*, 10 B.C.R. 466.

2. Future goods.]—Where a bill of sale is given with respect to goods to be acquired in future, the grantee is bound to identify such goods, otherwise the bill of sale will not attach to them. *Winter* v. *Gault*, 18 B.C.R. 487; 49 S.C.R. 541.

III. Apparent Possession.

Apparent possession—Premises occupied by "person giving bill of sale."]—The grantee under a bill of sale (treated as unregistered by reason of a defect in the affidavit), on 3rd January, 1894, took possession of the goods covered thereby, consisting of a bakery stock, and employed a person to take charge, and instructed him to let no one else in the place. The grantor had absconded from British Columbia. The plaintiff gave no written notice of change of ownership, but informed some of the creditors that he was in possession. The plaintiff carried on baking and delivered the product in his own name. The debtor's name, however, was not removed from the door of the premises. The defendant seized under fi. fa. on the 5th January, 1894:—Held, (1) that the goods were not in the "apparent possession" of the debtor. (2) That the premises were not "occupied" by him, within the meaning of the Act. *Brackman* v. *McLaughlin*, 3 B.C.R. 265.

IV. Sale.

1. Time for redemption.]—Where the plaintiff, holding an overdue mortgage of chattels, was given notice that foreclosure and sale would take place at a certain time, and where his solicitor attended just before the time fixed for sale, intending to pay off the mortgage, and was told that he was too late, that the chattels were sold, the sale was held to be unimpeachable. *Ishitaka* v. *British Columbia Land and Investment Agency, Limited*, 16 B.C.R. 299.

2. Purchase by mortgagee—Accounts—Goodwill of business.]—Mortgagees put up stock in trade of a butcher business for sale under their mortgage, bid it in and took possession with the assent of the mortgagor, paid off arrears of wages and rent, and carried on the business with the mortgagor in their employ for some months. In an action by the mortgagor to avoid the sale:—Held, (1) That it was void and the property could be redeemed; (2) That in the taking of accounts mortgagor could not be charged with arrears of wages paid by the mortgagee, this payment having not been previously expressly assented to by the mortgagor:—Held, further, on appeal: (1) That a sum stated by the mortgagees to be the value of the good will for the purposes of an amalgamation scheme between them and another company, could not be charged against them in the accounts. *Van Volkenburg* v. *Western Canadian Ranching Company*, 6 B.C.R. 284.

V. FILING.

A. Time Within Which.

Extension of time.]—A company, domiciled in Toronto, Ontario, took a bill of sale on goods in Grand Forks, British Columbia. It was not possible to send the instrument to Toronto and have it returned for filing with the registrar with the affidavit of bona fides within the five days required by sec. 7, sub-sec. 2, of the Bills of Sale Act, 1905:—Held, that, in the order granting an extension of time for filing the instrument, there should be a provision protecting intervening rights. *Re W. P. Ellis & Co.*, 13 B.C.R. 271.

B. Affidavits, Sufficiency of.

1. Jurat.]—The Bills of Sale Act, C.S.B.C. 1888, c. 8, s. 3, as to the affidavit of execution to be filed with the instrument, provides "the affidavit aforesaid may be in the form of the schedule hereto annexed marked 'A.'" In this form, and also in the affidavit filed with the chattel mortgage in question, no mention was made in the jurat of the place of swearing the affidavit:—Held, that the affidavit was sufficient as complying with the statute. Apart from its statutory sufficiency it would be presumed, from the fact that the affidavit was on the face of it sworn before a commissioner for taking affidavits in British Columbia, that the official acted within the territorial limits of his authority and not elsewhere. *Brown and Erb* v. *Jowett*, 4 B.C.R. 44.

2. Deficiency of affidavit.]—Where the affidavit of bona fides did not contain a clear and categorical affirmation that the grantors were justly and truly indebted to the grantees in the sum mentioned, the affidavit was held not to comply with the statute and therefore not to be such an affidavit as is required by the statute, and consequently the bill of sale was void. *Winter* v. *Gault*, 18 B.C.R. 487; 49 S.C.R. 541.

VI. PRIORITY.

Bank Act.]—A valid security taken by a bank under the Bank Act has priority over an unregistered bill of sale by way of mortgage. *Merchants Bank of Halifax* v. *Houston*, 7 B.C.R. 465; 31 S.C.R. 361.

BISHOP.

See ECCLESIASTICAL LAW.

BLACKJACK.

A game in which chances are not alike favourable to the players.]—Certain persons played the game called blackjack in a room to which the public had access, there being no constant dealer:—Held, that lessee of room was legally convicted of keeping a common gaming house. *Reg.* v. *Petrie*, 7 B.C.R. 176.

BLACK LISTS.

1. Poster advertising accounts for sale.]—Defendant, a debt collector, printed a poster containing the names of persons from whom he was employed to make collections, showing the amounts and the nature of the accounts, set opposite their respective names under the heading, in large letters, "Accounts for sale. Victoria, B.C. The British Columbia Commercial Agency offer the following accounts for sale at their office," etc. This poster, which showed the name of the plaintiff as debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons on the list, together with a circular stating, "You may still have your name lifted by paying the amount on or before the 27th inst., after which date the posters will positively be issued." An interim injunction having been granted to restrain further publication:—Held, on motion to continue the injunction till the hearing: That the poster was libellous, and the innuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent:—Held, on motion to dissolve injunction: The Court will interfere by interlocutory injunction restraining until the trial the publication of what clearly appears to be a libel. On appeal:—Held, that the poster was libellous. It was, in fact, in the eyes of the public a black list, implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent. That, though in England the Courts have not of late restrained publications before the question of libel has been submitted to a jury, there is undoubted power to do so under C.S.B.C. c. 31, s. 14, and appeal

should be dismissed. *Wolfenden* v. *Giles*, 2 B.C.R. 279.

BLAZING.

See MINES AND MINERALS.

BOARD OF HEALTH.

See HEALTH.

BOND.

See REPLEVIN.

BOOK DEBTS.

See BILLS OF SALE.

See EXECUTION.

BOUNDARIES.

I. MUNICIPALITIES, 105.
A. *Roads and streets*, 105.
II. OF PRIVATE PROPERTY, 105.

I. MUNICIPALITIES.

A. Roads and Streets.

Interference.]—The "City of Victoria Official Map Act, 1880," and amending Acts, have reference to streets only:—Held, therefore, that nothing in those Acts could justify an interference by private individuals with the boundaries of a lot held by purchase and 20 years' possession. *Crowther* v. *Beaven*, 1 B.C.R., Pt. II., 116.

II. OF PRIVATE PROPERTY.

Estoppel.]—In an action for the declaration of title to a piece of land claimed by plaintiff as part of Lot 376, and by defendant as part of 202. Defendant's title was derived through B., to whom, in 1870, a Crown grant was issued, granting that lot "numbered 202 on the official plan, said to contain 150 acres, more or less." In 1876-77 the Lands and Works Department, having caused an official survey of the adjoining lots to be made, found the official plan by which the boundaries of B.'s lot were defined to be incorrect, and with a view to retain the acreage proper to each grant, and to make the boundaries run true to the cardinal points, moved his S.E. corner post four chains north, and his S.W. corner post two chains south, and without notifying the defendant gave him, in the new official plan or survey, a new southern boundary. This adjustment of B.'s southern boundary gave to Lot 376 the gore of land now in question. Three years after the completion of this survey, defendant filed in the Land Registry Office a plan of the greater part of Lot 202, according to a private survey made by his own directions, in which he implicitly followed, as to his southern boundary, the survey of 1876-77. In 1881 a Crown grant to Lot 376—the boundaries thereof being as determined by the survey of 1876-77—was issued to plaintiff:—Held, that in questions relating to boundaries and descriptions of land the rule is that the work on the ground governs, and that the gore had been originally included in the grant to B., as part of 202, and further, that the filing of the map in 1880 did not under the circumstances (if at all) estop the defendant from claiming land not included therein, and that the defendant was entitled to the gore of land originally granted as part of Lot 202. *Johnston* v. *Clarke*, 1 B.C.R., Pt. II., 81.

See REGISTRATION OF DEEDS.

BRIDGES.

See MUNICIPAL CORPORATIONS.

BRITISH NORTH AMERICA ACT.

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BUILDING CONTRACTS.

I. CONSTRUCTION IN GENERAL, 107.
II. EXTRAS, 108.
III. EXCUSES FOR NON-PERFORMANCE, 108.
IV. CONDITIONS PRECEDENT TO PAYMENT, 108.
V. FORFEITURE, 110.
VI. LIABILITY OF ARCHITECT OR ENGINEER, 111.

I. Construction in General.

1. Payment by lump sum or specified prices.]—The City of Victoria called for tenders for the construction of sewers, setting forth in specifications and bills of quantities the amount and character of the excavations and work to be done, and requiring persons tendering to put their prices against each item in the specifications and bills of quantities, which were to form part of the contract. The plaintiffs tendered, filling in their prices for each item as required, and offering to do the work for a gross sum of $7,032, which represented the total of the itemized prices. The contract as executed was "to execute all work described in the specifications, bills of quantities and form of tender, which are hereby made part of the contract, in strict accordance with all the conditions and stipulations therein set forth . . . . for the sum of $7,032." The specifications required interim and final certificates of the work done to be given to the contractor by the named engineer of the Corporation. It turned out that the bills of quantities largely overestimated the amount of work. The plaintiffs sued for the full amount of $7,032 and extras:—Held, that the contract was to do the work by quantities at specified prices, and the amount of the contract price was not controlled by the sum specified. *Coughlan* v. *City of Victoria*, 4 B.C.R. 20.

2. Special agreement, non-fulfillment of.]—The plaintiff sued the defendants to recover from them, under a specially endorsed writ, the balance of an account due under and in pursuance of an agreement, under seal, providing that the plaintiff "was to run according to his best art and skill a tunnel of 200 feet for the sum of $4 per running foot; that $150 should be advanced on account of the contract, the balance to be paid on the satisfactory completion of the work." The plaintiff made five tunnels, none of which were 200 feet in length, but whose total length was alleged by the plaintiff to be 204 feet. The plaintiff brought his action both on the agreement and also for work and labour done:—Held, that there was not a sufficient performance of the agreement, and as the plaintiff had given no particulars nor any evidence under the claim for work and labour, judgment must be entered for the defendants. *Lakin* v. *Nuttall*, 3 S.C.R. 685.

II. Extras.

Condition precedent.] — Where a contract provided that no payment for extras would be allowed unless their value was agreed upon and indorsed on the contract, and the contractor made alterations and additions, on the instructions of an intending tenant of the building, but no agreement was come to nor indorsement made, it was held that the contractor could not recover. *McKinnon* v. *The Pabst Brewing Co.*, 8 B.C.R. 265.

III. Excuses for Non-Performance.

Prevention by owner.]—Where a building contract is so far performed that the parties cannot be restored to their original position, and unsatisfactory work is being done, if the party aggrieved, in the absence of agreement ad hoc, interferes with the work so as to make it difficult to determine the value of that already done, he does so at the risk of having to pay the other party more than he has really earned, apart from the question of damages. *Moore* v. *B.C. Pottery Co.*, 2 B.C.R. 45.

IV. Conditions Precedent to Payment.

1. Certificate.] — Where the plaintiff agreed to do certain work for the defendant and McLeod on the terms set out in certain correspondence, part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work," it was held that the plaintiff could not recover in the absence of a certificate by McLeod. *Leroy* v. *Smith*, 8 B.C.R. 293.

2. Misconduct of engineer.] — Where, under a contract which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer, who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though not fraudulent manner, and probably caused heavy loss to the contractors by his mistakes:—Held, in the absence of collusion on the part of the Corporation, the certificate could not be set aside. Impropriety of certain acts of the Corporation remarked upon. *Walkley* v. *City of Victoria*, 7 B.C.R. 481.

3. Refusal to arbitrate.]—In an action against a corporation by a firm of contractors for damages for losses incurred in the performance of a contract, due to the delay of the corporation in supplying material thereunder, the defendant set up the following clause in the contract: "To prevent all disputes and litigation it is agreed by and between the parties to this contract that the engineer shall in all cases determine all questions in relation to the work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of the work under this contract, on the part of the contractor, and his estimate and decision shall be final and conclusive upon said contractor, and such estimate and decision in case any question shall rise shall be a condition precedent to the right of the contractor to receive any money under this contract, and a condition precedent to the commencement of any action by the contractor to recover any moneys under this contract, or any damages on account of any illegal breach thereof." The contractors had offered to submit to arbitration and to accept the decision of the arbitrator, "if the same were just and reasonable," but the arbitrator refused to proceed on such terms, and there was no determination of the matters in dispute by the arbitrator. The learned trial judge held that owing to the refusal of the arbitrator to proceed the plaintiff had a right of action. He gave judgment in favour of the plaintiff and ordered a reference:—Held, that by the above clause it was the intention of the parties that all matters arising under the contract, including claims arising out of breaches thereof, would be adjudicated upon and determined by the engineer, that the arbitrator was justified in refusing to proceed on the terms imposed by the contractors, and that the right to maintain an action was therefore lost by reason of the non-fulfillment of the condition precedent. *McDougall & Company* v. *Municipality of Penticton*, 20 B.C.R. 401.

4. Failure to appoint engineer.]—The Canadian Northern Pacific Railway Company contracted with the Northern Construction Company and Patrick Welsh for the construction of their roadbed between Inkitsaph Creek and Lytton. The Construction Company then subcontracted to Griffin & Welsh, who again subcontracted to the plaintiffs. The final contract with the plaintiffs provided that the final estimate of the engineers of the Northern Construction Company as to the quantity and classification of the plaintiff's work should be binding on the parties. The engineers who made the final estimate were in fact in the employ of the Candian Northern Pacific Railway Company, and had no connection in any way with the Northern Construction Commpany. As the work progressed, the plaintiffs were paid from time to time on the estimates of these engineers. In an action for the recovery of the balance due under the contract, it was held by the learned trial judge that the plaintiffs, by their own action, were estopped from setting up that the engineers were not the engineers of the Northern Construction Company, and were bound by their final certificate as to the quantity and classification of the work:—Held, that the plaintiffs are only bound by the estimate of the engineers of the Northern Construction Company, and the engineers who gave the final certificate as to the work not being in the employ of that Company, the plaintiffs were entitled to a new trial. *Spadafora and others* v. *Griffin and others*, 20 B.C.R. 475.

V. Forfeiture.

1. Plant, material, etc.] — Defendants seized certain property of F., who had contracted with them to do certain railway construction work. Under this contract F. agreed that all the plant, materials, etc., provided by him for the work should be, until the completion of the work, the property of the defendants, but that upon completion of the work, all of such plant and materials as should not have been used and converted should be delivered up to F. Plaintiff based his claim to ownership of the seized property upon two absolute bills of sale by F. made and registered within a month of each other:—Held, that plaintiff could recover the value of any goods seized which had not been provided by F. for the work; but that kitchen supplies and utensils were not plant, materials or other things provided for the work. *Clancy* v. *Grand Trunk Pacific Railway Co.*, 15 B.C.R. 497.

2. Condition precedent.]—A contract for the construction of works provided that upon the insolvency of the contractor, or the company's manager certifying that, in his opinion, the contractor had abandoned the contract, then the company might enter upon the works, expel the contractor and

itself use the materials and plant upon the premises for the use of itself or another contractor in the completion of the works, and that upon such entry the contract should be determined. In consequence of a letter from the contractor notifying the company of the stoppage of the works, on account of alleged unjustifiable interference therewith, the company took possession of the materials and plant of the contractor, without obtaining the certificate specified, did some work therewith, and then entered into correspondence with the contractor's sureties to induce them to proceed with the contract. Upon seizure of the goods under execution by a judgment creditor, it was held that as the insolvency of the contractor had not been proved, nor a certificate of their manager procured, as provided by the contract, the goods in question did not become the property of the company, and the contractor's letter could not be considered as a waiver of the conditions precedent specified in the contract. Consequently the possession so taken of the plant and materials did not entitle the company to them as against an execution creditor. *The Uplands, Limited* v. *Goodacre*, 18 B.C.R. 343; 50 S.C.R. 75.

VI. Liability of Architect or Engineer.

Withholding certificate.]—Where a contract requires a final certificate to be given by the engineer of the building owner to the contractor, the only cause of action by the contractor against the engineer, in the event of his withholding the certificate, is for damages for fraudulently, and in collusion with the building owner, refusing to grant the certificate. *Coughlan* v. *City of Victoria*, 4 B.C.R. 20.

See Architect.

See Bills of Sale.

See Contract.

See Mechanic's Liens.

BULK SALES ACT.

Bill of Sale.]—The Bulk Sales Act is not intended to destroy a security in the shape of a mortgage on a stock in trade, and to enable the general creditors of a mortgagor to share equally with a secured creditor. A sale, therefore, of a stock in trade by such a mortgagee is not within the Act. *Drinkle* v. *Regal Shoe Co.*, 20 B.C.R. 314.

BUSH FIRES.

Liability for damages for.]—A fire started in brush and fallen timber by the defendant, for the purpose of clearing his land, spread on to the plaintiff's lands adjoining:—Held, in an action for damages, that the defendant maintained the fire at his own risk and was responsible for the damage caused by it. *Crewe* v. *Mottershaw*, 9 B.C.R. 246.

BYE-LAWS.

See Municipal Corporations.

CANCELLATION.

See Landlord and Tenant.

See Practice.

See Registration of Deeds.

See Vendor and Purchaser.

CAPIAS AD RESPONDENDUM. CAPIAS AD SATISFACIENDUM.

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CARRIERS.

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I. Who Are Common Carriers.

1. Authority of master.]—Defendants' steamer, which previously had been employed carrying freight and passengers between White Horse and Dawson, had gone out of commission on 23rd September, 1898, and on that day, 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 practically warned not to do any towing, but this evidence (being objected to by plaintiffs) was rejected. At the trial it was held that the defendants were common carriers and therefore liable:—Held, on appeal, that the appeal should be allowed with costs, and that the plaintiffs could have a new trial upon payment of the costs of the first trial. *Courtney* v. *The Canadian Development Company*, 8 B.C.R. 53.

2. Ultra vires.]—The Provincial Legislature may create a company with power to undertake extra-territorial contracts of carriage, and therefore it is competent to a company incorporated in this Province to carry goods from this Province to the Yukon. *Boyle* v. *Victoria Yukon Trading Co.*, 9 B.C.R. 213.

II. Carriers of Passengers.

A. Liabilities for Personal Injuries.

1. Injuries to passengers.] — In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. *Nightingale* v. *The Union Colliery Co.*, 9 B.C.R. 453; 35 S.C.R. 65.

2. Passenger—Travelling without permission.]—The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and is injured; such a person has no right of action unless injured through the dolus as distinguished from the culpa of the carrier. Nightingale had a contract with defendant company to repair a bridge, and while riding on the locomotive of the company's coal train on his way to the work, he was killed by reason of the train falling through a bridge. The engineer in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow people to travel on the engine without permission from some competent authority, but the company's officers and servants, and other persons authorized by the manager and master mechanic, used to ride on the coal train. A few days before the accident Nightingale and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day. In an action by Nightingale's representative to recover damages from the company for his death, the jury held that the company had undertaken to carry Nightingale as a passenger:—Held, on appeal, setting aside judgment in plaintiff's favour, that there was no evidence to support such a finding, and that Nightingale was a "mere licensee." *Nightingale* v. *Union Colliery Company of British Columbia, Limited Liability*, 9 B.C.R. 453.

3. Injury to passenger alighting.]—Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W., limited to the use of himself and the members of his family, between Vancouver and Central Park station. The plaintiff, who lived in Vancouver, went to visit the W.'s, travelling, as was her custom, on W.'s ticket, although not a member of the family. W. lived beyond Central Park station, and the company gratuitously, and for her own convenience, carried the plaintiff some four hundred yards farther on, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank suporting it:—Held, in an action for damages, that the company was not liable. *Burke* v. *B.C. Electric Railway Co., Ltd.*, 7 B.C.R. 85.

B. Liabilities for Baggage of Passengers.

1. Wearing apparel.]—The expression wearing apparel is a variable and elastic term, receiving a different construction under different circumstances. *Wensky* v. *Canadian Development Co.*, 8 B.C.R. 190.

2. Baggage—Limitation of liability.]—Defendant company sold plaintiff a ticket for Dawson, from Bennett, and containing the proviso that baggage liability was limited to wearing apparel only, and that each ticket was allowed 150 lbs. of baggage free, and not exceeding $100 in value. Plaintiff paid $10 excess baggage. Part of the baggage, including lady's apparel, men's suits and wolf robes, to the value of $655, was lost. Plaintiff sued for full amount, and defendants pleaded that their liability under the contract was limited to $100:—Held, that defendants were liable for more than $100, but under the Carriers' Act for not more than $500:—Held, also on appeal, that the contention that defendants were not liable for certain articles, not the wearing apparel of the plaintiff himself, was not now open to defendants, as that point was not raised in the pleadings, or taken at the trial. *Wensky* v. *Canadian Development Co.*, 8 B.C.R. 190.

III. Carriers of Goods.

A. Duties of.

1. As to Stowage.

1. Common carriers—Liability of negligent stowage inducing loss of goods for.]—The Hudson's Bay Co. and the other defendants, the Pioneer Line, were common carriers—the company plying the "Enterprise," between Victoria and New Westminster, and the Pioneer Line the "Irving" between New Westminster and Yale, so as to form a continuous line of steamers between Victoria and Yale. The receipts from traffic passing over both sections of the route were divided between the defendants. The plaintiff ordered goods from the company, which were to be forwarded by them to his agent at Yale. The company having filled the order, shipped the goods on the "Enterprise," and took the following receipt from the purser: "Shipped in good order by H.B. Co., on board the 'Enterprise,' bound for New Westminster, the following packages (the dangers of fire and navigation excepted), consigned to Gavin Hamilton, of 150 mile house, and marked," etc. On an appeal to the Full Court:—Held, as to this receipt, that parol evidence was admissible to show that the company has agreed to carry beyond New Westminster, viz., to Yale, as it did not contradict, but only supplemented the language of the receipt; also that the exception of liability in cases of fire does not protect the carrier where loss from fire is due to his, or his agents' or servants' negligence. At New Westminster the goods were transferred from the "Enterprise" to the "Irving." Next day, while the "Irving" was on her way to Yale, a fire broke out in some hay stowed near her boilers. The hay consisted of about 20 tons, and besides being uncovered, so nearly filled the whole space between decks, forward from the engine-room to within 8 feet of the boilers, that it was found impossible to do any good with the fire hose. The fire under the circumstances spread rapidly, and burnt the vessel and her cargo (including the plaintiff's goods:—Held, that the stowage of the hay was bad stowage, due to neglience, to which the loss of plaintiff's goods was fairly attributable; and therefore that the H.B. Co. were liable to plaintiff for breach of their contract to cary his goods to Yale, as their liability extended beyond their own line or section of route and throughout the whole distance over which they undertook to carry; and that they were, moreover, responsible for the negligence of the Pioneer Line, as the latter were their agents for the carriage of the goods; that the Pioneer Line having accepted the goods for carriage to Yale, thereby undertook a duty they neglected, viz.: "To use due care and diligence in the safe-keeping and punctual conveyance of the goods," that this obligation was cast upon them by the common law as well as by the Dominion Act respecting carriers by water; and that having failed to fulfil it and been privy to the loss of the goods through their own negligence, they were liable as well as the other defendants for such loss:—Held, also, that the measure of damages by way of compensation for delay (where delay has occasioned loss) is interest at the legal rate upon the actual value until judgment. *Hamilton* v. *Hudson's Bay Co., and Irving and Briggs*, 1 B.C.R., Pt. II., 176.

2. Delivery.

1. Damage to goods.]—A shipment of fruit from Italy to Fernie, in British Columbia, was delivered to the Great Northern Railway Company at St. Paul, Minnesota, on the 24th of December, 1909, to be forwarded to destination, which was not reached until the 19th of January, 1910, when the fruit was found to be frozen:—Held, in the absence of evidence by the Great Northern Railway Company as to

what care they took of the shipment while in their possession, that the damages occurred while the fruit was in their care, and that they were liable. *Albo* v. *Great Northern Railway Company and Crow's Nest Southern Railway Company*, 17 B.C.R. 226.

2. Non-delivery.]—Under a contract to tow logs the tug is entitled to be paid only for the logs delivered and where the special term that the tug is to be paid for logs "lost or not lost" is relied on it must be proved specifically. *Pacific Towing Company* v. *Morris*, 11 B.C.R. 173.

B. Payment of Freight.

1. Partial delivery.] — The plaintiff entered into a verbal contract with the defendant Company to convey by pack-train a quantity of supplies, including hydraulic piping, to the defendant's mines (a distance of about 180 miles). While on the trail one of the mules died and the plaintiff was obliged to leave behind 80 feet of hydraulic piping, weighing about 280 pounds. The rest of the consignment, about 8,000 pounds, he delivered, and it was accepted by the defendant Company, which made a part payment of the freight. The plaintiff sued for the balance, but made no claim for the goods not delivered. The defendant Company alleged that the plaintiff promised to bring in the hydraulic piping as soon as possible, but the plaintiff did not bring it, it having been brought in later by Indians at the instance of the defendant Company, at a cost less than the sum deducted from the plaintiff's contract price. The defendant Company counterclaimed for damages for non-delivery of the hydraulic piping:—Held, that as the subject-matter of the contract was divisible, the delivery of the entire consignment was not a condition precedent to the recovery of the contract price, and that the remedy by the Company for short delivery was by an action for damages. *Charleson* v. *Royal Standard Investment Company*, 19 B.C.R. 226.

2. Payment of freight before delivery though part of consignment damaged.]—Hind, Rolfe & Co. chartered the Notre Dame d'Avor at Antwerp to load cement to be delivered at Astoria, Wash., U.S.A. This was a joint project of Hind, Rolfe & Co. and Parratt & Co. Shortly after leaving port the Notre Dame d'Avor had a collision with the English ship Rathwaite. Part of her cargo was jettisoned and part sold at Falmouth, England. She put back to port and was repaired. In an action in the English Admiralty Court, arising out of the collision, it was decided that the Notre Dame d'Avor was not to blame, the action against her was dismissed and she was allowed her counterclaim. On leaving again she came into contact with the breakwater at Falmouth, whereby some of her plates were opened up and further damage to cargo ensued. During the voyage a portion of the cargo was sold to Balfour, Guthrie & Co., and by them to R. V. Winch & Co. Balfour, Guthrie & Co., by their contract, were only obliged to accept such portion of the cargo as might be in good condition. The ship's destination was diverted from Astoria to Victoria, where a portion of the cargo was discharged and she proceeded to Vancouver to unload the balance. After discharging a portion, some difficulty arose as to payment of freight, and the captain refused to wholly unload until the freight was paid. The consignees refusing to pay freight on the damaged portion of the cargo, the captain finished discharging at an independent warehouse to his own order:—Held, that the ship was absolved from liability for damage to cargo by the terms of her bill of lading, and that the captain was entitled to payment of freight as the cargo came over the side of the ship; in other words, that he was not bound to deliver it until after payment of freight; and that he was justified in removing his ship to another dock and discharging his cargo there to his own order. On the question of demurrage:—Held, that as the captain was justified in the action he took with regard to the cargo, he was entitled to demurrage caused by the plaintiff's failure to pay freight. *Parratt & Co. and Hind, Rolfe & Co.* v. *The Ship Notre Dame d'Avor*, 16 B.C.R. 381.

C. Damages for Delay.

Interest as damages.]—Interest on the amount recovered in an action for non-delivery of goods may be allowed at the legal rate as damages for delay. *Hamilton* v. *Hudson's Bay Co. and others*, 1 B.C.R., Pt. II., 176.

D. Stipulations as to Liability.

1. Special Contract.

Special contract—Variation of, by bill of lading.]—The defendant company as a

common carrier, in June, 1889, contracted with the plaintiff, a Dawson merchant, to carry for him from Puget Sound and British Columbia ports general merchandise, the rates being according to tariff annexed to contract. Three of the terms of the contract were: "Date of shipment—Throughout season of 1899. Consignees—T. G. Wilson, Dawson City. Quantity—Exclusive contract for season of 1899." Annexed to the contract was the freight tariff giving the rates to be charged on the different classes of goods "with guaranteed delivery of shipments during the season of 1899." The company decided not to receive after 20th August, any more freight with guaranteed delivery during 1899, and so notified one Pitts, a wholesaler of Victoria, of whom the plaintiff was a customer. Pitts afterwards shipped goods to Dawson consigned to the "Canadian Bank of Commerce, notify T. G. Wilson," and received from the company bills of lading marked with a special condition thus: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The company failed to deliver the goods, and Wilson sued for damages caused him by being deprived of the goods:—Held, that the goods were not carried under the exclusive contract for the season of 1899, by which delivery was guaranteed that same season, but that they were carried under the terms of the bills of lading, and the company was not liable for the loss. As the plaintiff's cause of action, if any, would be against the company for refusing to carry under the original contract, a new trial was granted, with leave to plaintiff to amend his pleadings. *Wilson v. Canadian Development Co.*, 9 B.C.R. 82.

2. Excepted Causes.

Wrongful conversion.]—A condition in a shipping receipt that the shipper should not hold the carrier responsible for the keeping a safe or prompt carriage of the goods and accepts all responsibilities therefor and agrees to hold the carrier absolved from delays, damages or losses, from whatever cause arising, including delays, loss or damage arising through negligence or carelessness, or want of skill of the officers, servants or workmen, but which shall have occurred without the actual fault or privity of the carrier, does not excuse the carrier where the goods have been wrongfully sold by the carrier. *Wilson v. Canadian Development Co.*, 9 B.C.R. 82; 33 S.C.R. 432.

3. Negligence.

1. Shipping receipt—Goods—Parol evidence to explain.]—The Hudson's Bay Co. and the other defendants, the Pioneer Line, were common carriers—the company plying the "Enterprise" between Victoria and New Westminster, and the Pioneer Line the "Irving" between New Westminster and Yale, so as to form a continuous line of steamers between Victoria and Yale. The receipts from traffic passing over both sections of the route were divided between the defendants. The plaintiff ordered goods from the company, which were to be forwarded by them to his agent at Yale. The company, having filled the order, shipped the goods on the "Enterprise" and took the following receipt from the purser: "Shipped in good order by H.B. Co. on board the "Enterprise," . . . . bound for New Westminster, the following packages (the dangers of fire and navigation excepted), consigned to Gavin Hamilton, of 150 mile house, and marked," &c.:—Held, as to this receipt, that parol evidence was admissible to show that the company had agreed to carry beyond New Westminster, viz., to Yale, as it did not contradict, but only supplemented, the language of the receipt; also that the exception of liability in cases of fire does not protect the carrier where loss from fire is due to his, or his agents' or servants' negligence. At New Westminster, the goods were transferred from the "Enterprise" to the "Irving." Next day, while the "Irving" was on her way to Yale, a fire broke out in some hay stowed near her boiler. The hay consisted of about 20 tons, and besides being uncovered, so nearly filled the whole space between decks, forward from the engine room to within 8 feet of the boilers, that it was found impossible to do any good with the fire hose. The fire under these circumstances spread rapidly, and burnt the vessel and her cargo (including plaintiff's goods):—Held, that the stowage of the hay was bad stowage, due to negligence, to which the loss of plaintiff's goods was fairly attributable; and therefore that the H.B. Co. was liable to the plaintiff for breach of their contract to carry his goods to Yale, as their liability extended beyond their own line or section of route, and

throughout the whole distance over which they undertook to carry; and that they were, moveover, responsible for the negligence of the Pioneer Line, as the latter were their agents for the carriage of the goods; that the Pioneer Line having accepted the goods for carriage to Yale, thereby undertook a duty they neglected, viz., "to use due care and diligence in the safe-keeping and punctual conveyance of the goods"; that this obligation was cast upon them by the common law as well as by the Dominion Act respecting carriers by water; and that having failed to fulfil, it had been privy to the loss of the goods through their own negligence, they were liable as well as the other defendants for such loss; that interest, at the legal rate, might be allowed as damages for delay in delivering the goods. *Hamilton* v. *Hudson's Bay Company and Irving and Briggs*, 1 B.C.R., Pt. II., page 1,, 176.

2. Exceptions.]—The exceptions in a bill of lading, "the dangers of fire and navigation excepted," do not protect the carrier where the loss is due to the negligence of the carrier or his servants or agents. *Hamilton* v. *Hudson's Bay Co.*, 1 B.C.R., Pt. II., 1, 176.

4. Limitation of Time for Claim.

Unseaworthiness.] — Where the bill of lading provides that all claims for damage to or loss of goods must be presented within one month from its date, after which the same should be completely barred, this limitation applies to a claim for damage caused by the unseaworthiness of the ship. *Drysdale* v. *The Union Steammship Co.*, 8 B.C.R. 228; 32 S.C.R. 379.

IV. Through Contracts of Carriage.

1. Liability of first carrier.]—Where a carrier takes a contract of carriage to places extending beyond his own line, he is liable for loss occasioned by the fault or default of the other carriers over whose lines the goods are carried. *Hamilton* v. *Hudson's Bay Co. and others*, 1 B.C.R., Pt. II., 1, 176.

2. Agency.]—In a contract of through carriage, the succeeding carriers are agents of the initial carrier. *Ibid.*

3. Duty of succeeding carriers.]—In a transit of goods over the lines of several carriers, the succeeding carriers are bound to use due care and diligence in safe-keeping and punctual conveyance. *Ibid.*

See Damages.

See Negligence.

See Tort.

CERTIFICATE.

Of Action—*See* Mechanic's Liens.

Of Architect—*See* Building Contract.

Of Free Miner—*See* Mines and Minerals.

Of Improvements—*See* Mines and Minerals.

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Of Shares—*See* Company—Estoppel.

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CERTIORARI.

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I. Jurisdiction.

A. Bye-laws of Municipal Corporations.

Invalidity.]—The validity of a municipal bye-law may be questioned in certiorari proceedings instead of by motion to quash. *Traves* v. *City of Nelson*, 7 B.C.R. 48; *Reg.* v. *On Hing*, 1 B.C.R., Pt. II., 148.

B. Proceedings of Licence Commissioners.

1. Resolution.]—A resolution granting a licence for the sale of intoxicating liquors in a hotel, passed by the board of licence commissioners for a municipality, was attacked upon the grounds that the requisite

number of qualified persons did not sign the petition for the licence, and that the premises were not such as could be licensed under the Municipal Act:—Held, that the proceedings were such as might be brought up on certiorari. *The King* v. *The Board of Licence Commissioners of the Municipality of Point Grey*, 18 B.C.R. 648.

2. Decision.]—Certiorari is a proper proceeding whereby to question the decision of a board of licence commissioners. *Freeman* v. *Licence Commissioners of New Westminster*, 20 B.C.R. 438.

C. Statutory Grants.

Water records.]—Under the Land Act, 1865, errors in the statutory conditions precedent to the grant of a water record should be raised by certiorari. *Carson* v. *Martley*, 1 B.C.R., Pt. II., 281.

D. Summary Convictions Under Special Statutes.

1. Chinese Regulation Act.]—Certiorari is the proper proceeding for questioning a conviction under an Act of the Legislature on the ground of its being ultra vires. *Reg.* v. *Wing Chong*, 1 B.C.R., Pt. II., 150.

2. Coal Mines Regulation Act.]—Certiorari is the proper proceeding for questioning a conviction under a special Act on the ground that such a conviction is not warranted by the Act on its true construction. *Reg.* v. *Little*, 6 B.C.R. 78.

II. Existence of Other Remedies.

1. Contrary to procedure.]—Sec. 108 of the Indian Act and sec. 889 of the Criminal Code do not prevent proceedings by certiorari where the ground of complaint is that something was done contrary to the fundamental principles of criminal procedure. *In re Sing Kee*, 8 B.C.R. 20.

2. Appeal to County Court.]—Certiorari is not taken away in regard to objections going to the jurisdiction of the convicting justices by the power of appealing from the conviction to the County Court. *R.* v. *McAnn*, 4 B.C.R., 587.

III. Procedure.

A. Application for Writ.

1. Application for—Should be to single judge.]—The Full Court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge. *Rex* v. *Tanghe*, 10 B.C.R. 297.

2. Second application after dismissal of first.]—When an application for a writ of certiorari has been dismissed the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection. *Rex* v. *Geiser*, 9 B.C.R. 503.

3. Production of order complained of.]—Under Crown Office Rule 35, non-production of the order complained of on motion for an order for the issue of a writ of certiorari, is not fatal where the judge grants leave to file a verified copy; it may, in such a case, be inferred that the absence of the copy was accounted for to his satisfaction. *Freeman* v. *Licence Commissioners of New Westminster*, 20 B.C.R. 438.

B. Affidavits.

1. Information and belief.]—Affidavits in which the deponents state the essential matters on belief only should not be read, unless the Court can ascertain not only the source of information and belief, but also that the deponent's statement is corroborated by some person who speaks from his own knowledge. The material before the Court therefore did not establish a prima facie case in support of an order nisi to quash the resolution. *R.* v. *The Board of Licence Commissioners of the Municipality of Point Grey*, 18 B.C.R. 648.

2. Contradiction of grounds of jurisdiction.]—Semble, that statements of fact, necessary to found jurisdiction in the inferior Court, appearing in the order of the inferior Court in question on the motion, may be contradicted by affidavit. *In re Bole*, 2 B.C.R. 208.

C. Service.

Service on justices.]—The Statute, 13 Geo. II., c. 8, sec. 5, requiring six days previous notice to convicting justices of motion for certiorari is in force in this Province. The service upon the justices of a rule nisi for a certiorari returnable more than six days after service will not be treated as a compliance with the statute. *Re Charles Plunkett*, 3 B.C.R. 484.

D. Amendment of Proceedings Complained of.

1. Amendment of warrant.]—The convicting justices, after service on them of a

rule nisi, substituted and brought in on its return a good warrant of commitment in place of that objected to, which was admittedly bad for not following the conviction:—Held, that they were entitled to do so. *In re Plunkett*, 3 B.C.R. 484.

2. Amendment of conviction.]—A minute of conviction for an offence under a by-law, and summary conviction drawn up in accordance therewith by the convicting magistrate, and returned by him to the County Court, directed the accused to be imprisoned with hard labour, in default of payment of the fine imposed or sufficient distress to meet it. The magistrate had no jurisdiction to impose hard labour. In answer to a rule nisi to show cause why a certiorari should not issue to bring up the conviction, and why it should not be quashed without the writ actually issuing, the magistrate brought in on affidavit a copy of the conviction altered by him after it was returned to the County Court by cutting out the sentence of hard labour:—Held, that the magistrate had a right so to amend the conviction and that the Court would not look behind it. *Regina* v. *McAnn*, 4 B.C.R. 587.

3. Amendment of conviction.]—Semble, on the return of a certiorari the justices are entitled, and may be required to amend their conviction on matters of form. But it is not open to them, on pretence of amending a conviction, to omit any vital part of what the conviction really contained, nor to introduce any new facts which are of vital importance to support the conviction. Semble, though the Court will not look at the depositions before the justice to see whether they were justified in their conclusion as to any matter of fact found in the conviction, yet the Court may look at the depositions where it is alleged that they contained nothing whatever to justify the finding of the alleged fact, or the conclusion on a point of mixed law and fact, e.g., as to the infliction of grievous bodily harm. Thus, in the present case, the actual conviction was for "striking on the head with a stick and cutting" the complainant. Semble, it would not be permisible, under colour of amending the conviction, to omit in the return all mention of "cutting." The original conviction did not allege any consent by the accused, such consent being necessary to give the magistrate jurisdiction. Semble, it would not be permissible, under colour of amending, to state as a fact in the returning conviction that the accused had given consent. And semble, the Court would examine the depositions to see whether (as alleged by the applicant), they contained no evidence whatever of any cut being inflicted, or any cutting instrument being used, or whether the injuries proved in the evidence did in law amount to grievous bodily harm. *Houghton's Case*, 1 B.C.R., Pt. I., 89.

E. Recognizance.

1. Time for applying.]—It is too early, on an application for a writ of certiorari, to order the applicant to give recognizances. *R.* v. *Ferguson*, 16 B.C.R. 287.

2. Necessity for.]—The Court, or a judge, has no jurisdiction to entertain an application to quash unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties conditioned to prosecute the proceding and to pay such costs as may be awarded against him. *Reg.* v. *Ah Gin*, 2 B.C.R. 207.

IV. Grounds for Quashing Convictions.

1. Omission in information.] — Where the information omits a material allegation of fact but the issue as to that fact is tried before the magistrate, who finds that fact against the accused, the conviction will not be quashed. *R.* v. *Taylor*, 14 B.C.R. 235.

2. Committal for non-payment of fine.]—Where power is given to justices to enforce payment of a fine or penalty by committal or distress, and in the event of there being no distress found, then to commit, the payment of the fine or penalty may be enforced in the first instance by committal. *R.* v. *Petersky*, 5 B.C.R. 549.

3. Questions of fact.]—Although the Court will not look at the depositions before the justices to see whether they were justified in their conclusion as to any matter of fact found in the conviction, yet the Court may look at the depositions where it is contended that they contain nothing to justify the finding of the alleged fact, or the conclusion on a point of mixed law and fact. *Houghton's Case*, 1 B.C.R., Pt. I., 89.

4. Interest of judges.]—The fact that the fines imposed by a police magistrate appointed by a municipal corporation are paid into the consolidated fund of the municipality and that he holds another office under the corporation, the salary of which is drawn from that fund, does not incapaci-

tate him by reason of interest in the prosecution. *Reg.* v. *Hart*, 2 B.C.R. 264.

5. View.] — A conviction under the Indian Act for selling liquor to an Indian will be quashed where the magistrate has gone alone to view the place of sale. *In re Sing Kee*, 8 B.C.R. 20.

6. Magistrate—Trying two informations together.]—Where a magistrate is trying two distinct but similar informations against an accused, a conviction by him in the second case, without regard to the evidence adduced in the first case, is not invalid merely because he reserved his decision in the first case, which he afterwards dismissed, until the conclusion of the second case. *Rex* v. *Sing*, 9 B.C.R. 254.

V. COSTS.

1. Order for.]—The old rule in certiorari proceedings that the Crown neither pays nor receives costs is no longer in force, and the Court will grant the costs of a successful appeal to the Crown if asked for. *Regina* v. *Little*, 6 B.C.R. 321.

2. Order for.]—Where an applicant for a writ of certiorari in a criminal proceeding was unsuccessful, the Crown asked for and was granted costs, it being held that the Crown Costs Act, 1910 (B.C. Stat., c. 12), which provides that no Court or judge shall have power, except under the provisions of a statute expressly authorizing it, to order that the Crown shall pay or receive costs in any cause, matter or proceeding, does not apply to criminal proceedings. *Rex* v. *Jones*, 16 B.C.R. 117.

See CONSTITUTIONAL LAW.

See CRIMINAL LAW.

CESTUI QUE TRUST.

See TRUSTS.

CHALLENGE.

See CRIMINAL LAW.

See JURY.

CHAMBERS.

See PRACTICE.

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CHARITABLE USES.

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CHINESE.

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See HABEAS CORPUS.

See IMMIGRATION.

See MARRIAGE.

See MUNICIPAL CORPORATIONS.

CHOSES IN ACTION.

See ASSIGNMENT.

CHURCH OF ENGLAND.

See ECCLESIASTICAL LAW.

CLUB.

See INTOXICATING LIQUOR.

COAL MINES REGULATION ACT.

1. Report of committee.]—A report of a committee appointed by a meeting of a miners' union to inspect a mine is not, nor is it equivalent to, the report of a committee appointed by "the persons employed in a mine" to make such inspection under rule 31, even though a majority of such persons may be members of that union. *Leadbeater and others* v. *Crow's Nest Pass Coal Co.*, 2 M.M.C. 145.

2. Notice.] — A statutory meeting of such employees may be called by due notice posted at the pit's mouth. *Ibid.*

3. Safety lamp.]—The bonnetted clanny lamp is a locked safety lamp within the meaning of rule 8. *Ibid.*

4. Inspection.] — It is not an offence against sec. 32 of the amended Act for a com-

pany to appoint for its own convenience and protection an additional though unqualified fireman to assist in carrying out the provisions of rule 4 of the Act relating to the inspection of non-gaseous mines. *Simister* v. *Morgan*, 2 M.M.C. 281.

See CONSTITUTIONAL LAW.

See MASTER AND SERVANT.

See STATUTES.

COAST.

Meaning of.] — The term "coast" or "sea-coast" has no fixed meaning apart from the context, and is equally applicable to the space between high and low-water mark, or to the territory bordering on the sea, or to that part of the sea which adjoins the land. *Mowat* v. *North Vancouver Corporation*, 9 B.C.R. 205.

COLLISION.

I. REGULATIONS FOR PREVENTING, 129.
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I. REGULATIONS FOR PREVENTING.

A. In General.

1. Non-observance of Canadian sailing rules.]—The ship Canadian, navigated by an American pilot, was making a landing against a current of about six miles an hour. The ship 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, on appeal, by Walkem and Drake, JJ., that both vessels were to blame, and that the appeal should be allowed without costs. By Irving, J., that both vessels were to blame, and that it be referred back to assess the damages to the Canadian, and then the damages should be apportioned according to the Admiralty rule. By Martin, J., that the appeal should be dismissed. Observations as to the necessity for complying with the Canadian navigation rules in Canadian waters. *Canadian Development Co.* v. *Le Blanc*, 8 B.C.R. 173.

2. Departure from regulations justified.]—Though a narrow channel may properly be entered by means of any other recognized and navigable channel, yet the circumstances may be such as to require the entering ship to be prepared to take precautions to clear other vessels:—Held, on the facts, that an outgoing steamship in Vancouver Narrows had not fully discharged this duty as regards a tug with scow entering the Narrows:—Held, further, on the facts, that, as a matter of prudent navigation, the tug with scow was justified, under Articles 25 and 27, in her course of conduct though it was a departure from the strict letter of the regulations. Observations upon the necessity of giving the proper signals to convey timely information. Failure to call the quartermaster on duty as a witness animadverted upon. *SS. Charmer* v. *SS. Bermuda*, 15 B.C.R. 506.

B. Overtaking Ship.

1. Overtaking ship.]—Where a steamer J. and C. cleared from the same wharf at Nanaimo Harbour at about the same time, the J. first. Each backed from the wharf in a different direction from the other, and each executed a manœuvre in the harbour for the purpose of making exit to the sea by a narrow channel between an island situated at the mouth of the harbour and a shoal, and approached its entrance and each other in directions convergent and almost at right angles, the J. being on the starboard side of the C. The relative courses and speed of the vessels were such that unless altered by one or the other a collision was imminent. Both vessels kept their courses, but a few seconds before the collision took place, the C. stopped and reversed her engines, notwithstanding which she struck the J., which was then crossing her bow, forward of amidships, almost at right angles:—Held, 1. That the J. was not an overtaking ship within the meaning of Article 20, or bound to keep out of C.'s way. 2. That the C. had the J. on her starboard side, within the meaning of Article 16, and was bound to keep out of the way. 3. That the C. was solely responsible for the collision. *The Cutch*, 2 B.C.R. 357.

2. Overtaking ship.]—Where a steamer proceeding on a course north seventy-two degrees west, and a barque 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 Steamship Empress of Japan*, 8 B.C.R. 122.

C. Narrow Channel.

1. Vancouver Harbour.]—On July 21st, 1906, between 11½ and 13 minutes after two p.m., the steamer Princess Victoria (length 300 feet, speed 19 to 20 knots) belonging to the defendant Company, collided with and sank the steamer Chehalis (length 59.3 feet, speed about 9 knots), both vessels being on their way westward out of Vancouver Harbour. The Princess Victoria's point of departure was her usual berth on the south side of the harbour; the Chehalis left from the north side, or North Vancouver, and both vessels proceeded through the Narrows, the Chehalis going first and crossing the channel diagonally towards the south shore so as to take advantage of the slack water and avoid the incoming tide. The day was fine and clear with a light westerly breeze, and there were three vessels in the Narrows at the time, viz.: the two steamers and a small gasoline launch. The Chehalis was in view of the Princess as soon as the latter was steadied on her course after leaving the wharf, and was three points to starboard about three-quarters of a mile off. There was a strong tide, about eight to nine knots, coming through the Narrows, and against the vessels. The launch came into view of the Princess as the latter swung into the tide at Burrard Shoal, and the launch was then about 100 yards west of Brockton Point and steering for the south shore, and on the port bow of the Princess. The latter, after rounding the point and swinging slowly to port, was steadied within half a point so as to avoid the launch, and then headed straight down and through the Narrows, the intention being to pass between the Chehalis and the launch, which at that time were some 250 yards apart. After being so steadied, two whistles were blown by the Princess to indicate to the Chehalis that the Princess would pass her on the port side. At the moment this signal was given, the Chehalis changed her course at least three to four points from west to southward, bringing her across the bows of the Princess. The engines of the latter were at once stopped and reversed at full speed, but the speed she was making through the water and the effect of the tide on the Chehalis brought both vessels together, and the Chehalis was swept under the Princess' starboard bow and sunk. The speed of the Princess at the moment of impact was four or possibly five knots through the water, though making no headway over the ground:—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 precaution which a prudent and skillful navigator should have taken in the circumstances. 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. *Bryce* v. *The Canadian Pacific Railway Company*, 13 B.C.R. 96.

2. Vancouver Harbour.]—In a collision action, there is, in order to establish contributory negligence, an onus on the overtaking vessel to show 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. *Bryce* v. *The Canadian Pacific Railway Company*, 13 B.C.R. 446. Reversed by the Judicial Committee of the Privy Council and judgment of Martin, J., restored. 15 B.C.R. 510.

D. Speed in Bad Weather.

Fog.]—By article 16 of the regulations for preventing collisions at sea, "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as

the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." The steamship Iroquois, proceeding in a fog (in which objects were not visible beyond half a cablelength), off the Sandheads, Fraser River, heading for Vancouver Narrows on a course N.W. by N. ½ N., at a speed (with the slight assistance of the tide), of a little over fourteen knots an hour, was given the signal for half speed, and almost immediately afterwards they sighted a tug with loaded scow; engines were immediately reversed, but too late to avoid a collision. The tug was bound for Fulford Harbour via Active Pass, on a course S.E. by S. ¾ S., when she ran into the fog about three-quarters of an hour before the collision at about six knots, but did not reduce her speed. The master and mate of the tug heard the fog signals of the steamer, but took no further precautions than to continue to sound fog signals. Both vessels appear to have given the proper fog signals, and after sighting one another did everything in their power to avoid the collision:—Held, that both vessels were equally at fault in having brought about the collision, by contravening Article 16, and that the damages should, therefore, be borne equally by both vessels. *Pallen* v. *The Iroquois*, 18 B.C.R. 76.

E. Lights.

1. Tug and boom of logs.]—Porlier Pass is about one mile in length, narrow, with sunken rocks, the tidal streams are from four to nine knots, and overfalls and whirling eddies are always in the northern entrance where it opens out into the Gulf of Georgia. Mariners are advised to avoid this pass. The plaintiffs' tug Erin, having in tow a boom of logs 1,500 feet long with a 240-foot tow line, was proceeding from the Gulf of Georgia to the entrance of the pass, holding its position a little east of a red bell-buoy at the northerly entrance and west side of the pass and waiting for the tide to slacken. As the tide slackened the tug gradually crept up until the boom was half way past the buoy, when the collision in question took place. The tug carried two white lights in vertical line, and an ordinary ship's lantern, with a range of about one and one-half miles, was placed six feet high on the boom, about 40 feet from its rear end. The defendants' steamer, entering the pass from the south, but not seeing the boom light, proceeded at seven and one-half knots, keeping to the west and passing between the Erin and the bell-buoy before seeing the lantern on the boom, that had twisted around to such an extent that it appeared on their port side, and was at first taken as a light on a fishing boat, as the boom itself could not be seen in the water beyond a distance of about 50 feet. They did not see the boom until almost on top of it. The collision took place about 1.30 a.m., and it appears that the boom had twisted across the channel to such an extent as to practically block the channel:—Held, that the collision was occasioned by the Erin's negligence in the following particulars: (1) Showing misleading lights; (2) too long a tow; (3) insufficient lights on the boom; (4) losing control of the boom and blocking the channel. *Paterson Timber Company, Limited* v. *The Steamship British Columbia*, 18 B.C.R. 86.

2. Obstruction to navigation.]—Apart from any statutory regulation as to lights, those who place obstructions across navigable waters, though lawfully authorized to do so, cannot complain if damage is done to their works by collision brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of absence of lights, to define his exact position in relation to such obstructions. *City of New Westminster* v. *Steamship Maagen*, 18 B.C.R. 441.

II. Stationary and Moving Vessels.

1. Moored to wharf.]—Articles 11 and 15 (*d*) of the Collision Regulations of February 9th, 1897, do not apply in 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. *Bank Shipping Co.* v. *The City of Seattle*, 10 B.C.R. 513.

2. Onus of proof.]—It appeared from the preliminary acts that the defendant ship was under way and the plaintiffs' ship at anchor at the time of the collision:—Held, upon proof of the interest and right to sue the plaintiffs, that the onus was on the defendant ship to show that the collision was not caused by her negligence. (2) That mortgagees of a ship, in possession, have a right of action for damage done to her. (3) That where both parties are to blame for a collision, though in different degrees, the loss and costs will be divided equally among them. *William Curtis Ward*

and Frederick Bernard Pemberton, Executors of the late Joseph Despard Pemberton, against the ship Yosemite, 3 B.C.R. 311.

III. Both to Blame.

A. Salvage Award.

Salvor entitled.]—Although the salvor and the salved are both to blame for a collision, the salvor may be awarded salvage. *Zambesi* v. *The Fanny Dutard,* 2 B.C.R. 91.

B. Division of Loss.

1. Both to blame.]—In Admiralty, where two colliding vessels are both to blame, each must bear one-half the total damage, but the Court has a discretion as to costs. *Lee* v. *The Olympian,* 2 B.C.R. 84.

2. Both to blame.] —Plaintiffs' claim for $408 was dismissed, and defendants on their counterclaim got judgment for $735. Plaintiffs appealed:—Held, by the Full Court, that the appeal must be limited to the judgment on the counterclaim, as the claim was not for an appealable amount. Plaintiffs in a collision case having failed to file a preliminary Act:—Held, by Dugas, J., and affirmed by the Full Court, that no evidence could be given in support of the plaintiff's claim. The ship Canadian, navigated by an American pilot, was making a landing against a current of about six miles an hour. The ship 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, on appeal, by Walkem and Drake, JJ., that both vessels were to blame, and that the appeal should be allowed without costs. By Irving, J., that both vessels were to blame, and that it be referred back to assess the damages to the Canadian, and then the damages should be apportioned according to the Admiralty rule. By Martin, J., that the appeal should be dismissed. Observations as to the necessity for complying with the Canadian navigation rules in Canadian waters. *Canadian Development Co.* v. *Le Blanc,* 8 B.C.R. 173.

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XVI. Scire Facias, 174.

I. Domicil.

Domicile of foreign company.]—The defendant—a foreign company—had a place of business in Victoria, where it carried on a trading business, although its principal place of business and head office, where the meetings of the governor, chief traders, and shareholders were held, were in England. The plaintiff, as administrator (appointed by the Court here) to the intestate estate of McL.—a deceased servant of the company—served a writ on the company's managers at Victoria. On an application to have the writ set aside:—Held, that inasmuch as by the company's rules the power to appoint, pay, and dismiss was with the English office, and as, by agreement, the deceased's account was kept at that office, and the balance due him from time to time was payable there, the English office must be regarded as the domicile of the company, and the company could not be sued here by the plaintiff as the administrator of the deceased. *Wilson* v. *Hudson's Bay Company,* 1 B.C.R., Pt. II., 102.

II. Promotion.

1. Liability of promoters of intended company.]—Defendants, promoters of a public company, signed a memorandum of association for incorporation under the Companies' Act, 1862, (Imp.), and instructed the company to be incorporated, which was not done. At a meeting of the promoters subsequently held, at which some of the defendants were present, and others not, one B. was directed to incur certain expenses, the subject of the action:—Held, giving judgment against the defendants present at the meeting, and in favour of those not proved to have been present: that the defendants still occupied the position of promoters, and were, as such, not each other's agents or liable for each other's acts. *Hung Man* v. *Ellis,* 3 B.C.R. 486.

2. Secret profits.]—Illicit profits made by a promoter vendor out of a transaction not disclosed to the vendee company cannot be retained by him. *Fire Valley Orchards, Ltd.* v. *Sly,* 20 B.C.R. 23.

III. Name and Change of Name.

1. Similarity.] — The opinion of the registrar as to the similarity of the names of different companies is not conclusive under the Investment and Loan Societies Amendment Act, 1898, c. 7, s. 2. *British Columbia Permanent* v. *Wootton,* 6 B.C.R. 382.

2. Similarity.]—The plaintiff company was registered in British Columbia in 1892, as "The Canada Permanent Loan & Savings Company (Foreign)," and carried on business under that name until January, 1898, when it obtained a licence under the Companies Act, 1897, to carry on business as "The Canada Permanent Loan & Savings Company," and the defendant company was incorporated in April, 1898, as "The British Columbia Permanent Loan & Savings Company":—Held, in an action for an injunction to restrain the defendant company from carrying on business under its name, that the two names were not so similar as to be calculated to deceive the public. *Canada Permanent* v. *British Columbia Permanent,* 6 B.C.R. 377.

3. Identity.]—Where plaintiff Company had obtained incorporation under the Dominion Companies Act, with a certain name, a company subsequently formed under a Provincial Act with the same name, was restrained from operating under such name. *Semi-Ready, Limited* v. *Semi-Ready, Limited,* 15 B.C.R. 301.

IV. Memorandum and Articles.

1. Power to issue shares at a discount.]—A company incorporated under the Com-

panies' Act, 1862 (Imperial), assumed power: (1) By its memorandum of association to issue shares at a discount; (2) By its articles of association, in other respects Table A. to the Act, "that these articles may be altered, etc. . . . . at any meeting of the company, by a resolution, etc., passed by a majority," etc.:—Held, both powers invalid (1) as contrary to law, and (2) as contrary to s. 51 of the Act, which requires a special resolution for the alteration of articles. By a resolution passed at a general meeting of the company, the whole of the general issue of shares of the company, which were expressed to be, and were in fact, fully paid up, was cancelled, the capital of the company was increased from $50,000 to $375,000, and new shares of the face value of the latter amount, falsely marked on their face, "fully paid up," were issued and divided among the original shareholders in lieu and in sole consideration of their former shares:—Held, ultra vires as the issue of shares at a discount; and also void as an increase of capital not authorized by special resolution of the company. The applicant accepted, under the idea that they were valid, and sold a portion of the new shares issued to him:—Held, not such an acquiescence as estopped the applicant from repudiating the remainder as against the company. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101; 4 B.C.R. 61.

2. Election of directors.]—In the memorandum of association of a joint stock company there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect three of the five directors, notwithstanding anything contained in the Act:—Held, that the agreement was ultra vires, being repugnant to the conditions as to elections of directors imposed by the Act. *Dunsmuir* v. *The Colonist, &c., Co.*, 9 B.C.R. 275; 32 S.C.R. 679.

V. Capital.

1. Discount.]—A company cannot take power by its memorandum to issue shares at a discount. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101; 4 B.C.R. 61.

2. Special resolution.]—Where there is no power to increase capital in the articles, a special resolution is required. *Ibid.*

VI. Prospectus.

1. Contribution between parties liable for misrepresentations.]—A subscriber for certain shares in an incorporated company, for which he had made certain payments, brought action and obtained judgment against the Company and certain of the directors for a refund of the moneys he had paid, on the ground of misstatements in the prospectus. The directors so sued paid the amount of the judgment and brought action against their co-directors for contribution. In their pleadings they confined themselves to a claim for contribution on account of the judgment the subscriber for shares had obtained against them, and which they had paid. The plaintiffs obtained judgment on the trial:—Held, on appeal, that under subsec. (1) of sec. 93 of the Companies Act, the plaintiffs, in order to succeed, must make out the case that the subscriber for shares would have had to make out if he had sued the directors who were defendants in this action, and that, upon the evidence, the plaintiffs had not made out such a case:—Held, further, that the plaintiffs, instead of confining themselves in their pleadings to a claim for contribution on account of the judgment which the subscriber for shares had obtained against them, should have alleged the defendants' responsibility for the issue of the prospectus, that the subscriber took shares on the faith of it, and he suffered loss by reason of the untrue statements therein. *Johnson* v. *Johnson*, 18 B.C.R. 563.

2. Scope of remedy.] — The statute enables the shareholder to recover damages for misrepresentation in a prospectus where there was no deceit, and places those directors who have been made liable at the suit of a shareholder in a position to recover contribution from other directors or promoters who were not sued with them, without being met by the defence that contribution cannot be claimed by one tort feasor from another, assuming the Act makes innocent misrepresentation a tort. *Ibid.*

VII. Membership.

A. Contract of Membership.

Membership by estoppel.]—The acceptance of invalidly issued shares in ignorance of the ground of invalidity, and the subsequent sale of some of the shares so accepted, will not preclude repudiation. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101.

B. Rectification of Register.

Invalidly issued shares.]—Where a company purported to cancel its fully-paid shares and to issue in lieu thereof new shares at a discount, the register was ordered to be rectified by removing the name of the members in regard to the new shares and restoring it in regard to the original shares. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101; 4 B.C.R. 61.

C. Register of Members.

Notice to creditors.]—Entries in the register of members are not notice to creditors of transfers of shares. *In re Enterprise, &c., Co.*, 1 B.C.R., Pt. II., 94.

D. Rights and liabilities of members.

1. Rights.

1. Right to exercise corporate acts and make by-laws.]—The shareholders in a company incorporated under the Companies Act, 1890, have no power to interfere in the ordinary management of the company by the trustees, who have the exclusive right of exercising its corporate powers and making by-laws. *Dunsmuir* v. *Colonist Pubs. Co.*, 9 B.C.R. 290.

2. Attacking distribution of capital.]—A shareholder, who has purchased at auction certain of the shares of the company which had been placed in the hands of trustees, by agreement between the promoters, to be sold by the trustees to raise money for working capital, has no locus standi to question the distribution of the share capital among the promoters, or to enforce a call on the shares held by them, as being not fully paid up. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

3. Mining claim.]—The owner of shares in an incorporated mining company is not an owner of any part of a mining claim owned by it, within s. 29, c. 25, Mineral Act, 1891. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71.

4. Regularity of proceedings—Right to assume.]—A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. *Jackson* v. *Cannon*, 10 B.C.R. 73.

5. Dividend.]—A shareholder in a company having left a portion of his dividend uncollected, subsequently sold out his shares. The Company thereafter assigned, and the shareholder claimed the balance due him on his dividend. The assignee pleaded section 182 (*g*) of the Companies Act as a bar to his payment of the claim:—Held, that inasmuch as the Company was not in process of being wound up, plaintiff was entitled to recover. *Savage* v. *Shaw*, 17 B.C.R. 343.

2. Liabilities.

(*a*) *In General.*

Liability of to creditors.]—The plaintiff company, as judgment creditor of the Westminster & Vancouver Tramway Company, brought the action against the defendants, as shareholders therein, to compel them to contribute and pay to the plaintiff company, out of the amounts respectively unpaid by them upon their shares in the company, a sum sufficient to satisfy the judgment. The statement of defence raised an objection in point of law to the whole claim, that the tramway company was not within the Act, as not being a "railway" company. Upon argument thereon, Drake, J., decided the point of law in favour of the defendants. Upon appeal by the plaintiff company, the Divisional Court affirmed the judgment of Drake, J. Quære: Whether the action as brought lay for want of privity between the parties; and whether a winding up of the company, and call upon the defendants as contributories, was not the only remedy of the plaintiff company. *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

(*b*) *Calls.*

1. Distribution of share capital.]—The action was brought by a public company to remove two of its trustees for refusing to obey an order of the Court made in a previous action directing them to join with the other trustees in assessing, as not being bona fide fully paid up, certain founders' shares marked fully paid up, in order to raise funds for carrying on the company:—Held, by the Full Court, upon appeal from the judgment of Davie, C.J.: 1. That the defendant trustees should be removed. 2.

That they were estopped by the judgment in the previous action from objecting to the status of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action. The promoters of the company agreed to allot 127,500 out of its total capital of 250,000 $10 shares, all marked fully paid up, to one of their number, C., in consideration of his procuring A. to advance $25,000 to the company, and of certain other services, and by the same instrument C. agreed to transfer 85,000 of such shares to A. in consideration of the $25,000:—Held, that A. was a purchaser of the 85,000 shares from C., who held them as fully paid up, and that A. could not be treated as a purchaser from the company of the shares at a discount, and could not be forced at the instance of another shareholder to contribute to its funds any part of the difference between the $25,000 which he paid for them and their face value. E. purchased at auction certain of the shares which had been placed in escrow, in the hands of trustees, by agreement between the promoters to be sold by such trustees to raise funds to carry on the company:—Held, that E. had no status to question the distribution of the share capital among the promoters, or to subject their shares to assessment for the purposes of the company as not being bona fide fully paid up. *The Fraser River Mining and Dredging Company, Limited Liability* v. *Gallagher, Crockett and Edwards* (by original action). And *Gallagher, Crockett and Edwards* v. *The Fraser River Mining and Dredging Company, Limited Liability* (by counterclaim), 5 B.C.R. 82.

2. Payment in shares.]—A company incorporated to take over a business carried on by defendants in partnership entered into possession, and in payment for his relative interest in the business each defendant received a corresponding number of shares at par value:—Held, that the payment for the shares was a "payment in cash" within the meaning of s. 50 of the Companies Act, and as the purchase price was fair, the shares were fully paid up. *Turner* v. *Cowan*, 9 B.C.R. 301; 9 B.C.R. 354. Reversed, 34 S.C.R. 160.

3. Payment.]—Where the balance of the amount due on shares is payable "on call within 18 months after allotment," the balance is not payable within 18 months except upon call, but on the expiry of the 18 months it becomes due and payable without call. *Graham Island Collieries* v. *McLeod*, 19 B.C.R. 114.

VIII. Shares.

A. Classes of Shares.

Preference shares.]—Whether preference in regard to dividends is essential to constitute preference shares. *Dunsmuir* v. *Colonist, &c., Co.*, 9 B.C.R. 275.

B. Allotment and Issue.

1. Application and Allotment.

1. Discount.]—A company cannot take power by its memorandum to issue shares at a discount. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101; 4 B.C.R. 61.

2. Formal allotment.]—Defendant purchased 50 shares in plaintiff Company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between defendant and the president of the Company that defendant was to be employed as a foreman by the Company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the Company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—Held, that upon the signing of the application and the delivery of the note, the defendant became the owner of the 50 shares, with power to forthwith validly assign them to anyone else, or to have bound himself to do so on the issue of the certificates if the Company's articles of association required indorsement of the certificates; and that there was no notice of allotment necessary. *Anglo-American Lumber Company* v. *McLellan*, 13 B.C.R. 318; 14 B.C.R. 93.

3. Specific performance.]—Where in an action against an applicant for shares in a company, for specific performance of the contract for their purchase, it appeared that the Company had set aside certain shares for the applicant to be issued to him on payment of the balance of the purchase price, and that these shares had been previously allotted to a former applicant,

which allotment was later declared forfeited by the Company, the question of whether or not the Company properly forfeited the shares has no bearing on the question before the Court. *Graham Island Collieries* v. *McLeod,* 19 B.C.R. 114.

2. Allotment for Cash and Otherwise than for Cash.

1. Distribution of share capital among promoters.]—The action was brought by a public company to remove two of its trustees for refusing to obey an order of the Court made in a previous action directing them to join with the other trustees in assessing, as not being bona fide fully paid up, certain founders' shares marked "fully paid up," in order to raise funds for carrying on the company:—Held, by the Full Court upon appeal from the judgment of Davie, C.J.: (1) That the defendant trustees should be removed. (2) That they were estopped by the judgment in the previous action from objecting to the status of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action. The promoters of the company agreed to allot 127,500 out of its total capital of 250,000 $10 shares, all marked fully paid up, to one of their number, C., in consideration of his procuring A. to advance $25,000 to the company, and of certain other services; and by the same instrument C. agreed to transfer 85,000 of such shares to A. in consideration of the $25,000:—Held, that A. was a purchaser of the 85,000 shares from C., who held them as fully paid up, and that A. could not be treated as a purchaser from the company of the shares at a discount, and could not be forced, at the instance of another shareholder, to contribute to its funds any part of the difference between the $25,000 which he paid for them, and their face value. E. purchased at auction certain of the shares which had been placed in escrow, in the hands of trustees, by agreement between the promoters, to be sold by such trustees to raise funds to carry on the company:—Held, (1) that E. had no status to question the distribution of the share capital among the promoters, or to subject their shares to assessment for the purposes of the company, as not being bona fide fully paid up. *Fraser River Mining Co.* v. *Gallagher,* 5 B.C.R. 82.

2. Payment in cash.]—Where, on the formation of a joint stock company to take over a partnership business, each partner receives a proportionate number of fully paid shares, at their par value, in satisfaction of his interest in the partnership assets, this does not constitute a payment in cash for shares subscribed for by the partner, and the debt owing to the shareholders as the price of the partnership assets cannot be set off against their liability on the shares. *James Turner & Co.* v. *Cowan,* 9 B.C.R. 301, 354; 34 S.C.R. 160.

C. Transfer.

1. Non-registration.] — B., a registered holder of shares in a limited company, transferred them to S., but B. being in arrear for some calls, the transfer was not registered. In August, 1881, B. obtained an order that, on certain payments being made, the company should take his name off the register and substitute S.'s name. The order was served on the secretary of the company, and payments were made by B. under the order. The register was not rectified in pursuance of the order. In February, 1883—the company having suspended business for over two years—a winding-up order was made, and in March, 1884, B. appeared on a summons to show cause why he should not be on the contributories' list:—Held, that there were no laches on the part of B., and that his name must be removed from the list of contributories. *Ex parte John Bibby. In re Enterprise Gold and Silver Mining Company, Limited,* 1 B.C.R., Pt. II., 94.

2. Restrictions on.]—A public company with a view to changing itself into a private company by special resolution, duly passed, imposed certain restrictions on the disposal of shares by shareholders:—Held, that such restrictions were not void as being opposed to absolute ownership. *Leiser* v. *Popham Brothers, Limited,* 17 B.C.R. 187.

3. Broker's duty to obtain registration.]—Plaintiff instructed a broker to purchase certain shares for him. The broker did so, and drew on plaintiff for the purchase money, the draft being indorsed by a member of the defendant firm, and the share certificate being attached to the draft. Plaintiff honoured the draft and received the shares, but on being informed that the indorsement on the share certificate was not in the handwriting of the transferor, James Boecher, forwarded the certificate to the Company's office. The Company's manager,

after some negotiation with the witness to the indorsement, John Boecher, handed him the certificate. He disappeared. The Company refused to register the transfer of the shares to the plaintiff, who sued to recover the amount paid for the shares, and for damages:—Held, that the broker's duty was satisfied when he handed over the certificates, ex facie, properly indorsed, and that there was no obligation on him to procure the registration of the transfer. *Castleman* v. *Waghorn, Gwynne & Co.*, 13 B.C.R. 351. Reversed, 41 S.C.R. 88.

4. Warranty of title.]—When shares in a joint stock company are sold for cash and a certificate delivered with a form of transfer indorsed purporting to be signed by the registered holder who is not the vendor, the latter must be taken to affirm that he has vested in him, by virtue of such certificate and transfer, a title which will enable the purchaser to be registered as the holder. *Castleman*, v. *Waghorn*, 13 B.C.R. 351; 41 S.C.R. 88.

5. Right of purchaser.]—Where a purchaser of shares is unable to obtain registration as holder, he has a right to recover back the purchase money from the vendor; and such right is not lost by his endeavouring to become registered, nor by the loss of the certificate without his fault. *Ibid.*

D. Forfeiture.

Abandonment.]—The plaintiff, H. A. Jones, one of the original shareholders of the defendant Company, organized in 1891, transferred 240 shares to his wife, the co-plaintiff, Clara B. Jones, on September 26th, 1893, and on the same day took an assignment of the same shares from her to himself. The assignment was never registered. The par value of the shares was $100, on which 80 per cent. had been paid up. In May, 1895, a call of 2½ per cent. was made, payable June 14th following, with the usual penalty of forfeiture in case of default. Default was made, and the shares were declared delinquent, were offered for sale, but there being no bid, were withdrawn. In March, 1896 (new by-laws having been adopted in the meantime), a call of 6 per cent. was made on all shares, including those of the plaintiff, Clara B. Jones. Default was made and in due course the shares were declared delinquent. In April, 1897, a further call of 9 per cent. was made. On the 21st of May, 1898, a resolution was passed by the directors that Mrs. Jones be served with a notice requiring her to pay the call of 2½ per cent. by the 24th of June, and that in the event of default the shares would be forfeited. At a meeting of the directors on the 25th of June, a resolution of forfeiture, reciting the facts, was put, when Mrs. Jones's husband and co-plaintiff, who was present and a director, offered to pay $100 on account if the shares were not forfeited for six months. This offer was refused and the resolution was passed. In May, 1897, Mrs. Jones's solicitors inquired of the Company whether the shares had been forfeited, and offering to pay up the arrears, but were informed that the shares had been forfeited. She then brought action:—Held, on appeal, that the plaintiff, Clara B. Jones, had elected to abandon the undertaking by acquiescing in the forfeiture at a time when the Company's prospects were doubtful, and such abandonment could not be recalled when it was found that the Company was prosperous. *Jones and Jones* v. *The North Vancouver Land and Improvement Company, Limited Liability*, 14 B.C.R. 285; 1910, A.C. 317.

E. Estoppel by Representation in Certificates.

1. Fully paid.]—A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value, and paid up, were allotted to three promoters. One of them sold part of his allotment at a discount, and had them transferred by the company direct to the purchasers, who were not aware that the shares were not really paid up:—Held, in an action by the company, that the purchasers were not liable for the discount on such shares, inasmuch as the company was bound by its statement in the certificates that the shares were "fully paid and non-assessable." *Kettle River Mines, Ltd.* v. *Bleasdel*, 7 B.C.R. 507.

2. Validly issued.]—A company which has no power to draw, make, or indorse negotiable instruments, and nevertheless sells its own shares and takes promissory notes in payment thereof, which it indorses to a holder in due course, is estopped from denying that such shares were validly issued. *Merchants Bank of Canada* v. *McLeod and Leeson*, 15 B.C.R. 290.

3. Unauthorized issue.]—Where a certificate of shares in proper form has been issued, but the affixing of the company's

seal has been unauthorized, such certificate must be held as a void document, and the issue does not operate as a warranty of genuineness or estop the company from denying the validity of the certificate. *Fire Valley Orchards, Ltd.* v. *Sly*, 20 B.C.R. 23.

IX. Regulation and Management.

A. Directors.

1. Fiduciary position of.

1. Exercise of powers.]—As fiduciary donees of their powers, the directors of a company are bound to exercise them bona fide for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the Court. *Madden* v. *Diamond; Rudolph* v. *Macey*, 12 B.C.R. 80.

2. Personal advantage.] — A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by showing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to show beyond all reasonable doubt the single-mindedness of his intentions. *Ibid.*

3. Purchase with company's funds.]—Defendant as general manager of a company engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber which he disclosed to the defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits":—Held, that as the limits were acquired for the company in the first instance, and the company's funds used for that purpose, that the defendant was merely a trustee for the company, to which he was bound to account. *Kendall* v. *Webster*, 15 B.C.R. 268.

2. Powers of.

Managing directors.]—In the absence of express powers in the articles, directors have no power to appoint one of their number managing director at a salary. *Claudet* v. *The Golden Giant Mines, Ltd.*, 15 B.C.R. 13.

3. Meetings of.

1. Presumptive regularity of proceedings.]—A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. *Jackson* v. *Cannon*, 10 B.C.R. 73.

2. Evidence as to.]—Minutes of a directors' meeting were taken down in shorthand by the solicitor for the Company and afterwards transcribed and handed to the secretary and re-transcribed into the minute book. They were not confirmed at any subsequent meeting. The solicitor died before the action came to trial:—Held, that such minutes or re-transcribed notes, were not admissible to prove what transpired at the meeting in question. *Claudet* v. *The Golden Giant Mines, Ltd.*, 15 B.C.R. 13.

3. Notice of.]—Plaintiff Company is an English company incorporated under the English Companies' Act, 1908, with its head office in London. The Company is capitalized at £20,000, in shares of £1 each, of which about £13,000 have been issued. There are six directors of the Company. Early in the year 1911 the defendant was appointed managing director of the business of the Company, which was carried on in British Columbia; in fact, the Company was incorporated for the purpose of taking over a cannery business on the Fraser river. Defendant then came out to British Columbia and entered on his duties. Some months after his arrival in British Columbia, dissatisfaction arose in connection with his management, and another of the directors was sent out, so that the matter stood: of six directors, four were in London and two in British Columbia, one being the managing director in British Columbia, and the other having been sent out to represent the English shareholders. In the latter part of 1911 the four directors in London had a meeting at which they appointed a Mr. Sherman managing director. The point was (1) Was it necessary, in order to have a legal meeting of the board of directors in

London, to give a notice to the two directors in British Columbia? (2) Whether the directors had power to dismiss the managing director? The trial judge held that there was no power to dismiss, and also that it was necessary to send notice of any meetings to the directors in British Columbia, and that anything done at a meeting held without such notice was irregular and void:—Held, that there was no necessity to send notices of meetings to absent directors. *C. S. Windsor, Limited* v. *J. W. Windsor*, 17 B.C.R. 105.

B. Special Resolutions.

Alteration of articles.]—A company's articles can only be altered by special resolution. *Twigg* v. *Thunder Hill Mining Co.*, 3 B.C.R. 101; 4 B.C.R. 61.

X. Powers and Liabilities of Company.

A. In General.

1. Partnership.] — The defendant company, having power by its memorandum of association, inter alia, to carry on and enter into contracts for the purposes of the business of bookbinders, entered into an agreement with the plaintiff whereby it purchased and amalgamated his bookbindery with its own, the joint concern to be carried on and profits and losses divided between the plaintiff and the company, in certain proportions, the plaintiff to be manager and foreman at a salary. The company not having paid plaintiff the purchase money as agreed, refused to furnish proper accounts or otherwise perform the stipulations of the agreement. In an action for a rescission of the agreement, an account, payment and a receiver:—Held, per Crease, J., that the agreement in question constituted a partnership, and that the remedy by rescission was inapplicable, as it was contracted in good faith, and business carried on under it; but that a dissolution should be ordered, with accounts and a receiver. On appeal to the Full Court:—Held, that the order for accounts and a receiver should be affirmed, but the contract rescinded instead of ordering a dissolution. Quære, whether the agreement constituted a partnership or not. *Roedde* v. *The News-Advertiser Publishing Company*, 4 B.C.R. 7.

2. Amalgamation.] — A new company, formed for the purpose of carrying out a scheme for the amalgamation of two old companies, purchased their assets, there being no provision in the purchase and sale agreements as to the payment of their liabilities. The officers of the new company, without specific instructions from their directors, paid the liabilities of the old companies with the assets of the new, carrying out what they believed was the real intent of the parties at the time the amalgamation scheme was entered into:—Held, upon the evidence, that all interested, except possibly the plaintiff, who was a shareholder, intended that the liabilities of the dissolving companies were to be assumed and paid by the defendant Company, that there was no wrong in the scheme of amalgamation or in carrying it out, and, therefore, there was no fraud on the part of the defendants. *Johnson* v. *Thompson*, 19 B.C.R. 105; 20 B.C.R. 520.

3. Purchase from promoters.] — The objects which a company may legitimately pursue must be ascertained from the memorandum of association, and the powers which the company may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from the provisions of such memorandum. Where, therefore, there is the power to buy from two promoters at a price to be agreed upon with them, it does not carry with it, by any reasonable implication, a power to buy from another, at a price to be agreed upon with him. *Fire Valley Orchards, Ltd.* v. *Sly*, 20 B.C.R. 23.

B. Acts Ultra Vires of the Company.

Guarantee.] — A company endorsed a promissory note guaranteeing the payment of goods already delivered to a second company, in which the first company held shares, of which it was a large creditor, and upon whose effects it held a blanket mortgage. The memorandum of association of the first company did not specifically include power to guarantee the payment of the obligations of others, or to undertake primary liability therefor. In an action against the first company for the balance due on the promissory note:—Held, that, even in the event of the defendant Company's interests being served by endorsing the note, the endorsement was ultra vires of the Company. *Carter Dewar Crowe Company* v. *Columbia Bitulithic Company*, 20 B.C.R. 37.

C. Agency.

1. Liability of Company for Acts of Agents.

1. Agency for of its officers—Evidence of acts of, as binding on the company without proof of express authorization.]—Statements made by the officers of the company to the plaintiff, indicating to him that he was dismissed from its service, are admissible in evidence upon an issue raised by a denial of the dismissal, without proof that the company authorized the same, or by resolution authorizing the dismissal of the plaintiff. *Varrelmann* v. *The Phœnix Brewing Company, Limited Liability*, 3 B.C.R. 135.

2. Tort.]—A servant of the defendant corporation employed to cut timber on its lands, knowingly trespassed and cut timber off plaintiff's land, which adjoined, and the defendants' manager, general foreman and other servants, knowingly took and included it in defendants' boom and hauled it away. It was afterwards cut up and sold along with defendants' lumber. Evidence was given for plaintiff and denied by defendants that the trespass was committed by instructions of the manager:—Held, that if a servant of a company commits a tort in the course of his employment and for the benefit of his employer, whether by direct orders or not, the employer is liable, even if the act was unknown to or actually forbidden by him. *Harris* v. *Brunette Saw Mill Co.*, 3 B.C.R. 172.

3. Ultra vires.]—A company is liable for a trespass committed by its servant while conducting its business, although committed in the doing of an act ultra vires of the company itself. *Adams* v. *The National Electric Tramway & Lighting Co.*, 3 B.C.R. 199.

4. Error of judgment.]—Where the servant of a company forms an erroneous judgment, and, in the supposed scope and discharge of the duty delegated to him, commits a trespass, the company is liable for it. *Ibid.*

5. Contract.]—In dealing with a company in the ordinary course of business through the general manager, it may be assumed that he has the authority to act for the company if under the articles of association such powers can be conferred upon him. In the absence of notice that the director has not the powers which his co-directors might have conferred upon him, it is not necessary to inquire whether such powers have actually been conferred. The plaintiff, an architect, sued the defendant Company for services rendered in preparing plans of a building they were about to erect for a safe-deposit business. The contract had been made by the plaintiff with a director who called himself general manager of the Company. The Company intended to carry on a safe-deposit business, and had the power to erect a building suitable for the purpose. Their articles of association were those of Table A of c. 44, Revised Statutes of British Columbia, 1897, with the exception of slight alterations that are not material in this case. By article 11 of these articles of association, any one of the directors might be authorized to act as the Company's agent. The Company's defence was that the contract was made with one who had no authority to bind the Company:—Held, that the subject-matter of the contract being within the ordinary business of the Company, and it having been entered into with a person to whom the power might have been given, it was binding upon the Company. *Doctor* v. *The People's Trust Company, Limited (No. 2)*, 18 B.C.R. 382.

6. Contract.]—The general manager of a lumber company gave written instructions to a logging superintendent to make contracts and hire assistants for cutting and delivering a certain quantity of logs at their mill for the season of 1912. The logging superintendent then contracted with the plaintiff for the cutting and taking out of all lumber in a certain area at a certain daily output, which would involve continuous operations for about three years. The plaintiff worked under the contract for three and one-half months, when the Company shut down their mill and discharged the plaintiff. In an action for damages for being denied the right to complete his contract:—Held, that the instructions received by the logging superintendent from the general manager did not authorize the contract made with the plaintiff, and the logging superintendent as such had no power to make the contract. *Hedican* v. *The Crow's Nest Pass Lumber Company, Limited*, 19 B.C.R. 416.

2. Ratification.

Ratification of by shareholders.]—A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was

no power to borrow, may be ratified by the shareholders. *Adams and Burns* v. *Bank of Montreal*, 8 B.C.R. 314.

D. Contracts, Form of.

Contract not under seal of company.]—A contract by a corporation to ship all goods consigned to them at Victoria from a certain point by plaintiff's steamers is not void for want of mutuality by reason of not being under the corporate seal of the plaintiffs. A contract by a trading corporation dealing with a subject within the scope of the object of its memorandum of association need not be under its corporate seal. The advantages to the defendants provided for in the contract set out below constituted a sufficient consideration to support it. *The Canadian Pacific Navigation Company* v. *The Victoria Packing Company*, 3 B.C.R. 490.

XI. Actions and Proceedings.

A. Parties.

1. Void transaction.] — The three plaintiffs were shareholders in the defendant Company, of which the defendant Melekov was the promoter and organizer. One F. A. King, carrying on business in Seattle in the name of the Keystone Oil Company, entered into an agreement with the defendant Company, whereby the latter were to acquire King's business conections in Vancouver, the consideration being 25,000 shares. It was further alleged that there was an agreement between Melekov and the Company's directors, that in consideration of his services in promoting the Company he was to receive a bonus of 25,000 shares. It was arranged that this bonus was to be given to Melekov through the transaction entered into with King; that is to say: the agreement with King should show the consideration to him for the acquirement of his business should appear as 50,000 shares, and it should be understood that 25,000 should go to Melekov instead of there being a transfer direct to him from the Company. It also appeared that certain shares had been given to some persons to become interested in the Company and act as directors, one director getting 1,000 shares as a bonus for consenting to be a director. The prospectus of the Company stated that there were no promoters' profits, and it was, as alleged, to get over this representation that the bonus to Melekov was carried out through the King transaction:—Held, that the plaintiffs, not having shown that the Company had declined to bring the action, or that any proper effort had been made by them to get the Company to do so, had no status to bring the action themselves in the circumstances. *Rose and others* v. *British Columbia Refining Company*, 16 B.C.R. 215.

2. Removal of directors.]—Proceedings to remove directors must be brought by the company, and an action for that purpose by one shareholder does not lie, nothwithstanding that he brings the action on behalf of himself and all the shareholders of the company, other than those attacked. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

3. Illegal application of corporate funds.]—The defendant Company, formed for the purpose, agreed in writing (in two agreements similar in terms) to purchase the undertakings and assets of the British Columbia Sand and Gravel Company and the Victoria Contracting Company, the consideration for the old Companies being shares in the newly-formed Company. There was no reference in the agreements as to the defendant Company assuming the debts and liabilities of the former Companies. The defendant Carlin was a shareholder and director in all three Companies; and the defendant Thompson was a shareholder and director of the Victoria Contracting Company and of the defendant Company. Prior to the amalgamation the defendants Carlin and Thompson, with three other directors (who collectively owned a majority of the stock in the defendant Company when formed), had indorsed notes to secure the indebtedness of the Victoria Contracting Company in the sum of about $68,000, and the British Columbia Sand and Gravel Company, of which the defendant Carlin had been president, had obtained an option for the purchase of a property known as the Keating Estate, in Esquimalt district, upon which it had made a payment of $1,000. Immediately after the amalgamation the defendant Company made a further payment upon the Keating Estate of $9,000, by a promissory note made by the Company and indorsed by the defendants Carlin and Thompson. Subsequently, at a meeting of the directors of the defendant Company, it was arranged that the defendants Carlin and Thompson should advance $10,000 in order to retire the $9,000 note and repay the British Columbia Sand and Gravel Com-

pany the $1,000 originally paid on the Keating Estate. The defendant Company thereupon assigned all its interest in the Keating Estate to the defendants Carlin and Thompson as security for their advance. Later the defendants Carlin and Thompson, without notice to the defendant Company, sold a portion of the Keating Estate for about $57,000. The directors of the defendant Company at the same time paid, with the assets of the Company, about $68,000 of the former debts of the Victoria Contracting Company. The plaintiff brought action on behalf of himself and the other shareholders in said Company against the Producers Rock and Gravel Company and Carlin and Thompson, claiming that the property standing in the name of the defendant directors should be declared to be the property of the defendant Company, and that the directors had improperly paid out moneys from the defendant Company's treasury on account of the debts of another company when the defendant Company was not responsible for the liabilities of said Company. The learned trial judge dismissed the action:—Held, on appeal, per Irving and Galliher, JJ.A., that the shareholders holding a majority of the stock issued, having been indorsers of the notes securing the indebtedness of the Victoria Contracting Company, and they having carried a resolution indorsing the action of paying said Company's indebtedness the day before the trial of this action, it was not necessary for the plaintiff to make a formal request in meeting assembled to enable him to obtain a status to bring this action in his own name. Per Martin and McPhillips, JJ.A., that the plaintiff must first apply to the defendant Company to proceed to recover the moneys alleged to be lost before he can bring this action in his own name. The Court being equally divided, the appeal was dismissed. *Johnston* v. *Carlin*, 20 B.C.R. 520.

XII. Ownership and Disposition of Property.

A. Sale of Assets.

1. Mode of sale.]—The provisions of sec. 2 of the Companies Act Amendment Act, 1893, respecting the mode of sale of a company's assets are enabling and not restrictive. *Daniel* v. *Gold Hill Mining Co. and others*, 6 B.C.R. 495.

2. Inadequate consideration.] — In an action to set aside the sale of a mineral claim, on the ground that the sale was a sham sale for the benefit of the purchaser and the directors, and that the stated consideration was not paid, and the trial judge found that the sale was made at a price so inadequate as to shew an intention to benefit the purchaser at the expense of the shareholders:—Held, on appeal, that on the findings of the trial judge the sale should be set aside. *Daniel* v. *Gold Hill Mining Company (Foreign) and others*, 6 B.C.R. 495.

B. Registration of Land.

Foreign company—Application to register title deeds to land.]—The registrar is not justified in refusing to register a non-registered foreign company as the owner of land. *Ex parte New Vancouver Coal Mining & Land Co.*, 2 B.C.R. 8; 9 B.C.R. 571.

XIII. Borrowing and Securing Money Lent.

A. Floating Charge.

The holder of a floating charge which has become fixed is not affected by contracts of the company.]—The defendant Company had entered into a contract with the Corporation of the City of Victoria for the construction of certain works. By one of the clauses of the contract the Corporation was empowered to determine the contract and complete the work, and by another clause the Corporation was given power upon such determination "to take possession of and use any materials, plant, etc., provided by the (defendant Company) for the purpose of the work." Subsequently to this contract the defendant Company gave to the plaintiff Bank a floating charge over all its property and assets. On the 11th of April, 1913, the defendant Company commenced an action against the Corporation to set aside the contract, or in the alternative for damages for its breach. On the 23rd of April, 1913, the Corporation gave notice to the defendant Company determining the contract. On the 30th of April, 1913, a receiver and manager was appointed in this action at the suit of the plaintiff Bank. By the order appointing him, the receiver and manager was directed to take possession of the defendant Company's assets, which he accordingly proceeded to do. The Corporation then claimed the material and plant of the defendant Company, which the receiver refused to deliver.

The Corporation now moved pro interesse suo in the action, for an order directing the receiver and manager to deliver possession of the materials and plant to the Corporation, who claimed it under the above clause in the contract. Judgment had been obtained in this action, declaring the plaintiff Company to have a first charge on all the assets of the defendant Company. The action by the defendant Company against the Corporation was still pending:—Held, that the Corporation was not entitled to possession as against the receiver and manager under the floating charge. *The Bank of Montreal* v. *The Westholme Lumber Company, Limited,* 18 B.C.R. 65.

B. Rights of Lenders.

Presumption of regularity of issue of security.]—A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. *Jackson* v. *Cannon,* 10 B.C.R. 73.

C. Registration of Mortgages and Charges.

1. Extension of time for registration.]—Where a bank, in the ordinary course of business, obtained a chattel mortgage from a company indebted to it, but without the knowledge of other creditors, and there was no evidence of concealment, and registered such mortgage in the County Court instead of with the registrar of joint stock companies, the bank was granted an extension of time within which to register. In an action to set aside the mortgage, it was held, that, there being no evidence of mala fides or dissimulation on the part of the bank, the transaction should not be set aside. *Morrison, Thompson Hardware Company, Limited* v. *Westbank Trading Company, Limited,* 16 B.C.R. 33, 314.

2. Priority by registration.]—A person (knowing that a first mortgage, given by a company to secure the unpaid portion of the purchase price, is held by the original vendor) who obtains a mortgage on the same land subsequently, is not entitled to priority by reason of prior registration under the Companies Act. *Kirk and Musgrave* v. *Harvey,* 18 B.C.R. 645.

XIV. EXTRA-PROVINCIAL COMPANIES.

A. Unregistered and Unlicensed.

1. Rights of.

1. Right to sue.]—A foreign company is not precluded by any provision in the Companies Act, 1897, compelling registration before it can transact any of its business within the Province, from access to the Courts of the Province in the capacity of an ordinary suitor. *The Charles H. Lilly Company* v. *The Johnston Fisheries Company, Limited, and A. R. Johnston,* 14 B.C.R. 174.

2. Land, registration of.]—The registrar-general of titles is not justified in refusing to register a non-registered foreign company as the owner of land. *Ex parte New Vancouver Coal Mining & Land Co.,* 2 B.C.R. 8; 9 B.C.R. 571.

2. Disabilities of.

1. Provision for licensing ultra vires.]—The authority of the Parliament of Canada to legislate for "the regulation of trade and commerce" conferred by sec. 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a Provincial Legislature. Part VI. of the Companies Act of British Columbia (R.S.B.C. 1911, c. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is therefore ultra vires the Provincial Legislature under the British North America Act, 1867. *John Deere Plow Co., Ltd.* v. *Wharton,* 1915, A.C. 330.

2. Contract made and to be performed within the Province.]—Where an unlicensed extra-Provincial company, in the course of carrying on its business within the Province, makes a contract within the Province to be performed there, such contract is unenforceable in view of the provisions of sec. 123 of the Companies Act (R.S.B.C. 1897, c. 44). *Northwestern Construction Co.* v. *Young,* 13 B.C.R. 297.

3. Carrying on Business.

1. Transactions beyond limits of the Province.]—The appellant company, incor-

porated under the Dominion Companies Act, had its head office in Winnipeg, and did not become licensed under the British Columbia Companies Act. In February, 1911, the company entered into an agreement with A., domiciled in British Columbia, giving him the exclusive right to sell its goods in British Columbia, in pursuance of which he ordered goods from the company to be shipped from Winnipeg to him, f.o.b. Calgary, he assuming all risks and charges from that place to Elko, British Columbia, where the goods were to be received and sold by him. He gave the company promissory notes, dated at Winnipeg, for the price of the goods, some of the notes being actually signed by him at Elko:—Held, that these transactions did not constitute the carrying on of business within the Province. *The John Deere Plow Co.* v. *Agnew*, 17 B.C.R. 543; 48 S.C.R. 208.

2. Work to be performed within the Province.]—Where a company enters into a contract in Ontario for the sale of certain machinery and plant, to be shipped to a place in British Columbia, and further undertakes to erect the plant and machinery upon arrival at its agreed destination in the Province, and to demonstrate the capacity thereof by a specified three days' test, that company is carrying on business within the Province. *Komnick Brick Co.* v. *British Columbia Pressed Brick Co.*, 17 B.C.R. 454.

3. Goods sent to agent for sale.]—It is difficult, if not impossible, to state accurately and exhaustively what constitutes a carrying on of business; but where goods are forwarded by a company to an agent for sale, and sold by him in his own name within the Province, this is probably not a transaction within the prohibition. It is extremely doubtful whether the creating within the Province of an obligation to be performed without the Province is such a carrying on of business. *The Laval Separator Co.* v. *Walworth*, 13 B.C.R. 74, 295.

4. Supply of machinery within the Province.]—Plaintiff Company, incorporated by the Dominion Companies Act, but not licensed in British Columbia, entered into an agreement in British Columbia, through their resident agent, to supply certain machinery to defendant Company, a British Columbia corporation:—Held, that plaintiffs were carrying on business within the Province as contemplated by the Companies Act, 1897, and should have taken out a licence to do so. *Waterous Engine Works Company* v. *Okanagan Lumber Company*, 14 B.C.R. 238.

5. Must be equivalent to submission to jurisdiction.]—Sec. 166 of the Companies Act, which subjects extra-provincial companies to penalties for carrying on in the Province any part of their business without licence or registration, indicates that the Legislature by the phrase "carrying on business" contemplated such conduct on the part of the Company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia Courts. No company would therefore come within the penalties or disabilities so imposed, unless it had a fixed place of business at which it carried on some part of its own business within the Province. *White & Co., Limited* v. *Donkin*, 19 B.C.R. 565.

4. Process and Service on.

1. Notification of time for appearance.]—Sec. 146 of the Companies Act, R.S.B.C. 1897, c. 44, defines an unlicensed and unregistered extra-provincial company. Sec. 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." Sec. 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 or summons to him, a notice of such writ or 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. Sec. 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. *Youdall* v. *The Toronto and British Columbia Lumber Company, Limited*, 12 B.C.R. 72, 73.

2. Leave to issue writ.]—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 pro-

ceed 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. *Ibid.*

XV. WINDING-UP BY THE COURT.

A. Jurisdiction.

1. In General.

Local judge.]—A local judge of the Supreme Court has no jurisdiction to make a winding-up order. *In re Kootenay Brewing Co.*, 7 B.C.R. 131.

2. Discretion to Order.

1. No assets.]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R.S. Canada, 1886, c. 129. A company will not be compulsorily wound up at the instance of unsecured creditors, where it is shown that nothing can be gained by a winding-up, as for example, where there would not be any assets to pay liquidation expenses. *In re Okell & Morris Fruit Preserving Company, Limited*, 9 B.C.R. 153.

2. Interference with voluntary winding-up.]—The Court will not interfere with a voluntary winding-up of a company by its shareholders, and order a compulsory liquidation, unless it is shown that the rights of the petitioner will be prejudiced by the voluntary winding-up. *In re The Oro Mines, Limited*, 7 B.C.R. 388.

3. Companies Which May Be Wound Up by the Court.

1. Under Dominion Act.]—A company incorporated under the Companies Act, 1890 (British Columbia), may be put into compulsory liquidation and wound up under the Dominion Winding-up Amendment Act of 1889. *In re British Columbia Iron Works Company, Limited Liability*, 6 B.C.R. 536.

2. Under Provincial Act.]—An order for the compulsory winding-up of a company may be made under the Companies Winding-up Act (S.B.C. 1898, c. 14), notwithstanding that the winding-up is opposed by the company. *In re The Florida Mining Co., Ltd.*, 9 B.C.R. 108.

B. Grounds for Winding Up.

1. Conditions.]—Upon the petition for a winding-up order, it appeared that the application was made by a creditor who had given the company an extension of time, not yet expired, for payment of the debt. The affidavit in support of the petition was made by a person who deposed upon information and belief, and upon cross-examination thereon it appeared that he had no personal knowledge of the matters deposed to:—Held, in the Court of first instance: 1. That the affidavit must be treated as a nullity. 2. That all the Winding-up Act requires, as essential to a winding-up order, is a petition setting forth sufficient facts; and that, although the rules require a verifying affidavit, the rules are not to be treated as imperative, but directory only. 3. That declarations of insolvency made by the officers of a company do not operate as an acknowledgment of insolvency by the company sufficient to satisfy sec. 5 of the Act, but that such acknowledgment must be a corporate one. 4. That the debt, though not yet payable, was sufficient to support the petition:—Held, on appeal: 1. There must be evidence to enable the Court to act, and as the affidavit was insufficient, there was no support for the order. 2. The distinction between the language of sec. 6 of the Act, which refers to a creditor whose debt is "then due," and that of sec. 8, in which the term is "creditor" only, is not unmeaning, and a creditor whose debt is not yet due, is a good petitioning creditor for winding-up order under sec. 8. The company had called its creditors together, and a deed was executed whereby the company assigned certain property to trustees to answer the creditors' claims, and the creditors agreed to extend the time for payment:—Held, that the creditors who had executed the deed, of whom the petitioner was one, were estopped from presenting a winding-up petition until the period of extension had expired. *In re Atlas Canning Company*, 5 B.C.R. 661.

2. Insolvency.]—By sec. 5 (*c*) of the Winding-up Act (Dominion) a company is deemed insolvent "if it exhibits a statement showing its inability to meet its liabilities:—Held, that the inability to meet its liabilities means liabilities to creditors as distinguished from liabilities to shareholders. On the hearing of a petition based on such a statement, the statement must be accepted as correct. *In re United Canneries of British Columbia, Limited*, 9 B.C.R. 528.

3. Just and equitable.]—An order for compulsory winding-up may be made under

sec. 5 of the Companies Winding-up Act, 1898 (Provincial), notwithstanding the winding-up is opposed by the company. In winding-up proceedings it appeared: (1) That shares had been unlawfully issued at a discount and at different percentages of their face value. (2) That the substratum was gone and that the company was unable to carry on business. (3) That there was a question as to the liability of the company to the principal shareholder, who had always been in practical control of the company:—Held, that it was just and equitable that the company should be wound up. *In re The Florida Mining Company, Limited,* 9 B.C.R. 108.

4. Voluntary winding-up already resolved on.]—The Court will not interfere with a voluntary winding-up of the company by its shareholders and order a compulsory liquidation unless it is shown that the rights of the petitioner will be prejudiced by the voluntary winding-up. *In re Oro Fino Mines Co.,* 7 B.C.R. 388.

C. Practice.

1. Petition.

1. Prima facie case — Affidavit.] — To the making of a winding-up order it is essential: 1. That the petition upon its face make a sufficient case for the winding-up; and 2. That the petition should be supported by a sufficient affidavit filed before its presentation. Leave to file a supplementary affidavit refused. *In re The Companies' Winding-up Acts and The Kootenay Brewing, Malting and Distilling Company,* 6 B.C.R. 112.

2. Creditors discontinuing — Whether other creditors entitled to be substituted.] —In an application for a winding-up order petitioners may discontinue proceedings on settlement of their claims; and creditors, other than the petitioners, who have not themselves petitioned, are not entitled to be substituted for such petitioners for the purpose of continuing the proceedings. *Doyle* v. *Atlas Canning Company,* 5 B.C.R. 279.

2. Discontinuance.

Settlement of claim of petitioner.]—In an application for a winding-up order, petitioner may discontinue proceedings on settlement of their claims; and creditors, other than the petitioners, who have not themselves petitioned, are not entitled to be substituted for such petitioners, for the purpose of continuing the proceedings. *Doyle* v. *Atlas Canning Co.,* 5 B.C.R. 279.

3. Inquiry.

Inquiry.]—Where the petitioner for the winding-up of a company does not avail himself of the opportunity to examine the officers of the company when leave is given by the judge who hears the petition, an inquiry will not be granted on appeal. *In re Okell, &c., Co.,* 9 B.C.R. 153.

4. Applications.

Summons.]—All applications made to the Court in its winding-up jurisdiction must be made by summons. *In re Nelson Sawmill Co.,* 6 B.C.R. 156.

5. Amendment of Order.

Misnomer.]—The plaintiff in an action to recover a debt from an association incorporated under the Agricultural Associations Act, in course of winding up under the control of the Court, applied for payment out of Court of garnisheed moneys to the plaintiff, in preference to the liquidator, on the ground that the winding-up proceedings were intituled with the wrong title of the association:—Held, that the moneys should be paid to the liquidator, and on a subsequent motion on behalf of the liquidator, a nunc pro tunc order was made. *Swift Canadian Company, Limited* v. *The Island Creamery Association, Limited; Canadian Pacific Railway Company, Garnishee,* 17 B.C.R. 475.

6. Appeal from Order.

Service of notice of appeal.]—Service on the liquidator of a notice of appeal on behalf of a company from a compulsory winding-up order is not necessary. *In re The Oro Fino Mines, Limited,* 7 B.C.R. 388.

7. Costs.

Failure to enter appearance.]—Held, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition as required by r. 56 of the Winding-up Rules passed by the judges on 1st October, 1896, but who appeared by counsel on the return of the petition, which

was dismissed with costs, were not entitled to costs. The fact that their counsel was heard without objection by petitioner's counsel makes no difference. *In the matter of the Winding-up Act and in the matter of the Albion Iron Works Company, Limited,* 10 B.C.R. 351.

D. Effect of Order.

Extra-territorial jurisdiction.] — Under the Dominion Winding-up Act there is but one winding-up order, and one date for the commencement of the winding up for the whole of Canada, and any execution or distress put in force after the date of the winding-up order, is void, irrespective of notice of the winding-up order, in whatever Province the winding-up order is made, and whether the execution or distress is put in force in that or any other Province, and the sheriff can recover no fees or charges or poundage in respect of such a void transaction. *Ex parte The National Trust Company, In re Kingham & Company, In re The Producers Rock and Gravel Company, Limited,* 18 B.C.R. 375.

E. Liquidator and Inspectors.

1. Appointment of Liquidator.

As a shareholder.]—All creditors of an insolvent company having agreed upon and recommended the appointment of E. as liquidator of the company:—Held, that the fact that E. was a shareholder of the company was not a valid objection to his appointment. *Re The New Westminster Gas Company,* 5 B.C.R. 618.

2. Powers of Liquidator.

1. Exercise of powers without the sanction of the Court.]—In an order for the winding-up of a company, it was provided that the liquidators, with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act, without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. Sec. 38 of the Act enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court:—Held, that it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of sec. 38. *Kendall and another* v. *Webster,* 14 B.C.R. 390. Reversed, 15 B.C.R. 268.

2. Valuation of security.]—A mortgage had been made by the company to a trustee, for B. and certain other of its creditors jointly, as security for their claims against it. Upon a winding-up, B., when called upon to value his security under sec. 62 of the Winding-up Act, swore that it was only of nominal value, and offered to assign his interest in the mortgage to the liquidator for nothing. The liquidator desired to have the whole security valued, so that he could take it over and rank all the creditors represented by it on the estate accordingly, and upon their being unable to agree as to its value, Mr. Justice Drake struck such creditors off the list and relegated them to their security. Upon appeal:—Held, that the principle of the Act is that of election and not forfeiture. That the appellant had the right to value his own interest in the security and to maintain the claim upon the estate, except as reduced by that valuation. That the right of the liquidator was limited to requiring an assignment of B.'s interest in the security, or permitting its retention at the value placed upon it; and that the Court had no right to forfeit the claim of B. upon the estate and relegate him to a security he considered valueless. *In the matter of the Winding-up Act, and Amendment Acts, and In the matter of the Thunder Hill Mining Co., Limited,* 5 B.C.R. 21.

3. Actions By and Against.

(a) Power to Bring.

Consent of inspectors.]—In an order for the winding-up of a company, it was provided that the liquidators with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. Sec. 38 enables the Court to provide by an order subsequent to the winding-up order that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court. The liquidators having brought an action, proceeding

under the above order, Morrison, J., at the trial held that it was necessary to obtain an order subsequent to the winding-up order before sec. 38 enured:—Held, on appeal, that the action having the consent and approval of the inspectors, was properly brought. *Kendall and another* v. *Webster*, 15 B.C.R. 268.

(b) Costs.

1. Where liquidator personally liable.]—Where an action is brought by the liquidator of a company in liquidation in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. *Jackson* v. *Cannon*, 10 B.C.R. 73.

2. Failure to plead winding-up.]—Judgment having been obtained against defendants in a foreign jurisdiction, suit was brought in British Columbia on the foreign judgment. The defendant Company had been wound up prior to the commencement of the suit, but this was not pleaded and was only raised by counsel for defendant Johnston at the opening of the trial, the liquidator of the Company not being present or represented; nor was the permission of the Court obtained to sue the Company:—Held, that the plaintiff must pay the costs occasioned subsequent to the receipt of notice of the Company's legal position. The liquidator of such a company appearing for the first time in the action when it came to appeal:—Held, that he should have only such costs as he could have obtained on an application to a judge in chambers. *Charles H. Lilly Co.* v. *Johnston Fisheries*, 14 B.C.R. 174.

F. Contributories.

1. Shares invalidly issued.]—A public company, incorporated under the Companies' Act, 1862 (Imp.), having power by its memorandum of association to increase its capital of $50,000, passed a resolution for the issue at a discount of new shares of the face value of $375,000 falsely marked "fully paid up," which were substituted for the original $50,000 of shares, which were fully paid up. The resolution was not a special resolution, as required. The company became insolvent. Upon motion by the liquidator to settle the list of contributories, the holders of the new shares maintained that they never had any legal existence, and were void for all purposes:—Held, that the issue of shares were invalid and voidable by the shareholders, but not as against creditors upon a winding-up, and that the shareholders who had not repudiated before the winding-up commenced, but had acquiesced in the issue of the shares in the manner adopted, should be put on the list of contributories in respect of the actually unpaid portion of their face value. *Re Thunder Hill Mining Company*, 4 B.C.R. 61.

2. Past member.] — B., a registered holder of shares in a limited company, transfered them to S., but B. being in arrear for some calls, the transfer was not registered. In August, 1881, B. obtained an order from Crease, J., that, on certain payments being made, the company should take has name off the register and substitute S.'s name. The order was served on the secretary of the company, and payments were made by B. under the order. The register was not rectified in pursuance of the order. In February, 1883—the company having suspended business for over two years—a winding-up order was made, and in March, 1884, B. appeared on a summons before the C.J. to show cause why he should not be on the contributories' list:—Held, that there were no laches on the part of B., and that his name must be removed from the list of contributories. *Ex parte John Bibby, In re Enterprise Gold and Silver Mining Company Limited*, 1 B.C.R., Pt. II., 94.

G. Realization of Property.

Valuation of security.]—The Court has no power to confirm a sale by a mortgagee from the company until the security has been valued and offered to the liquidator at that value. *Re Thunder Hill Mining Co.*, 3 B.C.R. 351.

H. Secured Creditors.

1. Valuation of security by.] — The Court has no power to confirm a sale by a mortgagee from the company until the security has been valued, and offered to the liquidator at that value. *Re Thunder Hill Mining Co.*, 3 B.C.R. 351.

2. Valuation of security.]—A creditor having valued his security against a company upon a winding up cannot withdraw such valuation and enforce the security, but the liquidator is entitled to obtain an

assignment and delivery thereof to himself at that valuation. Under sec. 62 of the Winding-up Act (Can.), it is compulsory on the creditor to value his security, leaving it to the liquidator to take it, or allow the creditor to keep it at that valuation. *In the matter of the British Columbia Pottery Co., and the Winding-up Act (Can.)*, 4 B.C.R. 525.

3. Right of one of several creditors holding joint security, to value his interest therein and rank on the estate for the balance.]—A mortgage had been made by the company to a trustee, for B. and certain other of its creditors jointly, as security for their claims against it. Upon a winding-up B., when called upon to value his security under sec. 62 of the Winding-up Act, swore that it was only of nominal value, and offered to assign his interest in the mortgage to the liquidator for nothing. The liquidator desired to have the whole security valued, so that he could take it over and rank all the creditors represented by it on the estate accordingly:—Held, that the principle of the Act is that of election and not forfeiture; that the appellant had the right to value his own interest in the security, and to maintain his claim upon the estate, except as reduced by that valuation. That the right of the liquidator was limited to requiring an assignment of B.'s interest in the security, or permitting its retention at the value placed upon it, and the Court had no right to forfeit the claim of B. upon the estate and relegate him to a security he considered valueless. *Re Thunder Hill and Bowker*, 5 B.C.R. 21.

4. Leave to bring action.]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under sec. 63 et seq. of the Act. *In re The Lenora Mount Sicker Copper Mining Company, Limited*, 9 B.C.R. 471.

5. Maritime lien.]—The liquidator in a winding-up proceeding, sold, under order of the Court, all the assets of a company, including a ship, for $67,500, of which $5,000 was for the ship. A bank held a mortgage upon the ship, and certain seamen were entitled to maritime liens for wages. As between vendor and purchasers, the ship was sold free from encumbrances. Shortly after it was taken over by the purchasers it was destroyed. The bank claimed the $5,000, the purchase price of the ship in the hands of the liquidator, the lien holders on the other hand claiming a first charge against the fund:—Held, that both the bank and the lien holders had the same rights in the fund as they had in the ship before the sale, and that the lien holders were therefore entitled to a first charge upon the fund. *In re Fort George Lumber Company*, 18 B.C.R. 473; 48 S.C.R. 593.

6. Mechanic's liens.]—The holders of mechanics' liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in the County Court the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal and an order was made, without notice to the lien holders, giving Holmes a first charge on the claims for his debt and the amount advanced by him; afterwards, on Holmes' application, an order was made, on notice to the liquidator but without notice to the lien holders, that the claims be sold to pay his charge. The lien holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over Holmes:—Held, that the order giving Holmes priority over the lien holders was made without jurisdiction, and the lien holders were not bound by it. *In re Ibex Mining and Dev. Co. of Slocan, Ltd. Lby.*, 9 B.C.R. 557.

I. Stay of Proceedings.

1. Registration of prior judgments.]—The fact that prior to a winding-up order judgments against the company being wound up were registered, will not disentitle a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security. *In the matter of the Winding-up Act and In the matter of the*

Giant Mining Company, Limited, 10 B.C.R. 327.

2. Right to enforce security.]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security. It is not optional for a secured creditor to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under secs. 63, et seq., of the Act. *In re The Lenora Mount Sicker Copper Mining Company, Limited,* 9 B.C.R. 471.

3. Enforcement of mortgage.]—A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court on the ground that such sale would be a "proceeding against the Company" under sec. 22 of the Winding-up Act:—Held, that the mortgagees were proceeding rightfully. *In re British Columbia Tie and Timber Company,* 14 B.C.R. 81.

4. Enforcement of maritime liens.]—Where a company is being wound up pursuant to the Dominion Winding-up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular:—Held, further, that, in the circumstances here, the leave should be granted without the imposition of terms. *In re British Columbia Tie and Timber Company, Limited (No. 2), and Colan* v. *The Ship Rustler,* 14 B.C.R. 204.

5. Execution.] — Where an order was made prior to seizure, by the Supreme Court of Ontario, winding up the company (judgment debtor), the execution is void under sec. 23 of the Winding-up Act, and after the making of the order the power of dealing with, and collecting the assets of the company is vested solely in the liquidator. *Richards* v. *Producers Rock and Gravel Co.,* 20 B.C.R. 109.

XVI. SCIRE FACIAS.

Public company—Act of incorporation of—Crown Franchises Regulation Act—Not applicable to Dominion companies.]—The defendant railway company was originally incorporated in 1897 by a Provincial Act, and in 1898 by a Dominion Act; its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—Held, setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company. *Attorney-General* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.,* 9 B.C.R. 338.

See ESTOPPEL.

See NEGLIGENCE.

See TORT.

COMPENSATION.

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COMPULSORY PURCHASE.

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I. COMPULSORY POWER OVER LAND.

A. Under Particular Statutes.

Land for waterworks.]—A municipality, having obtained water records under the Water Act, 1909, must proceed under the expropriation clauses of that Act in acquiring lands for the purposes of a waterworks system, and not under the provisions of the Municipal Clauses Act. *Lewis* v. *The Municipal Corporation of Delta*, 16 B.C.R. 228.

B. Conditions of its Exercise.

1. Compliance with statutory formalities.]—The Act incorporating the City of New Westminster, 51 Vict., c. 42 (British Columbia), by sec. 190, empowers the council of the city to order by by-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in sub-secs. 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land; sub-sec. 13 provides for the confirmation of the appointment and also for the deposit in Court of said price by the council, which deposit should vest in them the title to said land. Sub-sec. 17 of sec. 190 enacts that sub-secs. 3 and 4 shall apply to cases of damage to real or personal estate, by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality. The council was authorized by by-law to raise money for improving certain streets, but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult, and no retaining wall having been built, the soil of said lot caved and sunk, thereby weakening the supports of the buildings thereon:—Held, that the owner of the said lot could maintain an action for the damage sustained by lowering the grade of the street, and was not obliged to seek redress under the statute; that sub-sec. 17 of sec. 190, which dispenses with the formalities required by prior sub-sections, only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets, the corporation must comply with the formalities prescribed by sub-secs. 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land, the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they were liable for damage thereby caused:—Held, further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been if skillfully executed, such negligence in the manner of executing it, as to entitle the owner of the adjacent land to recover damages for the injury sustained:—Held, per Patterson, J., that in the absence of the statutory preliminaries a municipality has no greater right than any other owner or adjacent land to disturb the soil of a private person. *The Corporation of the City of New Westminster* v. *Manuella Brighouse*, 20 S.C.R. 520.

2. Necessity for making compensation.]—Before entering on land for the purpose of putting a sewer through it, the City of Vancouver must compensate the owner of the land through which it is proposed to lay the sewer. *Arnold* v. *The Corporation of the City of Vancouver*, 10 B.C.R. 198.

3. Defining powers intended to be exercised.]—The onus is on a district municipal council entering on land and taking any timber, stones, gravel or other material for repairs of roads, etc., to show what is intended to be taken, and the extent of the operations to be carried on. *Cook* v. *The Corporation of the District of North Vancouver*, 16 B.C.R. 129.

4. Delimitation of area.]—Before the lands of any person can be compulsorily expropriated under the provisions of any statute giving a company or corporation such powers, the area sought to be expropriated must be set out and ascertained in accordance with the terms of the statute. *Carroll* v. *The Corporation of the City of Vancouver*, 11 B.C.R. 493.

5. Failure to comply with statutory requirements.] — The defendant company was originally incorporated in 1897, by an Act of the Legislature of British Columbia, and on 28th June, 1898, by an Act of the Parliament of Canada. Its objects were declared to be works for the general advantage of Canada, and thereafter to be sub-

ject to the legislative authority of the Parliament of Canada, and the provisions of the Railway Act, except sec. 89 thereof. Sec. 4 of the Dominion Act of 1898 required the railway to be commenced within two years. In 1901 the defendant company commenced expropriation proceedings in respect of the plaintiff hotel company's lands, and by consent took possession and proceeded with construction, negotiations to determine the amount of compensation by arbitration being carried on in the meantime. The defendant company had purchased for its line of railway land on either side of the plaintiff company's right of way, and had applied to the Railway Committee of the Privy Council for leave to make a crossing. On the application of plaintiffs, who alleged, inter alia, that the defendants' railway was not commenced within two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the Department of the Minister of Railways, and that the work being done by the defendant company was not authorized and was not being prosecuted in good faith by the company under its charter, but was really for the benefit of the Great Northern Railway Company, so that it might extend its railway system, which lies south of the International boundary, into British Columbia, injunctions were granted restraining until the trial of the action defendant company from continuing in possession and proceeding with the expropriation of the land of the plaintiff hotel company, and also from taking any proceedings towards effecting the proposed crossing of the right of way of the plaintiff railway company. Motions to dissolve the injunctions were refused. *Yale Hotel Co., Ltd.* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.*, 9 B.C.R. 66.

6. Condition precedent.] — Where the defendants' charter 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, it was held that the making of compensation was not a condition precedent to making the survey and taking possession of the land. *Sandon Water Works & Light Co.* v. *Byron N. White Co.*, 10 B.C.R. 361; 35 S.C.R. 310.

II. Compelling Expropriation.

Registration of plans.]—The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the Railway Act, and the subsequent construction and operation of a railway along such area, do not render the railway company liable to a mandamus ordering the expropriation of a portion of the lands shown upon the plans which has not been physically occupied by the permanent way so constructed and operated. *McDonald* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.*, 15 B.C.R. 315; 44 S.C.R. 65.

III. Compensation.

A. Right to.

1. In Whom Vested.

Unregistered instrument.] — Where a purchaser merely holds property under an agreement for sale when damaged through the lowering of the grade of the street on which it fronts, but completes his title by a registered conveyance before commencing arbitration proceedings under the Municipal Act to recover compensation for the damage so caused, he is not thereby debarred by sec. 104 of the Land Registry Act. *In re Jackson and North Vancouver Corporation*, 19 B.C.R. 147.

2. Injurious Affection.

Lowering of street.]—The owner of property abutting on a street, the grade of which has been lowered by the Corporation, is entitled to arbitration for determining whether his property has been injuriously affected. *The Bishop of New Westminster* v. *The Corporation of the City of Vancouver*, 14 B.C.R. 136.

B. Subjects of.

1. Water.]—In an arbitration to determine the amount to be paid to the owner of land expropriated by a railway company, the arbitrators found for the owner as compensation, for the land, $2,950, and for loss of water supply from a spring, obstructed in consequence of such expropriation, two of the arbitrators awarded a sum of $1,200. The third arbitrator returned a finding against any compensation for deprivation of the water in the absence of a water record:—Held, that the owner was entitled to maintain the award. The owner of land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Clauses Consolidation Act, 1897. *In re Milsted*, 13 B.C.R. 364.

2. Land covered with water.]—The arbitrators appointed under the Victoria Waterworks Act, 1873, took into consideration the value of certain lands covered with water and awarded compensation therefor:—Held, that this was a proper subject of compensation. *In re W. C. Ward,* 1 B.C.R., Pt. I., 114.

3. Rates.]—On appeal from the award of arbitrators on the assessment of compensation for damages owing to the grade of a city street in front of the claimant's property having been lowered in the course of work done by the Corporation under local improvement by-laws:—Held, that the arbitrators properly refused to include in the damages an allowance equivalent to the rates charged against the property by the said by-laws. *In re Okell and the Corporation of the City of Victoria,* 19 B.C.R. 121.

C. Measure of.

Market value.]—Compensation for lands compulsorily acquired should be estimated upon the basis of the market value of the lands as before the giving of the notice of expropriation, but not of their value to the person acquiring them for a particular purpose. *In re False Creek Reclamation Act,* 20 B.C.R. 453.

IV. Abandonment of Expropriation.

1. Under Municipal Act.]—Defendant municipality, under powers conferred upon it by the Victoria Waterworks Act, 1873, and amendments, appropriated certain land for waterworks purposes. The compensation for said land having been settled by arbitration, the municipality sought to abandon the award of the arbitrators and to expropriate a smaller area:—Held, that the land having been appropriated, the defendant municipality could not withdraw. The option given by the statute to the land owner to resume possession in default of payment of the compensation awarded within the time limited is an additional safeguard to the land owner as a means of compelling prompt payment. [An appeal from the above was dismissed on the 2nd of April, 1912.] *Davie* v. *The Corporation of the City of Victoria,* 17 B.C.R. 102.

2. Under the Railway Act.]—Defendant Company proposing to expropriate certain lands of plaintiff, served notice to treat pursuant to sec. 193 of the Railway Act; but upon disagreement as to price, applied to a judge for the appointment of an arbitrator, under sec. 196, and also for a warrant of possession under secs. 217 and 218. This application was refused because the notice to treat was not accompanied by the certificate of a disinterested surveyor under sec. 194. Thereupon the Company served a new notice, accompanied by a proper certificate, and at the same time served a notice abandoning and desisting from the first notice and all proceedings had thereon:—Held, that the new notice to treat, being served at the same time as the abandonment of the first notice, was manifestly a continuation of the original proceedings, and did not come within sec. 207, an abandonment under which is one with the intention of wholly discontinuing and taking no further action. *Atwood* v. *Kettle River Valley Railway Company,* 15 B.C.R. 330.

V. Warrants of Possession.

A. In general.

Lands—Power to acquire, whether governed by local or Dominion Act.]—The Columbia and Western Railway Company was incorporated in 1896, by the Provincial Legislature, one of the powers given to build branch lines, and on 13th June, 1898, by an Act of the Dominion Parliament, its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Dominion Parliament, and to the provisions of the Railway Act:—Held, on an application for a warrant of possession, that the company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act. *In re Columbia and Western Railway Company and the Railway Acts,* 8 B.C.R. 415.

B. Costs.

Borne by the owner.]—Where a railway company, under its powers to expropriate land, obtains a warrant for possession, and the amount awarded the owner in subsequent arbitration proceedings is less than the amount at first offered by the Company, the costs of obtaining the warrant for possession shall be borne by the owner. *In re Vancouver, Victoria and Eastern Railway and Navigation Company, and Milsted,* 13 B.C.R. 187.

VI. ARBITRATION.

A. Procedure to Compel.

Mandamus.]—Where a railway company declines or neglects to proceed to make compensation for land taken or injuriously affected, the landowner may bring an action for a mandamus to compel it to take those proceedings. *Macdonald* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.*, 15 B.C.R. 315; 44 S.C.R. 65.

B. Scope of.

Question of law.]—The right to compensation cannot be determined by arbitrators appointed under sec. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to finding the amount of compensation. *In re Northern Counties Investment Trust, Ltd.*, 8 B.C.R. 338.

C. Interest on Award.

Award invalidated.]—On an application to set aside an award of arbitrators upon a question of compensation payable in respect of the expropriation of certain land by a municipal corporation under its statutory powers, Gregory, J., altered the rate of interest allowed under the award, but refused to set the same aside:—Held, on appeal, that interest was not payable, that the award could not be altered by the judge and must be set aside. *Humphreys* v. *The Corporation of the City of Victoria*, 17 B.C.R. 258.

D. Appeal from Award.

Amount of award.]—Where the three arbitrators agreed on the amount of compensation for land taken, and the third returned a separate finding dissenting, on the construction of a statute, from giving compensation for deprivation of a water supply, and an appeal was taken:—Held, on objection raised to the appeal as being based on an insufficient amount in dispute, under sec. 209 of the Railway Act (Provincial), that there was only one award given, and the appeal was properly brought. *In re Milsted*, 13 B.C.R. 364.

E. Costs.

1. Dominion Railway Act.]—On the principle that where land is compulsorily taken, the costs should be taxed on a larger scale than in ordinary litigation, they should be taxed on a solicitor and client basis. Therefore, everything that has been necessarily or reasonably incurred in order to properly present a party's case to the arbitrators should be allowed to him on taxation. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide, but the taxing officer is not bound by it, and should not follow it in all circumstances. *In re False Creek Flats Arbitration (No. 2)*, 17 B.C.R. 376.

2. Provincial Railway Act.]—The "costs of the arbitration" mentioned in the Railway Act (R.S.B.C. 1911, c. 194, sec. 58), are to be taxed as between party and party, but on a liberal scale. *In re Canadian Northern Pacific Railway Company and Bradshaw*, 19 B.C.R. 236.

3. Of appeal.]—The costs of an appeal from an award of arbitrators are not governed by the provision as to the costs of the arbitration contained in sec. 199 of the Railway Act (R.S.C. 1906, c. 37), but by the rules relating to costs of appeals generally. *Vancouver, Westminster & Yukon Railway Co.* v. *Sam Kee*, 12 B.C.R. 1.

4. Victoria Waterworks Act.]—A judge in chambers has no jurisdiction to order the costs of the arbitration to be deducted from the amount of the award, notwithstanding that the Corporation is entitled to the costs. *In re Dwyer*, 6 B.C.R. 165.

CONDITION.

See CONTRACT.

See WILL.

CONFLICT OF LAWS.

I. IN GENERAL, 182.
II. IMMOVABLES, 183.
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I. IN GENERAL.

Foreign laws.]—In the absence of proof it will be assumed that the law of the foreign country is the same as the domestic law. *Macaulay* v. *O'Brien*, 5 B.C.R. 510.

II. IMMOVABLES.

1. Law of domicil.] — Contracts of marriage made in a foreign country, the domicile of parties, by the terms of which, in accordance with the laws of that country, the alienation by a testator (one of the parties to the contract) of his real estate away from his wife and family, is forbidden, will prevent a contrary disposition of the same even though, according to the lex loci rei sitæ, there be no such restriction. By the comity of nations the contract travels abroad, and, as between the parties to that contract and their representatives, attaches to the testator's real estate in places other than the domicile. Marriage, carried out in consideration of such a contract, and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between these parties and their representatives, be respected and sustained, as to those incidents, in countries other than the domicile, where there is no direct local legislation to the contrary. *In re Klaukie's Will*, 1 B.C.R., Pt. I., 76.

2. Mineral claims.]—Mineral claims are immovable property, and are therefore governed as to their disposition by the lex loci rei sitæ, and not by the law of a foreign country, in whose Courts the party interested therein has been adjudicated bankrupt. *Barinds* v. *Green*, 16 B.C.R. 433.

III. SUCCESSION.

Disposition of lands.] — Contracts of marriage made in a foreign country, the domicile of the parties, by terms of which, in accordance with the laws of that country, the alienation by a testator (one of said parties) of his real estate away from his wife is forbidden, will prevent a contrary disposition of the same, even though acording to the lex rei sitæ there be no such restriction. By the comity of nations the contract travels abroad, and as between the parties, and their representatives, attaches to the testator's real estate in places other than the domicile. Marriage carried out in consideration of such contract and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between them and their representatives, be respected and sustained, as to these incidents, in countries other than the domicile, when there is no direct local legislation to the contrary. *In re Klaukie's Will*, 1 B.C.R., Pt. I., 76.

IV. FOREIGN JUDGMENTS.

A. In Rem.

Bankruptcy.]—Before an adjudication of bankruptcy in a foreign country can have effect as a transfer of property in British Columbia, it must be shown that the bankrupt was domiciled in the country of the Court making the adjudication. *Barinds* v. *Green*, 16 B.C.R. 433.

B. In Personam as Causes of Action.

1. Default judgment.]—A default judgment obtained in a foreign jurisdiction, though liable to be set aside, so long as it stands, is "final and conclusive" within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this Province. In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, such as being founded on an ex facie void contract. *Boyle* v. *V.Y.T. Co.*, 9 B.C.R. 213.

2. Alimony—Action for arrears of.]—Plaintiff, in 1891, recovered a consent judgment against the defendant in Ontario for alimony and maintenance, the judgment being a confirmation, subject to certain provisions, of an agreement previously made for the maintenance of the wife and children:—Held, that an action lay on the judgment for arrears of alimony and maintenance. *Hadden* v. *Hadden*, 6 B.C.R. 340.

C. When Not Enforceable.

1. Absence of personal service.]—No action will lie on a foreign judgment on the face of which it appears that the defendant was not served with any process of the foreign Court and that he had no knowledge that proceedings had been taken against him. *Wanderers Hockey Club* v. *Johnson*, 18 B.C.R. 367.

2. Undefended action.]—Judgment was given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note signed in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment:—Held, that defendant had acquired a British Columbia

domicile, and was not subject to Ontario domicile, and was not subject to the Ontario Courts. *Walsh* v. *Herman*, 13 B.C.R. 314.

CONSPIRACY.

See TORT.

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I. THE ROYAL PREROGATIVE.

A. The Crown in Relation to the Law.

1. Right to sue in any Court.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open, either because of the defendant not residing in, or of the cause of action not arising in the district. *The King* v. *Campbell*, 8 B.C.R. 208.

2. Right to intervene and stop actions.]—It is a prerogative right of the Crown to stop a suit between subjects in the subject-matter of which it is alleged that the Crown is or may be interested, and in respect of which suit has been brought in behalf of the Crown to have its interest declared. If the Crown right alleged is a right in behalf of the Province, then the Attorney-General of the Province is the proper officer to exercise the prerogative. *Attorney-General for British Columbia and the New Vancouver Coal Mining and Land Company, Limited* v. *The Esquimalt and Nanaimo Railway Company*, 7 B.C.R. 221.

B. Ports and Harbours: Foreshore.

1. Interference with public landing.]—Whoever interferes with the free use of a public landing or wharf, erected on land acquired for that purpose only by a municipality under Act of Parliament, is a wrongdoer, and the municipality has no power to license such interference. *Lee* v. *The Olympian*, 2 B.C.R. 84.

2. Obstruction of foreshore.]—In an action for damages and an injunction, the plaintiff alleged in the statement of claim that the defendant company had wrongfully erected an embankment on the foreshore of Burrard Inlet, and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—Held, on an application to strike out the pleading as embarrassing and as disclosing no cause for action, that the pleading was good. In such an action it is not necessary for the plaintiff to allege ownership in the foreshore. *The Attorney-General for the Province of British Columbia, ex rel. The City of Vancouver* v. *The Canadian Pacific Railway Company*, 10 B.C.R. 108.

3. Tidal river—Right of Dominion to restrain pollution of.]—The Crown in the right of the Dominion of Canada has the

right to take proceedings to restrain by injunction the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney-General to restrain any public nuisance caused by the improper conduct in question. The fact that a statute makes the conduct in question an offence, and imposes fines and imprisonment for its commission, does not derogate from the right of the Court, at the motion of the party injured, to restrain its commission by injunction. *The Attorney-General for the Dominion of Canada* v. *Ewen; The Attorney-General for the Dominion of Canada* v. *Munn*, 3 B.C.R. 468.

II. ROYAL GRANTS.

A. In general.

Specific performance.] — The Mineral Ordinance, 1869, provides that holders of a prospecting license for coal may select for purchase a portion of the lands included in their license. Upon compliance with the terms and conditions of the Act, the licensees are entitled to claim a Crown grant of the selected lands. The petitioners held a prospecting license for coal over 2,500 acres of land, and applied for a Crown grant. In support of their claim they relied on a certificate of the Assistant Commissioner of Lands and Works that they had posted notices of their application, and that no objection to the issue of a grant had been substantiated:—Held, (1) that the certificate was not in accordance with the Act:—Held, (2) that the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted by evidence to the contrary. It was contended that the Lands and Works Department having received the certificate without objection and not having cancelled the license under the provisions of the Mineral Ordinance Amendment Act, 1873, had waived the performance of the terms and conditions of the Act:—Held, that the Department could not waive the performance of conditions imposed by the Legislature. The petitioners' application for a Crown grant was made in 1874, but they did not prospect or work the land, or take further steps in support of their claim till 1882, and in the meantime the lands had increased in value:—Held, that, in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application. *Peck and others, petitioners* v. *The Queen, respondent*, 1 B.C.R., Pt. II., 11; 1 M.M.C. 13.

B. How Obtained.

Mandamus.]—Mandamus does not lie to compel the Chief Commissioner of Lands and Works to issue a Crown grant. The remedy is by petition of right. *Clarke and others* v. *Chief Commissioner*, 1 B.C.R., Pt. II., 328.

C. Rectification of.

Right to.]—An application was made to the Chief Commissioner of Lands and Works for the rectification of a Crown grant of certain mineral claims and was opposed by parties who had obtained a certificate of improvements covering a portion of the ground included in the grant:—Held, affirming the Chief Commissioner, that the applicant was entitled to have the grant rectified notwithstanding the said certificate. *In re The American Boy Mineral Claim*, 7 B.C.R. 268; 1 M.M.C. 304.

D. Construction of.

1. Land covered with water.] — The Crown granted to W.C.W., inter alia, secs. 49, 50, 63 and 64, Lake District, British Columbia, said to contain 329 acres. Within the limits of sec. 49 was a body of water, covering the land, known as Beaver Lake. The sections of land in question, excluding the area covered by the lake, contained 329 acres. By a proviso in the grant, Her Majesty reserved such water privileges and rights of carrying water over, through or under the lands as might be required for mining purposes in the vicinity of the lands, paying reasonable compensation therefor to the said W.C.W.:—Held, that although the maxim verba fortius accipiunter contra preferentem does not apply to the Crown, yet the intention of all grants must be construed from the language used with reference to surrounding circumstances, and as it was in evidence that it was the custom of the Crown to calculate acreage for the purpose of fixing the price exclusive of portions covered by water, and in view of the reservation of privileges in regard to the water in question, that the grant included Beaver Lake, and that an award upon expropriation for waterworks purposes allowing compensation to W.C.W.

for the land covered by water, was correct. *In re W. C. Ward and the Victoria Water Works*, 1 B.C.R., Pt. I., 114.

2. Surface rights.]—Plaintiff sued for cancellation of a lease from the defendant on the ground that the defendant's Crown grant did not pass the surface rights:—Held, (without deciding whether it did or not), that the action failed on the ground that the plaintiff had not affirmatively proved that the grant did not pass the surface rights. *Spencer* v. *Harris*, 6 B.C.R. 466, 1 M.M.C. 294.

3. Precious metals.]—A grant under a statute including "all coal, coal oil, ores, stones, clay, marble, slate, mines and minerals, and substances whatsoever thereupon, therein, and thereunder," does not include the precious metals. *Bainbridge* v. *Esquimalt and Nanaimo Railway Company*, 4 B.C.R. 181.

4. Precious metals.]—Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although not specially mentioned. *In re St. Eugene Mining Co. and the Land Registry Act*, 7 B.C.R. 288.

5. Exceptions.]—An exception of "lands held as mineral claims," in a Crown grant means de facto claims, and the word "lawfully" cannot be imported. *Nelson, etc., Ry. Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

6. Acreage.]—The number of acres specified in the early grants from the Crown of land on Vancouver Island is not the measure of the extent granted, but merely the measure of price. *In re W. C. Ward*, 1 B.C.R., Pt. I., 114.

E. Revocation of.

1. Deceit on the Crown.]—The Corporation of the City of Vancouver claimed to have been in possession of the property in suit under a grant from the Dominion Government on June 8, 1887, for the use of land contiguous thereto as a park, and also under a lease from the Dominion, dated November 1, 1908, for ninety-nine years, which did not expressly include the property in suit, and was, moreover subject to any existing leases of portions of the said land:—Held, in a suit by the company, who derived title under a Dominion lease dated February 14, 1899, that the Corporation, as defendant in possession, could not object thereto as not having been granted under the Great Seal, since that point had not been put forward in the Courts below; nor on the ground that it had been obtained by deceit practised on the Crown, since the company was without notice, actual or constructive, of a previous Crown grant (if any) to the Corporation inconsistent therewith. *City of Vancouver* v. *Vancouver Lumber Co.*, 15 B.C.R. 432; 1911, A.C. 711.

2. Certificate of improvements.]—In an action by the Attorney-General to set aside a certificate of improvements on the ground that it was obtained by fraud, the fraud alleged was a statement in an affidavit of defendant's agent sworn on 10th August, 1899, that the defendant was in undisputed possession of the Pack Train mineral claim. On 10th August, 1899, an action was then pending as to the title of the Pack Train claim, and judgment was not delivered till 11th August, 1899, in favour of defendant. As it was after the 11th of August when the affidavit reached the Gold Commissioner:—Held, not fraud within sec. 37 of the Mineral Act. The application to the Minister of Mines under sec. 10 of the Mineral Act Amendment Act, 1899, need not be in writing. *Attorney-General* v. *Dunlop*, 7 B.C.R. 312.

F. Navigable Waters.

Legalized obstruction.] — Semble, the Crown could not, in British Columbia, at the time the titles to land originated in 1858, or at any time since, by subsequent licence, legalize any addition to, or the continuance of, any obstruction to navigable waters which it had not the power to authorize in the first instance. *McEwen* v. *Anderson*, 1 B.C.R., Pt. II., 308.

III. CHARTERS, FRANCHISES, AND OFFICES HELD OF THE CROWN.

Revocation of.]—The Crown Franchise Regulation Act (R.S.B.C. 1897, c. 162) does not apply to a railway company whose objects have been declared to be works for the general advantage of Canada, and which is, therefore, subject to the legislative authority of the Parliament of Canada. *Attorney-General for British Columbia* v. *Vancouver, Victoria and Eastern Railway Co.*, 9 B.C.R. 338.

IV. LEGISLATIVE ASSEMBLY.

Disqualification of member.]—The acceptance by a member of the Legislative Assembly of a brief from the Dominion Government upon an arbitration, and the acting as counsel for the Dominion on the arbitration, disqualifies a member of the Legislative Assembly. *Barnard* v. *Walkem*, 1 B.C.R., Pt. I., 120.

V. THE LIEUTENANT-GOVERNOR.

A. Powers of.

1. Power of Lieutenant-Governor to issue commissions of Oyer and Terminer.]—British Columbia (in 1885) not being divided into judicial districts for criminal purposes, any place in the Province was a good venue for the trial of a criminal case. The Lieutenant-Governor in Council has authority to issue commissions of Oyer and Terminer. *Regina* v. *Malott*, 1 B.C.R., Pt. II., 207.

2. Proclamation bringing statute into force.]—Where the Fire Insurance Act, 1893, provided that "this Act shall not come into force until a day to be named by the Lieutenant-Governor in Council," and the Lieutenant-Governor in Council proclaimed, by advertisement in the Gazette, a certain date as that on which the Act should come into force, he was then functus officio, and had no power, by subsequent proclamations, to postpone the date when the Act should come into force. *Cope* v. *Scot. Un., etc., Co.*, 5 B.C.R. 329.

VI. DIVISION OF PROPRIETORY RIGHTS BETWEEN CROWN IN RIGHT OF DOMINION AND CROWN IN RIGHT OF PROVINCE.

1. Litigation as to.]—Litigation between the Dominion and a Province respecting the right to administer certain public property should not be conducted in the same way as a suit between subjects, but should rather be regarded as a public inquiry, in which it is incumbent on all the Crown officers to come forward with all the evidence in their possession, and any properly authenticated documents bearing on the issues should be admitted in evidence. *The Attorney-General of British Columbia* v. *Ludgate and The Attorney-General of Canada—Deadman's Island Case*, 11 B.C.R. 258.

2. Precious metals.]—A conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interests in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land, but belong to the Crown, and under sec. 109 of the British North America Act, 1867, beneficially to the Province, and any intention to transfer them must be expressed or necessarily implied. *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 S.C.R. 345; 14 App. Cas. 295; 1 M.M.C. 52.

3. Ownership of harbours vested in Dominion.]—The franchise of public harbours and the ownership of the soil within the limits of public harbours in Canada are both vested in the Dominion Government by sec. 108 of the British North America Act, and False Creek, British Columbia, is such a harbour. *The Attorney-General of Canada* v. *Keefer*, 1 B.C.R., Pt. II., 368.

4. English Bay.]—English Bay is not a public harbour within the meaning of sec. 108 of the British North America Act, 1867, and the bed and foreshore thereof are the property of the Crown in right of the Province. *Attorney-General of British Columbia* v. *Ritchie Contracting and Supply Co. and others*, 20 B.C.R. 333.

5. Foreshore.]—Sec. 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Secs. 91 and 92, read together, empower the Dominion to dispose of Provincial Crown lands, and, therefore, of a Provincial foreshore, for the purpose of a transcontinental railway connecting several provinces. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, 11 B.C.R. 289; 1906, A.C. 204.

6. Foreshore.]—The foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the Union. *The Attorney-General for the Province of British Columbia ex rel. The City of Vancouver* v. *The Canadian Pacific Railway Company*, 11 B.C.R. 289; 1906, A.C. 204.

7. Provincial public lands, rights of Dominion to dispose of.]—The Parliament

of Canada has power to appropriate Provincial public lands for the purposes of a railway connecting two or more Provinces. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company,* 11 B.C.R. 289; 1906, A.C. 204.

8. Beds of rivers in the Railway Belt.]—The beneficial ownership of the beds of navigable non-tidal waters within the Railway Belt, which were vested in the Crown in right of the Province at the time of the grant of the lands in the Railway Belt to the Crown in right of the Dominion, passed to the Crown in right of the Dominion by virtue of that grant. *In re British Columbia Fisheries,* 47 S.C.R. 493.

9. Deadman's Island.]—The Crown in right of the Dominion is entitled to alienate for private as well as public purposes the lands mentioned in the schedule to the Ordinance and Admiralty Lands Act, of which Deadman's Island forms part. *Vancouver Lumber Co.* v. *City of Vancouver,* 15 B.C.R. 432.

10. Deadman's Island.]—The land in suit, called Deadman's Island, was de facto a "reserve" by the Government of British Columbia under paragraph 3 of the Proclamation of 1859, and according to the evidence, a military reserve:—Held, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special grant, dated March 27, 1884. It did not, therefore fall to the Province in virtue of sec. 117 of the Act, nor to the Dominion in virtue of sec. 108. *Attorney-General for British Columbia* v. *Attorney-General for Canada,* 8 B.C.R. 242; 11 B.C.R. 258; 1906, A.C. 552.

VII. Legislation.

A. Imperial Legislation.

1. Statutes.

1. Supremacy of Imperial over conflicting Provincial statute on same subject.]—The question of supremacy in relation to subjects of legislation, as distributed by the British North America Act, arises only as between the Dominion Parliament and the Provincial Legislatures. The Imperial Parliament is sovereign to both. *Metherell* v. *The Medical Council of British Columbia,* 2 B.C.R. 186.

2. Jervis' Act and Amending Act.]—The Imperial Act of 20 & 21 Vict., c. 43, has not been repealed by the Dominion statute of 37 Vict., c. 42. *Reg.* v. *Ah Pow,* 1 B.C.R., Pt. I., 147.

2. Orders in Council.

Whether valid in colonies.]—Orders in Council passed in England under powers in an Imperial statute are not in force proprio vigore in a colony, although the statute itself may be in force. *Reynolds* v. *Vaughan,* 1 B.C.R., Pt. I., 3.

B. Delegation of Legislative Power.

Lieutenant-Governor.] — The Provincial Legislature can delegate to any person, or body of persons, to do what it can do itself. *Attorney-General of British Columbia* v. *Milne,* 2 B.C.R. 196.

C. Dominion and Provincial Legislation.

1. In General.

1. Questioning legislative competence.]—The constitutionality of a statute will only be considered where necessary to a decision of a question before the Court. *Re Dickinson,* 2 B.C.R. 262.

2. Indirect purpose.]—The Municipal Act, 1885, sec. 10, extended the powers of municipalities so as to include "licensing and regulating wash-houses and laundries," and sec. 11 enacts that municipalities may "hereafter levy and collect from every person who keeps or carries on a public wash-house or laundry, such sums as shall be fixed by by-law, not exceeding $75 for every six months." On appeal from conviction for carrying on a public laundry without a license:—Held, (1) Taxation by means of license fees, and the tax in question, is indirect and not direct taxation. (2) All indirect taxation, except that authorized by sec. 92, sub-sec. 9, British North America Act, providing, "in each Province the Legislature may exclusively make laws in relation to (9) shop, tavern, saloon, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes," is ultra vires of the Provincial Legislature. (3) The words "and other licenses" only included industries ejusdem generis with those specified, and do not include a wash-house. (4) The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being ejusdem generis with things specified therein "and others," is to look to the object or mischief

aimed at by the statute. All similar things that come within that object, though not in the abstract ejusdem generis, are so for the purpose of the statute. (5) If it appears that a tax is not bona fide within the purpose provided for, but is imposed with the real purpose of discriminating against a class, it is not within the jurisdiction of the enabling statute and, on the facts, the tax in question was intended not for the purpose of raising a revenue, but as a restriction on the Chinese. *Regina* v. *Mee Wah*, 3 B.C.R. 403.

2. Trade and Commerce.

1. Liquor License Act.]—The Liquor License Regulation Act, 1891 (British Columbia), sec. 4, is intra vires of the Provincial Legislature, and is consistent with sub-secs. 73, 78 and 92, of sec. 96 of the Municipal Act, 1891. *Sauer, appellant* v. *Walker, respondent*, 2 B.C.R. 93.

2. Chinese tax.]—A Provincial statute required every Chinese person over twelve years of age to take out a license every three months for which he was to pay the sum of $10 in advance to Her Majesty. The statute also required every employer of Chinese labour to furnish a list of all Chinese employed by him, etc., under a penalty of $100 for every Chinaman employed, to be recovered by distress:—Held, the statute was ultra vires of the Provincial Legislature under the British North America Act, (1) as dealing with and affecting trade and commerce, (2) as providing for unequal taxation, and discrimination against a class of persons, and being calculated for exclusion, and not being bona fide taxation. *Tai Sing* v. *Maguire*, 1 B.C.R., Pt. I., 101.

3. Special tax on non-resident traders.]—P. was convicted before a justice of the peace for soliciting in Victoria orders for the sale by retail of goods to be supplied by a firm doing business outside the Province of British Columbia. By the Municipal Act, 1891, British Columbia, 54 Vict., c. 29, sec. 166, "every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect by means of such licenses the amounts following": (12) "From every person who, either on his own behalf, or as agent for another or others, sells, solicits, or takes orders for the sale by retail of goods, wares or merchandise, to be supplied or furnished by any person or firm doing business outside the Province, and not having a permanent or licensed place of business within the Province, of a sum not exceeding $50 for every six months." By the by-law, following the language of sub-sec. 12, supra, except that the words "permanent or licensed place of business" are substituted for "permanent and licensed place of business," the license was fixed at $50:—Held, (1) the statute, by-law and license tax thereunder are not, as contended, ultra vires—(a) for interference with trade and commerce, or (b) for unlawful discrimination against traders outside the Province; (2) imposition of the license tax in question is within the powers relegated to Provincial control by the British North America Act, sec. 92, sub-sec. 16; (3) The word "and" in the statute, supra, should be construed "or." *Poole* v. *City of Victoria*, 2 B.C.R. 271.

4. Wide Tire Act.]—The Wide Tire Act, 1889, c. 22, is intra vires of the Provincial Legislature. *The Queen* v. *Howe*. *McNeil* v. *Howe*, 2 B.C.R. 36.

5. Class legislation.]—It is not competent to a Provincial Legislature or to a municipality to deny certain nationalities or individuals the right to take out municipal trade licenses, e.g., to a Chinaman the right to a pawnbroker's license. *Regina* v. *Corporation of Victoria* (*Re Mock Fee*), 1 B.C.R., Pt. II., 331. See also *Re Russell*, 1 B.C.R., Pt. I., 256.

6. Public health regulations.]—A municipal by-law providing, "The medical health officer shall have power to stop, detain, and examine every person or persons, freight, cargoes, boats . . . coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city," does not authorize the medical health officer, or other municipal authorities, to detain a steamship and its passengers and crew coming from an infected place, or to prevent them from landing within the municipal limits, without reference to a proper examination for the purpose indicated and its results, as showing danger of their introducing the disease. (2) That the stopping of all passengers without examination was not an exercise of the powers reposed in the corporation by the by-law, but was an interference with trade and commerce, and was ultra vires. (3) That the by-law and the

statute authorizing it, were intra vires. *The Canadian Pacific Navigation Co.* v. *The City of Vancouver*, 2 B.C.R. 193.

7. Prohibition of export.]—A Provincial statute prohibiting the exportation of game in a raw state, as one of a number of provisions for the protection of game within the Province, is not ultra vires as an interference with trade and commerce. *R.* v. *Boscowitz*, 4 B.C.R. 132.

3. Sea Coast and Inland Fisheries.

Railway Belt.] — In pursuance of the Terms of Union, under which the Province was admitted into the Union of Provinces constituted by the British North America Act, 1867, the Legislature of the Province, by two statutes, granted to the Government of the Dominion a strip of public land extending to twenty miles on each side of the railway to be constructed under those terms. This strip of land is known as the Railway Belt. By the British North America Act, 1867, sec. 91, the legislative authority of the Parliament of Canada extends to (12) "sea coast and inland fisheries," and by sec. 92, the Provincial Legislature may exclusively make laws in relation to (13) "property and civil rights in the Province":—Held, that it is not competent to the Provincial Legislature to authorize the Government of the Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt; so far as those waters are tidal, the right of fishing in them is a public right subject only to regulation by the Dominion Parliament; so far as they are not tidal, whether navigable or not, they are matters of private property, and under the grant became vested in the Crown in right of the Dominion. It is not competent to the Provincial Legislature to authorize the Government of the Province to grant the exclusive right of fishing in the sea, including arms of the sea, and estuaries of rivers. The right of fishing in the sea is a public right, not dependent upon any proprietory right, and the Dominion has the exclusive right of legislating with regard to it. The right of the public to fish in the sea does not depend on any title in the Crown to the subjacent lands. The question whether the shore below low water mark to within three miles of the coast forms part of the territory of the Crown, or is merely subject to special powers for protective and police purposes, is not one which belongs to municipal law alone, and it is not at present desirable that any municipal tribunal should pronounce upon it. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, 47 S.C.R. 493; 1914, A.C. 153.

4. Bankruptcy and Insolvency.

1. Homestead Act.]—Provincial statutes providing for exemptions from execution are not ultra vires as dealing with insolvency. *Johnson* v. *Harris*, 1 B.C.R., Pt. I., 93.

2. Fraudulent preference.]—The Fraudulent Preferences Act is intra vires of the Provincial Legislature. *Anderson* v. *Shorey*, 1 B.C.R., Pt. II., 325.

5. Naturalization and Aliens.

1. Provincial Elections Act.]—Sec. 91, sub-sec. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization, that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under sec. 92, sub-sec. 1, what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly, the Provincial Elections Act (1897, c. 67), sec. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires. *Cuningham and Attorney-General for British Columbia* v. *Tomey Homma and Attorney-General for Canada*, 7 B.C.R. 368; 8 B.C.R. 76; 1903, A.C. 151.

2. Coal Mines Regulation Act.]—Sec. 4 of the Coal Mines Regulation Act, 1890 (53 Vict., c. 33), which prohibits Chinese of full age from employment in underground coal workings, is in that respect ultra vires of the Provincial Legislature. Regarded merely as a coal-working regulation, it would come within sec. 92, sub-sec. 10 or sub-sec. 13 of the British North America Act, 1867, but its exclusive application to Chinese who are aliens or naturalized subjects establishes a statutory prohibition which is exclusively within the competence of the Dominion Parliament, conferred by sec. 91, sub-sec. 25. *Bryden* v. *Union Colliery Co.*, 1 M.M.C. 337; 1899, A.C. 580.

3. Immigration.]—Parliament having, by the Immigration Act (R.S.C. 1906, c. 93), provided a complete code dealing with immi-

gration, the British Columbia Immigration Act, 1908, is inoperative. *In re Narain Singh and others*, 13 B.C.R. 477.

4. Chinese Regulation Act.] — The Chinese Regulation Act, 1884, is ultra vires of the Provincial Legislature, on the following grounds. 1. It is an intereference with the rights of aliens. 2. It is an interference with trade and commerce. 3. It is an infraction of the existing treaties between the Imperial Government and China. 4. It imposes unequal taxation. *Regina* v. *Wing Chong*, 1 B.C.R., Pt. II., 150.

5. Chinese Tax Act.]—The Chinese Tax Act, 1878, is ultra vires of the Provincial Legislature. *Tai Sing* v. *McGuire*, 1 B.C.R., Pt. I., 101.

6. Coal Mines Act.]—The provision in sec. 4 of the Coal Mines Regulation Act, as amended by the Coal Mines Regulation Amendment Act, 1890, sec. 1, that "No Chinaman shall be employed in, or allowed to be for the purpose of employment in, any mine to which this Act applies, below ground," is within the constitutional power of the Provincial Legislature as being a regulation of coal mines, and is not ultra vires as an interference with the subject of aliens. *In re the Coal Mines Regulation Amendment Act, 1890*, 5 B.C.R. 306, 1 M.M.C. 116.

7. Coal Mines Act—Employment of Chinamen.]—Rule 34 of sec. 82 of the Coal Mines Regulation Act, as enacted by the Legislature in 1903, and which prohibits Chinamen from employment below ground, and also in certain other positions in and around coal mines, is in that respect ultra vires. *In re the Coal Mines Regulation Act and Amendment Act, 1903*, 10 B.C.R. 408.

8. Trade licenses.]—It is not competent to the Provincial Legislature by itself, or to authorize a municipality to deprive, generally, particular nationalities or individuals of the capacity to take out trade licenses. *R.* v. *City of Victoria*, 1 B.C.R., Pt. II., 331.

6. Criminal Law and Procedure.

1. Sunday trading.] — The Provincial Legislature has power to confer on municipalities the right to prevent sales of personal property on Sundays. *R.* v. *Petersky*, 4 B.C.R. 385.

2. Sunday trading.]—A by-law prohibiting Sunday trading in the interest of public morals, being a subject of criminal law, cannot be authorized by the Provincial Legislature, and is invalid. Sub-secs. (129) and (130) of sec. 53 of the Municipal Act, authorizing municipalities to pass by-laws "for the regulating of public morals, including the observance of the Lord's Day," are ultra vires. *Rex* v. *Walden*, 19 B.C.R. 539.

3. Commissions of assize.]—The dispensing with the issue of commissions of assize is a matter affecting the constitution of the Court and not of procedure. *R.* v. *Walker and Chinley*, 15 B.C.R. 100.

7. Taxation.

1. Mortgages.] — The Assessment Act (C.S.B.C. 1888, c. 111, sec. 3), imposing a revenue tax upon all personal property, including, by the interpretation clause, mortgages, is intra vires. *In re Yorkshire, etc., Co.*, 4 B.C.R. 258.

2. Salaries of school teachers.]—A Provincial enactment providing that a certain proportion of the salaries of public school teachers in a municipality shall be paid by the municipality is intra vires. *Attorney-General of British Columbia* v. *The Corporation of the City of Victoria*, 2 B.C.R. 1.

3. Chinese Regulation Act.] — The Chinese Regulation Act, 1884, is ultra vires of the Provincial Legislature on the following grounds:—1. It is an interference with the rights of aliens; 2. It is an interference with trade and commerce; 3. It is an infraction of the existing treaties between the Imperial Government and China; 4. It imposes unequal taxation. *Regina* v. *Wing Chong*, 1 B.C.R., Pt. II., 150.

4. Chinese Taxing Act.]—The Chinese Tax Act, 1878, is ultra vires of the Provincial Legislature. *Tai Sing* v. *Maguire*, 1 B.C.R., Pt. I., 101.

5. Dominion official—Income tax.]—The imposition of a tax upon the income of a Dominion official is ultra vires of the Provincial Legislature. *Regina* v. *Bowell*, 4 B.C.R. 498.

6. Differential tax.] — Sec. 14 of the Chinese Regulation Act, 1884, declaring "that no free miner's certificate shall be issued to any Chinese except upon payment of fifteen dollars," was an attempt to impose a differential tax on the Chinese, and, therefore, ultra vires of the Provincial Legislature. *Regina* v. *Gold Commissioner of Victoria District*, 1 B.C.R., Pt. II., 260.

7. Indirect purpose] — The Municipal Act, 1885, sec. 10, extended the powers of municipalities so as to include "licensing

and regulating wash-houses and laundries," and sec. 11 enacts that municipalities may "hereafter levy and collect from every person who keeps or carries on a public wash-house or laundry, such sum as shall be fixed on by by-law, not exceeding $75 for every six months." On appeal from a conviction for carrying on a public laundry without a license:—Held, (1) Taxation by means of license fees, and the tax in question, is indirect and not direct taxation; (2) All indirect taxation, except that authorized by sec. 92, sub-sec. 9, British North America Act, providing "in each Province the Legislature may exclusively make laws in relation to shop, tavern, saloon, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes, is ultra vires of the Provincial Legislature; (3) The words "and other licenses" only include industries ejusdem generis with those specified, and do not include a wash-house; (4) The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being ejusdem generis with things specified therein "and others" is to look to the object or mischief aimed at by the statute. All similar things that come within that object, though not in the abstract ejusdem generis, are so for the purposes of the statute; (5) If it appears that a tax is not bona fide within the purpose provided for, but is imposed with the real purpose of discriminating against a class, it is not within the justification of the enabling statute, and, on the facts, the tax in question was intended not for the purpose of raising a revenue, but as a restriction on the Chinese. *Regina* v. *Mee Wah*, 3 B.C.R. 403.

8. Succession duty.]—The tax imposed by the Succession Duty Act is not an indirect tax, and is within the powers of the Provincial Legislature. The impost is laid expressly upon the property passing under the will (or the intestacy as the case may be), and there is no legal obligation to pay the duty upon any person or persons other than the beneficiaries; even as to them the liability to pay is inferential, or arises under order of the Court made in the course of the enforcement of the charge upon the property. *In re Doe*, 19 B.C.R. 536.

8. Municipal Institutions.

Salaries of school teachers.]—A Provincial enactment providing that a certain proportion of the salaries of public school teachers employed in a municipality shall be paid by the municipality is intra vires. *Attorney-General of British Columbia* v. *The Corporation of the City of Victoria*, 2 B.C.R. 1.

9. Railways.

1. Mechanic's lien.]—The provisions of the Mechanic's Lien Act are not to be construed to apply to railways within the control of the Dominion Parliament. *Larsen* v. *Nelson & Fort Sheppard Railway Co.*, 4 B.C.R. 151.

2. Obligation to fence.]—The provisions of the Cattle Protection Acts, 1891 and 1895 (54 Vict., c. 1; 58 Vict., c. 7), to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is ultra vires of the Legislative Assembly of this Province. *Madden* v. *Nelson & Fort Sheppard Railway Co.*, 5 B.C.R. 541; 1899, A.C. 626.

3. Vancouver Island Settlers Rights Act, 1904.]—The Vancouver Island Settlers Rights Act, 1904, was intra vires of the Provincial Legislature. It had the exclusive power of amending or repealing its own Act of 1883 (47 Vict., c. 14). The Act, moreover, related to land which had become the property of the plaintiff, and affected a work and undertaking purely local within the meaning of sec. 92, sub-sec. 10 of the British North America Act, 1867. *Esquimalt and Nanaimo Railway Company* v. *McGregor*, 12 B.C.R. 257; 1907, A.C. 462.

10. Companies.

1. Extra-provincial.]—The authority of the Parliament of Canada to legislate for "the regulation of trade and commerce," conferred by sec. 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies, the objects of which extend to the entire Dominion; the status and powers of a Dominion company, as such cannot be destroyed by a Provincial Legislature. Part VI. of the Companies Act of British Columbia (R.S.B.C. 1911, c. 39), which, in effect, provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the Province or maintaining proceedings in its Courts, is

therefore ultra vires the Provincial Legislature under the British North America Act, 1867. *John Deere Plow Co., Ltd.* v. *Theodore F. Wharton*, 1915, A.C. 330.

2. Insurance Act.]—H. was the authorized agent at Vancouver of the Equity Fire Insurance Company, a company incorporated in Ontario, but which was not registered or licensed under the provisions of any British Columbia statute, or of the Insurance Act of Canada. H. was convicted under the provisions of the Insurance Act for carrying on an insurance business without a license:—Held, confirming the conviction, that the Act is intra vires of the Parliament of Canada. *Regina* v. *Holland*, 7 B.C.R. 281.

3. Provincial objects.] — The Province can create a company with power to undertake extra-territorial contracts of carriage, and, therefore, a company incorporated in British Columbia may contract to carry goods to a point in the Yukon from British Columbia. *Boyle* v. *V. Y. Trading Co.*, 9 B.C.R. 213.

11. Property and Civil Rights.

1. Salaries of school teachers.]—A Provincial enactment providing that a certain proportion of the salaries of public school teachers employed in a municipality shall be paid by the municipality is intra vires. *Attorney-General of British Columbia* v. *The Corporation of the City of Victoria*, 2 B.C.R. 1.

2. Mechanics' lien.]—The provisions of the Mechanics' Lien Act, as to priority of mechanics' liens upon property charged, being inconsistent with the Dominion Railway Act as to priority of mortgages upon railways, it is not to be construed to apply to railways within control of Federal Parliament. *Larsen* v. *Nelson and Fort Sheppard Railway*, 4 B.C.R. 151.

3. Coal Mines Regulation Act.]—Held, that sec. 4 of the Coal Mines Regulation Act, 1890, which prohibits Chinamen of full age from employment in underground coal workings, is in that respect ultra vires of the Provincial Legislature. Regarded merely as a coal working regulation, it would come within sec. 92, sub-sec. 10, or sec. 92, sub-sec. 13 of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects, establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament, conferred by sec. 91, sub-sec. 25, in regard to naturalization and aliens. *Bryden* v. *Union Colliery Co.*, 1899, A.C. 580; 7 B.C.R. 247; 1 M.M.C. 337.

4. Coal Mines Regulation Act.]—The provision of sec. 4 of the Coal Mines Regulation Act, as amended by the Coal Mines Regulation Amendment Act, 1890, sec. 1, that "No Chinaman shall be employed in, or allowed to be for the purpose of employment in any mine in which this Act applies, below ground," is within the constitutional power of the Provincial Legislature as being a regulation of coal mines, and is not ultra vires as an interference with the subject of aliens. *In re Coal Mines Regulation Act*, 5 B.C.R. 306; 1 M.M.C. 116.

5. Animals Contagious Diseases Act.]—The Animal Contagious Diseases Act, 1903, is intra vires of the Dominion Parliament. *Brooks* v. *Moore*, 13 B.C.R. 91.

6. Master and Servant Act.]—It was within the power of the Provincial Legislature to pass the Master and Servant Amendment Act, 1899, as coming under the head of civil rights. *Ashmore* v. *Bank of British North America*, 18 B.C.R. 257.

12. Administration of Justice and Constitution of Courts.

1. Courts—Power of Province to legislate as to jurisdiction of.]—The power given to the Provincial Governments by the British North America Act, sec. 92, sub-sec. 14, to legislate regarding the constitution, maintenance and organization of Provincial Courts, includes the power to define the jurisdiction of such Courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such Courts. The Acts of the Legislature of British Columbia (C.S.B.C., c. 25, sec. 14), authorizing any County Court judge to act as such in certain cases in a district other than that for which he is appointed, and 53 Vict., c. 8, sec. 9, which provides that until a County Court judge of Kootenay is appointed the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, are intra vires of the said Legislature under the above section of the British North America Act. The Speedy Trials Act 51 Vict., c. 47 (Dominion), is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure. By this Act jurisdic-

tion is given to "any judge of a County Court" to try certain criminal offences:—Held, that the expression "any judge of a County Court" in such Act means any judge having, by force of the Provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature so to do. *In re County Courts of British Columbia*, 21 S.C.R. 446.

2. Power of the Provincial Legislature over jurisdiction and procedure in civil matters in the Supreme Court of British Columbia.] — The Provincial Legislature had, by an Act pased in 1881, declared that the sittings of the Supreme Court for reviewing nisi prius decisions, motions for new trials, etc., should be held only once in each year, and on such day as should be fixed by Rules of Court, and that the Lieutenant-Governor in Council should have power to make such Rules of Court:—Held, 1. That the Supreme Court of British Columbia is not a Provincial Court within the meaning of the British North America Act, sec. 92, sub-sec. 14, and that the Provincial Legislature had not power to make laws regulating its procedure or any power to diminish or repeal its powers, authorities or jurisdiction, nor to allot any jurisdiction to any particular judge thereof, nor to alter or add to any of the existing terms and conditions of the tenure of office by the judges, whether as to residence or otherwise. 2. That even if it had such power, it had no right to delegate its exercise to the Lieutenant-Governor in Council. 3. That the power resided in the Dominion Parliament. *Sewell* v. *British Columbia Towing Co., The "Thrasher Case,"* 1 B.C.R., Pt. I., 153.

NOTE.—The matters in question having been referred to and argued before the Supreme Court of Canada, under sec. 52 of the Supreme and Exchequer Courts Act, judgment was delivered on 15th May, 1883, holding that the Provincial Legislature of British Columbia had the powers in question. *Ibid*, 1 B.C.R., Pt. I., 243-244.

3. Speedy trial—County Court Amendment Act, 1890.]—Plaintiff in error was tried and convicted for housebreaking and larceny before the judge of the County Court of Kootenay, there being no county judge commissioned for the latter county by the Governor-General of Canada. By the Speedy Trials Act (C.S.C., c. 175), as amended by 51 Vict., c. 46, the expression "judge" in the Province of British Columbia, was defined to mean the Chief Justice or a puisne judge of the Supreme Court, or a judge of a County Court. But by 52 Vict., c. 47, this definition of a judge is repealed, and in lieu thereof it is provided that in the Province of British Columbia the expression "judge" means and includes the Chief Justice or a puisne judge of the Supreme Court, or any judge of a County Court. By the Provincial statute, 53 Vict., c. 8, sec. 9, the "County Courts Amendment Act, 1890," it is enacted as follows:—"Until a County Court judge of Kootenay is appointed, the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, and shall, while so acting, whether sitting in the County Court District of Kootenay or not, have, in respect of all actions, suits, matters or proceedings being carried on in the County Court of Kootenay, all the powers and authorities that the judge of the County Court of Kootenay, if appointed and acting in the said district, would have possessed in respect of such actions, suits, matters and proceedings; and for the purposes of this Act, but not further or otherwise, the several districts as defined by secs. 5 and 7 of the County Courts Act, over which the County Court of Yale and the County Court of Kootenay, respectively, have jurisdiction, shall be united":—Held, on appeal, quashing the conviction, that the judge had no jurisdiction to try the plaintiff in error either by virtue of the Speedy Trials Act and Amending Acts, or by sec. 9 of the County Courts Amendment Act, 1890 (British Columbia), which section, so far as it purports to appoint the County Court judge of Yale to act as and perform the duties of the County Court judge of Kootenay, is ultra vires of the Provincial Legislature. *Piel Ke-ark-an, plaintiff in error* v. *Her Majesty the Queen, defendant in error*, 2 B.C.R. 53; 21 S.C.R. 446.

4. Commission of Oyer and Terminer.]—The Lieutenant-Governor has power to issue commissions of oyer and terminer. *R.* v. *Malott*, 1 B.C.R., Pt. II., 207, 212; *R.* v. *Sproule*, 1 B.C.R., Pt. II., 219.

5. Canada Police Act.]—Although the Peace Preservation Act, 1869, 32-33 Vict. (Can.), c. 24, makes no provision for the

appointment of a "commissioner" under that Act, yet its provisions can be enforced here by a commissioner appointed for the Province under the Canada Police Act, 31 Vict., c. 28, as such Police Commissioner is a justice of the peace in respect of the "criminal laws and other laws of the Dominion." The Peace Preservation Act, 1869, and the Canada Police Act, 1868, can be enforced in this Province as they are intra vires of the Parliament of Canada, under sec. 101 and sub-sec. 10 (a), (c), sec. 92, of the British North America Act, 1867. The word "provincial," in sub-sec. 14, sec. 92, British North America Act, 1867, is to be read in its political, and not in its geographical sense. *Keefer* v. *Todd*, 1 B.C.R., Pt. II, 249.

6. Magistrate—Civil jurisdiction of.]—A Provincial statute providing that stipendiary magistrates and police magistrates shall have jurisdiction to hear and determine actions of any kind of debt where the sum demanded does not exceed $100 is intra vires. *In re a certain statute of the Province of British Columbia intituled "An Act to confer limited civil jurisdiction upon Stipendiary Magistrates and Police Magistrates,"* 5 B.C.R. 246.

7. Creation of Mining Courts.]—It is competent to the Provincial Legislature to create Mining Courts and to fix their jurisdiction, but not to appoint officers thereof with judicial functions. *Burk* v. *Tunstal*, 2 B.C.R. 12; 1 M.M.C. 61.

8. Jurors and jury lists.]—The prescribing of the qualifications for jurors and of the manner of preparing jury lists, by the Jurors Act, 1883, is not a matter of criminal procedure, but is a matter belonging to the organization of Provincial Courts, and, therefore, constitutional. *R.* v. *Sproule*, 1 B.C.R., Pt. II., 219.

9. Liquor License Regulation Act, British Columbia, 1891.]—The Liquor License Regulation Act, British Columbia, 1891, sec. 4, providing for the closing of saloons between 11 p.m. on Saturday night, and 1 a.m. on Monday morning, is intra vires of the Provincial Legislature as a police regulation, and is not an interference with trade and commerce. *Sauer* v. *Walker*, 2 B.C.R. 93.

13. Matters of a Local or Private Nature.

1. Coal Mines Regulation Amendment Act, 1890.]—The provision in sec. 4 of the Coal Mines Regulation Act, as amended by the Coal Mines Regulation Amendment Act, 1890, sec. 1, that "No Chinamen shall be employed in, or allowed to be for the purpose of employment in, any mine to which this Act applies, below ground," is within the constitutional power of the Provincial Legislature as being a regulation of coal mines, and is not ultra vires as an interference with the subject of aliens. *In re the Coal Mines Regulation Amendment Act, 1890*, 5 B.C.R. 306; 1 M.M.C. 116.

2. Preservation of game.]—A clause in a Provincial statute which contained other provisions for the protection of game within the Province, provided: "No person shall at any time purchase, or have in possession with intent to export or cause to be exported or carried out of the limits of this Province, or shall at any time or in any manner export, or cause to be exported or carried out of the Province, any, or any portion of the (game) animals or birds mentioned in this Act in their raw state":—Held, affirming a conviction of defendant for having deer hides in his possession in their raw state with intent to export same, that, as the preservation of game within the Province is within the competence of the Provincial Legislature, the prohibition against export did not render the enactment ultra vires as interference with trade and commerce, such provision being subsidiary and incidental to the general purpose of the statute. *Regina* v. *Boscowitz*, 4 B.C.R. 132.

3. Class legislation.]—It is not competent to the Provincial Legislature or to a municipality to deprive, generally, particular nationalities or individuals of the capacity to take out a municipal trade license; e.g., a Chinaman has a right to apply for a pawnbroker's license. *Regina* v. *Corporation of Victoria, at the prosecution of Mock Fee and another*, 1 B.C.R., Pt. II., 331.

4. Coal mine regulation—Employment of Chinamen.]—An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence, inasmuch as by the British North America Act, 1867, sec. 91, sub-sec. 25, legislation with respect to "naturalization and aliens" is reserved exclusively to the Parliament of the Dominion. *Union Colliery Co. of British Columbia* v. *Bryden*, 1 M.M.C. 337; 1899, A.C. 580.

5. Sale of milk.]—Sec. 20 of the Provincial Government regulations governing the

sale of milk and the management of dairies, cow sheds and milk shops, is ultra vires, as being repugnant to the Dominion legislation on the same subject. *Rex* v. *Garvin*, 13 B.C.R. 331.

14. Agriculture.

1. Animals.]—The Animals Contagious Diseases Act (S.C. 1903, c. 11) is intra vires of the Dominion Parliament. *Brooks* v. *Moore*, 13 B.C.R. 91.

2. Sale of milk.]—Sec. 20 of the Provincial regulations for the sale of milk and the management of dairies, cow sheds and milk shops, is ultra vires as being repugnant to the Dominion legislation on the same subject. *R.* v. *Garvin*, 13 B.C.R. 331.

15. Education.

School teachers—Salaries of.]—A Provincial enactment providing that a certain proportion of the salaries of public school teachers employed in a municipality shall be paid by the municipality is intra vires. *The Attorney-General of British Columbia* v. *The Corporation of the City of Victoria*, 2 B.C.R. 1.

See COMPANIES.

See PUBLIC LANDS.

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I. IN GENERAL.

Observations in newspaper pending suit—Application to commit—Criminal Code, sub-sec. 290, et seq.—R.S.B.C. 1897, c. 56, sec. 10.]—The Supreme Court has no power to decide the validity of an appointment of one of its members. The Court has power summarily to commit for constructive contempt notwithstanding sub-secs. 290, 292 and 293 of the Criminal Code; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court. A statement to the effect that a judge of the Court having taken an active part in a general election, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt. A statement to the effect that the spectacle of such judge trying election cases is not edifying, and that it does not produce a good impression in the public mind, is not a contempt. A party to a suit has status to move to commit a stranger to the suit for constructive contempt, although no affidavit is filed by him, or on his behalf, to the effect that the alleged contempt is calculated to prejudice him in his suit. Any person may bring to the notice of the Court any alleged contempt. *Stoddart* v. *Prentice*, 6 B.C.R. 308.

II. PARTICULAR CONTEMNORS.

A. Aspersions on Judicial Officer: Publications Pending Suit.

Constructive contempt.]—The Supreme Court has no power to decide the validity of the appointment of one of its members. The Court has power summarily to commit for constructive contempt, notwithstanding sub-secs. 290, 292 and 293 of the Criminal Code, but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court. A statement to the effect that a judge of the Court, having taken an active part in a general election, would do well to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt. A statement to the effect that the spectacle of such judge trying election cases is not edifying, and that it does not produce a good impression in the public mind, is not a contempt. A party to a suit has status to move to commit a

stranger to the suit for constructive contempt, although no affidavit is filed by him, or on his behalf, to the effect that the alleged contempt is calculated to prejudice him in his suit. Any person may bring to the notice of the Court any alleged contempt. *Stoddart* v. *Prentice*, 6 B.C.R. 308.

B. Disobedience of Order of Court.

1. Order of local judge.]—An ex parte restraining order made by a local judge must be obeyed until set aside. *Leberry* v. *Branden*, 7 B.C.R. 403.

2. Breach of injunction.]—A person who receives telegraphic notice of an injunction and fails to conform his conduct thereto will be attached. *The Canadian Pacific Navigation Co.* v. *Vancouver Corporation*, 2 B.C.R. 298.

3. Persons not named in injunction.]—Persons not named in an injunction are not liable to be committed for breach of it, unless, with knowledge of the injunction, they interfere and commit the act enjoined, in which case they are liable for contempt of Court. *DeCosmos* v. *The Victoria and Esquimalt Telephone Co. (Ltd.)*, 3 B.C.R. 347.

III. PRACTICE.

1. Proof of offence.]—Contempt of Court being a criminal offence, on the hearing of an application to commit, nothing will be inferred, and it is necessary to prove the charge with particularity. *In re Scaife, Potts* v. *The City of Victoria and the Consolidated Railway Company*, 5 B.C.R. 153.

2. Proper remedy.]—Upon motion for a writ of attachment against the manager of a defendant company for disobeying an injunction restraining the company, its agents, servants, etc., from blasting or depositing rock upon the plaintiffs' mineral claim, it was objected: (1) Under r. 451, that there was no memorandum of the consequence of his disobedience endorsed on the order. (2) That the notice of motion for attachment was not personally served on the manager, but only on the solicitor for the defendant company. Counsel had appeared for the manager and obtained several adjournments of the motion to obtain affidavits on the merits, which finally were not forthcoming:—Held, per Bole, L.J., S.C., overruling the objections: 1. That r. 451 does not apply to prohibitory injunctions. 2. That the want of personal service of the notice of motion upon the manager was waived by the adjournments at his request. Upon appeal:—Held, allowing the appeal: That committal and not attachment is the appropriate remedy for breach of a prohibitory injunction. That personal service of a notice of motion is an essential prerequisite to committal, and that the party applying in a case proper for committal is not absolved from the necessity for such personal service by moving for attachment instead of committal. That the objection of want of personal service of the notice was not waived by the adjournments. *The Golden Gate Mining Company* v. *The Granite Creek Mining Company*, 5 B.C.R. 145.

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I. FORMATION OF OBLIGATIONS.

A. In General.

1. Agency — Estoppel.] — Prior to the issue of a Crown grant to the defendants (as trustees for the Canadian Pacific Railway Company) of some 6,000 acres, the plaintiff, with others, who, notwithstanding a reserve placed upon the land, had settled upon some lots near Granville, petitioned the C.C.L. & W. that clemency would be shown them, and that they might be allowed to purchase their improved land on fair terms. While the negotiations for the issue of the Crown grant were being carried on between the C.C. and B. (the agent of the company), the C.C. requested B. to authorize him (the C.C.) "to inform all such persons as shall be found to have located in a bona fide manner previous to 4th August, and who have made substantial improvements thereon," that the company would sell to each such locatee his respective lot at $200. To this B. replied, somewhat varying the conditions, but giving the C.C. no authority to communicate with plaintiff and other petitioners. On the same day that the Crown grant issued, the C.C. announced to the petitioners that the company would convey to them their respective lots on terms somewhat different from those mentioned either in his letter to B. or in B.'s letter to him. The company afterwards refused to convey to plaintiff his lot. On motion for judgment:—Held, that the C.C. was neither the agent of the plaintiff nor a trustee for him, and that there was no concluded agreement of which the plaintiff could claim performance; and although the plaintiff had substantially complied with the conditions proposed, his action must be dismissed, but without costs. As there was no evidence that the defendants were aware of the plaintiff's improvements:—Held, that the doctrine of estoppel did not apply. *Hayden* v. *Smith & Angus*, 1 B.C.R., Pt. II., 312.

2. Illusory—Promise to form company and allot reasonable amount of stock to be amicably determined.]—Where on a sale of mineral claims the purchaser promises and agrees to form a company to take over the claims, and that the vendor shall have in such company a reasonable amount of stock, to be amicably determined between them, and then refuses to form a company, the vendor has a right of action, as the agreement is not illusory. *Briggs* v. *Newswander*, 8 B.C.R. 402; 32 S.C.R. 405.

3. Illusory promise—Agreement to pay such sum as W. H. shall consider right—Release.]—Plaintiff had performed services for a mining company for over three years, when the following resolution was passed: "Resolved, and carried unanimously, that Mr. H. E. C. be requested to accompany Messrs. H. and M. to England, and assist them in negotiating the sale of the mines, and that he be paid for his expenses $70 by each of the aforesaid thirteen interests, and such further sum as Mr. W. H. shall consider right upon the sale of the mines, in consideration of his services to the partnership." The plaintiff proceeded to England acordingly, and in the result a sale of the mines was effected. W. H. declined to allow plaintiff anything, and the defendants refused to pay him anything for his services, either before, or consequent on, the resolution. At the trial the jury found a

verdict, and judgment was entered for the plaintiff for $1,350 for the former, and $4,350 for the latter services. On appeal to the Full Court:—Held, (1) that the resolution affected subsequent services only, and that it contained no contract upon which the plaintiff could recover anything. (2) Its acceptance constituted an agreement by the plaintiff to abide by the decision of W. H. to the exclusion of any right of action for the subsequent services upon a quantum meruit, and that the judgment as to the $4,350 should be set aside. (3) A vested right of action can only be discharged by payment, release under seal, or accord and satisfaction, and, as plaintiff had at the date of resolution such a right in respect of his prior services, the resolution could not be construed as affecting it, and that the judgment for $1,300 should stand. *Croasdaile* v. *Hall*, 3 B.C.R. 384.

4. Mutuality.]—A saloon keeper paying the stipulated fee to a municipality for a stipulated period of license to sell, etc., has a contract which the municipality cannot infringe upon by subsequent by-law. *In re Clay and the City of Victoria*, 1 B.C.R., Pt. II., 300.

B. Intention to contract Binding Obligation.

1. Lack of consent.]—A clergyman in British Columbia is not bound to perform the ceremony of marriage, but, if he does, the rights and usages of his church or denomination, and the accustomed form, must be followed:—Held, also, marriage between non-Christians ought to be left to their own officiants or to the registrar. A marriage purporting to have been solemnized by a Wesleyan minister between two Chinese was void for want of understanding on the woman's part of the nature of the ceremony and of any intention to contract. *In re Ah Lie*, 1 B.C.R., Pt. I., 261.

2. Government service.] — Where the petitioner performed services for the Provincial Government without making any stipulations as to payment, it was held there was no contract enforceable at law. *DeCosmos* v. *Reg.*, 1 B.C.R., Pt. II., 26.

C. Definiteness.

1. Uncertainty.]—A real-estate agent, in negotiating a sale of land to the plaintiffs on behalf of the owners, which sale was carried through, promised that he would "make them a profit of $30,000 within sixty days, or take the property himself." In an action to enforce the promise as an agreement:—Held, that the contract was indivisible; that it was too vague for the Court to enforce, and void for uncertainty. *Fletcher* v. *Holden*, 19 B.C.R. 567.

2. Contract according to sample—Uncertainty.]—Where a contract provides for the manufacture according to specifications of an article "equal in every respect to a sample to be produced," and no sample is produced and agreed upon, the contract is void for uncertainty, and no action can be brought for breach of it by either party. *Kerr & Begg* v. *Cotton*, 2 B.C.R. 246.

3. Mineral law—Partnership—"In on it."]—Plaintiff having discovered "mineral float" communicated its situation to the defendant upon a verbal agreement by the latter, that in the event of his thereby discovering the ledge, and discovering a mineral claim, the plaintiff should be "in on it":—Held, that the words "in on it" imported an agreement to give the plaintiff an interest in the nature of a partnership or co-ownership; that, in the absence of anything in a partnership contract to the contrary, the presumption of law is that the partnership shares are equal, and that the contract was not void for uncertainty. *Wells* v. *Petty*, 5 B.C.R. 353.

4. Mineral claims—Purchase of—Agreement to form company.]—Where on a sale of mineral claims, the purchaser promises and agrees to form a company to take over the claims, and that the vendor shall have in such company a reasonable amount of stock, to be amicably determined between them, and then refuses to form a company, the vendor has a right of action, as the agreement is not illusory. *Briggs* v. *Newswander*, 8 B.C.R. 402; 32 S.C.R. 405.

D. Offer and Acceptance.

1. New term.]—Where the purchaser's solicitors accepted the offer, and agreed to pay the balance of the purchase price, adding the words "so soon as title is evidenced to our satisfaction," this addition did not import the proposal of a new term nor render the acceptance conditional. *Calori* v. *Andrews*, 12 B.C.R. 236; 38 S.C.R. 588.

2. Additional terms.] — The plaintiff wrote a letter, dated the 2nd October, 1899, offering to supply the defendant with 37 car loads of hay at prices mentioned, "subject to acceptance in five days, delivery

within six months." On the 5th October the defendant wrote and posted a letter in reply, as follows: "We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd inst. Please ship as soon as possible the orders you already have on hand and also get off the seven cars as early as possible as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to the shipment of the thirty 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, yet, by reason of the registration, it was not received by him until the following day. On the 12th October the plaintiff's agent wrote to the defendant acknowledging the letter and saying the acceptance of the offer had arrived too late, and that, therefore, the hay could not be furnished. On the 6th November the defendant replied, insisting on delivery of the hay as contracted for by the 15th of that month, and notifying the plaintiff that, in case of default, they would buy in against the contract, charging him with any extra costs and expenses:—Held, that the correspondence did not constitute a binding contract, as the parties were never ad idem. *Oppenheimer* v. *Brackman*, 9 B.C.R. 343; 32 S.C.R. 699.

3. Delivery of policy.]—An application for life insurance dated the 16th of September, 1894, and made part of the policy to be effected, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof, and that the place of contract, for all purposes, should be the head office of the company at Toronto. The policy insured the applicant's life to the 5th of October, 1895, and provided that it would not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that the company affixed its seal and the president and managing director signed and delivered this contract "at the City of Toronto this 27th day of September, 1894." The insured lived in British Columbia, and the policy and receipt were posted at Toronto on the 27th of September to the company's agent at Winnipeg, and forwarded by him on the 1st of October to the insured, who would not receive them before October 7th:—Held, that the policy and receipt were delivered and the contract of insurance was completed, at least as early as the 27th of September, 1894, when the papers were posted at Toronto. *North American Life Assurance Co.* v. *Elson*, 33 S.C.R. 383.

4. Variation of terms.]—Where T. offered to purchase lands which the municipality had bought in at a sale for arrears of taxes and to pay therefor the amount of the arrears of taxes and costs, and the council resolved to accept "the amount of taxes, costs, and interest" charged against the lands, and authorized the reeve and clerk to issue a deed at that price, this did not, even if communicated to T., constitute an acceptance and create a contract, on account of the variation made by the addition of interest to the price. *Tracy* v. *District of North Vancouver*, 10 B.C.R. 235; 34 S.C.R. 132.

5. Building contract.] — Negotiations were carried on by letter between the parties, whereby all the terms and conditions of a building contract between them were settled and assented to, and one of the letters contained the following words: "An agreement and bond in the terms of your offer will be prepared and submitted to you for execution as soon as the contract for the erection of the buildings has been awarded." The contract was awarded, and the bond (viz., as a guarantee for the performance of the agreement) was executed, but no formal agreement was ever executed:—Held, that there was a binding agreement between the parties. *The Koksilah Quarry Company, Limited Liability* v. *The Queen*, 5 B.C.R. 525.

6. Correspondence.]—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 defendant: "Deposit on Lot Kitsilano, $1,400. Wire aproval and instructions." 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, that there was no concluded bargain between the parties. Held, also, that the defendants F. & F. had not represented that they were, nor assumed to act as, the owner's agents. *Williams* v. *Hamilton and Forbes & Franklin*, 13 B.C.R. 268.

7. Option.]—Defendant on the 4th of September, 1908, agreed, under seal, to give to plaintiff the exclusive right to purchase certain timber limits at $1.50 per acre, plaintiff to examine and cruise the limits within 30 days from the date of the agreement, when if accepted, plaintiff was to pay $2,000 and the balance in equal portions as stipulated. The cruising, which was effected within 30 days, was satisfactory:—Held, that the option never became a contract; that the examination and cruising, although the result was satisfactory to the plaintiff, and so intimated by him, did not constitute an acceptance of the option; that the option should have been accepted within 30 days, or within a reasonable time thereafter, and a tender made on the 23rd of October, 1908, was not in the circumstances, a reasonable time, and that the plaintiff could not obtain specific performance. *Cunningham* v. *Stockham*, 15 B.C.R. 141.

8. Not ad idem.] — In negotiations between plaintiff and defendant as representative of the Grand Trunk Pacific Railway Company, for the purchase of one thousand lots in the Prince Rupert townsite, two letters constituted the principal basis of an understanding. According to these letters the lots were to be selected by plaintiff, and the only lots which the Company would concur in transferring were those embraced in the "Phillips list," the prices to be fixed by the defendant Company. The latter and the Provincial Government employed appraisers who placed an upset price on the townsite lots for the purposes of an auction sale, but these prices were not communicated to the plaintiff. It was contended for the plaintiff that the price list fixed by the apraisers would be a list binding on the Company at his option:—Held, that there had been no identification of the lots to be selected, nor a fixing of prices during the negotiations, and, generally, that the parties were never ad idem. *Frewen* v. *Hayes*, 16 B.C.R. 143.

9. Fresh offer.]—Defendant telegraphed "Propose to go in from Alert Bay over to west coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply." Plaintiff telegraphed in reply: "Five dollars per day and expenses"; upon which the defendant telegraphed "All right please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt this wire; collect":—Held, that there was no contract. The telegram from plaintiff to defendant was not an acceptance of defendant's offer, but was merely a quotation of terms and could not bind plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied. *Little* v. *Hanbury*, 14 B.C.R. 18.

E. Terms, Notice of.

Conditions.]—In an action under the Fatal Accidents Act, it was proved that the deceased was employed in the defendants' workshops and travelled to and from his work on the defendants' trams with a pass. The condition on the back of the pass, exempting the defendant from all liability for damage to the person or property of the holder of the pass, was not signed by the deceased. The deceased had refused to work for the defendant unless provided with a pass. It was held that the jury was entitled to find that the deceased was not made acquainted with the conditions on the pass, and that the defendants were not absolved from liability. *Farmer* v. *British Columbia Electric Railway Company*, 16 B.C.R., 423.

II. Parties.

A. Privity of Contract.

Engineer in building contract.]—In a building contract, where certificates are to be given by the engineer of the building owner to the contractor, there is no privity of contract between the engineer and the contractor. *Coughlan* v. *City of Victoria*, 4 B.C.R. 20.

B. Contracts of Agents.

1. Personal liability.]—Where an agreement was executed on behalf of a company by the president and secretary-treasurer, and underneath the execution the words were added: "We, the undersigned, guarantee payment of the obligation as noted above. Imperial Fisheries, Ltd., J. O. Hearn, president; S. J. Levy, secretary-treasurer; William Kilroy, vice-president," the three signatories were held personally liable on the guarantee. *Johnson, Lieber & Van Bokkelen, Ltd.* v. *Imperial Fisheries, Ltd.*, 16 B.C.R. 445.

2. Principal purporting to contract as agent.]—Where B., acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half interest in the following claims (describing them) in the name of J. B. & Sons," without authority from the owners of two of the claims and without their knowledge, and subsequently these others transferred their interest to B., it was held that although no such firm as J. B. & Sons existed, B. was personally bound by the agreement as to all three claims. *McMeekin* v. *Furry*, 13 B.C.R. 20; 39 S.C.R. 378.

3. Scow taken in tow by steamer contrary to orders of owners of steamer—Liability of owners.]—Defendants' steamer, which previously had been employed carrying freight and passengers between White Horse and Dawson, had gone out of commission on 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 plaintiffs) was ruled out. At the trial, Dugas, J., held that defendants were common carriers, and therefore liable:—Held, on appeal, that the appeal should be allowed with costs, and that the plaintiffs could have a new trial upon payment of the costs of the first trial. *Courtnay* v. *The Canadian Development Company*, 8 B.C.R. 53.

C. Contracts of Aliens.

Jurisdiction of Court and remedies to enforce where made between foreigners in, and to be performed in a foreign country.]—In the absence of an agreement ad hoc with his obligee, a party is liable at the latter's suit on a good cause of action to all the remedies, including arrest and imprisonment, allowed by law, and it is immaterial that the parties are aliens, or that the particular remedy sought is not allowed in the foreign jurisdiction. The Court has jurisdiction by reason of the residence of the parties within the jurisdiction, though the contract and breach arose outside the jurisdiction, and the parties are aliens. *Baxter* v. *Jacobs, Moss*, 1 B.C.R., Pt. II., 373.

D. Contracts of Lunatics.

Inquisition.]—A finding by inquisition of the insanity of a person is not a necessary preliminary to an action by his next friend to set aside his contract on the ground of his insanity. Insanity once established is presumed to continue. *Harper* v. *Cameron*, 2 B.C.R. 365.

III. FORM.

A. In General.

1. Hiring—Municipal corporation—Corporate seal.]—A person duly elected, at a meeting of the municipal council, to municipal office, pursuant to a statute giving the municipal corporation power so to appoint its officers, becomes thereby the servant of the corporation without further evidencing or ratification of the contract of hiring, either by writing under the corporate seal or otherwise, and can maintain an action for damages for not being received into the employment. *Tuck* v. *The Corporation of the City of Victoria*, 2 B.C.R. 179.

2. Postscript.]—The fact that part of a writing appears written below the signature of the party to be bound does not exclude the subscripted words, if they were intended to form part of the agreement. *Borland* v. *Coote*, 10 B.C.R. 493; 35 S.C.R. 282.

B. Under Seal.

1. Trading company.]—Contracts by a trading company with reference to a sub-

ject-matter within the scope of its objects need not be under seal. So a contract by a fish packing company to ship all goods consigned to it on the ships of a carrying company need not be under seal. *Can. Pac. Navig. Co.* v. *Victoria Packing Co.*, 3 B.C.R. 490.

2. Corporation.] — An acceptance, by resolution of the council, of an offer to purchase land bought in by a municipal corporation at a sale for arrears of taxes is sufficient to constitute a contract, and an agreement under seal is not essential. *Tracy* v. *District of North Vancouver*, 10 B.C.R. 235; 34 S.C.R. 132.

3. Municipal corporation.]—Sec. 82 of the Municipal Act, 1892, providing: "Each municipal corporation shall have a corporate seal, and the council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the council," is imperative, and applies to all contracts of the corporation. That the contract was in fact wholly executed, and the work completed, and accepted by the corporation, and part payment therefor made, and that the clerk of the corporation had acknowledged an order by the contractor in favour of the plaintiffs:—Held, not to operate to cure the objection that the contract was not under seal. *United Trust Company* v. *Chilliwack*, 5 B.C.R. 128.

4. Corporate seal.]—Plaintiffs by their statements of claim alleged that they were solicitors in partnership, and that they were duly appointed to be the "legal advisers" of the defendant corporation, and were afterwards continuously and exclusively employed as the solicitors of the corporation. This allegation was not put in issue by the defendant's pleadings. In conformity with a resolution of the mayor and council, the municipal clerk, by a letter under the corporate seal addressed to the plaintiffs, informed them that they had been appointed to be the "legal advisers" of the corporation. Semble, this might be insisted upon as an appointment under seal. The designation "legal advisers" being ambiguous, may be interpreted to mean "solicitors" or "attorneys," by reference to the circumstances of the parties at the time of the appointment, and the acts of the parties subsequently, and was so interpreted. An appointment to be solicitor of a corporation operates as a general retainer. *Drake & Jackson* v. *Corporation of Victoria*, 1 B.C.R., Pt. II., 165.

IV. Statute of Frauds.

A. In General.

Variation by parol evidence.]—Where a contract within the Statute of Frauds is duly evidenced by a proper note or memorandum, it cannot be varied by a subsequent agreement not satisfying the statute. *McMeekin* v. *Furry*, 13 B.C.R. 20; 39 S.C.R. 378.

B. Note or Memorandum.

1. Sufficiency of.] — B., a resident of British Columbia, wrote to his sister in England that he would like one of her children to come out to him, and in a second letter he said: "I want to get some relation here, for what property I have, in case of sudden death, would be eaten up by outsiders and my relations would get nothing." On hearing the contents of these letters, T., a son of B.'s sister and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B., containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram, which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd.) B." Under these circumstances, T. claimed the farm and stock of B., and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death:—Held, affirming the judgment of the Court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Turner* v. *Prevost*, 17 S.C.R. 283.

2. Resolution of municipal council.]—An instrument never delivered, executed by the reeve and clerk of a municipality, in the statutory form of a conveyance upon a sale of land for taxes, reciting a resolution, in response to an offer for the lands, to accept the amount of taxes, costs and interest charged against the lands, but without reference to any contract in pursuance of the resolution, does not constitute a sufficient note or memorandum. *Tracy* v. *District of North Vancouver,* 10 B.C.R. 235; 34 S.C.R. 132.

3. Resolution.] — Where, two months after the passing of a resolution, in response to an offer to purchase, to accept the amount of taxes, costs and interest charged against certain lands, the council of a municipal corporation, upon receipt of another offer for the same lands, resolves to intimate to the person making the second offer that the lot has been sold to the first offeror, this does not constitute a sufficient note or memorandum. *Ibid.*

4. Agreement for lease.]—It is doubtful whether a memorandum of an agreement for a lease, not specifying the term, is sufficient to satisfy the statute. *McLennan* v. *Millington,* 5 B.C.R. 345.

5. What constitutes a sufficient writing to satisfy.]—In an action in their own names by the vendors, who were trustees, for specific performance by defendants of an agreement to purchase lands, or damages in lieu thereof, or rescission of the contract and ejectment, it appeared that the negotiations for purchase were carried on between the vendees and one B. by means of a written correspondence. B.'s letters contained the terms of sale offered, which were accepted by the defendants. These letters were written on printed letter forms headed "Canadian Pacific Railway Company Land Department," and under B.'s signature was the word "Commissioner." The defendants pleaded the Statute of Frauds, and maintained that the only written contract was, on its face, between the Canadian Pacific Railway Company and the defendants, and that evidence that the plaintiffs were the undisclosed principals of B. was not admissible:—Held, the form of the writing did not import that B. was contracting as agent for the Canadian Pacific Railway Company. 2. That the contract was by B. in his own name. 3. That evidence was admissible to show that the contract was made by B. on behalf of unnamed principals. 4. That such principals, being trustees, were (under r. 98) entitled to sue on the contract in their own names without joining their cestuis que trustent as parties. *Smith* v. *Mitchell,* 3 B.C.R. 450.

6. Correspondence.]—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 enquiring 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 deposit 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 the first of 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 thirteen thousand dollars net cash offer, with the understanding that I am not to be called upon to produce any title papers other than those 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 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, that A.'s letter following his cable "writing acceptance," read with C. & Co.'s cable announcing sale at

$13,000, and the letter of plaintiff's solicitors to C. & Co. constituted a memorandum of a contract between the plaintiff and defendant sufficient to satisfy the Statute of Frauds. *Calori* v. *Andrews*, 12 B.C.R. 236; 38 S.C.R. 588.

7. Correspondence.]—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 defendant Hamilton, "Deposit on lot Kitsilano, $1,400. Wire approval and instructions." 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, (1) That the agents were not authorized 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 and Forbes & Franklin*, 14 B.C.R. 47.

8. Guarantee—Omission of name of party guaranteed.]—A memorandum of a contract of guarantee required under the Statute of Frauds is not necessarily insufficient by reason merely that a blank space left therein for inserting the name of the party whose account is guaranteed has not been filled in, if it appears from the whole document that a person of ordinary capacity must have been able to infer whose account it was intended to guarantee. *Kelly, Douglas & Co.* v. *Locklin*, 17 B.C.R. 331.

C. Description of Property.

By number.]—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 showing the subject-matter of the negotiations between the parties. *Lewis and Sills* v. *Hughes*, 13 B.C.R. 228.

D. Parties.

1. Name of purchaser omitted.]—Where in a memorandum of a contract for the sale of land the name of the broker negotiating the sale appears, but there is no mention of the name of the purchaser, the memorandum is insufficient to satisfy the statute. *Rathom* v. *Calwell*, 16 B.C.R. 201.

2. Name of purchaser.]—In a real estate transaction a firm of brokers arranged terms with the vendor, and on themselves paying a deposit of $50, procured the following receipt: "Received from Marriott & Fellows the sum of fifty dollars, being deposit on account of purchase of lot numbered 799 in block 10 in section 18, Victoria, at the price or sum of six thousand dollars ($6,000) two thousand five hundred on the execution of agreements, and the balance as follows: assume mortgage for ($3,500) three thousand five hundred at 7½ per cent. interest. Five per cent. commission to be paid to Marriott & Fellows when sale is completed. Taxes, insurance, rent, etc., to be adjusted to date of sale. Mrs. Minnie Calwell, wife of Hugh E. Calwell":—Held, that this was not a sufficient memorandum within the Statute of Frauds so as to entitle the purchaser to specific performance, as the name of the purchaser did not appear, nor was there any evidence in it by which to identity the purchaser. *Rathom* v. *Calwell and Calwell*, 16 B.C.R. 201.

3. Client.]—The description of one of the parties to a contract for the sale of land as "client of A." is not such that his identity cannot fairly be disputed, and non-compliance with the Statute of Frauds is therefore a good defence to an action for specific performance of the contract. *Newberry* v. *Brown*, 20 B.C.R. 483.

E. Signature by Agent.

Delegation.]—An agent "thereunto lawfully authorized" within the Statute of Frauds, cannot delegate his authority. An agent who, at the time of making a contract, has failed to bind his principal by a written note or memorandum within the statute, cannot sign an effectual note or memorandum after his authority as agent to sell has been withdrawn. *Stevenson* v. *Smith*, 13 B.C.R. 213.

F. Part Performance.

Equitable mortgage.]—The Statute of Frauds is not a defence to an action on an equitable mortgage. *Hudson's Bay Co.* v. *Kearns*, 3 B.C.R. 330.

V. CONSIDERATION.

1. Marriage.]—A woman, in consideration of a man marrying her, promised him that she would make him her sole heir; he married her and after marriage, in acknowledgment of the ante-nuptial contract, she signed a writing stating "I voluntarily promised . . . . before and after marriage that I would make him my sole heir . . . . by virtue of this contract he is my sole heir." She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—Held, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband and should be specifically performed; and that "voluntarily" in the acknowledgment meant "of her own free will." *Raser* v. *McQuade*, 11 B.C.R. 161.

2. Nudum pactum.]—An agreement for the sale of mineral claims provided for payment by instalments and contained a proviso that "failure to make any of the above payments to render this agreement void as to all parties thereto, and the said (vendees) can quit at any time without being liable for any further payments thereunder from such time on." At the request of the vendees, the vendors, without consideration, extended the time for payment of one of the instalments. After the original, but before the extended period for making the payment, the vendees notified the vendors that they had quitted. In an action to recover the full amount of the instalment:—Held, that the liability of the defendants, the vendees, to pay the instalment in question was absolute upon the day named in the original agreement and remained unaffected by the voluntary concession of further time to pay. *Webb* v. *Montgomery*, 5 B.C.R. 323.

3. Nudum pactum.]—An agreement not under seal, made without consideration, is unenforceable. *Manley* v. *Mackintosh*, 10 B.C.R. 84.

VI. CONSTRUCTION.

A. In General.

1. Functions of judge and jury.]—The question of the construction of a contract where it is unambiguous is for the judge, but where it is doubtful what constitutes the contract, this question should be submitted to the jury. *MacAdam* v. *Kickbush*, 10 B.C.R. 358.

2. Terms.]—The question as to whether all the terms of a contract are to be found in the document or whether there are collateral oral agreements is for the jury. *Harris* v. *Dunsmuir*, 6 B.C.R. 505; 30 S.C.R. 334.

3. Crown.]—No terms will be implied in a contract with the Crown. *DeCosmos* v. *Reginam*, 1 B.C.R., Pt. II., 26.

4. Expressio minus.]—An express covenant excludes an implied covenant. *Rithet* v. *Beaven*, 5 B.C.R. 457.

5. Mining contract.]—Where a written contract for the lease of a quartz mine is silent as to the use of timber, track, trestle, and ore bin, but one of the parties alleges that such matters were the subject of oral agreement, it should be left to the jury to say whether there was a collateral agreement concerning these matters. *Halpin* v. *Fowler*, (*No. 2*), 12 B.C.R. 441.

6. Alternative agreement.]—Upon the payment of $6,000 on account of the purchase price, on the 2nd of September, 1910, B. obtained an exclusive option for 20 days to purchase A.'s mill and timber rights, A. agreeing that in the event of B.'s failure to make a sale, and in the event of one being concluded by himself, he would, in consideration of B.'s assistance and of the use of cruise reports obtained by B., refund him the $6,000. No sale was effected, and on October 5th the parties entered into a further agreement, B. paying A. $20,000 for a renewal of the option until November 22nd, or until B. declared that a deal he had under way with parties in London was off. Under a further clause it was agreed that in the event of the London sale being so declared off, if either party could sell for the price agreed upon, in the case of B. selling, the $26,000 already paid would be applied on the purchase price, and in the case of A. selling, the $26,000 was to be refunded and considered as a loan. In order that the property could be offered for sale as a running concern, B. advanced A. three further sums upon the terms set out in the agreement of the 5th of October, namely: $5,000 on the 21st of November, $5,000 on the 9th of December, and $2,500 on the 24th of April, 1911. On June 11th, 1911, B. notified A. that the London negotiations were at an end. On June 19th, B. wrote A., proposing another disposition of the property, from which there was an intimation that he regarded the agreement of October 5th as still subsisting, and on

July 3rd A. answered this letter and took no exception to that assumption. A. sold the property in December, 1912. In an action by B. for the return of the sums advanced A. as moneys loaned:—Held, that the contents of the letters of the 19th of June and the 3rd of July, 1911, showed that, while the exclusive option to B. was at an end, yet the alternative arrangement set forth in the agreement of October 5th was recognized by the parties as still subsisting and was subsisting when A. sold the property. *Nebraska Investment Company* v. *Moresby Island Lumber Company, Limited,* 19 B.C.R. 341.

7. Smelting contract—Automatic sampling.]—A contract between mine owners and smelter owners provided, inter alia, that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence showed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling, and had been in vogue for about twenty years:—Held, per Hnnter, C.J., and Walkem, J., that the contract was entered into on the footing that the sampling was to be done automatically. Per Drake and Irving, JJ.: The contract permitted any mode of sampling so long as it was done properly and the true value of the ore was arrived at. A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract. Where the smelter returns of ore of average character, sampled either negligently or in a manner not contemplated by contract, show a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. *The Le Roi Company, No. 2, Limited* v. *The Northport Smelting and Refining Company, Limited, and the Le Roi Mining Company, Limited,* 10 B.C.R. 138.

B. Particular Words, Phrases, and Cases.

1. Not Less Than.

Option.]—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons, and not less than 10,000, as required by the second party, does not bind the second party to supply more than 10,000 tons. *Haggerty* v. *Lenora,* 9 B.C.R. 6.

2. Words of Estimation.

Crop.]—The defendants, acting as commission agents for the sale of the plaintiff's crop of potatoes, agreed to handle and dispose of the whole future crop (except a small amount for seed purposes for the following year), which the plaintiff, at the time the contract was made (as set forth in the written memorandum of the agreement) estimated at 600 tons more or less. The defendants disposed of 1,140 tons out of an actual crop of 1,230 tons, and then notified the plaintiff to cease shipping potatoes. The plaintiff brought action to recover $1,000 in damages for the non-acceptance or refusal to take delivery of the remaining 90 tons:—Held, on appeal, that the contract was one for the disposal of the entire crop at the price fixed, and the words "estimated by the principal at 600 tons more or less" were not words of contract, but words of expectation and estimate only. *Hammond* v. *Daykin & Jackson,* 19 B.C.R. 550.

3. As to Transfer of Property.

(*a*) *Realty.*

Sale of land—Warranty.]—An agreement to sell land "according to a plan deposited in the Land Registry Office and numbered 319," does not import a warranty that the plan is deposited in accordance with the provisions of the Land Registry Act. *Thompson* v. *Courtney,* 2 B.C.R. 89.

(*b*) *Personality.*

1. Consequential damages.] — Plaintiffs contracted to construct for defendants, according to specifications, a marine boiler, capable of standing 120 lbs. pressure to the square inch, to be used in a steam tug. The boiler, as delivered, did not comply with the specifications, but it was accepted upon the statement by plaintiffs "that if it was not right they would make it right." The boiler burst, and besides direct damage, the defendants were obliged to hire another tug to carry on its work. The defendants admitted the plaintiffs' claim for goods sold and delivered, and counterclaimed, alleging breach of express warranty of the boiler, claiming direct and consequential dam-

ages:—Held, at the trial upon the counterclaim that, on the evidence, the injury was caused by defective construction of the boiler, and that its steam pressure capacity was not as agreed. That the contract as to the form of the boiler was waived, but that the agreement to "make it all right," etc., amounted to a general warranty of fitness for the purpose. That the defendants were entitled to recover the cost of putting the boiler in the condition originally agreed upon, but not the amount paid for hire of another tug during the delay, on the ground that such liability was not contemplated by the contract. Plaintiffs appealed to the Full Court and defendants cross-appealed, claiming that the judgment should be increased by allowing the consequential damages claimed:—Held, that apart from any, in this case doubtful, express warranty, there is an implied warranty by a manufacturer of goods for a particular purpose that they are fit for that purpose, and that, upon the evidence, the defendants were entitled to recover for the breach of such warranty. That on the facts, the consequential damage which ensued from the bursting of the boiler must be taken to have been within the contemplation of the parties to the contract, as an accident to the boiler would, in the known circumstances of the defendants, necessitate the hire by them of another tug. *William Hamilton Manufacturing Company* v. *Victoria Lumber and Manufacturing Company*, 4 B.C.R. 101. Overruled, 26 S.C.R. 96.

2. Timber.]—In an agreement for the transfer of certain stock of a timber company, it was provided the vendor was "to give a satisfactory guarantee . . . . that the quantity of *timber* on the different tracts of land, as shown by the statement . . . . copy of which is attached hereto . . . . is true and accurate, it being the intention, and made one of the conditions of this trade that the *timber* shall at least run equal in quantity to the number of feet shown in the attached statement." And that the "second parties are to have until September 1, 1907, to cruise and verify the figures . . . . regarding the quantity of *timber* on said various tracts, and in the event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented . . . . first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of *timber* estimated . . . ." And "in event second party fails to find the quantity of *timber* on said tracts . . . .":—Held, that the term "timber," as here used, was intended to include not merely that which was presently marketable at the time of entering into the agreement, but that future conditions, as to market, logging facilities and improved means of transportation should be taken into consideration in estimating the value of the tracts in question as timber areas. Affirmed by Judicial Committee of the Privy Council. *Swift* v. *David*, 16 B.C.R. 275.

3. Property.]—In consideration of the construction of a siding to their mill premises, plaintiff Company entered into an agreement with the Railway Company freeing them from liability for damage to the "siding or to buildings, fences or other property whatsoever" of the plaintiff Company "or of any other person." Two horses of the plaintiff Company, engaged in hauling a car from one part of the siding to another, were killed by being run down by a car sent on the siding by a flying switch:—Held, that the word property in the agreement was not confined to fixtures, buildings and rolling stock, and that the horses were properly included. *East Kootenay Lumber Company* v. *Canadian Pacific Lumber Company*, 13 B.C.R. 422.

4. Mining property.]—D. gave E. an option to purchase all the shares in a coal company and 51 per cent. of the shares in another, the sale to include all D.'s properties in British Columbia or in California in anywise relating to coal or coal mines and fire-clay and all machinery, articles or things used, or which might be used in connection therewith. The agreement provided that the sale should be free from contracts for sale and delivery of coal except such as had been made in the ordinary course of business before the date of the option and such current cargo contracts as might be subsisting at the time of the completion of the sale, D. to retain possession until the purchase price be paid, he then to assign the shares and transfer the properties free from liability. The properties, during the existence of the option, were to be kept intact, subject only to sale and shipment of coal in the ordinary course of business, D. to pay all expenses of operation and upkeep and to retain for his own use all the earnings of the properties up to the date of giving up possession. The purchase price

was paid in full on the 16th of June, 1910. The parties could not agree on the interpretation of the option:—Held, that the mine being sold as a going concern, all the coal mined and undisposed of, and the coke manufactured and undisposed of, were to be considered as stock in trade, not earnings, but that D. was entitled to all the earnings, both of cash and outstanding obligations, pertaining to the business at the time of the completion of the sale. Held, further, that the word "used" meant "ordinarily used," and all ships ordinarily used for transporting the product of the mines were "things" within this clause. Held, further, that the agreement must be construed in accordance with the language used read in the light of the circumstances in which it was made, and that oral evidence to explain what was intended was inadmissible. Under a five-year contract with a railway company, D. undertook to keep a certain quantity of coal in a stock pile at a certain place for the use of the company, who were to pay for the coal as they took it away from the stock pile:—Held, that the obligations under the contract passed to the vendee, and the stock of coal so kept was part of the properties which the vendor was to keep intact, and were not earnings. Reversed by the Judicial Committee of the Privy Council. *Canadian Collieries (Dunsmuir), Limited* v. *Dunsmuir; Dunsmuir* v. *Mackenzie,* 18 B.C.R. 583.

4. Arbitration Clauses.

1. 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 sale would prove equal to that shown in a statement annexed and a covenant that he would repay to the purchasers 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, but it did not in express terms deprive the purchaser of the right to recover any such claim for shortage until after an award had been obtained:—Held, that an award by arbitrators had not been made a condition precedent to recovery of the amount of any deficiency in the quantity of timber guaranteed to be upon the limits. *Swift* v. *David,* 15 B.C.R. 70; 44 S.C.R. 179.

2. Abortive proceedings.]—In an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive it is the duty of the Court to supply the defect by itself ascertaining the amount due. *Cuddy* v. *Cameron,* 16 B.C.R. 451; 1914, A.C. 651.

C. Covenants, Dependent or Independent.

1. Arbitration.]—Held, that the holding of an arbitration to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase price. *Cuddy* v. *Cameron,* 15 B.C.R. 452.

2. Separate covenants.]—Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies:—Held, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title. *Dunsmuir* v. *Last Chance Mining Company, Limited,* 16 B.C.R. 499.

3. Agreement and lease.]—A lease of land for 25 years, containing a covenant by lessee not to assign without leave, was executed contemporaneously with an agreement by the lessee to purchase from the lessor a building on the land, which agreement contained a covenant by the lessee to pay the purchase money by instalments and to insure, and give the lessor the right to cancel the agreement, "upon breach of any of the covenants herein contained." The only reference to the agreement in the lease was contained in a proviso, "the first month's rent to be paid on the execution of an agreement of even date," etc. The lessee sub-let the premises for ten years, and did not pay the instalments of purchase money under the agreement, or insure. The action was to cancel the agreement, lease and sub-lease, for such breaches. The sub-lessee set up in his defence that the lease and sub-lease were registered, and that the agreement was not, and claimed the benefit of the Land Registry Act, sec. 35, which provides that "no purchaser or mortgagee for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice expressed, implied

or constructive, of any unregistered title, interest or disposition affecting such real estate other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity notwithstanding":—Held, that the agreement and its covenants were independent of the lease and its covenants. *Griffiths* v. *Canonica*, 5 B.C.R. 67.

VII. PAROL EVIDENCE.

1. Contract of agency.]—The defendant gave instructions in writing to the plaintiff respecting the sale of a coal mine on terms mentioned, and agreed to pay a commission of five per cent. on the purchase price, such commission to include all expenses. The plaintiff failed to effect a sale:—Held, that in an action by the plaintiff to recover expenses incurred in an endeavour to make a sale and reasonable remuneration parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but that there had been a collateral oral agreement in respect to the expenses and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought to have been submitted to the jury. *Harris* v. *Dunsmuir*, 6 B.C.R. 505; 30 S.C.R. 334.

2. Remuneration of agent.]—Where an agent employed to sell a mine for a commission failed to effect a sale but brought an action on a verbal collateral agreement by the owner to pay "expenses," or "expenses and compensation," in case of failure, and the jury found that there was a promise of fair treatment in case no sale was made, it was held that this finding did not establish the collateral agreement, but was, if anything, opposed to it. *Lowenberg, Harris & Co.* v. *Dunsmuir*, 9 B.C.R. 303; 34 S.C.R. 228.

3. Account stated, promise not to sue.]—In an action on an account as stated the defendants pleaded that the plaintiff had verbally agreed that he would not sue upon the account as stated, and that the document should be treated as merely showing what would be payable to him upon the collection of outstanding debts owing to the firm:—Held, that as the effect of the alleged collateral agreements was to vary and annul the terms of the written instrument, they could not be proved by parol testimony. *Jackson* v. *Drake, Jackson* v. *Helmcken*, 37 S.C.R. 315.

4. Through carriage.]—Where a company agreed to carry from Victoria to Yale, and gave a bill of lading for part of the route, viz., from Victoria to New Westminster, parol evidence was admitted to prove the agreement to carry as far as Yale. *Hamilton* v. *Hudson's Bay Co.*, 1 B.C.R., Pt. II., 1, 176.

5. Promissory note.]—Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement. *Emerson* v. *Erwin*, 10 B.C.R. 101.

6. Subject matter.]—Where there is an informal agreement, and such agreement is embodied in an informal memorandum in writing, parol evidence may be given to show what the parties were dealing about. *Embree* v. *McKee*, 14 B.C.R. 45.

VIII. ASSIGNMENT.

A. In General.

Assignability.] — By contract made between the defendants and the plaintiff firm, carrying on business under the name of the Paterson Timber Company, the plaintiff firm agreed to sell and the defendants agreed to purchase the entire output for one year of certain lumber camps operated by the plaintiff firm. The contract was expressed to be binding upon the parties, their executors, administrators and successors respectively. Logs were to be paid for in cash upon delivery. Shortly after the contract was entered into, the plaintiff firm caused a company to be incorporated under the name of The Paterson Timber Company, Limited, to which company the firm assigned all its assets, including the timber limits concerned in the contract with defendants, and including also the contract itself. The incorporated company agreed to perform all the contracts of the firm. The company continued to deliver logs under the contract for some months until the defendants, claiming that a breach of the contract had been made, notified the firm that further deliveries of logs would not be accepted. It was not clear from the evidence that the fact of the plaintiff firm having turned its business over to the company had ever been clearly brought to the attention of the defendants, although the

latter in correspondence and in their minute book used the name of the incorporated company, and referred to the contract as being made with the incorporated company:—Held, that the contract was not of such a personal nature that it could not be assigned, or at any rate it did not require to be performed by the plaintiff firm personally, but could be performed by the company, and therefore the plaintiffs were entitled to recover damages for the wrongful repudiation of the contract. *The Paterson Timber Company* v. *The Canadian Pacific Lumber Company,* 15 B.C.R. 225; 47 S.C.R. 398.

B. Novation.

1. Verbal.]—There may be a complete verbal novation; neither the discharge of the original debtor on one side, nor the assumption of the new debt on the other, need be evidenced in writing. *Strong* v. *Hesson,* 5 B.C.R. 217.

2. When complete.]—To bring about a complete novation there must be three things: 1st, the new debtor must assume the complete liability; 2nd, the creditor must accept the new debtor as a principal debtor; and 3rd, the creditor must accept the new contract in full satisfaction of and substitution for the old contract, so that the original debtor is discharged. *Polson* v. *Wulfsohn,* 2 B.C.R. 39.

3. Partnership—Dissolution—Acceptance of notes.]—In an action against B. & S. as partners for goods sold and delivered, it appeared that the firm had dissolved, S. carrying on the business and assuming the liabilities. Plaintiffs having drawn on the firm for the amount, S. returned the draft, stating the dissolution, and that he had no right to accept in the firm name, but sent his own note. This note not being paid at maturity, plaintiffs drew on S., who did not accept, but in lieu sent four notes made by himself, for the amount in the aggregate. These notes were held by plaintiffs and sent for collection at maturity, and on non-payment brought the action against B. & S.:—Held, that the proper question for the trial judge was whether the plaintiffs had expressly agreed to take, and did take, the notes of S. in satisfaction of the joint debt. That there was no evidence of such agreement, and the fact that the plaintiffs, when taking the notes of S., did not expressly reserve their rights against B. was immaterial. *Gurney* v. *Braden,* 3 B.C.R. 474.

C. Contract Running with Property.

Agreement to mine ore.]—Where the lessee of a mine enters into a contract for the extraction of ore under which he is to receive a percentage only of the ore extracted, and subsequently mortgages his interest in the lease, if the mortgagee has notice of the contract at the time of advancing the money, he is bound by the contract. *Forrest* v. *Smith,* 14 B.C.R. 183; 42 S.C.R. 514.

IX. ILLEGALITY.

A. Transactions Prohibited by Statute.

1. Pre-emption claim, sale of.] — An agreement for the sale of a pre-emption claim is void by sec. 26 of the Land Act, 1888. *Turner and Jones* v. *Curran,* 2 B.C.R. 51.

2. Land Act.] — An agreement to sell land comprised in a pre-emption record is not void as being an infraction of the Land Act, R.S.B.C. 1911, c. 129, sec. 159. *Simpson* v. *Proestler,* 18 B.C.R. 68.

3. Pre-emption claim—Transfer of.]—Plaintiff having a pre-emption claim to certain land, signed an undated deed conveying the same to the defendant, but it was agreed, in view of sec. 26 of the Land Act prohibiting the transfer of pre-emption claims, that the deed should remain in the hands of a third party until after the issue of a Crown grant, and that the date should then be inserted and delivery made. The transaction was completed accordingly:—Held, that the parties had avoided doing that which the Act prohibited, and that the conveyance was valid and effectual. *Hjorth* v. *Smith,* 5 B.C.R. 369.

4. Mineral claim—Use of another's name in locating claim.]—Where one free miner locates and records a mineral claim, if he locates another claim on the same vein in the name of another free miner, he thereby acquires no interest in such last claim by virtue of sec. 29 of the Mineral Act of 1896. *Alexander* v. *Heath,* 8 B.C.R. 95.

5. Extra-provincial company.] — An unlicensed extra-provincial company, carrying on business within the Province, sued for a balance due on a contract to deliver building stone, entered into within the Province. The defence advanced was that, by reason of sec. 123 of the Companies Act, the contract was illegal and void:—Held, that as the act to be done in pursuance of the contract was prohibited by statute, the contract was therefore unenforceable.

Northwestern Construction Company v. *Young*, 13 B.C.R. 297.

6. Land Act.]—The plaintiff employed B. to stake a large quantity of Crown lands under the Land Act, for purchase from the Provincial Government. B., in turn, employed the defendant and, acting under the plaintiff's instructions, supplied the defendant with the names of certain persons as ostensible purchasers. It was the intention of the plaintiff to purchase the lands from the Government and sell for agricultural purposes; of this the defendant was aware. The defendant staked certain sections of land, using the names given by the plaintiff, and later reported to the plaintiff that they were good bottom lands which would cost from $20 to $30 to clear, and were first-class agricultural and fruit lands. These statements turned out to be untrue. On the strength of the report the plaintiff paid the defendant for his services, became the purchaser of the property staked, using the names that were supplied the defendant for staking to satisfy the Act, paid the Government a large amount on account of the purchase price of the property, and also expended money in advertising and surveys. The plaintiff, discovering that the defendant's representations were untrue, brought this action for damages:—Held, that the transaction was a fraud on the Land Act, and no right of action against the staker for fraudulent misrepresentation in his report can spring therefrom; nor will the Court assist in the recovery of moneys paid to the staker in such circumstances. *Clark* v. *Swan*, 19 B.C.R. 532.

7. Land Act.]—The plaintiff, who had laid out and inspected Crown lands as a Government surveyor, furnished information to the defendant and an associate which enabled them to secure advantageous locations, comprising over 7,000 acres of these lands, in the names of a number of persons nominated by them and employed as "stakers." Subsequently the plaintiff assisted in the disposal of the lands thus secured to innocent purchasers, under an arrangement with the defendant and his associate that he was to participate in any profits which should be obtained on such sales. In an action to recover compensation for the services rendered in regard to these sales, it was held that the circumstances disclosed a scheme concocted in opposition to the policy of the Land Act and in violation of its provisions respecting the disposal of Crown lands, and consequently, the agreement, being tainted with the illegality of the scheme, ought not to be enforced. *Brownlee* v. *McIntosh*, 48 S.C.R. 588.

B. Transactions Contrary to Public Policy.

1. In General.

1. Deportation.]—It is not illegal for a steamship company to contract with a Chinese to carry him from China through Canada to the United States on the terms, among others, that if he is refused admittance to the United States he will be carried back to China by the company. *In re Lee San*, 10 B.C.R. 270.

2. Marriage settlement—Provision for future separation.]—The parties to an intended marriage (which was subsequently entered into) executed an indenture of settlement providing, inter alia, as follows: "The trusts and purposes for which the said respective trust funds shall be held as hereinbefore mentioned are as follows: Upon trust to pay the income thereof to the said Hugh Nelson so long as the said parties shall live together as husband and wife. In case of the death of either party in trust for the survivor absolutely, and in case for any reason whatsoever the parties shall cease to cohabit, then upon trust to sell and convert the said trust property and to hold one-half of the proceeds of such sale and conversion upon such trusts as may be agreed upon between the parties for the children of the said marriage (if any) and to divide the other half of the said proceeds between the said parties equally and if there shall be no such child or children then to divide the proceeds of such sale and conversion between the parties equally." The defendant also joined in an instrument creating the plaintiff joint tenant with him in his real estate, which was duly registered:—Held, that the agreement was void as being against public policy. *Nelson* v. *Nelson*, 14 B.C.R. 406.

3. Brothel—Insurance.]—A contract of insurance of a brothel is not illegal. *The Trites-Wood Company, Limited* v. *Western Insurance Company*, 15 B.C.R. 405.

4. Evading secrecy of tenders for municipal work.]—Tenders were invited for certain municipal public works. Defendant having already put in a tender, met the plaintiff, who also proposed to tender for

the work. It was agreed between them that the defendant should withdraw his tender and put in another at a higher figure, and that the plaintiff should tender at a still higher price; that in the event of the defendant's tender being accepted, the profits of the contract should be equally divided between them. The defendant's tender was accepted. In an action to declare a partnership:—Held, that the agreement constituted a partnership, and was not void as against public policy. *Stevenson* v. *Boyd*, 5 B.C.R. 626.

5. Municipal Act.]—Sec. 21 of the Municipal Clauses Act (R.S.B.C. 1897, c. 144), disqualifying a municipal officer who contracts with the corporation does not prohibit the making of the contract, which is consequently not stricken with invalidity. *District of South Vancouver* v. *Rae* (*No. 2*), 12 B.C.R. 184.

6. Interest of mayor in company from which municipality is purchasing.]—A city by-law to borrow money for the purchase of electric light plant belonging to a company is not invalid merely because the mayor was president of the company at the time of the passage of the by-law, and of the completion of the contract. *Re Arthur and the Corporation of the City of Nelson*, 6 B.C.R. 323.

2. Stifling Criminal Prosecution.

1. Embezzlement.]—An agreement not to prosecute for the embezzlement of partnership property, which was made a crime by R.S.C., c. 164, sec. 58, is unenforceable. *Major* v. *McCraney*, 5 B.C.R. 571; 29 S.C.R. 182.

2. Compounding criminal offence.]—Held, that the assignment in question was void for illegality, it appearing that it was made in consideration of the assignee refraining from taking criminal proceedings against the assignor. That as the question of illegality was not raised on the pleadings a new trial should be granted on payment of costs, to give the assignee an opportunity of adducing evidence to contradict the illegality of the consideration. *The Meriden Britannia Co.* v. *Bowell*, 4 B.C.R. 520.

3. Fraud on Third Persons.

1. Fraud on company by its manager.]—L., being the manager and part owner of a mining company which was in financial difficulties and owing him some $1,600 on account of salary, agreed with H. that the latter should acquire the outstanding debts of the Company, obtain judgment, sell the property at sheriff's sale and organize a new company in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the Company, and in consideration therefor he was to be given in the new company a proportionate amount of fully paid-up and non-assessable shares to those held by him in the old company. He also agreed not to reveal this understanding to certain of the shareholders:—Held, that if any consideration passed, it was an illegal consideration, a fraud on certain of the shareholders and a breach of trust. *Lasell* v. *Thistle Gold Company, Limited* (*Non-Personal Liability*), *and Adam Hannah*, 11 B.C.R. 466; 37 S.C.R. 324.

2. Interference with contractual relations.]—An agreement, the carrying out of which is calculated to defraud or injure a third party, is illegal. *Wanderers Hockey Club* v. *Johnson*, 18 B.C.R. 367.

4. Gaming and Wagering Contracts.

Margins — Payment of differences — Criminal Code — Sec. 201.] — Defendant instructed the plaintiff to sell shares in the C. T. Co. for him, who asked for cover, and defendant paid $600; no time was fixed for delivery; plaintiff asked defendants for more, as shares were rising, and finally called for $2,400, which defendant refused to pay. Plaintiffs then, as they alleged, purchased the shares to satisfy their own liability, and sued for amount paid:—Held, that as no stock was ever delivered, or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal. *British Columbia Stock Exchange, Limited* v. *Irving*, 8 B.C.R. 186.

5. Champerty.

1. Nullity.]—An agreement for a champertous consideration is illegal and void, and the defence that the agreement is tainted with champerty is open to others than they who are parties to the agreement. *Briggs* v. *Fleutot*, 10 B.C.R. 309.

2. Conveyance of land.]—In an action of Briggs v. Newswander, the plaintiff was

held to be entitled to a conveyance from the defendants of a quarter interest in certain mineral claims. In that action Newswander and others were only nominal defendants, the real interest in the claims belonging to one Fleutot. After the judgment was delivered, the plaintiff conveyed nine-tenths of his interest to one Giegerich, the expressed consideration being moneys advanced and an undertaking by Giegerich to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to Giegerich the remaining one-tenth, the consideration of that deed being $500 payable by instalments. Briggs afterwards assigned the above-mentioned judgment and his interest in the claims to Fleutot. In an action by Giegerich against Fleutot for a declaration that he was entitled to the quarter interest, it was held that the transfer to Giegerich of the nine-tenths was champertous, and the Court would not interfere to assist one claiming under a title so acquired, but that the transfer of the one-tenth was valid, being made for good consideration, and severable from the other part of the transaction. *Giegerich* v. *Fleutot*, 10 B.C.R. 309; 35 S.C.R. 327.

3. Between solicitor and client.]—Plaintiffs, advocates in the Yukon, sued 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 defendants that they were to get 10 per cent. if collected by them:—Held, that by Yukon law an advocate cannot legally obtain a lump sum for professional services except under r. 524 of the North-West Territories Judicature Ordinance of 1893. *Robertson* v. *Bossuyt*, 8 B.C.R. 301.

6. Restraint of Trade.

Contract of carriage.]—A contract by a company to ship all goods consigned by them at Victoria from a certain point by the plaintiff's steamships is not void as being in restraint of trade. *The Canadian Pacific Navigation Company* v. *The Victoria Packing Company*, 3 B.C.R. 490.

C. Recovery Under Illegal Contract.

1. Return of moneys paid.]—Where a party pays money in pursuance of a contract void for illegality, in ignorance that it is an illegal contract, he is entitled to recover the money so paid. *Burgess* v. *Zimmerli*, 19 B.C.R. 428.

2. As between principal and agent.]—The general rule that persons who enter into dealings forbidden by law must not expect any assistance from the law, is not applicable so as to exonerate an agent from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the agency. If the money is paid to him in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal. *De Laval Separator Company* v. *Walworth*, (*No. 2*), 13 B.C.R. 295.

3. Separable causes of action.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs":—Held, by the Full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 10 B.C.R. 449.

4. Lease — Illegal — Premises for hotel purposes.]—Premises in Vancouver leased for use as a hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was

entered into. The lessee was stopped using the premises as a hotel by the authorities:—Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio and the maxim *in pari delicto potior est conditio defendentis* applied. Even if the lease were not void ab initio it became void by the action of the authorities in stopping the further use of the premises as a hotel. *Hickey* v. *Sciutto*, 10 B.C.R. 187.

X. Mistake.

1. Mutual mistake.]—The parties to a contract may ignore a mutual mistake and carry out their agreement according to their real intention. *Johnson* v. *Thompson and others*, 19 B.C.R. 105; 20 B.C.R. 520.

2. Unilateral mistake.]—An agreement for a sale of lands containing no reservation of the minerals thereunder, issued by the land agent of a railway company to an intending purchaser, accompanied by a deposit, does not bind the company to convey the minerals if the agent had instructions to reserve them, on the ground that there was unilateral mistake against which the Court will relieve. *Hobbs* v. *Esquimalt and Nanaimo Railway Company*, 6 B.C.R. 228.

XI. Duress and Undue Influence.

Agreement between solicitor and client.]—Plaintiff, being unable to raise money to pay off a mortgage upon his lands, applied to a solicitor, who, in consideration of certain interest and commissions, agreed to advance the necessary amount, and also to obtain time from defendant's unsecured creditors, and took as security a conveyance of plaintiff's equity of redemption in the property, with a short period for payment and redemption. Upon the evidence it appeared that there was no fraud or improper dealing on the defendant's part:—Held, there is no principle upon which any agreement a solicitor and client choose to make in the circumstances of the particular case, is to be invalidated, if no deception is practised and no advantage taken, merely because of the existence of the relationship. *Bell* v. *Cochrane*, 5 B.C.R. 211.

XII. Election.

Ratification.]—A party who elects to affirm a voidable contract, with full knowledge of all the facts, is precluded from afterwards setting up a right to rescind. *Jackson* v. *Irwin & Billings Co., Ltd.*, 20 B.C.R. 487.

XIII. Impossibility.

A. In General.

Prevention by law.]—By an agreement with the Province of British Columbia a railway company bound itself to complete a certain undertaking by a specified date, and due performance of the agreement was secured by a bond. The work was stopped owing to certain landowners obtaining injunctions against the company, which were affirmed on appeal to the Full Court, but finally dissolved on appeal to the Supreme Court of Canada a few days before the date fixed for completion of the contract. In an action on the bond, it was held, on demurrer, that it could not be said as a matter of law that in no case could such a circumstance be an excuse for non-payment within the specified period. *Attorney-General* v. *Canadian Pacific Railway Company*, 1 B.C.R., Pt. II., 350.

B. Implied Condition.

1. Failure of condition.] — Where the performance of a contract becomes impossible by reason of the failure of an implied condition, the obligation is broken off. *Topping* v. *Marling*, 15 B.C.R. 52.

2. Hotel.]—A lease of premises intended for use as an hotel becomes void if the further continuance of the use of the building as an hotel is prohibited by competent authority. *Hickey* v. *Sciutto*, 10 B.C.R. 187.

3. Sale of timber.]—One O'Brien held rights in unpatented lands and agreed to sell the timber thereon to Mackintosh, one of the conditions as to payment being that, as soon as the Crown grant should issue, Mackintosh should settle a judgment against O'Brien 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 in full settlement at the latter date, and took proceedings to enforce execution for the full amount. The execution was opposed on behalf of O'Brien, Mackintosh becoming surety for the costs and being also made a party to the proceedings:—Held, that the agreement to settle

the outstanding judgment was not made unconditionally by Mackintosh, but was limited to settling it for $500 after the issue of the Crown grant for the land. *Manley* v. *Mackintosh,* 10 B.C.R. 84; affirmed sub nom., *O'Brien* v. *Mackintosh,* 34 S.C.R. 169.

4. Terms of payment.]—The plaintiff held rights in unpatented lands and agreed to sell the timber thereon to the defendant, one of the conditions as to payment therefor being that, as soon as the Crown grant should be issued, the defendant should settle a judgment against the plaintiff, which they both understood at that time could be purchased for $500. On the issue of the grant, about six months later, the judgment creditor refused to accept $500 as full settlement at the latter date:—Held, that the agreement was conditional on the possibility of settling the judgment debt for $500. *Manley* v. *Mackintosh,* 10 B.C.R. 84; 34 S.C.R. 169.

XIV. PERFORMANCE: BREACH.

A. Who Entitled to Enforce Performance.

1. Right of contractor to compel engineer to give final certificate.]—The City of Victoria called for tenders for the construction of certain sewers, setting forth in specifications and bills of quantities the amount and character of the excavations and work to be done, and requiring persons tendering to put their prices against each item in the specifications and bills of quantities, which were to form essential parts of the contract. Plaintiffs tendered, filling in their prices for each item as required, and offering to do the work for a lump sum of $7,032, which represented their total. The specifications called for interim and final certificates of work done to be granted by W., an engineer employed by the corporation. The contract, as executed, was "to execute all works described in the specifications, bills of quantities and form of tender, which are hereby made parts of this contract, in strict accordance with all the conditions and stipulations therein set forth, in the best and most workmanlike manner, for the sum of $7,032." It turned out that the bills of quantities largely over-estimated the work. Plaintiffs obtained the contract and performed the work, and sued to recover the lump sum and extras, less amounts paid them by the defendant corporation, and to compel W., the engineer, to grant them a final certificate:—Held, that there was no privity between the plaintiffs and W., and their right of action against him, if any, was for damages for fraudulently, and in collusion with the defendant corporation, refusing his certificate. *Coughlan & Mayo* v. *Wilmot and the Corporation of the City of Victoria,* 4 B.C.R. 20.

2. Minister of the Crown as agent.]—An arrangement made between the Minister of the Crown and a railway company pending negotiations for the grant by the Crown to the company of certain lands, that the company should give certain locatees thereon options to purchase the lots occupied by them from the company at a named upset price, is not enforceable by the locatees, against the railway company, for want of privity, as the Minister of the Crown could not be considered as the agent of the locatees. *Hayden* v. *Smith & Angus,* 1 B.C.R., Pt. II., 312.

B. Time of Performance.

1. Time of the essence.]—The avowedly speculative character of the subject-matter of a contract makes time to be of the essence of the contract, even when it is not so provided in express terms. *Manson* v. *Howison,* 4 B.C.R. 404.

2. Time of the essence.]—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. *Morton and Symonds* v. *Nichols,* 12 B.C.R. 485.

3. Notice to perform.]—Where no time is specified between the parties for the carrying out of a contract, the law implies that it should be carried out within a reasonable time, having regard to all the circumstances. If there be an undue delay on the part of either party, the other party has the right to notify him that unless the contract is carried out within a specified time, such time to be reasonable, the contract will be considered at an end, and where the work to be done requires a considerable period of time he may also fix a reasonable time for its commencement. *Johnson* v. *Dunn,* 11 B.C.R. 372.

C. Conditions: Precedent.

1. Payment for extras.]—The plaintiff, a Vancouver builder, contracted to erect a

building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. On the instructions of S., who intended to occupy the building for the purpose of a bottling company, of which he was a member, and bottle defendants' beer, amongst other things, the plaintiff made alterations and additions, but no indorsement was made on the contract:—Held, that such indorsement was a condition precedent to plaintiff's right to recover. *McKinnon* v. *The Pabst Brewing Co.*, 8 B.C.R. 265.

2. Certificate.] — Plaintiff agreed with Smith to do tunnelling in mineral claims in which Smith and McLeod were interested, and the agreement was contained in correspondence, part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McLeod to certify that you have done the work." McLeod did not give a certificate. In an action by plaintiff to enforce a mechanics' lien, it was held that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover. *Leroy* v. *Smith*, 8 B.C.R. 293.

3. Failure of condition.] — Under an agreement whereby the defendants purchased all timber on the plaintiff's land, to be paid for after the defendant had removed the timber and had had it scaled by a Government official scaler, the defendants loaded a scow with timber, which was allowed to drift away and was lost before an official scaling could take place:—Held, that as the failure to scale was the fault of the defendants, they could not set that up as an answer to an action for the recovery of the price of the timber. *Rich* v. *North American Lumber Company, Limited*, 18 B.C.R. 543.

4. Sale at invoice price—Failure to produce invoices.]—In a contract for the sale of a stock of merchandise, the purchase price was fixed at an advance of ten cents on the dollar on the invoice price. The invoices were not produced in several instances where disputes arose as to the price:—Held, that the failure to produce the invoices relieved the defendants from being held to the contract. *Periard* v. *Bergeron and Rickson*, 17 B.C.R. 339.

5. Indemnity.] — In an action upon a covenant to indemnify, it is a condition of the plaintiff's right to performance that he has paid or been called upon to pay the sum indemnified against. *Baker* v. *Dalby*, 3 B.C.R. 289.

D. Repudiation.

1. Failure to pay instalment.]—Failure to pay an instalment of money due under a contract does not necessarily constitute a repudiation of the contract. *Champion & White* v. *The World Building Co.* 20 B.C.R. 156.

2. Incapacitating oneself from performance.]—A contract by defendants to employ plaintiff as brewmaster in its lager beer brewery in Victoria for three years, and during that period pay him as such brewmaster a salary of $250 a month, at the end of each month, is broken by the company incapacitating itself from continuing the plaintiff in that employment, and is not satisfied by a readiness to pay the salary at the end of each month. *Varrelmann* v. *Phœnix Brewery Company (Ltd.)*, 3 B.C.R. 135.

E. Breach by Negligent Performance.

Vis major.]—In carrying out a verbal arrangement to move a boom of logs in exchange for the loan of certain boom sticks, plaintiffs lost control of the boom, which was carried away in a gale. It was not shown that it was necessary to move the boom at that particular time, or that plaintiffs had made any time a condition for the lending of the boom sticks. There was evidence of negligence and incompetence in the operation:—Held, that the defendants not being under any obligation to move the logs at the time they did, and having selected an inopportune time and used inadequate and deficient equipment, were guilty of negligence and must be held liable for the loss. *Wattsburg Lumber Co.* v. *W. E. Cooke Lumber Co.*, 16 B.C.R. 154. Reversed, 17 B.C.R. 410.

F. Effect of Breach.

1. Damages.]—Plaintiff contracted with defendant to do work at a certain price per day and to take in part payment stock in a mining company. On completion of the work defendant failed to deliver the stock:—Held, that on defendant's failure to deliver the stock, plaintiff was entitled to damages for breach of contract and could

not be compelled to accept stock. *Miller* v. *Averill*, 10 B.C.R. 205.

2. Repudiation.]—Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain the vendor, who has accepted the repudiation, from dealing with the property as he sees fit. *Christie* v. *Fraser and others*, 10 B.C.R. 291.

XV. Discharge.

A. In General.

1. Vested right of action.]—A vested right of action can only be discharged by payment, release under seal, or accord and satisfaction. *Croasdaile* v. *Hall*, 3 B.C.R. 384.

2. Payment of smaller sum.]—A contract for payment of a certain sum of money cannot be discharged by payment and acceptance of a smaller sum. *Soder* v. *Yorke*, 5 B.C.R. 133.

B. Payment.

1. Place of payment.]—The rule that a debtor is bound to seek out his creditor in order to pay him applies when both parties are within the jurisdiction, but not when the debtor is resident abroad. *Shallcross* v. *Alaska Steamship Co.*, 8 B.C.R. 203.

2. Place of.]—Where there is a stipulation to pay money on a particular day, and no place of payment is agreed upon, it is the duty of the party liable to pay to seek out and find the payee if he is within the jurisdiction. *Morton* v. *Nichols*, 12 B.C.R. 9, 485.

3. Demand.]—A party is not bound to say yes or no at once when confronted with a demand for the payment of money, where there may be a doubt as to his liability to pay, but he is entitled to a reasonable time, according to the circumstances of the case, to consider the position and to make up his mind whether he really owes the money or not, and as to what course he will pursue. *Belcher* v. *McDonald*, 9 B.C.R. 377.

C. Appropriation of payments.

Principal and surety.]—K. made and gave to R. Bros. four promissory notes of $2,500 each, with interest at 12 per cent. R. Bros. obtained the indorsement of M. to these notes, discounted them with the defendant Company and deposited as collateral security for the payment of the notes 500 shares of the capital stock of the Vancouver Gas Company. Subsequently R. Bros. obtained a second loan on two other promissory notes, to which K. was also a party, and as security, deposited 500 additional shares of the Vancouver Gas Company. M. was not connected with this loan, nor the security deposited in respect of it, although he claimed to be entitled to the benefit of the security. In an action against K., R. Bros. and M., the defendant Company signed judgment against K. for $10,634.23 in respect of the first four notes; but on the same day, though prior to so signing judgment, they also took judgment against him for $21,000 in respect of the second loan. Following on this the defendant Company threatened to proceed to judgment against R. Bros. and M. and actually did sign judgment against R. Bros. for $21,180.23; but M. for himself obtained a four months' extension of time by depositing 250 additional shares of the Vancouver Gas Company. These shares were deposited as collateral security for the four notes of $2,500 each, and were to be returned to M. if within the four months agreed upon he paid the defendant Company a sum not less than $6,000 on account of the said notes. Before the judgment in the action, the subject of this appeal, was given, the defendant Company received dividends on the first 500 shares deposited $2,657.80, and in respect of the 250 shares deposited by M. $1,328.90, both of which sums were placed to the credit of the K.-M. account. The defendant Company also received a dividend in respect of the 500 shares deposited by R. Bros. for the second loan, but this was not credited to the K.-M. account. M., who was president of the Gas Company, got his wife to purchase the whole 1,250 shares for $8,000, which amount M. contended "was to be placed to his credit until the notes of K. were relieved or paid." This sum was carried in a suspense account to the credit of M. from December, 1894, to October, 1901. In October, 1901, the defendant Company transferred this sum of $8,000 from M.'s account and placed three-fifths of this amount to the credit of the said four notes, and two-fiftns to the credit of the notes of R. Bros. In February, 1900, the defendant Company agreed to receive from K., or his nominee, the sum of $15,000

in consideration of which they were to assign to him or his nominee the above mentioned judgments of $10,634.23 and $21,180.23, together with certain securities (mortgages) held by them. This money arrived in August, 1900, but the defendant Company did not reach a final settlement with K.'s nominees, C. & S., until November, 1901. In the meantime, they had an action pending against M. for a settlement, but abandoned the proceedings; and M. brought this action for a declaration that he had been discharged from liability to the defendant Company as surety for or as indorser of the said four notes; for an account of what had been received by the defendant Company in respect of the securities deposited by him with them under the circumstances above set out; and for payment of the amount so found:—Held, that prior to the appropriation by the defendant Company, in payment of K.'s liability, of the moneys standing to the credit of M. in their hands, there was neither an actual satisfaction of K.'s liability, nor any enforceable agreement by which the defendant Company bound itself to compound with K., and that consequently the appropriation in question was valid. That the defendant Company might rightfully appropriate the moneys received from K.'s nominees, C. & S., in liquidation of any of K.'s liabilities, and having appropriated them in payment of a liability in which M. was not concerned, M. was not entitled to an account of these moneys. *Milne* v. *Yorkshire Guarantee and Securities Corporation, Limited,* 11 B.C.R. 402. Reversed, 37 S.C.R. 331.

D. Accord and Satisfaction.

1. New agreement.]—One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C., in company with defendant, inspected the land. C. wrote plaintiffs submitting the proposition, and giving a specific description of certain land. Plaintiffs wrote to a solicitor, instructing him to prepare a conveyance thereof. The solicitor, finding that there had been a misdescription in the letter to plaintiffs, accepted a conveyance of the land actually shown by defendant to C.:—Held, in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover. *Pither & Leiser* v. *Manly,* 9 B.C.R. 257; 32 S.C.R. 651.

2. Time—Voluntary concession of.]—An agreement for the sale of mineral claims provided for payment by instalments and contained a proviso that "failure to make any of the above payments to render this agreement void as to all parties thereto, and the said (vendees) can quit at any time without being liable for any further payments thereunder from such time on." At the request of the vendees the vendors, without consideration, extended the time for payment of one of the instalments. After the original, but before the extended period for making the payment, the vendees notified the vendors that they had left. In an action to recover the amount of the instalment:—Held, that the liability of the defendants, the vendees, to pay the instalment in question was absolute upon the day named in the original agreement, and remained unaffected by the voluntary concession of further time to pay. *Webb* v. *Montgomery,* 5 B.C.R. 323.

3. Accepting part of debt and giving receipt in full.]—Defendant, after service of a writ claiming $152.16, settled with plaintiff personally by payment of $60, taking a receipt in full. Plaintiff's solicitor, being unaware of the settlement, signed judgment for the full amount and costs. Upon motion by the defendant to set aside the judgment as a breach of the settlement:—Held, that as there was no release under seal of the balance of the debt, or consideration for the agreement to accept a part in full discharge, the plaintiff was entitled to maintain the judgment. *Soder* v. *Yorke,* 5 B.C.R. 133.

XVI. CONSTRUCTIVE CONTRACTS.

A. Money Paid.

1. Request.]—Money paid by the lender for insurance premiums on policies deposited with him by the borrower as security cannot be recovered from the borrower in the absence of a request by him to pay them. *Williams* v. *Richards,* 3 B.C.R. 510.

2. Instalment of pre-emption fees.]—Where the plaintiff paid one instalment of the purchase money for a pre-emption record and afterwards the land was sold for taxes, he was held to be entitled to recover the amount as money paid to the use of the purchaser at the sale for taxes. *Moriarty* v. *Wadhams,* 1 B.C.R., Pt. II., 145.

3. Default judgment.]—If one pays a judgment got against him by default, he cannot sue to recover back part thereof, but must apply to have the judgment set aside. *Goon Gan* v. *Moore*, 2 B.C.R. 154.

B. Money Had and Received.

1. Failure of consideration.]—Where, by the error of both parties and without fraud, there has been a complete failure of consideration, a Court of equity will rescind the contract and compel the vendor to return the purchase money. *Pope* v. *Cole*, 6 B.C.R. 205; 29 S.C.R. 291.

2. Mining claim.]—Where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims, whereby the purchaser got nothing for his money, the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. *Ibid.*

3. Failure of consideration.]—A contract to procure insurance against fire in some office valid (sic) in Canada means in some company licensed to do business in Canada, and a premium paid under such contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the assured in a company not so licensed. *Barrett* v. *Elliott*, 10 B.C.R. 461.

4. Part performance of contract.]—A company which had a contract to grade and excavate a portion of a railway line, sub-let a certain portion to plaintiff. Subsequently the company went into liquidation and abandoned the contract. The plaintiff at this time had removed some 3,000 cubic yards, part of a cut of 4,710 yards, for which he was to be paid at the rate of 20 cents a yard. He did not proceed with the work after the company went into liquidation, and was not paid for what he had done. Defendants herein contracted with the railway company to continue the work at the same price as the original contractors, 23 cents per yard, and upon their completing the cut on which plaintiff had worked, they were paid for the whole, including the 3,000 yards taken out by the plaintiff. In settling with plaintiff for other work done by him under their contract, they charged him with the cost of completing the cut, $1,882.72, and credited him with $1,083.30, leaving a balance against him of $99.42, and later with a further sum of $90, as having over-credited him three cents a yard on 3,000 yards:—Held, on appeal, that plaintiff was not entitled to recover $600 for the work done by him as money had and received for him or paid to his use; that there was no privity of contract between the plaintiff and the railway company or between him and the defendants with respect to this particular work, and that the money was not paid upon a trust, express or implied; but that he was entitled to succeed as to the two items of $99.42 and $90; that he was under no obligation to the defendants to complete the work and that they could not charge him with their loss in completing it. *Tucker* v. *Puget Sound Bridge and Dredging Company*, 15 B.C.R. 393.

See BUILDING CONTRACTS.

See EQUITY.

See MINES AND MINERALS.

See SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

CONTRIBUTOR.

See GUARANTEE.

See TORT.

CONTRIBUTORY.

See COMPANY.

CONVERSION.

See TORT.

CONVEYANCE.

See DEED.

See VENDOR AND PURCHASER.

CONVICTION.

See CRIMINAL LAW.

COPYRIGHT.

Stolen material.]—The plaintiff published a "Directory of Vancouver Island and Adjacent Islands for 1909," and registered same under the Copyright Act. The defendant Company later published "Henderson's Brit-

ish Columbia Gazeteer and Directory for 1910," and the plaintiff complained that in its preparation the defendant Company made such an unfair use of his, the plaintiff's, directory by copying names from it that the publication of the defendant Company's book was an infringement upon his copyright. The defendant Company had published directories in previous years, and their defence was that plaintiff's directory was itself the result to a large extent of an unfair use of, particularly, the defendant Company's British Columbia Directory for 1905, the Victoria Directory for 1908, and the Directory for Western Canada for 1908:—Held, that the plaintiff could not, within the meaning of the term under the Copyright Act, be considered as the "author" of his own directory, the material being partly pirated, to what extent it being impossible to determine. *Bain* v. *Henderson*, 16 B.C.R. 318.

CORPORATION.

I. CORPORATION SOLE.

Covenant by, whether binding on successors.]—A covenant by a corporation sole, described in his corporate capacity, expressed to be on behalf of himself, his heirs, executors and administrators, will not bind his successors in office. *Paris* v. *Bishop of New Westminster*, 5 B.C.R. 450.

II. CORPORATION AGGREGATE.

See COMPANIES.

See MUNICIPAL CORPORATIONS.

See RAILWAY COMPANIES.

COSTS.

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I. RECOVERY OF.

1. Action for.]—A successful party may proceed to obtain the costs either by taxation and execution or by action, but not in both ways. *Nicol* v. *Pooley*, 9 B.C.R. 21, 363.

2. Want of jurisdiction.]—A Court dismissing a motion for want of jurisdiction has power to award costs. *Hendryx* v. *Hennessey*, 3 B.C.R. 53.

3. Right of solicitor to proceed for costs.]—Where a defendant in good faith settles an action in such a way as to deprive the plaintiff's solicitor of his costs, such solicitor is not entitled to leave to proceed with the action for the recovery of his costs. *Rideout* v. *McLeod*, 6 B.C.R. 161.

II. Following the Event.

1. Event.]—Where it is provided that costs shall follow the event, the word event may be read distributively. *Hopper* v. *Dunsmuir*, 12 B.C.R. 18.

2. Issue.]—An issue is not equivalent to the event, and where a railway company appealed from an award of arbitrators on several grounds, on all of which, with the exception of that relating to the rate of interest allowed by the arbitrators, they failed, it was held that the question of interest was an issue, but not an event. *Vancouver, Westminster and Yukon Railway Co.* v. *Sam Kee*, 12 B.C.R. 1.

III. Good Cause for Depriving of.

1. Discretion of Court in regard to.]—Under r. 751 the discretion as to costs in an action tried with a jury is exerciseable by the judge or Court of first instance only; the Full Court has no power to make any order thereon except upon appeal upon the question whether or not "good cause" has been shown for depriving the successful party of his costs. *Gibson* v. *Cook*, 5 B.C.R. 534.

2. Depriving successful party of costs.]—In an action for libel between two newspapers, arising out of statements as to their respective circulation, the trial judge found on the facts that the statement made by the defendant newspaper was not established; but he came to the conclusion that there had been no special damage suffered by the plaintiff newspaper in consequence of the statement, and gave judgment dismissing the action without costs:—Held, that under the rule governing costs in British Columbia, as distinguished from that in force in England, the trial judge must find good cause for depriving a successful party of his costs; and here there was not such good cause. *The World Printing and Publishing Company, Limited* v. *The Vancouver Printing and Publishing Company, Limited*, 13 B.C.R. 220.

3. Conduct of party.] — Where the plaintiff seeks to take an unfair advantage of a mistake of the defendant, and the action is of an aggressive nature, the plaintiff should be deprived of costs. *Richards* v. *Bank of British North America*, 8 B.C.R 143.

4. Good faith.]—Where a party is not acting in good faith, though he may be stricto jure entitled to judgment, he may be deprived of his costs. *Goon Gan* v. *Moore*, 2 B.C.R. 154.

5. Libel.]—The fact that a plaintiff in a libel action recovers merely a nominal sum as damages does not per se warrant his being deprived of costs. *Mackenzie* v. *Cunningham*, 8 B.C.R. 206.

6. Doubtful procedure.]—Where there is a doubt as to procedure, based upon a decision of the Court, the Court, in its discretion, will not order costs to the successful party. *Disourdi* v. *Sullivan Group Mining Co.*, 14 B.C.R. 241.

7. Oppressive conduct.] — Where the plaintiff's conduct has been oppressive throughout the transaction, and he has made an unfounded charge of fraud, he should be deprived of his costs. *Wainwright* v. *Farmer*, 16 B.C.R. 468.

8. Misleading defence.]—Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy and prolong the trial, the Court, exercising its discretion under r. 132, will make no order for costs. *McArthur* v. *The Johnson*, 18 B.C.R. 94.

IV. In Particular Cases.

A. Of Trustees.

Trustees—Summons for an account.]—Trustees having received money under a decree in one of several actions relating to the same subject-matter to which they were parties, an originating summons was obtained by other parties to the same actions calling upon the trustees for an account, not directed by the decree in question, and to pay into Court:—Held, by the Divisional Court, that the proceeding, by originating summons, was warranted by r. 591, sub-secs. (c), (d), and an objection that the motion should have been made in one of the pending actions overruled, and that the trustees were properly ordered per-

sonally to pay the costs of the motion, and that they should also personally pay the costs of the appeal. *Boscowitz* v. *Belyea*, 4 B.C.R. 527.

B. Of Personal Representatives.

Resisting claim.]—Where executors act reasonably in resisting a claim against the estate, they are entitled to their costs out of the estate. *Raser* v. *McQuade*, 11 B.C.R. 161.

C. Of Creditors' Action.

Solicitor and client.]—The costs incurred in a creditors' action in preserving for the creditors property which had been fraudulently transferred constitute a first charge upon the fund recovered, and are allowed as between solicitor and client. *In re Hood*, 9 B.C.R. 233.

D. Of Foreclosure Actions.

Untenable defence.]—In an action for foreclosure of the purchaser's rights under an agreement for sale, where the purchaser raises an untenable defence, he is personally liable to pay the costs occasioned thereby. *Essen* v. *Cook*, 20 B.C.R. 213.

E. Of Inquisition in Lunacy.

Costs of inquisition terminated by death of alleged lunatic before verdict.]—K., a person alleged to be of unsound mind, died during the progress of an inquisition as to his lunacy, and before verdict. On an application by the petitioner in lunacy, supported by an affidavit that the proceedings were taken bona fide, and for the sole and only purpose of protecting K.'s estate, the judge made a declaration that the costs of the inquisition had been properly incurred and ought to be paid out of K.'s estate in due course of administration. *In re Kaye*, 6 B.C.R. 61.

F. Of Collision Actions.

Both to blame.]—Where both vessels are in fault, the rule is to give costs to neither. *Canadian Development Co.* v. *Le Blanc*, 8 B.C.R. 173.

G. By and Against the Crown.

1. Certiorari.]—The old rule in proceedings by way of certiorari that the Crown neither pays nor receives costs is no longer in force, and the Court will grant the costs of a successful appeal to the Crown. *R.* v. *Little*, 6 B.C.R. 321.

2. Certiorari.]—The Crown Costs Act does not apply to criminal proceedings, and therefore an unsuccessful applicant for a writ of certiorari may be condemned in costs. *R.* v. *Jones*, 16 B.C.R. 117.

3. Habeas corpus.]—Where the applicants have been unlawfully deprived of their liberty, they ought to be indemnified as to their costs. *In re Narain Singh and others*, 13 B.C.R. 477.

H. Action at Suit of Relator.

Relator.]—In an action by the Attorney-General at the instance of a relator, if the action fails, the costs are payable by the relator. *Attorney-General* v. *Ruffner*, 12 B.C.R. 299.

I. Where Private Rights Defended by the Crown.

Right to.]—In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. On action taken by plaintiff Company to test the statute, judgment was given in favour of the defendant. The Company appealed and the appeal was dismissed:—Held, as to costs, that defendant was not in a position to claim any costs against plaintiff Company, as his rights were being asserted by and defended at the expense of the Crown. *Esquimalt and Nanaimo Railway Company* v. *Hoggan*, 14 B.C.R. 49.

J. Against Party Indemnified.

Registrar of joint stock companies.]—Where the registrar is indemnified by the company at whose instance he refuses to register another company with a similar name, he must pay the costs of an action in which the latter company successfully vindicates its right to the use of the name. *British Columbia Permanent Loan, &c., Co.* v. *Wootton*, 6 B.C.R. 382.

K. Replevin.

No affidavit.]—Where no affidavit is filed before the issue of the writ, and the writ is in consequence set aside, unless this

ground is taken in the summons, no costs will be allowed. *McGregor* v. *McGregor*, 6 B.C.R. 258.

L. Trespass.

Misconduct of plaintiff.]—Where the plaintiff could have prevented the trespass, but did not; on the contrary, rather encouraging it, with a view to an action for damages, each party was left to bear his own costs. *Vedder* v. *Chadsey*, 1 B.C.R., Pt. II., 76.

M. Specific Performance.

Variation.]—Where a plaintiff sues for specific performance of a contract, including a term which the defendant disputes, and at the trial is given the option of having the contract rescinded or of taking it without the disputed term, no costs will be given to either party. *Hobbs* v. *Esquimalt and Nanaimo Railway Company*, 6 B.C.R. 228.

N. In Actions on Illegal Contracts.

Defence of illegality.]—Where illegality is set up as a defence to an action on a contract, the action is dismissed without costs. *British Columbia Stock Exchange* v. *Irving*, 8 B.C.R. 186.

O. Of Libel Actions.

Five cents damages.] — Where in an action for libel the plaintiff recovers only five cents by way of damages, he is entitled to his costs in the absence of evidence of misconduct or of any reason for depriving him of costs other than the smallness of the damages awarded. *Emerson* v. *Ford-McConnell, Ltd.*, 16 B.C.R. 193.

P. Of Actions by Liquidator.

Personal liability.]—Where an action is brought by the liquidator of a company in his own name he is personally liable for costs, and the fact that he obtained the leave of the Court to sue will not relieve him of his liability in this respect. *Jackson* v. *Cannon*, 10 B.C.R. 73.

Q. Of Winding Up.

1. Failure to enter appearance.]—Held, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition as required by r. 58 of the Winding-Up Rules passed by the judges on 1st October, 1896, but who appeared by counsel on the return of the petition, which was dismissed with costs, were not entitled to costs. The fact that their counsel was heard without objection by petitioner's counsel makes no difference. *In the matter of the Winding-up Act and in the matter of the Albion Iron Works Company, Limited*, 10 B.C.R. 351.

2. Proceeding with action without leave.]—A plaintiff who has, without the consent of the Court, brought an action against a company in liquidation, must pay the costs of the action incurred after receipt of notice of the company's position. *The Charles H. Lilly Company* v. *The Johnston Fisheries Co.*, 14 B.C.R. 174.

R. Of Matters of Procedure.

1. In General.

1. Doubtful question.]—Where there is a doubt as to procedure, based upon a decision of the Court, the Court may exercise its discretion by not allowing costs to the successful party. *Disourdi* v. *Sullivan Group Mining Co.*, 14 B.C.R. 241.

2. Separate Defences.

Who liable.]—Where defendants sever in their defence, the successful plaintiff is entitled to costs against them jointly, and each defendant is liable for the costs of his separate defence, but not for any costs occasioned solely by the other. *Merchants Bank* v. *Houston*, 7 B.C.R. 352.

3. Default of Defence.

Motion for judgment.]—The plaintiff is entitled to the costs of a motion for judgment in default of defence when the defence is filed after the service of the notice of motion. *San Francisco, &c., Co.* v. *Martin*, 5 B.C.R. 538.

4. Withdrawing Defence.

Abandonment of part.]—In the statement of defence to an action under Lord Campbell's Act by the plaintiff to recover damages for the death of her husband, killed owing to the alleged negligence of the defendants, the defendants in their statement of defence denied that the plaintiff

was the widow of the deceased, but at the trial moved, upon notice, to withdraw that defence. The Chief Justice allowed the amendment, but imposed as a condition, against the consent of the defendants' counsel, that the defendants should pay the costs of the action up to and including the costs of the first day of the trial:—Held, that the defendants had a right to withdraw any part of their defence upon payment of the costs thrown away by the plaintiff owing to that issue being raised. *Gordon* v. *The Corporation of the City of Victoria*, 6 B.C.R. 129.

5. Demurrer.

Point of law not raised.]—The plaintiff may have a point of law which is raised on the pleadings disposed of before trial, but there is no duty cast on the defendant to do so, and therefore, where a defendant succeeds on a point of law at the trial which could have been so disposed of, he is entitled to the usual costs of the trial. *Hall* v. *Reginam*, 7 B.C.R. 120.

6. Application for Stay of Execution.

Indulgence.]—An application for a stay of execution is an application for an indulgence, and the applicant should pay the costs. *Alexander* v. *Walters*, 14 B.C.R. 250.

7. Third Party Proceedings.

Discretion.]—The question of allowing a third party his costs is purely one of discretion, depending upon the circumstances of the case. *Baker* v. *Atkins*, 14 B.C.R. 320.

S. Of New Trial.

1. General rule.]—As a general rule the costs of the first trial abide the result of the second. *British Columbia Iron Works* v. *Buse*, 4 B.C.R. 419.

2. Successful party in fault.]—Where, through the negligence of the party who succeeds in a motion for a new trial, evidence was excluded at the first trial which might have seriously affected the result, he will be compelled to pay the costs of the first trial. *Courtnay* v. *Canadian Development Co.*, 8 B.C.R. 53.

3. Excessive damages.]—Where the Court of Appeal orders a new trial on the ground of excessive damages and the jury increases the amount on the second trial and the Court on a second appeal reduces the amount of damages, and the plaintiff is practically in the same condition at the time of both trials, he is entitled to the costs of both trials. *Taylor* v. *British Columbia Electric Railway Company*, 16 B.C.R. 420.

4. Excessive damages.] — Where the defendants, in their pleadings and at the trial, admit their liability, and only contest the action on the question of the amount of damages, and the verdict is set aside on the ground of excessive damages, the plaintiff will be ordered to pay the costs of the abortive trial. *Carty* v. *British Columbia Electric Railway Company*, 16 B.C.R. 3.

T. Of Appeal from Summary Conviction.

Against a person not party to the proceedings.]—A County Court judge has no power to award costs of an appeal to him from a summary conviction, to be paid by a person not a party to the conviction or proceedings before the justices, though improperly made respondent to the appeal, and who has not appeared thereon. *In re Bole*, 2 B.C.R. 208.

V. Taxation.

A. In General.

1. Costs thrown away owing to absence of judge.]—The costs to which a party is entitled on a party and party taxation are such costs as have been incurred by the act of the opposite party, and costs of the day of the trial thrown away by reason of the absence of the trial judge disallowed upon review. *The William Hamilton Manufacturing Company* v. *The Victoria Lumber Company*, 5 B.C.R. 53.

2. When payable.]—On an application in chambers costs are generally made payable by the unsuccessful party in any event, but not forthwith. *City of Victoria* v. *Bowes*, 8 B.C.R. 15.

3. Disbursements.]—The taxing officer has jurisdiction to order the cross-examination of a party on his affidavit of disbursements. *Johnson* v. *Moore*, 17 B.C.R. 219.

4. Tariff.]—A charge in a bill of costs, although not justified by 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 Cowan,* 7 B.C.R. 353.

5. Change of tariff.]—Plaintiff taxed, in 1896, his costs of recovering judgment, and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff finally, in 1901, recovered judgment, with costs:—Held, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand. Semble, costs incurred before the new tariff came into force were still taxable under the old tariff. *Harris* v. *Dunsmuir* (2), 9 B.C.R. 317.

6. New scale.]—Where some of the items in a bill of costs are for proceedings taken before the introduction by statute of a new scale of taxation, and others for proceedings taken since the introduction of the new scale, all the items must be taxed on the new scale. *Youdall* v. *Douglas,* 2 B.C.R. 342.

7. Directions.] — Where a summons is taken out in respect of any of the matters for which a summons for directions might have been taken out, the costs will be reserved, to consider whether, in the event of any other summons being taken out, all such applications could not have been conveniently dealt with under a summons for directions, and if so, only the costs of such an application will be allowed. *Jones* v. *Pemberton,* 6 B.C.R. 67.

B. Review of Taxation.

1. Powers.]—A taxation may be reviewed under r. 583 as well as under r. 790 (of the R.S.C. 1890). *Fry* v. *Botsford,* 9 B.C.R. 207.

2. Evidence.]—On a review of taxation an affidavit by counsel who attended at the taxation, at the trial and on the appeal, was received. *Eastern Township's Bank* v. *Vaughan,* 15 B.C.R. 299.

C. No Order.

No order as to costs.]—The statement "no order as to costs" means that each party must pay his own costs. *McCune* v. *Botsford,* 9 B.C.R. 129.

D. Briefs and Transcript of Evidence.

1. Allowance for.]—Although there is no allowance in terms in the tariff for the costs of making briefs on appeal, th be allowed under the heading of "Co pleadings, briefs, and other docu where no other provision is made though there is no allowance fo paid to the official stenographer, hi script may be taxed as a copy. *General Electric Co.* v. *Bank of Columbia,* 5 B.C.R. 34.

2. Printing appeal books, costs allowed.]—There being no provision Rules of the Supreme Court and no the schedule of costs permitting the ing of appeal books upon appeals Divisional Court, the costs of readi proof of the printed case and for p of same were disallowed, and an amen of the bill of costs by inserting a cha written copies of the appeal book refused after the improper item ha unsuccessfully supported on appeal. v. *Mesher,* Cassidy's British Columbi Notes, Pt. II., 63.

E. Fees to Counsel.

1. View by counsel.]—Plaintiff obtained a review of the taxation defendant's costs, an affidavit by who attended the taxation, and was trial and on appeal, was submitte allowed to be read. The affidavit shown that the applicant inform taxing officer that a view by counsel the trial was necessary and had bee the judge refused to disallow the fee, or interfere with the discretion registrar. *Eastern Townships Ba Vaughan,* 15 B.C.R. 299.

2. Application for increased fee an application for increased counsel formal summons is necessary; me letter notifying the other side of in to apply at a time mutually conv and the applicant should have a cer from the registrar, showing dates and of sittings and the highest fee taxa the registrar. These facts should b mitted without any argument. O tions on the reasons which will be into consideration by a judge in exe this discretion. *Bryce* v. *Canadian Railway Company,* 14 B.C.R. 155.

F. Witness Fees.

1. Not called at trial.]—The onus a party seeking to tax fees for a witn

called at the trial, to show, by affidavit, the relevancy and nature of his evidence, the necessity for it, that he was in attendance, and the reason why he was not called. *Eastern Townships Bank* v. *Vaughan*, 15 B.C.R. 299.

2. Surveyors.]—The principle to be acted upon in dealing with allowances to witnesses for the expense of surveying is that all work should be allowed for which a reasonable man preparing for trial would feel bound to undertake in order to prove his case. *Bogardus* v. *Hill*, 18 B.C.R. 358.

G. Costs of Party to Action.

Coming from abroad.]—The plaintiff, resident in England, came to British Columbia to prosecute the action, remained until after the trial, and obtained a verdict:—Held, on taxation of costs, a party to an action coming from abroad to prosecute it is not entitled to tax against the other side either his travelling expenses or the cost of his subsistence while awaiting trial. *Adams* v. *McBeath*, 3 B.C.R. 34.

H. Commission to Take Evidence.

1. Not used at the trial.]—Where evidence taken on commission is not made use of at the trial, the costs of the commission will not be allowed. *R.* v. *Nichol*, 8 B.C.R. 276.

2. Second commission.]—A second commission to New York granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action. *Gill* v. *Ellis*, 5 B.C.R. 137.

I. Inspection.

Inspection.]—Defendants got an order at the trial for inspection of the vein in plaintiff's claim which they alleged was a continuation of a vein the apex of which was within the limits of their own claim, and the plaintiffs alleged such an order necessitated inspection by them to meet any evidence adduced by reason of the defendants' inspection, and asked for an adjournment, which was granted only on the terms that all costs occasioned thereby be borne by them in any event:—Held, that the costs should abide the event of the issues to which inspection related. *Iron Mask* v. *Centre Star*, 7 B.C.R. 66.

J. Settling Pleadings.

Not perusal.]—On receipt of a pleading from the opposite party, the fee allowed by item 230 for settling and revising refers to a party's own pleadings, not to the pleadings received from the opposite party. *Blair* v. *British Columbia Express Co.*, 11 B.C.R. 153.

K. Garnishee Proceedings.

Money paid into Court.]—Costs of garnishee proceedings are not allowed where defendant pays money into Court before judgment. *Shawnigan Lake Lumber Co.* v. *Fairfull*, 7 B.C.R. 58.

L. Separate Defences.

Costs of separate defences—Who liable for.]—Where defendants separate in their defence, a plaintiff who obtains judgment against them is entitled to costs against them jointly, and each defendant is liable for the costs of his separate defence, but not liable for any costs occasioned solely by the other. *Merchants Bank* v. *Houston*, 7 B.C.R. 352.

M. Of Demurrer.

Law point undisposed of before trial.]—Under r. 233 the plaintiff may have a point of law raised on the pleadings disposed of before trial, but there is no duty cast on a defendant to do so, and therefore where a defendant succeeds on a point of law at the trial which could have been so disposed of, he is entitled to the usual costs of trial. *Hall* v. *The Queen and the Kaslo and Slocan Railway Company*, 7 B.C.R. 120.

N. Motion for Judgment in Default of Defence.

Filing defence.]—A plaintiff is entitled to costs of a motion for judgment in default of defence when the defence is filed after service of the notice of motion. *San Francisco Mining Company, Limited* v. *J. & E. Martin*, 5 B.C.R. 538.

O. Adjournment.

No court room available.]—No costs of an adjournment of trial will be allowed to the successful party where the adjournment was caused by reason of there being no court room available. *MacDonell* v. *Perry*, 10 B.C.R. 326.

P. Abortive Trial.

Criminal libel action.]—In a criminal libel action, defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken for use at the trial. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial defendant was acquitted, but the evidence was not used, owing to the private prosecutors giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—Held, that defendant was not entitled to the costs of the abortive trials. *Rex* v. *Nichol,* 8 B.C.R. 276.

Q. Attempted Settlement.

Negotiations.] — After an appeal was opened, it was stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful, and the appeal was ultimately dismissed with costs:—Held, that the successful party was entitled (1) to a counsel fee (under item 224 of the Tariff of Costs), on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 81 of schedule No. 4. *Milton* v. *The Corporation of the District of Surrey (No. 2),* 10 B.C.R. 325.

R. Improper, Vexatious and Unnecessary Proceedings.

Directions.]—Where a summons is taken out with respect to any of the matters for which under r. 268 (a) a general summons for directions should have been taken, the costs will be reserved, to consider whether, in the event of any other summons being taken out, all such applications could not have conveniently been dealt with under a general summons, and the costs only of such an application allowed. *Jones* v. *Pemberton,* 6 B.C.R. 67.

VI. Solicitor and Client.

Payment of the costs of reference.]—The provisions of sec. 79 of the Legal Professions Act as to the payment of costs of reference when one-sixth is taxed off, applies to all references provided for in secs. 76, 77 and 78 of the Act. *In re G. G. Duncan and Carscallen,* 18 B.C.R. 374.

VII. On County Court Scale.

1. Discretion.]—Plaintiff having brought his action in the Supreme Court for $2,010, and recovering only $160:—Held, that, notwithstanding the modification of sec. 100 of the Supreme Court Act by marginal rule 976, the amount recovered being more than $100, costs must follow the event and be allowed on the Supreme Court scale. *Young Hong and Qwong Sang Co.* v. *Macdonald,* 15 B.C.R. 303.

2. Discretion.]—An appeal in this case, reported (1910), 15 B.C.R. 303, was allowed on the ground that the facts showed that the learned judge had not exercised his discretion, and the case was remitted to be dealt with on that basis. *Young Hong and Quong Sang Ho* v. *Macdonald,* 16 B.C.R. 133.

3. No discretion.]—In a Supreme Court action, the judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court. *Russell* v. *Black,* 10 B.C.R. 326.

4. Discretion.]—The costs of an action in the Supreme Court, which might have been brought in the County Court, are not necessarily taxable on the County Court scale. *Royal Bank of Canada* v. *Harris,* 8 B.C.R. 368.

5. Counterclaim.]—Where the defendant in a Supreme Court action counter-claims for an amount beyond the jurisdiction of the County Court, costs on the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court. *Pacific Towing Co.* v. *Morris,* 11 B.C.R. 173.

6. Banker's lien.]—Where an action was brought to establish a lien for $197.97, only costs on the County Court scale were allowed. *Richards* v. *Bank of British North America,* 8 B.C.R. 209.

7. Bill of exchange.]—Where an action was brought on a bill of exchange for $312.15, costs only on the County Court scale were allowed. *McPherson* v. *Johnston,* 3 B.C.R. 465.

8. Rylands v. Fletcher.]—An action to enforce liability under the principle of Rylands v. Fletcher, where the damages sought to be recovered only amount to $300, should be brought in the County Court. *Crewe* v. *Mottershawe,* 9 B.C.R. 246.

VIII. Refund After Successful Appeal.

1. Order of Court of Appeal silent.]—The plaintiff recovered a judgment in the Supreme Court which was reversed in the Court of Appeal, and the plaintiff paid the defendant's costs. The Supreme Court of Canada restored the original judgment, but made no order as to the costs paid by the plaintiff. On application by the plaintiff, an order was made for the defendant to refund these costs. *Davies* v. *McMillan*, 3 B.C.R. 72.

2. Undertaking.]—Upon an application of a successful appellant to include in the minutes of the order for judgment a direction to return the costs of the trial paid upon counsel's undertaking to refund in case the appellant were successful:—Held, that it is not within the province of the Court to make the order. After taxation has taken place the parties may then apply in the proper quarter to have an undertaking carried out according to its true intent. *Thompson* v. *The Columbia Coast Mission*, 20 B.C.R. 144.

IX. Time for Payment.

1. Interlocutory.]—There is no fixed rule that in all cases the costs of interlocutory proceedings shall not be payable until the conclusion of the litigation. *Jones* v. *Davenport*, 7 B.C.R. 452.

2. Interlocutory.]—In the case of applications in chambers, costs are generally made payable by the unsuccessful party in any event, but not forthwith. *Victoria Corporation* v. *Bowes*, 8 B.C.R. 15.

X. Security for Costs.

A. Application for.

Evidence in opposition to.]—Where a party resident out of the jurisdiction opposes an application for security for costs, he should set out clearly and frankly in his affidavit, for the information of the Court, the facts on which he relies. *Richards* v. *Verrinder*, 15 B.C.R. 431.

B. For What Costs Ordered.

Foreign company.]—A foreign company, on appealing from a judgment against it at the trial, cannot be ordered to give security for the costs of the action ordered to be paid by it by the judgment appealed from, as well as security for the costs of the appeal. *Nelson, &c., Railway Co.* v. *Paris Belle Mining Co.*, 5 B.C.R. 166.

C. When Ordered to be Given.

1. Where plaintiff is a judgment creditor of defendant.]—Security for costs, on the ground that the plaintiff is resident outside the jurisdiction, will not be granted to a defendant against whom the plaintiff holds an unsatisfied judgment for an amount sufficient to cover the costs of the action. *Horsfall* v. *Phillips*, 3 B.C.R. 352.

2. Residence of wife.]—The residence of a wife, not living away from her husband, is at the place of residence of her husband, and the defendant is not entitled to security for costs from the plaintiff on the ground that she is living in California, her husband being resident in Victoria. *Cowan* v. *Cuthbert*, 3 B.C.R. 373.

3. Extra-provincial company.] — An extra-provincial company must give security for costs under R.S.B.C. 1897, c. 44, sec. 144, notwithstanding it is suing along with a resident of the Province and has assets within the Province. *McClary* v. *Howland*, 7 B.C.R. 299.

4. Foreign company—Lessee in Victoria.]—An American steamship company having its head office in Seattle was the lessee of certain premises in Victoria, where applications for freight and passage could be made to an agent:—Held, that the company was a foreign company within the meaning of sec. 144 of the Companies' Act, and was bound to give security for costs. *Alaska Steamship Co.* v. *Macaulay*, 8 B.C.R. 84.

5. Nominal insolvent plaintiff.] — The Court will order a nominal insolvent plaintiff to give security for costs of the action. Where a party is ordered to give security for costs within a limited time, and makes default, he will be compelled to pay the costs of a motion to dismiss the action for the non-compliance as a condition precedent to his right to furnish the security and proceed. *Cowan* v. *Patterson*, 3 B.C.R. 353.

6. Plaintiff divested of interest in action.]—The Court will order a plaintiff to give security for costs who has divested himself of his interest in the action, either before or after suit, and who appears to have no property or means. *Beer* v. *Collister*, 3 B.C.R. 79.

7. Test actions.]—Twenty-nine actions by different plaintiffs were commenced

against defendants at one time, and subsequently forty-four similar actions were commenced. One action, known as the Leadbeater action, was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the Full Court with the Leadbeater action and ordered to be tried as test actions for the whole seventy-three. In the Leadbeater action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction and in the other three they resided outside the jurisdiction:—Held, that the plaintiffs outside the jurisdiction should not be required to give security for costs. *Silla* v. *Crow's Nest Pass Coal Company, Limited,* 10 B.C.R. 224.

8. When order increasing will be allowed.] — Plaintiff residing outside the jurisdiction, voluntarily deposited $100 as security for costs. Upon motion by defendant, after appearance, to increase the amount to $150:—Held, (1) the amount in which security is to be given is in the discretion of the Court. (2) An order increasing security for costs will only be made after the amount furnished has been exhausted. *McLean* v. *The Inland Construction and Development Co., Ltd.,* 3 B.C.R. 307.

9. Address.] — Security will not be ordered where indorsement of address is sufficient, unless misleading address deliberately given. *Dundas* v. *McKenzie,* 10 B.C.R. 174.

10. Temporary absence.]—The plaintiff, having been returned by an examining board as having failed to pass the requisite examination to entitle him to practise his profession, brought an action against the board of examiners for damages for fraud and for conspiracy. At the time of action brought, he was living and practising at a place without the jurisdiction. On an application for an order to compel him to give security for costs, he filed an affidavit stating that his absence was only temporary, that his home was in Victoria and that his intention was to present himself for examination again:—Held, that his absence was due to the action of the defendants, which compelled him to follow his profession outside the jurisdiction pending his admission, and that the application must be refused. *Richards* v. *Verrinder,* 14 B.C.R. 438.

11. Ownership of property within jurisdiction.]—A plaintiff resident outside the jurisdiction cannot avoid giving security for costs by showing ownership of shares in a registered foreign company owning property within the jurisdiction or of mining claims the value of which are purely speculative and problematic. *Trimble* v. *Cowan,* (*No. 2*), 20 B.C.R. 238.

12. Insolvent suing in representative capacity.]—While as a general rule security for costs will be ordered in case proceedings are taken by an insolvent person for the benefit of other persons, this rule does not apply in the case of an executor. If he is authorized by statute to take proceedings for the benefit of other persons, it makes no difference that the moneys recovered are not payable to the executor as part of the estate, but are payable directly to the persons beneficially interested. *Kruz* v. *Crow's Nest Pass Coal Company, Limited,* 14 B.C.R. 385.

13. Third parties.]—Security to be given by, where substituted as defendants by their request. *Wilkerson* v. *City of Victoria,* 3 B.C.R. 367.

14. Insolvent company.] — Defendants applied, under sec. 114 of the Companies Act, for the costs of the action, which had been decided in their favour, and also for the costs of the appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, defendants were aware of the plaintiffs' inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place the 27th of June, 1906, and the application for security was made on the 30th of July, 1906:—Held, on appeal, that the application was made too late, plaintiffs having in the meantime perfected all necessary steps for taking an appeal. Held, as to the costs of the appeal, that sec. 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed. *Star Mining and Milling Company, Limited Liability* v. *Byron N. White Company* (*Foreign*), (*No. 2*), 12 B.C.R. 355.

See APPEAL.

COUNTY COURT PRACTICE.

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I. In General.

1. County Court jurisdiction.]—There is jurisdiction under the County Court Act and rules, and it is the proper course to entertain questions of practice arising in that Court upon summons in Chambers in the same manner as in Superior Court actions. *Wilkerson* v. *City of Victoria*, 3 B.C.R. 366.

2. Jurisdiction.] — The County Court judge has no power to apply the Supreme Court rules when the County Court Act and rules deal with the subject of pleadings. *Bailey* v. *Granite Quarries, Limited*, 18 B.C.R. 149.

3. Discretion.]—On a motion to strike out a plaint, the County Court judge having exercised his discretion as to the application of the Supreme Court rules, under sec. 77 of the County Courts Act, his decision is final and there is no appeal. *Ibid.*

4. Minute of order.]—Where a registrar is present and takes a minute of an order, the minute so taken is conclusive even though the judge's recollection of the order is different. *Wallace* v. *Ward*, 9 B.C.R. 450.

II. Ouster of Jurisdiction.

Mining jurisdiction.] — Sec. 34 of the County Courts Act which provides, inter alia, that if in any action of tort the plaintiff shall claim over $250 and the defendant objects to the action being tried in the County Court and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court under the mining jurisdiction of that Court. *Muirhead* v. *Spruce Creek Mining Company, Limited*, 11 B.C.R. 1.

III. Locality of Cause of Action.

Dwells or carries on business.]—Where a company, operating under a Dominion charter, but having its head office in Manitoba, although registered to carry on business in British Columbia, and having a local office in the latter Province, pursuant to the British Columbia Companies Act, was sued in British Columbia for a cause of action arising in Manitoba:—Held, that the Company did not come within the provisions of sec. 67 of the County Courts Act providing that a defendant may be sued in the county in which he dwells or carries on business, and that, the cause of action having its origin in another Province, the registration by the company in British Columbia did not benefit the plaintiff. *Pearlman* v. *Great West Life Insurance Company*, 17 B.C.R. 417.

IV. Plaint and Particulars.

1. Allegations showing jurisdiction.]—After judgment had been signed in default of a dispute note in a County Court action, in which it did not appear on the face of the process that the Court had jurisdiction, the defendant filed a dispute note (what it contained was not shown) and applied to set aside the judgment and for leave to defend on the merits, and on the hearing of the application, which was dismissed, facts were disclosed showing that the Court had jurisdiction:—Held, that County Court process should show jurisdiction on its face, but that the defendants, by filing the dispute note and applying for leave to defend on the merits, had waived their right to object to the jurisdiction. *Beaton* v. *Sjolander*, 9 B.C.R. 439.

2. Addresses of parties.]—The statement in the plaint of the residence of the plaintiff (temporarily resident in California) as the wife of Maynard Havelock Cowan, of Victoria," etc.:—Held, sufficient. Statement of the residence of defendants as "of Broad Street, Victoria, Auctioneers":—Held, sufficient. *Cowan* v. *Cuthbert*, 3 B.C.R. 373.

V. Actions By and Against Partnerships.

Married woman.]—L., who had been a member of a firm doing business under the

firm name of the Pacific Land Company, retired from the firm after the registration of the same under the Partnership Act, leaving R., a married woman, sole member. Subsequently to his retirement the transaction in question in this action arose:—Held, that R. was entitled to sue in the County Court under Order III., r. 17, and that, although she was a married woman, Order V., r. 3 did not apply in the circumstances. *Pacific Land Company* v. *Jamieson,* 15 B.C.R. 219.

VI. SERVICE OF PROCESS.

Foreign railway company.]—A person employed in British Columbia by a foreign railway company which has no line of railway in the Province, such person acting merely as commercial agent to solicit orders for freight to be forwarded over the company's lines, is a person in the employ of the company, proper to be served with any process under marginal rule 100. *Gillis Supply Company, Limited* v. *Chicago, Milwaukee and Puget Sound Railway Company (No. 1)*, 16 B.C.R. 241.

VII. TRANSFER OF ACTION.

1. Time of taking effect.]—The order transferring an action from the County Court to the Supreme Court takes effect as soon as pronounced. *Parrot* v. *Cheales,* 13 B.C.R. 445.

2. Relief sought.]—Defendant Pemberton, as first mortgagee, exercised his power of sale and realized some $2,950. From this he satisfied certain charges and liens. Plaintiff, a second mortgagee, sued for an account and distribution arising from the mortgage sale. Defendant applied, under sec. 73 of the County Courts Act, for an order remitting the action for trial to the County Court, the plaintiff's mortgage claim amounting to only $130:—Held, refusing the application, that if the subject-matter was founded in contract, it was not a contract to which the defendant Pemberton was a party, but that the relief sought against him was on the ground that he was in reality a trustee having in his hands moneys which the plaintiff contended should be applied in satisfaction of her claim. *Soper* v. *Pemberton and Godfrey,* 15 B.C.R. 69.

VIII. AMENDMENT AND WITHDRAWAL.

Discretion to allow.] — In a County Court action to recover a balance of moneys due under a mining agreement, defendant filed a dispute note containing a counterclaim setting up breaches of the covenants and conditions of the agreement, and asking for damages. Subsequently defendant intimated his desire to amend the dispute note and counterclaim, as he had drawn them hurriedly in order to file them for the next sittings of the Court. Plaintiff consented, and stated that as the dispute note and counterclaim raised new issues which he could not plead as a counterclaim, he wished to amend. Defendant agreed, on condition that he could file an amended defence and counterclaim, but subsequently, on the same day, further intimated that the action ought to be transferred to the Supreme Court, and asked plaintiff to consent to such transfer. Plaintiff declined, and defendant forwarded the dispute note, omitting the counterclaim, for which at the same time he issued a writ in the Supreme Court, and sent to plaintiff a discontinuance of the counterclaim in the County Court. Plaintiff replied that it was on a count of the counterclaim that he had amended the plaint and added to the claim a claim for damages. At the trial in the County Court defendant moved for leave to withdraw the counterclaim, stated that he was not prepared to offer any evidence in support of it, and produced the correspondence. The motion was dismissed:—Held, that the trial judge was wrong in that (1) there was no counterclaim before him to deal with. (2) That the arrangement arrived at was the ordinary consent to amend pleadings as the solicitor may be advised, and that the essence of such an arrangement is that the parties are to begin de novo. (3) That defendant had the right, if he chose, to discontinue the counterclaim and select his own forum. (4) That the proper course in the circumstances was that each party should withdraw the amended pleadings and that each should be left to his rights as they existed before the pleadings were delivered. *Halpin* v. *Fowler (No. 1)*, 12 B.C.R. 441.

IX. JUDGMENT BY DEFAULT.

Setting aside.]—The plaintiffs brought action for rent due under a lease of certain land given to the defendants, and for an account of gravel removed from the land

and payment therefor. Prior to the commencement of the action the plaintiff had demanded security from the defendants for the amount due, and they delivered over certain bonds as security, on the understanding that if satisfactory it was to be accepted and time given for payment of the indebtedness, but if unsatisfactory, was to be returned before action was brought. The plaintiff was not satisfied with the security, but he held the bonds and commenced action, and upon the default of the defendants in filing a dispute note, he entered judgment. An application by the defendants to set aside the judgment was dismissed:—Held, that the judgment be set aside and the defendants be allowed to defend upon their paying the costs of the application to re-open and of entering judgment, and that the plaintiff hold the bonds pending the final determination of the action. *MacGill* v. *Duplisea*, 18 B.C.R. 600.

X. Speedy Judgment.

1. Affidavit.]—The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated, were an affidavit of the plaintiff verifying his cause of action, and an affidavit of plaintiff's solicitor verifying defendant's signature to the account and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—Held, that the materials were sufficient to support a judgment for plaintiff. *Bremner* v. *Nichols*, 11 B.C.R. 35.

2. Leave to defend.]—In an action on a promissory note, the defence was, inter alia, misrepresentation. Plaintiff moved for speedy judgment, and defendant opposed it, but omitted to state in his affidavit that one of the grounds was misrepresentation:—Held, that the defendant should be allowed in to defend. *Easefelt* v. *Houston and Johnson*, 16 B.C.R. 353.

3. Defences.]—On a motion for speedy judgment it is open to a defendant to set up other defences than those disclosed in the dispute note. *McGuire* v. *Miller*, 9 B.C.R. 1.

XI. Discovery.

1. Oral examination.]—A County Court judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories. *Roberts* v. *Fraser*, 9 B.C.R. 296.

2. Further and better affidavit.]—In an action on a guarantee, plaintiffs applied for an affidavit of documents. Defendant Rebecca Levy (who carried on business as L. Levy & Co., with her husband, L. Levy, as manager) admitted that she had certain letters relating to the present action written subsequently to the 16th of February, 1904 (the date on which defendants notified plaintiffs that they, defendants, would no longer be responsible under their guarantee). Plaintiffs having had previous dealings with defendants on the strength of other guarantees given by them, obtained an order for further and better discovery generally. In her affidavit filed pursuant to this order, defendant Rebecca Levy swore that she had no entry in her books of cheques received on account of the previous transactions to that in question in this action; that if the cheques had been indorsed with the name L. Levy & Co. it was done wholly without authority, and she denied having any documents relating to the guarantees. Plaintiffs then obtained an order "that the defendants do within one week from the date hereof make full discovery on oath of all books of account, ledgers, journals, blotters, cash books, bank pass books, promissory notes, cheques, memoranda and other books of account, statements, or writings which now are, or were in use in the business of the defendants in the years 1902, 1903, 1904, 1905, 1906, with liberty to the plaintiffs to apply again as to the other matters mentioned in the notice of application filed and served herein on the 25th day of July, 1906." An appeal from this order was dismissed. *The Empire Manufacturing Company, Limited* v. *L. Levy and Company*, 12 B.C.R. 387.

XII. Attachment of Debts.

Supreme Court judgment.]—The County Courts have no jurisdiction to issue a garnishee order attaching a debt due under a judgment of the Supreme Court. *Belyea* v. *Williams*, 12 B.C.R. 226.

XIII. Notice of Trial.

Power of judge to abridge.]—A County Court judge has no jurisdiction to abridge the six clear days' notice of trial to be given by sec. 92 of the County Courts Act. *Hickingbottom* v. *Jordan*, 8 B.C.R. 126.

XIV. NONSUIT.

1. Evidence given by the defendant.]—Where in a County Court action a motion for a nonsuit is reserved until after the defendant has given evidence, the Court is entitled to regard the evidence given for the defendant, and if this evidence proves his adversary's case, the plaintiff is entitled to judgment. *McAdam* v. *Kickbush*, 11 B.C.R. 488.

2. Evidence in reply.]—In an action of replevin, plaintiff proved ownership and rested his case. Defendant then moved for a nonsuit, the decision on which was reserved until he had presented his case. Plaintiff offered evidence in rebuttal to meet the case made by defendant, which was rejected on the ground that evidence to prove the non-existence of the tenancy alleged would be merely confirmatory of the plaintiff's case, and the action was disposed of by allowing defendant's application for a nonsuit:—Held, that in the circumstances, the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case of the plaintiff; and that the course adopted by the learned trial judge admitted the evidence for the defendant to and excluded the evidence for the plaintiff from review by the Court of Appeal. *McAdam* v. *Kickbush*, 11 B.C.R. 488.

XV. NEW TRIAL.

Power to re-hear.]—A County Court judge has no power to grant a new trial merely because he is dissatisfied with the verdict; he is to be guided in granting a new trial by the same principles as the Full Court. *Hutchins* v. *The British Columbia Copper Company, Limited*, 9 B.C.R. 535.

XVI. STAY OF PROCEEDINGS.

Jurisdiction.] — A County Court judge has jurisdiction to stay proceedings on a judgment in his Court on a proper case for a stay being made out, such, for instance, as that the judgment has in effect been satisfied. In such 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.

XVII. JUDGMENT SUMMONS.

1. Order of committal.]—An order of committal under sec. 193 of the County Courts Act (R.S.B.C. 1897, c. 52) must be absolute, not conditional. *Wallace* v. *Ward*, 9 B.C.R. 450.

2. Service.]—Where an order of committal is made in the absence of the debtor, he must be served with a copy of the order before arrest. *Ibid.*

3. Terms of discharge.]—Orders of committal should contain the terms on which discharge out of custody may be obtained. *Ibid.*

4. Married woman.]—A married woman against whom a judgment has been obtained under the provisions of the Married Women's Property Act is not a judgment debtor within the meaning of sec. 147 of the County Courts Act. *Greenshields & Co., Ltd.* v. *Reeves*, 15 B.C.R. 19.

XVIII. COSTS.

1. Scale of.]—Plaintiff claimed $333.19 for certain cattle sold to defendant, who pleaded tender of $300 and payment into Court, and not indebted as to the remainder of the claim. Judgment for plaintiff was given for $320. The taxing officer allowed costs on the scale "over $250 to $500":—Held, on review of the taxing officer's ruling, that the amount recovered by means of the action being only $20, the costs should have been taxed on the scale "over $10 to $25." *McLean* v. *Dove*, 13 B.C.R. 292.

2. Garnishee proceedings — Costs not allowed on payment into Court.]—Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days' limit mentioned in the summons, the plaintiff will not be allowed the costs of a garnishee summons. *Shawnigan Lake Lumber Co.* v. *Fairfull, Coburn Garnishee*, 7 B.C.R. 58.

See COURTS.

COURTS.

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I. Jurisdiction Generally.

A. Powers in General.

1. Order of reference — A matter of jurisdiction.]—The power to make an order of reference in an action is a matter of jurisdiction, and not merely a question of "procedure and practice" within the meaning of sec. 3 of the Judicature Ordinance, and therefore the Yukon Court has no power under this section to make an order of reference. *Williams* v. *Faulkner and Kroenert; Raymond* v. *Faulkner and Kroenert,* 8 B.C.R. 197.

2. Order of reference.]—In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons, under instructions from the Gold Commissioner (after the location of plaintiff's claim), for the purpose of establishing an official boundary between the hill and creek claims, and which cut off part of plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—Held, that the Yukon Court has no power to make an order of reference, and as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer, the doctrine of extra cursum curiæ did not apply. *Stevenson* v. *Parks,* 10 B.C.R. 387.

B. Waiver of Objection to.

1. Agreement to bring action in the Courts of Ontario.]—Where a defendant, under sec. 34 of the County Court Act, objects to an action being tried in the County Court, and an order is made directing that the plaint stand as a writ, and that an appearance be entered thereto in five days, he waives his right to object to the jurisdiction of the Court to try the action on the ground that the parties have agreed that any action brought in respect of the cause of action sued upon shall be tried in another forum. *Howay and Reid* v. *Dominion Permanent Loan Company,* 6 B.C.R. 551.

2. Entering appearance.]—Entering an appearance does not waive the right to object to the jurisdiction if notice of objection be served. *Loring* v. *Sonneman,* 5 B.C.R. 135.

II. Divisional Court.

1. Appeal.]—No appeal lies to the Divisional Court from an order setting aside an order giving leave to issue a writ of summons for service out of the jurisdiction. *Fuller* v. *Yerxa,* 1 B.C.R., Pt. II., 330.

2. Appeal.]—An order setting aside an award, and giving leave to apply for further directions is not a final order, and the Divisional Court has jurisdiction to entertain an appeal from it. *Wood* v. *Gold,* 3 B.C.R. 281.

3. Judgment appealed from final or interlocutory.]—Plaintiffs having recovered judgment in an action against defendant J. C., brought this action on behalf of themselves and his other creditors against him, J. C., jr., and H., to set aside prior judgments recovered by the two latter against him upon the ground that they were fraudulent and collusive as against the plaintiff's judgment. Pending this action, the plaintiffs arrested J. C. on a ca. re. under this judgment, and defendants herein pleaded such arrest, and that J. C. remained in custody thereunder, as a satisfaction of the judgment and bar to this action. Upon issue in law and argument of the point:—Held, (1) That the judgment appealed from was not a final judgment, as it would not have been so had the point been decided the other way, and that the Divisional Court had jurisdiction. *Robert Ward & Co.* v. *John Clark, John Clark, Jr., and Hennigar,* 4 B.C.R. 71.

4. Final judgment.] — The Divisional Court, on a motion for a new trial, has power to enter final judgment for the defendant where there is no evidence to sustain the verdict. *Kerr* v. *Cotton,* 2 B.C.R. 246.

III. SUPREME COURT.

A. Constitution.

Power of Provincial Legislature to legislate respecting procedure and residence of judges.]—The Provincial Legislature had, by a local Act, passed in 1881, declared that the sittings of the Supreme Court for reviewing nisi prius decisions, motions for new trials, etc., should be held only once in each year, and on such day as should be fixed by Rules of Court, and that the Lieutenant - Governor - in - Council should have power to make such Rules of Court:—Held, that the appointment of the days on which the Court should sit for such purposes is a matter of procedure, and of purely judicial cognizance, and is not within the power of local Legislature either to fix by positive enactment, or to hand over to be fixed by any other person or persons, but belongs to the Court itself; and that the above sections are in that respect unconstitutional and void. The power conferred by sec. 92 of the British North America Act, 1867, on Provincial Legislatures is a legislative power, enabling them to exercise legislative functions merely, and does not enable them to interfere with functions essentially belonging to the judiciary or to the executive. The judges of the Supreme Court of British Columbia are officers of Canada, and by sub-secs. 129 and 130 of the British North America Act, 1867, their power and jurisdiction remain as before Confederation, subject only to the constitutional action of the Parliament of Canada under the British North America Act, 1867. The authority given by sec. 92, sub-sec. 14, to the local Legislature to make laws in relation to civil procedure is confined to civil procedure in the Courts described in that sub-section, and the Supreme Court of British Columbia does not come within the meaning of that sub-section. The power to make laws in relation to criminal procedure in those Courts, i.e., the Provincial Courts described in that sub-section, and as to all procedure in all other Courts is, either by the general or the particular words of sec. 91 of the British North America Act, 1867, reserved to the Parliament of Canada. The local Legislature has no power to diminish or repeal the powers, authorities, or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office by the judges, whether as to residence or otherwise. *Sewell* v. *British Columbia Towing Co., the "Thrasher" Case,* 1 B.C.R., Pt. I., 153. [The Supreme Court of Canada reversed the judgment of the Full Court.]

B. Jurisdiction.

1. In Civil Actions.

1. Generally.]—The Supreme Court of British Columbia is clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, in the Province—powers as full and ample as those known to the common law and possessed by the superior Courts of England. *In re Sproule,* 12 S.C.R. 140.

2. Mechanic's liens.] — The Supreme Court has no original jurisdiction to enforce a mechanic's lien, whatever the amount claimed. *Martin* v. *Russell,* 2 B.C.R. 98.

3. Divorce.]—The Supreme Court has jurisdiction to entertain a petition for divorce between persons domiciled in the Province and in respect of matrimonial offences alleged to have been committed therein. *Watt* v. *Watt,* 13 B.C.R. 281; 1908, A.C. 573.

4. Divorce.] — The Supreme Court has jurisdiction under the Divorce and Matrimonial Causes Act, 1857. *Sheppard* v. *Sheppard,* 13 B.C.R. 486.

5. Divorce.] — The Supreme Court of British Columbia has in British Columbia all the jurisdiction conferred on the "Court for Divorce and Matrimonial Causes" under the Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), as amended by 21 and 22 Vict., c. 108. The legislative adoption by British Columbia in March, 1867, of the English law as it existed in England on the 19th November, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but coupled with the language constituting the Supreme Court in British Columbia was a direct legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery and clothed the Supreme Court of the Province with ample power to hear and determine divorce and matrimonial causes. *M., falsely called S——,* v. *S——,* 1 B.C.R., Pt. I, 25.

6. In ecclesiastical matters.]—Held, on an application for an injunction, that,

though the letters patent from which the Bishop of Columbia derives his authority do not confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil Courts. This Court will, on proper application, supply coercive jurisdiction to enforce the sentence of ecclesisatical tribunals of assessors, appointed in accordance with the provisions of the Church Discipline Act (3 & 4 Vict., c. 86), so far as its provisions are applicable to this country, when the finding of such tribunal is not unreasonable, and the proceedings before it are conducted in a way consonant with the principles of justice, as understood in a Court of Equity. *Bishop of Columbia* v. *Cridge*, 1 B.C.R., Pt. I., 5.

7. Appointment of members of Court.]—The Supreme Court has no power to decide the validity of the appointment of one of its members. *Stoddart* v. *Prentice*, 6 B.C.R. 308.

8. Motion to quash.]—The Full Court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single judge. *Rex* v. *Tanghe*, 10 B.C.R. 297.

9. Reference by the Lieutenant-Governor.]—By the Supreme Court Reference Act, 1891, sec. 1, "The Lieutenant-Governor-in-Council may refer to the Supreme Court of British Columbia, or to a Divisional Court thereof, or to the Full Court, for hearing and consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same." Upon this statute the Lientenant-Governor-in-Council assumed to refer a certain question and issue "to the Honourable Mr. Justice Drake for decision and report." On appeal to the Full Court from the report of Mr. Justice Drake:—Held, that there was no power to refer otherwise than to the Supreme Court, and that the proceedings appealed from before Mr. Justice Drake were coram non judice. *In the matter of the Horsefly Mining Co., In re Supreme Court Reference Act, 1891*, 4 B.C.R. 165.

10. Making order in Court below—After allowance of appeal to Supreme Court of Canada.]—The Supreme Court of British Columbia has no power to make an order controlling proceedings under its judgment, after the perfecting of an appeal from such judgment to the Supreme Court of Canada. *Foley* v. *Webster*, 2 B.C.R. 251.

2. In Criminal Matters.

1. Venue in criminal cases—Right of Supreme Court judge to try without commission.]—The plaintiff in error was committed for trial on a charge of murder. The scene of the alleged homicide was in the bailiwick of the Sheriff of Kootenay. On the application of the Crown, Victoria (in the bailiwick of the Sheriff of Vancouver Island) was fixed as the place of trial. The Chief Justice, before making the order, required from the Crown "an undertaking that the Crown would abide by such order as the judge who might preside at the trial should think just to meet the equity of sec. 11 of 32-33 Vict., c. 29." The order so pronounced was not drawn up, but a document incorrectly stating the order, and omitting all mention of the terms imposed, was signed at the time and handed to the gaoler, and under this document the prisoner was detained in the gaol at Victoria until his trial. The prisoner was tried and found guilty at the sitting of the Court of Oyer and Terminer and General Gaol Delivery held at Victoria, under the Assize Court Act, 1885, and presided over by Gray, J., a judge of the Supreme Court of British Columbia, and a justice named in a Commission of Oyer and Terminer and General Gaol Delivery issued by the Lieutenant-Governor. In the body of the indictment there was no venue stated, and the marginal venue was simply "British Columbia to wit." The jurors were selected, not from the whole of the bailiwick of the Sheriff for Vancouver Island, as defined by the Sheriffs' Amendment Act, 1878, but from that portion of the bailiwick created by the Jurors' Act, 1883, as Victoria District. On the return to a writ of error, the prisoner alleged a diminution of the record, and applied for a writ of certiorari:—Held, (1), that where an order has been made orally, and afterwards imperfectly drawn up, (i.e.), without specifying the terms upon which it was made, and such terms appear in the judge's note, made at the time of the application, it is proper, in making up the record on a writ of error prayed, that a true and perfect order should be drawn up and placed on the record:—Held, (2) that the refusal of the judge at the trial to allow the prisoner's counsel to poll the jury after verdict was not a matter that could be dealt with on a writ of error, and therefore should not appear in the record. On the writ of error:—Held, (1) that assuming

the Lieutenant-Governor's commission to be void, the Court was properly constituted without commission, under sec. 14, Judicature Act, 1879, and the Assize Court Act, 1885. Held, (2) following McLean's Case, that the commissions of Oyer and Terminer and General Gaol Delivery was sufficient and that the Lieutenant-Governor had power to issue it under sec. 129, British North America Act, 1867. Held, (3) that the commission was not exhausted by reason of the justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province. Held, (4) that there was no objection to the summoning of jurors from a limited portion of the shrievalty, under the Jurors' Act, 1883, as that Act in effect created new districts for the purposes of the administration of justice in criminal cases. Held, (5) that the prescribing of the qualifications of jurors, and the manner of preparing the jury lists, by the Jurors' Act, 1883, were not matters of criminal procedure within the meaning of sec. 91, sub-sec. 27, of the British North America Act, 1867, but were matters belonging to the "organization of Provincial Courts" within the meaning of sec. 92, sub-sec. 14, and therefore intra vires of the Provincial Legislature. Held, (6) that the venue was sufficiently stated in the record, and that the marginal venue, "British Columbia to wit," was at the lowest but an imperfect venue, and therefore cured by sec. 23, Criminal Procedure Act, 1869. Held, per Crease, J., that the statement of the imposition of conditions in an order under sec. 11, 32-33 Vict., c. 29, is not jurisdictional. Held, per Begbie, C.J., that any application for an order for a change of venue under sec. 11 should be made as early as possible after the commitment. Held, by Gray, J., after argument before himself and brother justices, sitting as assessors, on a case stated, that on a trial on a charge of felony the prisoner is not entitled, in this Province, as of right, to have the jury polled; and that where, in such a trial, after verdict given, the prisoner's counsel moved to have the jury polled, but as the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was refused:—Held, that such refusal was proper. *Robert E. Sproule, plaintiff in error* v. *The Queen, defendant in error*, 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

2. As Court of Oyer and Terminer.]—Neither the Supreme Court nor any judge thereof has any authority mera virtute officii to preside in a Court of Oyer and Terminer. No person, whether judge of that Court or otherwise, can do so without a commission. *R.* v. *McLeans and Hare.* Report of The Honourable H. P. P. Crease, 1880.

C. Judges of, Powers of.

1. Reference by Lieutenant-Governor.]—By the Supreme Court Reference Act, 1891, sec. 1, "The Lieutenant-Governor-in-Council may refer to the Supreme Court of British Columbia, or to a Divisional Court thereof, or to the Full Court, for hearing and consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same." Under this statute the Lieutenant-Governor-in-Council assumed to refer a certain question and issue "to The Honourable Mr. Justice Drake for decision and report." On appeal to the Full Court from the report of Mr. Justice Drake:—Held, that there was no power to refer otherwise than to the Supreme Court, and that the proceedings appealed from before Mr. Justice Drake were coram non judice. *In the matter of the Horsefly Mining Co., In re Supreme Court Reference Act, 1891,* 4 B.C.R. 165.

2. Setting aside orders of lower Court.]—A Supreme Court judge has power to set aside an order made by a judge of limited jurisdiction beyond his jurisdiction. *Tate and others* v. *Hennessy and others*, 7 B.C.R. 262.

3. Supreme Court judge—Jurisdiction of, to perform duties of County judge.]—The jurisdiction of a Supreme Court judge to perform the duties of a County Court judge, in an action in the County Court, does not attach until the existence of the statutory pre-requisites to the exercise of the jurisdiction are made to appear as a matter of fact. A Court on dismissing a motion for want of jurisdiction has power to award costs. *Hendryx* v. *Hennessey*, 3 B.C.R. 53.

4. Rules.]—A rule made by the judges empowering the senior puisne judge, or any other judge of the Court, to perform the duties devolving by the rules on the Chief Justice whenever the office of Chief Justice is vacant, or he is absent from the Province, is valid. *Jardine* v. *Bullen*, 7 B.C.R. 471.

D. Officials of.

Master.]—The appointment of a new master under rules made by the judges operates as a rescission of any former appointment, it being unnecessary to rescind any such appointment by express writing. *Jardine* v. *Bullen,* 7 B.C.R. 471.

IV. Of Oyer and Terminer.

1. Commission.]—The various statutes of British Columbia providing for the holding of Courts of Oyer and Terminer and General Gaol Delivery render unnecessary a commission to the presiding judge. *In re* Sproule, 12 S.C.R. 140.

2. Power of Governor to issue commissions.]—The prisoner was tried and found guilty at the sittings of the Court of Oyer and Terminer and General Gaol Delivery held at Victoria under the Assize Court Act, 1885, and presided over by Gray, J., a judge of the Supreme Court of British Columbia, and a justice named in a commission of Oyer and Terminer and General Gaol Delivery issued by the Lieutenant-Governor:—Held, (1) that assuming the Lieutenant-Governor's commission to be void, the Court was properly constituted without commission, under sec. 14, Judicature Act, 1879, and the Assize Court Act, 1885. Held, (2) that the commission of Oyer and Terminer and General Gaol Delivery was sufficient, and that the Lieutenant-Governor had power to issue it under section 129, British North America Act, 1867. Held, (3) that the commission was not exhausted by reason of the justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province. *Robert E. Sproule, plaintiff in error* v. *The Queen, defendant in error,* 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

3. Commission, issue of.]—The Lieutenant-Governor is authoried, under sec. 129 of the British North America Act, to issue Commissions of Oyer and Terminer. Even if the commission were invalid, a Court of Oyer and Terminer, if presided over by a judge of the Supreme Court, would be properly constituted by the combined effect of sec. 14 of the Judicature Act, 1879, and the Assize Court Act, 1885. *R.* v. *Malott,* 1 B.C.R., Pt. II., 207.

4. Necessity for commission.]—A trial held before a judge of the Supreme Court without the issue to him of a Commission of Oyer and Terminer is coram non judice. *R.* v. *McLeans and Hare.* Report of The Honourable H. P. P. Crease, 1880.

V. Local Judge of Supreme Court.

1. County Court judge acting as.]—A County Court judge, sitting as local judge of the Supreme Court has, under the statutes and rules, jurisdiction to make orders in actions in the Supreme Court which are domiciled in a registry outside the territorial limits of his jurisdiction as a County Court judge. *Postill* v. *Traves,* 5 B.C.R. 374.

2. Local judge of County Court.]—A County Court judge for one county was requested by a Supreme Court judge, being the acting County Court judge for another county, to sit in lieu of himself whenever absent:—Held, that the County Court judge had no jurisdiction to sit by virtue of such request, and that sec. 8 of the County Courts Act empowers only a County Court judge to make such request. *Bell & Flett* v. *Mitchell,* 7 B.C.R. 100.

3. Leave to serve out of the jurisdiction.]—A local judge of the Supreme Court has jurisdiction to make an order for an ex juris writ. *Tate* v. *Hennessey,* 7 B.C.R. 262.

4. Receiver.]—An order for the appointment of a receiver must be made by the Court and cannot be made by a judge in chambers, and consequently a local judge has no power to appoint a receiver. *Wakefield* v. *Turner,* 6 B.C.R. 216.

5. Holding trial of an action.]—A local judge of the Supreme Court has no power to sit as a trial judge in an action. *Brigman* v. *McKenzie,* 6 B.C.R. 56.

6. Land Registry Act.]—A local judge has jurisdiction under the Supreme Court Act, 1904, to determine what fees are payable on a transfer of realty under the Land Registry Act. *In re Hall Mining & Smelting Co.,* 11 B.C.R. 492.

7. Winding-up order—Local judge.]—A local judge of the Supreme Court has no jurisdiction to make a winding-up order. *In re Kootenay Brewing Company,* 7 B.C.R. 131.

VI. County Courts.

A. Jurisdiction.

1. Power of Province to define jurisdiction of Courts.]—The power given to the Provincial Governments by the British

North America Act, sec. 92, sub-sec. 14, to legislate regarding the constitution, maintenance and organization of Provincial Courts includes the power to define the jurisdiction of such Courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such Courts. The Acts of the Legislature of British Columbia, C.S.B.C., c. 25, sec. 14, authorizing any County Court judge to act as such in certain cases in a district other than that for which he is appointed, and 53 Vict., c. 8, sec. 9, which provides that until a County Court judge of Kootenay is appointed the judge of the County Court of Yale shall act as and perform the duties of the County Court judge of Kootenay, are intra vires of the said Legislature under the above section of the British North America Act. The Speedy Trials Act, 51 Vict., c. 47 (D), is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure. By this Act jurisdiction is given to "any judge of a County Court" to try certain criminal offences:—Held, that the expression "any judge of a County Court" in such Act means any judge having, by force of the Provincial law regulating the constitution and organization of County Courts, jurisdiction in the particular locality in which he may hold a "speedy trial." The statute would not authorize a County Court judge to hold a "speedy trial" beyond the limits of his territorial jurisdiction without authority from the Provincial Legislature so to do:—Held, it is doubtful if Parliament had power to pass those sections of the Act, 54 & 55 Vict., c. 35, which empower the Governor-General-in-Council to refer certain matters to this Court for an opinion. *In re County Courts of British Columbia*, 21 S.C.R. 446.

2. Supreme Court judge in County Court actions.]—The jurisdiction of a Supreme Court judge to perform the duties of a County Court judge, in an action in the County Court, does not attach until the existence of the consolidated statutory pre-requisites to the exercise of the jurisdiction are made to appear as a matter of fact. *Hendryx* v. *Hennessey*, 3 B.C.R. 53.

3. Jurisdiction of County Court judge when requested to sit by Supreme Court judge.]—A County Court judge for one county was requested by a Supreme Court judge, being the acting County Court judge for another county, to sit in lieu of himself whenever absent:—Held, that the County Court judge had no jurisdiction to sit by virtue of such request, and that sec. 8 of the County Courts Acts empowered only a County Court judge to make such a request. *Bell & Flett* v. *Mitchell*, 7 B.C.R. 100.

4. Equitable jurisdiction.]—County Courts have no equitable jurisdiction other than that conferred by the County Courts Act, C.S.B.C. 1888, sec. 25, sec. 44, and cannot entertain an action to set aside a chattel mortgage as being a fraudulent preference. *Parsons' Produce Company* v. *Given*, 5 B.C.R. 58.

5. Equitable jurisdiction — Action for rent—Void lease.]—It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease, if valid, would exceed $2,500, the County Court has no jurisdiction. *British Columbia Board of Trade Building Association, Limited Liability* v. *Tupper and Peters*, 8 B.C.R. 291.

6. Metalliferous mine.]—An action for damages for personal injuries received by an employee in a metalliferous mine may be brought for any amount in the County Court. *Beamish* v. *Whitewater Mines, Limited*, 7 B.C.R. 261.

7. County Court order.] — An order made by a county judge that garnisheed moneys remain in Court to abide the event of a new action to be commenced forthwith (a former suit in respect of the same cause of action being dismissed by the same order), is not a nullity, and if not appealed against is valid. *King* v. *Boultbee*, 7 B.C.R. 318.

8. Jurisdiction to make personal order over $1,000 in mechanic's lien suit.]—A claim for a personal order to pay an amount over $1,000 was entertained in the County Court as auxiliary to relief by way of enforcement of a mechanic's lien. *Post* v. *Jones*, 2 B.C.R. 250.

9. Jurisdiction — Venue.]—Where the plaintiff and defendant to a cause of action within the competence of the County Court reside in different County Court districts the action should be brought in the County Court in the district where the defendant carries on business, or where the cause of action, wholly or in part, arose (C.C. Amendment Act, 1894, sec. 3), and is no reason for bringing the action in the Supreme Court. *McPherson* v. *Johnson*, 3 B.C.R. 465, at p. 467.

10. Jurisdiction of, in Crown actions.]—It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open, either because of the defendant not residing in or of the cause of action not arising in the district. *The King* v. *Campbell*, 8 B.C.R. 208.

VII. SMALL DEBTS COURT.

1. Jurisdiction—Action for damages.]—Under the Small Debts Act the magistrate's jurisdiction is limited to actions for debt. Where defendant agreed to hire plaintiff's boat for a trip on certain terms, but before the trip commenced notified plaintiff that he could not use the boat, and same was not used, the plaintiff sued in the Small Debts Court:—Held, that this was not an action for debt, but rather for damages, and that the Small Debts Court had no jurisdiction. *Simpson* v. *Widrig*, 15 B.C.R. 5.

2. Jurisdiction — Mechanic's Lien.]—An action to enforce a mechanics' lien is not one of debt within the meaning of sec. 2 of the Small Debts Act. In the County Court of Atlin. *Dillon* v. *Sinclair*, 7 B.C.R. 328.

3. Jurisdiction—Claim of exemption.]—A magistrate sitting as judge of the Small Debts Court has no jurisdiction to decide the validity of a claim of exemption under the Homestead Act of goods seized under process of execution issued from that Court. *Auberg* v. *Anderson*, *Stewart* v. *Anderson*, 5 B.C.R. 622.

4. Jurisdiction—Order for committal.]—A notice by a judgment creditor's solicitor of an application to a magistrate of a Small Debts Court for an order to commit a judgment debtor because of failure to pay instalments ordered to be paid on the return of a judgment summons is a nullity. A judgment debtor, by appearing pursuant to such notice, does not waive his right to object at any stage. *In re The Small Debts Act: In re Waxstock*, 9 B.C.R. 433.

5. Appeal.]—An appeal from the Small Debts Court, either to a judge of the Supreme Court or to the County Court, is final. *Larsen* v. *Coryell*, 11 B.C.R. 22.

VIII. COURTS OF REVISION.

1. Excess of jurisdiction.]—Where an assessor exceeds his jurisdiction the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover the taxes. *The Corporation of Coquitlam* v. *Hoy*, 6 B.C.R. 546.

2. Jurisdiction.] — The jurisdiction of the Court of Revision is confined to the question whether the assessment was too high or too low. *In re Crow's Nest Pass Coal Co.*, 13 B.C.R. 55.

IX. POLICE COMMISSIONERS.

Court of Record.]—The Court of a police commissioner "is a Court of Record for British Columbia" within the meaning of sec. 2 of the British Columbia Replevin Act. *Keefer* v. *Todd*, 1 B.C.R., Pt. II., 249.

X. COURTS OF SUMMARY JURISDICTION.

Jurisdiction of justice of the peace.]—An information was laid before a justice of the peace against the police magistrate of the City of Kaslo for a breach by him of one of the city by-laws, and the justice of the peace granted a summons thereon, returnable at Nelson. By sec. 212 of the Municipal Clauses Act, "No justice of the peace shall adjudicate upon or otherwise act in any case for a city where there is a police magistrate, except in the case of illness, or absence, or at the request of the police magistrate. Sec. 213 saves the jurisdiction of justice of the peace for the several districts in regard to offences committed in any city situated within their respective districts in which there may be no police magistrate. The police magistrate was not ill or absent and did not request the justice of the peace to act. Upon motion for a prohibition against further proceedings upon the information:—Held, that in the particular circumstances there was, for the purposes of the case in question, no police magistrate in Kaslo, and that sec. 212, supra, did not apply, and that the ordinary jurisdiction of justices of the peace of the district, exerciseable over its whole area, applied. The making of the summons returnable at Nelson was improper on the ground of inconvenience, but was within the jurisdiction of the justice of the peace. *Regina* v. *Chipman*, 5 B.C.R. 349.

See APPEAL.

See COUNTY COURT PRACTICE.

See PRACTICE.

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I. JURISDICTION.

1. Territorial area.]—Counselling a person in Canada to submit in a foreign jurisdiction to an operation which, if performed in Canada, would be a crime is not an offence against the criminal law of Canada. *Rex* v. *Walkem*, 14 B.C.R. 1.

2. Naval tribunal, offences triable by.]—An objection to a conviction by a Criminal Court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by a Naval Court, is bad. *R.* v. *Day,* 16 B.C.R. 323.

3. Peace Preservation Act.]—Although the Peace Preservation Act, 1869 (32 & 33 Vict., c. 24, D.), makes no provision for the appointment of a commissioner under the Act, its provisions can be enforced in the Province by a commissioner appointed for the Province under the Canada Police Act (31 Vict., c. 28, D.), as such commissioner is a justice of the peace in respect of the criminal laws and other laws of the Dominion. *Keefer* v. *Todd,* 1 B.C.R., Pt. II., 249.

II. Application of the Code.

His Majesty's forces.]—An objection to a conviction by a Criminal Court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by a Naval Court, is bad. *R.* v. *Day,* 16 B.C.R. 323.

III. Criminal Liability.

A. Mens rea.

Mens rea — Sanitary bye-law — Overcrowding—"Suffering to be occupied"—Proof of knowledge of defendant.] — In order to support a conviction under the clause in the Victoria Consolidated Health Bye-law, 1886, providing: (17) No person shall let, occupy, or suffer to be occupied as a dwelling or lodging any room (a) which does not contain at least 384 cubic feet of space for each person occupying the same," it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged. *Re Wing Kee,* 2 B.C.R. 321.

B. Attempts.

Felony.] — An assault with intent to commit a felony is an attempt to commit such felony within the meaning of sec. 183 of R.S.C., c. 174. *John v. Reginam,* 15 S.C.R. 384.

C. Justification or Excuse.

1. Claim of right.]—Assuming the existence of a bona fide belief in a claim of right, that does not justify the employment of the means prohibited by sec. 111 of the Code in an attempt to exercise that right, and sec. 16 did not justify the accused in what he did. *R.* v. *Bonner,* 18 B.C.R. 454.

2. Warning.]—In a charge of assault committed by the accused when resisting removal from property of which he was placed in care, justification was set up and also warning. The trial judge made no finding on the question of warning, as he came to the conclusion on the evidence that as the assault was savage, hot-tempered and unnecessary, it could not be justified by any warning even if warning had been proved:—Held, on appeal, that in the circumstances a finding as to warning was immaterial. *Rex* v. *Kinman,* 16 B.C.R. 148.

D. Parties.

1. Corporation.]—Under sec. 213 of the Criminal Code, 1892, a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. *The Union Colliery Co.* v. *Reginam,* 7 B.C.R. 247; 31 S.C.R. 81.

2. Manslaughter.] — The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. *Ibid.*

IV. Offences Against the Administration of Law.

A. Obstructing Police Officer.

What constitutes.] — Actual physical interference with an officer in the discharge of his duty is not necessary to constitute obstruction. A menacing attitude entailing on the officers, as here, more than normal vigilance and care, such as keeping back by means of a drawn revolver, a mob apparently intent on rescuing a prisoner, is an obstruction. The fact that a person is in custody of a police officer, and is being taken to the police station, is prima facie, though rebuttable, evidence that the custody is lawful. *Rex* v. *McDonald,* 16 B.C.R. 191.

B. Perjury.

1. Civil proceedings.]—The Court may refuse to hear a charge of perjury while civil proceedings are pending. *R.* v. *T——,* 12 B.C.R. 223.

2. Form of oath.]—Where a witness, without objection, takes an oath in the form ordinarily administered to persons of his race or belief, it is binding, and he cannot afterwards be heard to say that he was not sworn. It is unnecessary that a witness be explicitly asked "if the oath in the form in which he took it is recognized by him as binding on his conscience" when there is no such word as "conscience" in his language; all that is required is to use such appropriate and equivalent terms as would bring home to the mind of the witness the fact that he was binding himself according to his moral sense to speak the truth. *Rex* v. *Shajoo Ram,* 20 B.C.R. 581.

3. Form of oath.] — When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn. Perjury may be assigned in respect of statements given in evidence by a Chinaman who was not a Christian where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth and nothing but the truth, or his soul would burn up as the paper had been burned." *R.* v. *Lai Ping,* 11 B.C.R. 102.

4. On examination for discovery.]—The accused having been charged with perjury, committed on his examination for discovery before the registrar in a civil suit, elected to take speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery:—Held, that as every statement made upon oath by the person examined during his examination for discovery forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of sec. 145 of the Criminal Code. *Rex* v. *T*——, 12 B.C.R. 223.

5. Coram non judice.]—Where an order had been made in a proceeding under the Guardian's Appointment Act for the cross-examination on an affidavit:—Held, that the judicial proceeding ended when the registrar left the room in which the cross-examination was being held after swearing the witness, leaving the official stenographer to take the cross-examination in shorthand. *Rex* v. *Rulofson,* 14 B.C.R. 79.

6. Solemn declaration.] — There is a marked difference between taking an oath and a solemn declaration. In the one case, the false swearing itself constitutes the offence; in the other, before the procedure becomes a solemn declaration the statutory form must be followed. The permission to receive a solemn declaration includes the authority to make it. A solemn declaration is not made unless the declarant reads over to the officer receiving the declaration the form as given in the Act, or unless the officer reads over that form to the declarant. *Rex* v. *Phillips,* 14 B.C.R. 194.

C. Escapes and Rescues.

What constitutes the offence.]—Where the accused was indicted for "concealing himself with intent to escape from the penitentiary":—Held, that as the criminal act consists in an attempt to commit an offence, doing something with intent to commit the offence is not necessarily sufficient to constitute an attempt. *Rex* v. *Labourdette,* 13 B.C.R. 443.

V. Offences Against Morality.

A. Neglect of Duties Tending to Preservation of Life.

Negligence — Medical aid.] — Medical attendance and remedies are necessaries within the meaning of sub-secs. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so. See also at Common Law. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. *Rex* v. *Brooks,* 9 B.C.R. 13.

B. Incest.

Evidence of relationship.]—On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted:—Held, that this was not sufficient proof of relationship to justify a conviction. *Rex* v. *Smith,* 13 B.C.R. 384.

C. Seduction.

1. Procuring female to leave home.]—On a prosecution for procuring a female to

leave her home for the purpose of embarking her in a life of prostitution, the judge, after defining the crime of procuring, said: "You have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner." There was some doubt upon the evidence as to whether the female in question had any regular place of abode:—Held, that the judge had properly defined the crime to the jury. *Rex* v. *Mah Hung*, 17 B.C.R. 56.

2. By owner of premises.]—The accused was charged with an offence against sec. 217 of the Criminal Code, which provides that "every one who, being the owner or occupier of any premises, ... induces or knowingly suffers any girl under the age of 18 years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence . . . ." There was no evidence that the accused had induced a girl within the prescribed age to be in the premises for the purpose of being carnally known by any man other than himself:—Held, that the object of the section is to forbid the use of premises as assignation houses to which girls may be induced to resort, and it is not an offence, within the section, for the owner of the premises to induce a girl within the prescribed age to be therein for the purpose of himself having connection with her. *Rex* v. *Sam Jon*, 20 B.C.R. 549.

3. Promise of marriage.]—On a charge of seduction under a promise of marriage the words, "Do you love me enough to live with me? I have enough money for two," are not capable of bearing the inference that there was a promise of marriage. *Rex* v. *Spray*, 20 B.C.R. 147.

D. Disorderly Houses.

1. Definition of "disorderly house."]—The meaning of the term "disorderly house" in sec. 783, sub-sec. (f), must be taken from its definition in sec. 198, and not from the common law. *Re Farquhar Macrae, Ex parte John Cook*, 4 B.C.R. 18.

2. Common gaming house.]—The term "disorderly house" in sec. 774 of the Code includes any house to which persons resort for criminal or immoral purposes, and therefore includes a common gaming house. *Rex* v. *Four Chinamen*, 13 B.C.R. 216.

E. Gaming.

1. Black jack.]—Certain persons played the game called black jack in a room to which the public had access, there being no constant dealer:—Held, that the lessee of the room was legally convicted of keeping a common gaming house. *Regina* v. *Petrie*, 7 B.C.R. 176.

2. Unlawful game.]—It is not necessary to a conviction under 40 Vict., c. 33, sec. 4, providing "any person playing in a common gaming house is guilty of an offence," to allege or prove that the game played is an unlawful game, and it appearing in the case stated that cards and instruments of gaming were found in the house when entered on a warrant, there was prima facie evidence, under sec. 3 of the Act, that the place was a common gaming house, and that the defendant, who was found there, was playing therein. *Regina* v. *Ah Pow*, 1 B.C.R., Pt. I., 147.

F. Betting.

Betting on race course.]—The plaintiff, a director and shareholder in defendant Company, brought an action for an injunction restraining the defendants from carrying out an arrangement entered into with a bookmaker named Jackson. The material points of the arrangement were that Jackson should be allowed to carry on his business as a bookmaker at a race meeting to be held on the defendants' race-track at Victoria, provided that he carried on his betting operations at no fixed spot on the race-track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track:—Held, that the proposed method of betting was legal. Held, also, that the booth from which it was proposed to pay off the bets was not a common betting house within the meaning of sec. 227 of the Code. *Fraser* v. *Victoria Country Club, Limited*, 14 B.C.R. 365.

G. Vagrancy.

1. Means of support.]—Accused, when arrested, had on his person $27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and other criminal classes:—Held, that although he might be convicted under sub-sec. (b) of sec. 238 of the Code, yet he could not, on the evidence, be convicted of being a loose, idle, disorderly

person, with no visible means of support, and that evidence that the money found on his person was obtained by gambling was immaterial to the charge in this case. *Rex* v. *Sheehan*, 14 B.C.R. 13.

2. Good account.]—Before a person can be convicted of vagrancy the accused must have been expressly asked to give an account of himself. *R.* v. *Regan*, 14 B.C.R. 12.

VI. Offences Against the Person.

A. Murder.

Evidence of cause of death.]—On the trial of the accused for murder, by committing an abortion on a girl, it appeared in evidence that a post mortem examination of the girl had been made by a medical man, which was, however, confined to the pelvic organs and was, upon the medical evidence, inconclusive as to the cause of death, but there was other evidence pointing to the inference that death was caused by the operation. Davie, C.J., left the case to the jury, but reserved a case for the Court of Criminal Appeal as to whether there was, in point of law, evidence to go to the jury upon which they might find that the death of the girl resulted from the criminal acts of the accused. The jury found a verdict of guilty:—Held, that there is no rule that the cause of death must be proved by post mortem examination, and that there was evidence to go to the jury of the cause of death notwithstanding the absence of a complete post mortem examination. *Regina* v. *Garrow*, 5 B.C.R. 61.

B. Manslaughter.

Indictment of corporation—Punishment—Criminal Code, secs. 191, 192, 213, 252, 639 and 713.]—The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway, which was used for hauling coal and carrying passengers, and that on the 17th of August, 1898, a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge were precipitated into the valley underneath, thereby causing the death of certain persons. The defendants were found guilty and a fine of $5,000 was inflicted by Walkem, J., at the trial:—Held, that such an indictment will lie against a corporation under sec. 252 of the Code. *Regina* v. *Union Colliery Company*, 7 B.C.R. 247; 31 S.C.R. 81.

C. Rape.

Proof of non-marriage.]—The averment that the prosecutrix is not the wife of the accused may be proved by any lawful evidence from which such a conclusion may be properly inferred. *R.* v. *Faulkner*, 16 B.C.R. 229.

D. Abduction.

Gist of offence.]—Prisoner was indicted for having, at the City of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one B. R., being under the age of sixteen years, out of the possession and against the will of her father, contrary to sec. 283 of the Criminal Code. The evidence showed that the girl, by persuasion of letters written by the prisoner in Victoria, Canada, addressed to and received by her within the State of Washington, U.S.A., was induced to leave her father's house in that State and meet the prisoner at Victoria. Upon meeting her there he suggested that it was not too late for her to return home, but she declined, and the prisoner thereupon took her to a house near Victoria, where they spent the night together:—Held, that it was essential to the offence that the girl should have been in the possession of her father at the time of the taking, and that, upon the facts, when she met the prisoner at Victoria, she had already abandoned that possession. *Regina* v. *Blythe*, 4 B.C.R. 276.

VII. Offences Against Rights of Property.

A. Theft.

1. Onus of proof.]—On a charge of theft of goods from a store evidence of the finding in prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession. Under such circumstances it is not necessary for the Crown to prove that the goods had not passed

from the possession of the owners by some means other than sale. *Rex* v. *Theriault*, 11 B.C.R. 117.

2. Possession of goods recently stolen.]—Where a person is found in possession of stolen property, recently after the theft has been committed, an onus is cast upon him to account for such possession, and in the absence of a satisfactory explanation it is reasonably to be presumed that he came by the property dishonestly. Where, therefore, chickens had been stolen, and were some hours afterwards found in the accused's shop, and no clear account was given of how they came to be there:—Held, that a conviction for receiving stolen property was right. *Rex* v. *Lum Man Bow and Hong*, 15 B.C.R. 22.

B. False Pretences.

Knowledge of agent.]—C., a policy holder of a fire insurance company, conspired with H., their local agent, to defraud the company. C. handed in to H., for transmission to the company, an unfounded claim for pretended losses by fire, supported by his (C.'s) statutory declaration, the whole being false to the knowledge of H. Upon this, C. obtained the money from H. from W. & Co., the general agents of the company:—Held, (1) The knowledge of their agent H. of the falsity of the pretence could not be imputed as the knowledge of W. & Co., or of the company, so as to effect the criminality of C. (2) The fact that C. and H. might have been indicted for conspiracy to defraud was immaterial. *Regina* v. *Clark*, 2 B.C.R. 191.

C. Robbery.

Claim of right.]—Where the prisoner acted in the bona fide belief that he had been swindled, and, in the belief that he was entitled to retake the money, committed an assault for that purpose alone, and did retake the money, or a portion of it, in that sole and bona fide belief, the jury, on consideration of the facts, would be justified in acquitting him on a charge of robbery, although it was open to them, on the same facts, to convict for assault. *Rex* v. *Ford and Armstrong*, 13 B.C.R. 109.

VIII. Game Laws.

1. Prohibition—Against killing deer out of season—Exemption of resident farmer.]—Defendant was convicted under sec. 15 of the Game Protection Act, 1895 (British Columbia), for having shot certain deer within the period prohibited by the Act. It appeared from the evidence that the defendant resided upon and managed a certain farm as the agent of the owner, who was then absent, and that the deer in question came upon and was depasturing a cultivated field, part of the farm, when the defendant shot and killed it:—Held, that the defendant, in committing the act, was within the exemption created by sec. 16 of the Act, providing: "16. Nothing in this Act shall be construed as prohibiting any resident farmer from killing at any time deer that he finds depasturing within the cultivated fields." *Reg.* v. *Symington*, 4 B.C.R. 323.

2. Game Protection Act—Exception in statute.]—The existence of an exception nominated in the description of an offence created by statute must be negatived in order to maintain the charge, but if a statute creates an offence in general, with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso. The generality of the prohibition contained in the statute (sec. 7) against purchasers having in possession with intent to export, causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province. *Regina* v. *Strauss*, 5 B.C.R. 486.

3. Species of animal hunted.]—A conviction under sec. 14 of the Game Protection Act, 1898, as re-enacted by Cap. 20, sec. 8, of 1909, for hunting any animal must be supported by evidence showing the species of animal hunted. *Rex* v. *Oberlander*, 15 B.C.R. 134.

IX. Special Procedure and Powers.

A. Cases Requiring Consent of Governor-General.

Foreign seaman.]—A preliminary hearing before a magistrate of a charge against a foreign seaman for an indictable offence committed on board a British ship within the English Admiralty jurisdiction is not such a proceeding for the trial and punishment of such person as to require the consent of the Governor-General pursuant to sec. 591 of the Criminal Code. *Rex* v. *Tano*, 14 B.C.R. 200.

B. Search Warrants.

Gaming house—Order to enter—Within what time to be executed.]—An order to enter a house reported to be a common gaming house must be executed within a reasonable time. *Regina* v. *Ah Sing*, 2 B.C.R. 167.

X. COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICES.

A. Arrest Without Warrant.

For what offences.]—The applicant had been arrested, without a warrant, by the chief of police for Vancouver at the instance of a private detective there who had received a telegram from a private detective in Montreal. The offence alleged was that the accused had, in Montreal, received a ring with instructions to hand it over to a third person. A second ring he had, as alleged, stolen from such third person directly. He converted it to his own use and left for British Columbia:—Held, that this was not an offence within the meaning of sec. 355 for which an arrest could be made without a warrant. *Rex* v. *Schyffer*, 15 B.C.R. 338.

B. Summons or Warrant.

Necessity of sworn information.]—A constable released from custody before the expiration of his term of imprisonment an Indian who had been convicted and sentenced to 14 days' imprisonment. The constable then went before one of the convicting magistrates and told him that, acting upon instructions from the Superintendent of Indian Affairs at Ottawa, he had released the Indian. The magistrate thereupon had a summons issued and served upon the constable calling upon him to appear in answer to a charge of unlawfully releasing the Indian. The constable appeared before two justices of the peace upon said charge and by his counsel objected that the magistrate had not jurisdiction to deal with the matter, as there was no sworn information. The magistrate overruled the objection, held a preliminary enquiry and committed the accused for trial:—Held, that accused could not set up sec. 654 of the Code, providing that a sworn information was necessary before the magistrate could issue a summons. *In re Thompson*, 14 B.C.R. 314.

XI. PROCEDURE ON APPEARANCE OF ACCUSED BEFORE JUSTICES.

A. Procuring Attendance of Witnesses.

Minister of the Crown.]—A minister of the Crown may be summoned as a witness. The power of compelling attendance given by secs. 671 and 711 of the Criminal Code should be exercised only when the magistrate has reason to believe that any person can give relevant and material evidence in a matter pending before him. *Rex* v. *Allerton*, 19 B.C.R. 493.

B. Preliminary Inquiry.

Inquiry commenced by one and completed by two justices.]—Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two is irregular unless they have heard all the evidence. *Re Nunn*, 6 B.C.R. 464.

C. Restoration of Property.

Evidence—Money taken from person of accused—Restoration of.]—It appearing that money taken by the police from a prisoner would not be required as evidence by the Crown, the Court ordered it to be restored. *Regina* v. *Harris*, 1 B.C.R., Pt. I., 255.

D. Bail.

1. Materials for exercise of discretion.]—On an application for bail on a charge which before the Code would have been a felony, the probability of the prisoner appearing for trial is the principal consideration in determining whether or not bail should be granted. Where, therefore, it appeared that the prisoner had not his home or family in this country, and was here by virtue of extradition proceedings, which he resisted, bail was not granted, notwithstanding the apparent weakness of the Crown's case. *Rex* v. *McNamara*, 18 B.C.R. 125.

2. After committal.]—A judge who has committed a prisoner for trial may subsequently admit him to bail. *In re Ruthven*, 6 B.C.R. 115.

XII. SUMMARY CONVICTIONS.

A. Jurisdiction of Justices.

1. Charge of keeping disorderly house.]—A magistrate has absolute jurisdiction,

under sec. 785, sub-sec. (f), and sec. 784 of the Criminal Code, to hear and determine in a summary way a charge of keeping a disorderly house. The exercise of the summary jurisdiction is, under those sections, and under sec. 791, discretionary with the magistrate, and he may commit the accused for trial, and a mandamus will not lie to compel him to hear and determine the charge summarily. *Re Farquhar Macrae,* 4 B.C.R. 18.

2. Obstructing peace officer.]—A person charged with obstructing a peace officer in the execution of his duty may be tried summarily by a magistrate without the consent of the accused. *R.* v. *Jack,* 9 B.C.R. 19.

3. Charge of obstructing peace officer.]—A person charged with obstructing a peace officer in the execution of his duty may be tried summarily without the consent of the accused. *Rex* v. *Nelson,* 8 B.C.R. 110.

B. Information.

1. Omission of material allegation.]—Where the information omits a material allegation of fact, but the issue as to that fact is tried out before the magistrate, who finds the fact against the accused, the conviction will not be quashed. *R.* v. *Taylor,* 14 B.C.R. 235.

2. Describing offence charged.] — An information charging vagrancy should show the particular facts relied on to establish the offence. *R.* v. *McCormack,* 9 B.C.R. 497.

3. Surplusage.]—An allegation in an information laid under the Dominion Statute of the 40 Vict., c. 33, that the accused was playing "at an unlawful game" is merely surplussage and may be rejected. *R.* v. *Ah Pow,* 1 B.C.R., Pt. I., 147.

C. Summons and Warrant.

Return of summons.]—Where a justice of the peace for the district of West Kootenay, on an information against the police magistrate for the City of Kaslo, granted a summons returnable at Nelson, he was held to have acted within his jurisdiction. *R.* v. *Chipman,* 5 B.C.R. 349.

D. Trial.

1. View by magistrate.]—On the trial for selling an intoxicant to an Indian, the magistrate, after hearing the evidence, but before giving his decision, went alone and took a view of the place of sale:—Held, quashing the conviction, that this proceeding was unwarranted. *Re Sing Kee,* 8 B.C.R. 20.

2. Withdrawal of charge.]—Defendant was charged with selling liquor to an Indian. The prosecution offered all the evidence it had and closed its case. Defendant's counsel objected that no evidence had been given that the liquor was supplied to an Indian. The magistrate allowed the informant to withdraw the charge and lay a new information for the same offence, and convicted the defendant. Application was made for a writ of prohibition to be issued against the magistrate prohibiting him from signing a warrant of commitment against the defendant:—Held, that the magistrate should have dismissed the charge and granted a certificate of dismissal, or convicted the defendant. There is no provision for withdrawing summary proceedings once started. *Rex* v. *Chew Deb,* 18 B.C.R. 23.

E. Adjudication.

1. Conviction.

1. Describing offence.] — A conviction is bad if it does not set out the facts constituting the offence. *R.* v. *McCormack,* 9 B.C.R. 497.

2. Insufficiency of conviction.]—A conviction which does not show that the offence was committed within the jurisdiction of the justices, and containing a sentence to pay a fine, costs, and the expenses of conveyance to goal, without specifying the person entitled to receive the costs or the amount of the expenses, is bad. *R.* v. *Akerman,* 1 B.C.R., Pt. I., 255.

3. Amendment.]—A magistrate has a right to amend a conviction on the return to a rule to show cause why a writ of certiorari should not issue to bring up the conviction. *R.* v. *McAnn,* 4 B.C.R. 587.

4. Amendment.]—Justices may amend convictions before making a return to a writ of certiorari, in matters of form but not in matters of substance. *Houghton's Case,* 1 B.C.R., Pt. I., 89.

5. Depositions.]—The Court may look at the depositions for the purpose of deciding whether there is any evidence whatever to found jurisdiction to convict. *Houghton's Case,* 1 B.C.R., Pt. I., 89.

6. Evidence taken down in writing.]—The omission of the magistrate to have the evidence taken down in writing at the hearing is fatal to the conviction. *R.* v. *McGregor,* 11 B.C.R. 350.

7. Different offences charged—Hearing of second information before decision on first—Conviction on second.]—Where a magistrate is trying two distinct but similar informations against an accused, a conviction by him in the second case is not invalid merely because he reserved his decision in the first case, which he afterwards dismissed, until the conclusion of the second case. *Rex* v. *Sing,* 9 B.C.R. 254.

8. Preliminary inquiry.]—The omission by the magistrate to hold the preliminary inquiry as provided in sec. 789 of the Code, to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction. *Rex* v. *Williams,* 11 B.C.R. 351.

9. Sitting of Court.]—That the omission to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, was also fatal. *Ibid.*

10. Description of accused.]—A summary conviction describing defendant as "Mrs. Morgan" held bad. *Regina* v. *Morgan,* 1 B.C.R., Pt. I., 245.

2. Warrants of Commitment.

1. Territorial jurisdiction.]—An Indian agent, acting in a magisterial capacity, in committing an accused person for an offence under the Indian Act, must show on the warrant of commitment the district in which such Indian agent is acting. *Rex* v. *McHugh,* 13 B.C.R. 224.

2. Not showing conviction.]—A warrant of commitment not showing any conviction is defective. *Ex parte Ettamass,* 2 B.C.R. 232.

3. Description of justices.]—Where the warrant of commitment stated that the prisoner was convicted before a justice of the peace "in and for the said County of Westminster," but the document was signed "J. Pittendrigh, Cap'n, S.M.":—Held, that the warrant was bad. *Rex* v. *Hong Lee,* 14 B.C.R. 248.

4. Granting bail.]—A warrant of commitment to prison after conviction on a criminal charge is not vacated by the lodging of an appeal and granting of bail. *Rex* v. *Estelle Durlin alias Stella Carroll,* 17 B.C.R. 207.

5. Commitment on non-payment of fine.]—Under the Municipal Act, 1896, an offender may be committed to gaol for non-payment of a fine without the previous issue of a distress warrant. *R.* v. *Petersky,* 5 B.C.R. 549.

XIII. Summary Trial of Indictable Offences.

1. Stipendary.]—Even though a stipendiary magistrate for a County may have conferred upon him by a Provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under sec. 777 of the Criminal Code. *Rex* v. *Nar Singh,* 14 B.C.R. 192.

2. By consent.]—Sec. 777 of the Criminal Code applies in British Columbia. *R.* v. *Rahmat Ali, No. 2,* 15 B.C.R. 175.

3. Reading depositions.]—Sec. 798 of the Code relieves the magistrate from the duty of reading the depositions to the witnesses before the accused enters on his defence. *Rex* v. *Klein,* 15 B.C.R. 165.

4. View.]—Accused was charged with obtaining a cheque for $500 unlawfully, in that he sold a particular town lot for a certain sum, but on inspection the purchaser discovered that the lot actually sold was a different lot. The evidence for the prosecution and defence was closed and argument thereon was being proceeded with when the question arose as to the necessity of a view of the lot by the Court. It being doubtful whether there was power to hold such view, the learned magistrate submitted a case for the opinion of the Court of Appeal:—Held, that there was no authority, statutory or otherwise, empowering the magistrate to take a view. *Rex* v. *Crawford,* 18 B.C.R. 20.

XIV. Speedy Trial.

A. In General.

1. Right of accused to—After bail by magistrate.]—A person accused of an indictable offence, who has been admitted to bail under Code, sec. 601, by the magistrate before whom he is brought for preliminary examination under the charge, has a right to a speedy trial under Code, sec. 765, to the same extent as if the magistrate had committed him for trial under sec. 506. *Regina* v. *Lawrence,* 5 B.C.R. 160.

2. Right of prisoner to re-elect as to mode of trial.]—A prisoner who has been brought up for election as to the mode of his trial under the speedy trial sections of the Criminal Code, and has elected to be tried by a jury, may afterwards re-elect to be tried speedily by a judge. *Reg.* v. *Prevost,* 4 B.C.R. 326.

3. Right to change election.]—A person committed for trial and out on bail, appearing voluntarily with his counsel before a County judge and electing to be tried speedily, cannot change his election so as to chose trial by jury. *Rex* v. *Day,* 16 B.C.R. 323.

4. Absence of sheriff.]—The fact that the sheriff was not present or that he did not notify the judge of the accused coming before him for election, does not invalidate such election. *Ibid.*

5. New trial—Re-election.]—An accused appealing from a conviction in a County Court judge's Criminal Court, and securing a new trial, is sent back to that Court, and has not any right to re-elect whether he shall be tried speedily or go before a jury. *Rex* v. *Deakin,* 17 B.C.R. 13.

6. Depositions disclosing offence not subject of speedy trial.] — Where the depositions disclose an offence which could not have been disposed of by speedy trial, the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial. *Rex* v. *Preston,* 11 B.C.R. 159.

7. Election of prisoner to be tried speedily for a certain offence—Failure of Crown to prove—Whether prisoner can be convicted on a different offence disclosed by the evidence.] — A prisoner having decided to be tried speedily upon the charge of forgery, for which he was committed to trial, and being charged and tried for that offence accordingly, there was not sufficient evidence to convict, but there was evidence upon which he might be convicted of obtaining money by false pretences:—Held, that the Crown could not then substitute a charge for the latter offence for the charge of forgery upon which the prisoner had elected to be tried. *Regina* v. *Morgan,* 2 B.C.R. 329.

B. Pleading.

Guilty.] — Where the accused pleads guilty, and the indictment only alleges a fact which might or might not, according to the circumstances, be sufficient to prove an offence, the plea of guilty will be struck out. *R.* v. *Labourdette,* 13 B.C.R. 443.

C. Adjournment.

1. Power to grant.] — Although the Crown elects to proceed with a speedy trial in the absence of a material witness, and although the trial has commenced, the Court has power to grant an adjournment to enable the witness to be produced. *R.* v. *Gordon,* 6 B.C.R. 160.

2. Refusal of.]—An adjournment of a trial for the purpose of procuring the evidence of a witness out of Canada will be refused, as contrary to the spirit of the Speedy Trials Act. *R.* v. *Morgan,* 2 B.C.R. 329.

XV. INDICTMENT.

A. Preferring Indictment.

1. Acting Attorney-General.] — Where the accused had been committed for trial by a magistrate, the indictment was preferred by counsel acting for the Crown at the assize, and contained a direction to that effect signed by the acting Attorney-General:—Held, that the indictment was properly preferred under sec. 872 of the Code. *Rex* v. *Faulkner,* 16 B.C.R. 229.

2. Judge.]—It is no part of the duty of a judge to initiate a criminal prosecution. *Rex* v. *Daniel,* 17 B.C.R. 150.

B. Amendment of.

Name of prosecutrix.]—An amendment to the indictment changing the Christian name of the prosecutrix is proper to be allowed. *R.* v. *Faulkner,* 16 B.C.R. 229.

C. Form of.

1. Conspiracy.]—In an indictment for conspiracy to defraud it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. *R.* v. *Hutchinson,* 11 B.C.R. 24.

2. Abortion.]—An indictment under sec. 273 of the Code, charging accused "with unlawfully using on her own person . . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage), is sufficient. *Rex* v. *Holmes,* 9 B.C.R. 294.

3. Alternative charges.]—The fact that a person charged with an offence might, upon the facts, have been charged with a conspiracy with another is no objection to the individual charge. *Regina* v. *Clark*, 2 B.C.R. 191.

4. Attempt.]—On an indictment for rape, a conviction for an assault with intent to commit rape is valid. *John* v. *Reginam*, 2 B.C.R. 191; 15 S.C.R. 384.

XVI. Grand Jury.

A. Summoning.

1. Number.]—Upon the sheriff summoning thirteen grand jurors, Schedule B of the Jurors Act is complied with in that portion of the Province to which it applies. *Rex* v. *Bonner*, 18 B.C.R. 454.

2. Omission to summon.]—A sheriff when about to summon, pursuant to sec. 48 of the Jurors Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented and did not summon him:—Held, that the grand jury was not legally constituted and that an indictment found by the jurors who had been summoned must be quashed. A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of sec. 656 of the Criminal Code. *Rex* v. *Hayes*, 9 B.C.R. 574.

B. Constitution of.

1. Qualification.]—A motion to quash an indictment found by a jury not properly summoned is not an objection to the constitution of the jury within the meaning of sec. 656 of the Criminal Code. *R.* v. *Hayes*, 9 B.C.R. 574.

2. Qualification.]—An objection to the qualification of a member of a grand jury is not an objection to the constitution of the jury within the meaning of sec. 656 of the Criminal Code, and so cannot be raised by motion to quash. *R.* v. *Hayes*, 11 B.C.R. 4.

C. Materials to Act On.

1. Grand jury—Perusal of deposition of absent witness.]—Upon a bill of indictment being presented, the grand jury reported that without the evidence of an absent witness they had not materials to find a bill:—Held, that they were entitled to peruse the depositions without proof that the witness was too ill to travel or absent from Canada. *Regina* v. *Howes*, 1 B.C.R., Pt. II., 307.

2. Returning bill without taking evidence.]—A grand jury having returned a true bill without calling any of the witnesses named on the indictment, but upon reading depositions taken at the preliminary hearing, which had not been legally submitted to them, the assize judge sent them back with instructions to take the evidence of the witnesses whose names were on the back of the indictment and determine upon such evidence whether they would bring in a true bill, which they did:—Held, that the judge had properly exercised his discretion, and was right in dismissing a motion to set aside a conviction had in a trial upon such true bill. *Rex* v. *Thurstan*, 16 B.C.R. 326.

D. Finding True Bill.

Requisite number.]—In a county where twelve grand jurors are required to concur in the finding of a true bill, the Court of Appeal must assume, in the absence of evidence to the contrary, that a true bill returned by the grand jury was so found by the requisite number. *Rex* v. *Spintlum*, 18 B.C.R. 606.

E. Bias.

Determination.]—The question as to whether a member of the grand jury is prejudiced is for the judge of assize to decide, and his decision cannot be reviewed on appeal. *R.* v. *Hayes*, 11 B.C.R. 4.

F. Indorsing Names of Crown Witnesses.

Indorsing names of witnesses on back.]—The provisions of sec. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment. *Rex* v. *Holmes*, 9 B.C.R. 294.

XVII. Venue.

A. In General.

1. Division into districts.]—British Columbia has been divided into districts for purposes relative to the administration of justice in criminal cases by the Sheriffs Act, 1873, and the Sheriffs Act Amendment Act, 1878, and a prisoner arraigned at Kamloops, in the district of Clinton, for a mur-

der alleged to have been committed in the district of Kootenay is improperly arraigned and the proceedings are null and void. *R.* v. *Malott*, 1 B.C.R., Pt. II., 207, 212.

2. Imperfect statement.]—Where in the body of the indictment there was no venue stated, and the marginal venue was simply British Columbia "to wit," it was held that the venue was sufficiently stated in the record, and that the marginal venue was at worst but an imperfect venue, and therefore cured by section 23 of the Criminal Procedure Act, 1869. *R.* v. *Sproule*, 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

B. Change of.

1. Criminal libel.]—In a prosecution for criminal libel it is not sufficient, in order to obtain a change of venue, 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 accused cannot obtain a fair trial, nor is the fact that two trials have proved abortive a reason per se for a change of venue. *R.* v. *Nicol*, 7 B.C.R. 278.

2. Affidavits.]—Upon an application for a change of venue when the judge is seised of the facts, the usual practice of putting those facts on affidavit may, with the consent of counsel for the accused, be dispensed with. *R.* v. *Spintlum*, 18 B.C.R. 606.

3. Authorization of change.] — The entry in his book by the clerk of assize is a sufficient authorization for a change of venue, and can be proved by an exemplification of the proceedings. *R.* v. *Spintlum*, 18 B.C.R. 606.

4. Decision of judge as to change.]—Where a judge is seised of facts from which it can be properly inferred that it is conducive to the ends of justice to make a change of venue, his decision is one of fact, and is not open to review by way of case stated. *Ibid.*

5. Expenses.]—An order made pursuant to the Dominion Statute 32 & 33, Vict., c. 29, sec. 11, directing a change of venue, would be sufficient although containing no reference to any provision for expenses, when the indictment has been pleaded to and the trial proceeded with without objection, and even in a Court of error there could be no valid objection to a conviction founded on such order. *In re Sproule*, 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

XVIII. Pleading.

Plea of guilty struck out.]—Where the accused pleads guilty to a charge, and it appears that the indictment alleges only facts which might or might not amount to the offence, the plea of guilty will be struck out. *R.* v. *Labourdette*, 13 B.C.R. 443.

XIX. Trial.

1. Grounds on which adjournment granted.]—On an application to grant a postponement of a trial on the ground of absence of witnesses, the Court must be satisfied by affidavit, firstly, that the persons are material witnesses, which must be sworn to positively and not merely on belief; secondly, that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance; and, thirdly, that there is reasonable expectation of counsel being able to procure their attendance at the future date, if granted. *R.* v. *Mulvihill*, 19 B.C.R. 197.

2. Lapse of warrant of commitment by postponement.]—The applicant was extradited to Canada on account of stealing a large sum of money from the Bank of Montreal at New Westminster. He had a preliminary hearing before the magistrate and was committed, in September, 1912, to the gaol at New Westminster, until discharged by due process of law. The assizes for the County of Westminster were held in the month of October following. During the assizes an application was made to the presiding judge regarding the position taken by the Crown that it did not propose to prefer a bill of indictment to the grand jury against the accused at the said assizes. On this application it was contended by the Crown that in effect an order was made by the judge traversing the case to the next assizes. This was disputed on behalf of the accused. The present application was for the discharge of the accused on the ground that the warrant of commitment lapsed at the end of the assizes, and that the Crown had obtained no traverse of the proceedings to the next assizes:—Held, that the warrant of commitment was still valid and subsisting, and that the only application which the prisoner could make in the circumstances was for an order to be released on bail. *Rex* v. *Dean*, 18 B.C.R. 18.

XX. ADDRESSES TO JURY.

A. By Accused.

Statement by accused.]—A prisoner, though defended by counsel, may, at the conclusion of his counsel's address, himself make a statement of fact to the jury. *R.* v. *Rogers,* 1 B.C.R., Pt. II., 119.

B. Right of Reply.

1. Where prisoner makes a statement.]—Notwithstanding the prisoner calls no evidence, if he makes a statement of fact to the jury, the Crown has the right of reply. *Regina* v. *Rogers,* 1 B.C.R., Pt. II., 119.

2. By the Crown.] — Counsel for the Crown is not restricted in his reply under sec. 944 to answering matters dealt with by counsel for the prisoner. *R.* v. *Walker and Chinley,* 15 B.C.R. 100.

XXI. JURY.

A. Summoning.

1. Summons.]—There was no objection to the summoning of jurors from a limited portion of the shrievalty under the Jurors Act, 1883, as that Act in effect created new districts for the purposes of the administration of justice in criminal cases. *R.* v. *Sproule,* 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

2. Change of law.]—Where a new Act governing the selection and summoning of juries comes into force after a jury for a particular assize has been selected and summoned under the old Act, but before the trial commences, this is not a good objection to the panel. *R.* v. *McNamara (No. 2),* 19 B.C.R. 193.

B. Conduct of Trial With.

1. Exclusion of during argument.]—The jury should not be excluded during the preliminary inquiry as to whether certain evidence is admissible as a dying declaration. *R.* v. *Aho,* 11 B.C.R. 114.

2. Right to find guilty of lesser offence.]—If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. *Rex* v. *Scherf,* 13 B.C.R. 407.

C. Matters Invalidating Verdict.

1. Separating.] — After the jury had been given in charge, one of the jurymen was taken with a fit and removed, in charge of the sheriff and his physician, to his residence. The remainder of the jury subsequently removed to the sick man's house, where, upon his recovery, a verdict of guilty was rendered:—Held, that after the verdict had been recorded it could not be discharged. *R.* v. *Peter,* 1 B.C.R., Pt. I., 2.

2. Poll.]—On a trial for felony, the prisoner is not entitled, as of right, to have the jury polled. Where on such a trial, after the delivery of the verdict, the prisoner's counsel moved to have the jury polled, but the Court perceived nothing to create a doubt regarding the agreement and concurrence of the whole jury, the motion was rightly refused. *R.* v. *Sproule,* 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

3. Bias.]—Where, on the second day of a trial, the foreman of the jury informed the judge that one of the jury stated that he was prejudiced, the judge was right in refusing to take any action and in directing that the trial should proceed. *R.* v. *Mah Hung,* 17 B.C.R. 56.

XXII. CONDUCT OF TRIAL.

Evidence in reply.]—After the case for the Crown and the case for the defence was closed the Crown called a witness in reply, whose evidence changed by a few minutes the exact time of the commission of the crime as stated by the previous witnesses of the Crown, which change tended to weaken the alibi set up by the defence:—Held, that to allow the evidence was entirely in the discretion of the judge, and the accused was not prejudiced, as he was allowed to cross-examine and was given an opportunity to meet the evidence. *R.* v. *Wong On,* 10 B.C.R. 555.

XXIII. JUDGE'S CHARGE.

1. Duty to define crime—New trial.]—It is the duty of a judge in a criminal trial with a jury to define to the jury the crime charged, and to explain the difference between it and any other offence of which it is open to the jury to convict the accused. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the judge's charge is immaterial. *Rex* v. *Wong On and Wong Gow,* 10 B.C.R. 555.

2. Comment on motive.]—The prisoner was found with the clothing of the prosecutrix in his valise, but he denied any knowledge of how it came to be there, and the jury discredited his story. The evidence of the prosecutrix was that she had gone to Prince Rupert from Vancouver with the accused and lived there with him; that when she decided to return to Vancouver her clothing, including her boots, were missing, and were found in the prisoner's bag when he was arrested on the dock waiting for his steamer. The defence suggested that the girl herself had placed the clothing in the bag, but she denied this. The trial judge, in his charge to the jury, said: "It is suggested on the part of the Crown, or, if it is not suggested, your common sense would suggest to you, that there would be a motive, we can readily understand, on the Chinaman's part, for the taking of those clothes. There is sufficient evidence here, if you find that the intention of taking the girl to Prince Rupert was to embark her in the business of prostitution, and it is a matter of common knowledge that one of the most usual ways of forcing them to embark in the business of prostitution by men who intend to profit by their becoming prostitutes, is by taking away their clothes." There was no objection to this charge on behalf of the prisoner at the time:—Held, that no substantial wrong had been done to the prisoner sufficient to justify the Court exercising its powers, under sec. 1,019 of the Criminal Code, to direct a new trial. *Rex* v. *Lew*, 17 B.C.R. 77.

3. Lesser offence.]—If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. *R.* v. *Scherf*, 13 B.C.R. 407.

XXIV. Appeals.

A. Jurisdiction.

1. Summary conviction.]—The decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court judge has no jurisdiction to interfere by habeas corpus. *Rex* v. *Beamish*, 8 B.C.R. 171.

2. Summary conviction.] — An appeal from a conviction under sec. 72 of the Summary Convictions Act must be brought in the County Court of the county within which the offence is alleged to have been committed. *Rex* v. *Brady*, 20 B.C.R. 217.

3. From justices.]—The right of appeal given by sec. 782 of the Criminal Code, as amended by 58 & 59 Vict. (Can.), 40 (a), from conviction by two justices of the peace, under Code sec. 783 (a) and (f), is not taken away in British Columbia by Code sec. 784, sub-sec. 3, as amended by 58 & 59 Vict. (Can.), c. 40 (b). *Regina* v. *Wirth and Reed*, 5 B.C.R. 114.

4. Commission to take evidence.]—No appeal lies to a Divisional Court from an order appointing commissioners to take evidence under sec. 23, sub-sec. 2, of the Criminal Law Amendment Act, 1890. *Regina* v. *Johnson*, 2 B.C.R. 87.

5. Case stated under 20 & 21 Vict., c. 43.]—This statute is in force in British Columbia, not having been repealed by the Dominion Statute of the 37 Vict., c. 42. *R.* v. *Ah Pow*, 1 B.C.R., Pt. I., 147.

6. Postponement of trial.]—Where, on an application under sec. 901 of the Criminal Code, the Court, in the exercise of judicial discretion, has refused to postpone the trial, there can be no review of the decision by an Appellant Court, and the question presented does not constitute a question of law upon which there may be a reserved case under sec. 1,014. *R.* v. *Mulvihill*, 19 B.C.R. 197; 49 S.C.R. 587.

B. Practice.

1. Leave to appeal.]—Leave to appeal to the Court of Appeal should not be lightly granted, and the Crown should be served with a notice of appeal, setting out the grounds thereof. *R.* v. *Lai Ping*, 11 B.C.R. 102.

2. Rules of decision.]—The practice of the Court of Appeal is to follow the decisions of other like Courts of Canada on Federal statutes, particularly criminal, with the intention of harmonizing the decisions and securing uniformity of application thereof throughout Canada. *R.* v. *Sam Jon*, 20 B.C.R. 549.

3. Transmitting the case stated.]—The provisions in sec. 87 of the Summary Convictions Act that the appellant shall, within three days after receiving the case stated, transmit it to the district registry, is a condition precedent to the jurisdiction of the Court to hear the appeal. *Cooksley* v. *Nakashiba*, 8 B.C.R. 117.

4. Recognizance on.]—The recognizance required by sec. 71 (c) of the Summary Convictions Act (Provincial) must be entered into before the appeal can be entered for trial. *Regina* v. *King*, 7 B.C.R. 401.

5. Recognizance.] — The recognizance required by sec. 900, sub-sec. 4, of the Criminal Code is a condition precedent to the jurisdiction of the Court to hear the appeal, and no substitute therefor is permissible. *Rex* v. *Geiser*, 8 B.C.R. 169.

6. Notice of appeal.] — A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient. *Rex* v. *Mah Yin*, 9 B.C.R. 319.

7. Notice of appeal—Service of.]—A notice of appeal from a summary conviction (Provincial), served upon the convicting magistrate, is not invalid because it is not also addressed to and served upon the respondent. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody:—Quære, whether service of notice of appeal on respondent's solicitor would not be sufficient in any event. *Rex* v. *Jordan*, 9 B.C.R. 33.

8. Payment of fine—Effect of, on right of appeal.]—A person, by paying his fine on a summary conviction, loses any right of appeal he might otherwise have had under sec. 880 of the Criminal Code. Where, on an appeal from a summary conviction, an appellant makes a money deposit in lieu of recognizance, the deposit, which includes both the fine and the security for costs of appeal, should be returned by the justice into the appellate Court, and in default the appeal cannot be heard. *Rex* v. *Neuberger*, 9 B.C.R. 272.

9. Summary conviction—Objection as to by-law not taken in Court below.]—A defendant convicted on summary conviction of an infraction of a city by-law is estopped from contending on appeal that the by-law is ultra vires unless the objection was taken before the magistrate. He is estopped from appealing on the merits if he pleaded guilty before the magistrate. *Regina* v. *Bowman*, 6 B.C.R. 271.

10. Summary convictions — Return of conviction and deposit.] — On an appeal from a summary conviction, the conviction and the deposit as security for costs should be returned into the County Court, but failure to do so does not invalidate the appeal. *In re Kwong Wo*, 2 B.C.R. 336.

11. Amendment of stated case.]—A motion to the Court of Appeal to amend a stated case must be disposed of before the hearing of the stated case. *R.* v. *McNamara*, 19 B.C.R. 175.

12. Notes of evidence.] — The official stenographer's transcript of the evidence should not be taken as the only evidence of what took place at the trial; reference may be made to the judge's notes appearing in the stated case in which he stated that the stenographic notes were imperfect. *R.* v. *Angelo*, 19 B.C.R. 261.

13. Necessity for case stated.]—Upon leave to appeal being granted on motion under sec. 1,015 of the Criminal Code owing to the refusal of the Court below to reserve a question, the Court will not thereupon hear and deal with the question upon the agreement of counsel and the evidence before the Court as though the case had been stated by the Court below. The Court cannot substitute itself for the tribunal nominated by statute to discharge that duty. *R.* v. *Angelo*, 19 B.C.R. 261.

14. Time for reserved case.]—After verdict, but before sentence, it is too late to move for a reserved case. Sec. 1,014, sub-sec. 2, of the Code provides that the Court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal . . . . :—Held, that this means that any reservation of a case after verdict must be of the Court's own motion. *Rex* v. *Pertella*, 14 B.C.R. 43.

15. Object to charge.]—An objection to a conviction on a charge other than that upon which a prisoner is extradited cannot be entertained without evidence of what the charge was upon which the extradition was effected. *Rex* v. *McNamara (No. 1)*, 19 B.C.R. 175.

C. Writ of Error.

1. Indictment for assault.]—On appeal by way of writ of error from a conviction upon indictment for assault occasioning bodily harm, the following errors were, inter alia, in effect assigned: (1) That the grand and petit juries were stated by the record to be taken from the County of Westmin-

ster and not from the district of New Westminster (a smaller area included within the boundaries of the former), as required by the Jurors Act, C.S.B.C. 1888, c. 64:—Held, that this was a question of law which could not have been reserved at the trial, but that sec. 247 of the Criminal Procedure Act precluded the plaintiff from raising the objection in error. (2) That the trial judge did not deliver the whole of his charge to the jury in open Court, but, having been requested by message from the jury after they had retired, proceeded to the jury room with the plaintiff in charge of the sheriff, and in the absence of both counsel for the Crown, who elected to be absent, and counsel for the plaintiff, gave further instructions to the jury, the plaintiff not objecting:—Held, that the facts as to this did not properly form part of the record; that it was a question which could have been reserved, and therefore, not raisable in error; and that in any event, while it is inexpedient for a judge to communicate with the jury otherwise than in open Court, yet his doing so is not necessarily a ground of error; (3) That the record did not state where the offence was committed:—Held, that secs. 143 and 245 of the Criminal Procedure Act precluded the plaintiff from assigning this as error:—Held, further, that if the record is imperfectly returned, the plaintiff in error should allege a diminution of the record, but it is too late to do so after errors have been assigned, joinder therein and arguments thereon. *Samuel Greer, plaintiff in error* v. *Her Majesty the Queen, defendant in error*, 2 B.C.R. 112.

2. Polling of jury—Change of venue—Power of Governor to issue commissions.] —The plaintiff in error was committed for trial on a charge of murder. The scene of the alleged homicide was in the bailiwick of the Sheriff of Kootenay. On the application of the Crown, Victoria (in the bailiwick of the Sheriff of Vancouver Island) was fixed as the place of trial. The Chief Justice, before making the order, required from the Crown "an undertaking that the Crown would abide by such order as the judge who might preside at the trial should think just to meet the equity of sec. 11 of 32-33 Vict., c. 29." The order so pronounced was not drawn up, but a document incorrectly stating the order, and omitting all mention of the terms imposed, was signed at the time and handed to the gaoler, and under this document the prisoner was detained at the gaol at Victoria until his trial. The prisoner was tried and found guilty at the sittings of the Court of Oyer and Terminer and General Gaol Delivery held at Victoria under the Assize Court Act, 1885, and presided over by Gray, J., a judge of the Supreme Court of British Columbia, and a justice named in a commission of Oyer and Terminer and General Gaol Delivery issued by the Lieutenant-Governor. In the body of the indictment there was no venue stated, and the marginal venue was simply "British Columbia, to wit." The jurors were selected, not from the whole of the bailiwick of the Sheriff for Vancouver Island, as defined by the Sheriffs Amendment Act, 1878, but from that portion of the bailiwick created by the Jurors Act, 1883, as Victoria District. On the return to a writ of error, the prisoner alleged a diminution of the record, and applied for a writ of certiorari:—Held, (1) that where an order has been made orally, and afterwards imperfectly drawn up, i.e., without specifying the terms upon which it was made, and such terms appear in the judge's note made at the time of the application, it is proper, in making up the record on a writ of error prayed, that a true and perfect order should be drawn up and placed on the record:—Held, (2) that the refusal of the judge at the trial to allow the prisoner's counsel to poll the jury after verdict was not a matter that could be dealt with on a writ of error, and, therefore, should not appear in the record. On the writ of error:—Held, (1) that assuming the Lieutenant-Governor's commission to be void, the Court was properly constituted without commission, under sec. 14, Judicature Act, 1879, and the Assize Court Act, 1885:—Held, (2) following McLean's Case, that the Commission of Oyer and Terminer and General Gaol Delivery was sufficient, and that the Lieutenant-Governor had power to issue it under sec. 129, British North America Act, 1867:—Held, (3) that the commission was not exhausted by reason of the justices therein named having held under it Courts of Oyer and Terminer in other districts of the Province:—Held, (4) that there was no objection to the summoning of jurors from a limited portion of the shrievalty, under the Jurors Act, 1883, as that Act in effect created new districts for the purposes of the administration of justice in criminal cases:—Held, (5) that the prescribing of the qualifications of

jurors, and the manner of preparing the jury lists, by the Jurors Act, 1883, were not matters of "criminal procedure" within the meaning of sec. 91, sub-sec. 27, of the British North America Act, 1867, but were matters belonging to the "organization of Provincial Courts" within the meaning of sec. 92, sub-sec. 14, and therefore intra vires of the Provincial Legislature:—Held, (6) that the venue was sufficiently stated in the record, and that the marginal venue, "British Columbia, to wit," was at the lowest but an imperfect venue, and therefore cured by sec. 23 of the Criminal Procedure Act, 1869:—Held, per Crease, J., that the statement of the imposition of conditions in an order under sec. 11, 32-33 Vict., c. 29, is not jurisdictional:—Held, per Begbie, C.J., that any application for an order for a change of venue under sec. 11 should be made as early as possible after the commitment:—Held, by Gray, J., after argument before himself and brother justices, sitting as assessors on a case stated, that on a trial on a charge of felony the prisoner is not entitled in this Province, as of right, to have the jury polled, and that where in such a trial, after verdict given, the prisoner's counsel moved to have the jury polled, but as the Court perceived nothing to create a doubt respecting the agreement and concurrence of the whole jury, the motion was refused:—Held, that such refusal was proper. *Sproule* v. *Regina*, 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

D. New Trial.

1. Voluntary statement by witness.]—Where a witness who is being examined through an interpreter voluntarily makes a statement incriminating the accused, but which statement is included in other evidence subsequently admitted, the accused is not necessarily prejudiced thereby. *R.* v. *Walker and Chinley*, 15 B.C.R. 100.

2. Improper admission of evidence.]—Where evidence has been improperly admitted, or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shown that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the Court of Appeal may order a new trial. *R.* v. *Allen*, 16 B.C.R. 9; 44 S.C.R. 331.

3. Improper admission of—Effect of.]—Under sec. 746 of the Code, the improper admission of evidence at a criminal trial cannot be said in itself necessarily to constitute a wrong or miscarriage, but it is a question for the Court, upon hearing of any appeal, whether in the particular case it did so or not. *Regina* v. *James Woods*, 5 B.C.R. 585.

4. Counsel's address not supported by evidence.]—In a trial for murder, counsel for the Crown, in opening the case, directed the attention of the jury to the blood-stained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of the prisoner in question, and she was not examined. The subject was not brought to the attention of the jury in any other way, nor did the trial judge refer to it in his summing up; nor was the charge objected to by either side:—Held, that the counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the Court and jury, and that omission by the trial judge to advise the jury to ignore the remarks of counsel was non-direction, causing a substantial wrong within the meaning of sec. 1,019 of the Code so as to entitle the accused to a new trial. *R.* v. *Walker and Chinley*, 15 B.C.R. 100.

5. Joint trial of two accused—Refusal of separate trial—Admission of statement in writing made before trial of one accused—Not admissible as against the other—Failure of judge to caution jury.]—The defendant and one C. were tried jointly on a charge of murder. C. had made a statement in writing, with respect to the crime, before trial. The Crown did not offer it in evidence, but, in the cross-examination of C., who testified on his own behalf, counsel for the Crown asked him if he had made a statement and he said that he had, but the contents of the statement were not disclosed. Counsel for the defendant then cross-examined C. to some length on the statement, and, on re-examination C.'s counsel put the statement in, after objection by counsel for the Crown, but without objection by counsel for the defendant (he stating his reason for not objecting being that he did not wish to prejudice his client's case). There was nothing in the statement which had not already been brought out in the examination and cross-examination of C.:—

Held, that the trial judge properly exercised his discretion in refusing a separate trial. Held, further, that it would not be useful to send the case back to have question five restated; all that can be said upon it has already been said by counsel, and all the evidence bearing upon it has been brought to the attention of the Court, and in the circumstances, it is not a serious error not to have cautioned the jury that any admission or confession made by one of the accused, not in the presence of the other, is only evidence against the one making such confession or admission, and in any case it is manifest that there has been no wrong or miscarriage by reason of such warning not having been given. *R.* v. *Davis,* 19 B.C.R. 50.

6. Circumstantial evidence.] — The deceased was murdered, according to the only eye witness (a girl of about 8 years), by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes, and a dark coat. Prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat and trousers mentioned, in addition to which he wore a stiff black hat. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. When arrested, three days later, prisoner was without the dark shirt:—Held, refusing an application for a new trial, that the jury was justified on the evidence in coupling the prisoner with the crime. In a criminal, as in a civil case, on an application for a new trial on the ground that the verdict is against the weight of evidence, the Court will be governed by the fact whether the evidence was such that the jury, viewing the whole of the evidence, reasonably could not properly find a verdict of guilty. While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. *Rex* v. *Jenkins,* 14 B.C.R. 61.

7. Inquiry into sanity of accused.]—On a trial for murder, the Crown moved for an inquiry as to prisoner's sanity and the case was sent over to the next assizes, the trial judge remarking: "There will be that preliminary trial first to determine. Of course, when that time arrives, there may not be any doubt about his sanity, or, on the other hand, there may not be any doubt about his insanity." At the next assizes there was a different judge. The trial proceeded without the inquiry as to sanity being held as mentioned. It was then objected on behalf of accused that the inquiry should have been held before trial, and a reserved case requested for the opinion of the Court of Appeal. The objection was overruled, and a reserved case refused:—Held, on appeal, per Macdonald, C.J.A., that the judge at the first assize merely directed counsel how they should proceed at the second assize, and that the motion should be dismissed. Per Irving and Martin, JJ.A.: That counsel for accused, by proceeding to verdict at the second assize, had waived or abandoned any order that was made, or supposed to have been made, at the previous assize. Per Martin, J.A.: The proper order to have made at the first assize was to have postponed the trial in the ordinary way, leaving it to the judge at the next assize to decide, de novo, the issue as to the sanity or insanity of the accused at the time of such next assize. *Rex* v. *Watt,* 15 B.C.R. 466.

8. Corroboration—Other material evidence—Whether testimony in whole case, including defence, may be looked at for corroboration—Judge hearing one charge against accused defers sentence and proceeds with another charge — Mixing up trials—Evidence of previous similar offence on same person.]—There were four questions reserved for the opinion of the Court: (1) Whether there was any corroboration of the evidence of the boy on whom the assault was committed, this corroboration being required on account of the fact that the boy was too young to take an oath? (2) Was it competent for the trial judge to look to the whole case, including the evidence put in by the defence, for such corroboration? (3) The judge having heard one charge against the accused, he then adjourned that case and proceeded with another charge. After hearing the second charge he dismissed the first and convicted upon the second. Was it competent for the judge to adopt this procedure? (4) The trial judge admitted evidence of a boy who testified to a previous similar offence committed by the accused with regard to

himself (the boy). Was this evidence admissible in the present case?—Held, on the first point, per Macdonald, C.J.A., and Irving, J.A., that there was no corroboration. Per Martin and Galliher, JJ.A., upholding the trial judge, that there was corroboration. Also that corroboration may be furnished by a child too young to take an oath:—Held, on the second point (per curiam) that the whole case might be looked to for corroboration:—Held, on the third point, per Macdonald, C.J.A., and Irving, J.A., that the matter involved in this question was simply one of procedure, and it was open to the judge to deal with the cases in any order he chose; or at all events that the accused was not prejudiced by the manner in which the judge heard and determined the charges. Per Martin and Galliher, JJ.A.: That the mixing up of the two trials occasioned "a substantial wrong or miscarriage" under sec. 1,019:—Held, on the fourth point (per curiam) that evidence of a prior offence was not admissible on the charge in the present case. In the result the conviction was set aside and a new trial ordered. *Rex.* v. *Inman Din,* 15 B.C.R. 476.

9. Accused testifying on his own behalf —Witness at preliminary hearing not present at trial nor absence accounted for—Accused in his evidence referring to such witness—Right of Crown to cross-examine thereon.]—On a trial for murder, the defence set up was temporary insanity caused by over-indulgence in alcohol. This defence broke down, and the prisoner was found guilty. The killing was actually proved. A witness at the preliminary hearing, who testified to certain threats by the prisoner against the deceased, was not produced at the trial, nor his absence accounted for. Prisoner entered the box and was sworn on his own behalf. In his evidence he endeavoured to cast suspicion upon the witness referred to, and in cross-examination, counsel for the Crown asked prisoner certain questions as to his recollection of the absent witness's evidence at the preliminary hearing. This was objected to and ruled out. There was other evidence of threats by accused against deceased, independently of that objected to:—Held, that there had been no substantial wrong done the prisoner within the meaning of sec. 1,019 of the Code, and that he was not entitled to a new trial. *Rex* v. *Allen,* 16 B.C.R. 9. Reversed, 44 S.C.R. 331.

10. Charge on which extradited.]—Four questions were grounded upon the suggestion that the prisoner was indicted and tried on a charge other than the charge or charges on which he was said to have been extradited:—Held, that as there was no evidence, except vague allusions, to show that the prisoner was brought to trial after extradition from a foreign country, no warrant having been put in evidence, and even assuming him to have been extradited, as there was no evidence that he was tried on a charge other than that upon which he was extradited, there is nothing in the material submitted to show that a mistake in law was made in the Court below. *R.* v. *McNamara (No. 2),* 19 B.C.R. 193.

XXV. Penalties.

No punishment provided.]—Where a section of the Code provides no punishment for an offence created by it, the common law punishment of a fine may be imposed. *The Union Colliery Co.* v. *Reginam,* 7 B.C.R. 247; 31 S.C.R. 81.

XXVI. Costs.

Appeal from summary conviction.]—A County Court judge, upon an appeal from a summary conviction, has no power to award costs of the appeal to be paid by a person not a party to the conviction or proceedings before the justices, although improperly made respondent to the appeal, and who has not appeared thereon or objected. *In re W. N. Bole,* 2 B.C.R. 208.

CROWN.

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CROWN GRANTS.

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DAMAGES.

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I. In General.

1. Remoteness.] — Consequential damages must be for matters deemed to have been in the contemplation of the parties at the time of the contract. *William Hamilton Manufacturing Co.* v. *Victoria Lumber and Manufacturing Co.*, 4 B.C.R. 101.

2. Alternative remedy.]—A party to a contract cannot be decreed both specific performance and rescission, and where he obtains rescission he cannot be given damages, which are awarded in lieu of specific performance. *Smith* v. *Mitchell,* 3 B.C.R. 450.

3. Failure to deliver subject matter of contract.]—Where the plaintiff has contracted with the defendant to do work at a certain price per day and to take in part payment shares in a mining company, and on the completion of the work the defendant fails to deliver the shares, the plaintiff is entitled to damages for breach of the contract, and cannot be compelled to accept the shares. *Miller* v. *Averill,* 10 B.C.R. 205.

II. Remoteness.

Nervous shock.]—Damages arising from mere sudden terror, unaccompanied by actual physical injury but occasioning a mental or nervous shock, are too remote to be recovered, but where the nervous condition is the result of bodily injuries, such a condition may be the natural and probable result of the defendant's negligence. *Taylor* v. *British Columbia Electric Railway Company,* 16 B.C.R. 109.

III. Measure of Compensation.

A. On Contracts Generally.

Loss by fire.]—Defendant, having contracted to erect a building, including a baker's oven, sub-let the work of constructing the oven. Plaintiff complained to defendant, after the oven was built, that the arch was defective and liable to collapse. Defendant and the sub-contractor who built the oven were of opinion that the oven was properly built. On the other hand, an expert called in by the plaintiff was of a contrary opinion. On being called upon to fulfil his contract by giving a mortgage on the building as security for the contract price, plaintiff complained that the oven was not properly constructed, but later agreed to pay the contract price, but insisting in his contention that the oven was unsafe. Defendant, in reply, wrote: "If what you dread happens, why it will be put right." Plaintiff proceeded to use the oven, when a fire broke out in the bake house, where the oven was, and injured that and the main building adjoining it:—Held, on appeal, that the fire was caused by the collapse of the oven, and that the plaintiff was entitled to damages, but that he should be confined to such damages as the parties had in contemplation, that is, damages to the oven itself. *Baker* v. *Atkins,* 15 B.C.R. 177.

B. Sales of Realty.

Deficiency in quantity.]—Plaintiff having received a conveyance of certain mineral claims from defendant Company, it was discovered that some 38 acres of the same land had been conveyed to another purchaser. The mistake arose through an omission to mark off the mineral claims on the official map. The Company offered plaintiff a refund of the purchase price on this shortage proportionate to the acreage so disposed of, which he refused, and sued for damages:—Held, that he was entitled to damages only for the purchase price of the acreage short, with interest thereon at the legal rate, as, on the evidence, he had not established that the mineral claim in respect of which he claimed damages for such shortage was of any commercial value. *Hird* v. *Esquimalt and Nanaimo Railway Company,* 14 B.C.R. 382.

C. Sales of Personalty.

1. Non-delivery.

Loss of profits.]—By a contract dated the 21st of February, 1910, the plaintiffs agreed to ship to the defendants on or before the 28th of April, 1910, a dredger. The price was $8,080, of which $1,000 was paid

in cash. The dredger was not shipped until the 6th of June. The plaintiff then brought an action for the price, and recovered judgment for $7,614. The defendant counterclaimed for damages and specifically claimed (a) $5,000, loss of profit on a dredging contract which they expected to obtain when they ordered the dredger; and (b) $2,500, loss on costs of scows; this sum being the amount thrown away, or needlessly incurred, in consequence of the plaintiffs' delay in making delivery of the dredger. The learned trial judge thought the case was governed, so far as the delay in delivery of the dredger was concerned, by *Elbinger Actien-Gesellschafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, and that the defendants were entitled to damages; but he refused to allow any damages in respect of the contract for the bonus paid for hurried construction of the scows, or for loss of profit of an expectation of obtaining a particular contract. The damages which he thought proper to allow were ordered to be assessed by the registrar, not the damages specifically claimed, but general damages which he based on the net earning power of the dredger per day for 39 working days. From this judgment the defendants appealed:—Held, that the course followed by the trial judge in arriving at the basis of damages was a proper one, and the principle having been determined, it was within his right and discretion to direct the reference for assessment. *Brown* v. *Hope*, 17 B.C.R. 220.

2. Non-acceptance.

Goods sold to third party.]—In an action for damages for non-acceptance of the entire output of logs of the plaintiffs' camps, agreed to be bought by the defendants, the value of two booms sold by the plaintiff to third parties, with the consent of the defendant, is not to be deducted from the estimate of damages. *The Paterson Timber Co.* v. *The Canadian Pacific Lumber Co.*, 15 B.C.R. 225; 47 S.C.R. 398.

3. Breach of Warranty.

1. Warranty of fitness.]—Where, under a contract of sale, fish is supplied to a purchaser that subsequently are found to be unfit for human food, the measure of damages is the amount necessary to place the purchaser in the same position as if at the time of the discovery of the true condition of the fish he had been furnished with proper fish. *White & Co., Ltd.* v. *Donkin*, 19 B.C.R. 565.

2. Bursting of boiler.]—Plaintiffs contracted to construct for defendants, according to specifications, a marine boiler capable of standing 120 lbs. pressure to the square inch, to be used in a steam tug. The boiler, as delivered, did not comply with the specifications, but it was accepted upon a statement by plaintiffs "that if it was not right they would make it right." The boiler burst, and besides direct damage, the defendants were obliged to hire another tug to carry on its work. The defendants admitted the plaintiffs' claim for goods sold and delivered, and counterclaimed, alleging breach of express warranty of the boiler, claiming direct and consequential damages:—Held, at the trial upon the counterclaim, that, on the evidence, the injury was caused by defective construction of the boiler, and that its steam pressure capacity was not as agreed. That the contract as to the form of the boiler was waived, but that the agreement to "make it all right," etc., amounted to a general warranty of fitness for the purpose. That the defendants were entitled to recover the costs of putting the boiler in the condition originally agreed upon, but not the amount paid for hire of another tug during the delay, on the ground that such liability was not contemplated by the contract. Plaintiffs appealed to the Full Court, and defendants cross-appealed claiming that the judgment should be increased by allowing the consequential damages claimed:—Held, on appeal, that apart from any, in this case doubtful, express warranty, there is an implied warranty by a manufacturer of goods for a particular purpose that they are fit for that purpose, and that, upon the evidence, the defendants were entitled to recover for the breach of such warranty. That, on the facts, the consequential damage which ensued from the bursting of the boiler must be taken to have been within the contemplation of the parties to the contract, as an accident to the boiler would, in the known circumstances of the defendants, necessitate the hire by them of another tug. *William Hamilton Manufacturing Co.* v. *Victoria Lumber and Manufacturing Co.*, 4 B.C.R. 101; 26 S.C.R. 96.

3. Measure of damages.]—In an action (by counterclaim) for damages for breach

of warranty of an engine sold and delivered by plaintiffs to defendants, the warranty and its breach were proved at the trial. Walkem, J., delivered judgment, ordering the engine to be returned to the defendants and assessed the damages to be recovered on that basis. Upon appeal to the Full Court:—Held, overruling Walkem, J., reversing the order for re-delivery of the engine and directing a re-assessment of damages, a completed sale of chattels cannot be rescinded for breach of warranty. *William Hamilton Manufacturing Company* v. *Knight Bros.*, 5 B.C.R. 391.

D. Contracts of Services or Employment.

1. Negligence of agent in valuing land.]—In an action for damages against agents of a mortgagee for negligence in not procuring an accurate valuation of the lands or a good security for the loan, the property having been put up for sale under the mortgage and proving unsaleable, the measure of damages is not the amount loaned, with interest, but the difference between that amount and the actual value of the land. *Wolley* v. *Lowenberg, Harris & Co.*, 3 B.C.R. 416; 25 S.C.R. 51.

2. Wrongful dismissal.]—The defendant employed the plaintiff under a written agreement in the following terms: "As a draughtsman and generally in survey work for three months or until the drafting and survey work in connection with a certain contract to survey certain Canadian Northern Pacific Railway Company's rights of way held by the employer, at $165 per month, and thereafter to complete a term of three years from the date of this agreement in the said employment at the rate of $125 per month." Plaintiff worked under the $165 wage for nine and a half months, when the defendant told him that the contract with the Canadian Northern Pacific Railway was completed and he (plaintiff) would in future work under the $125 wage. The facts were that, although the defendant had been paid in full for his work under the contract, the drafting had not been completed. On the following day the defendant asked the plaintiff to make certain changes in this drafting, which plaintiff refused to do under the $125 wage. He was dismissed:—Held, that there was a breach of contract and that the measure of damages be $165 per month from the date of plaintiff's discharge to the time of his new employment. *Pos* v. *Johnson*, 18 B.C.R. 159.

3. Mitigation.]—In order to recover damages for wrongful dismissal, a plaintiff must show an endeavor and failure to obtain other employment. *Lamberton* v. *Vancouver Temperance Hotel Co.*, 11 B.C.R. 67.

E. Carriage of Goods.

1. Plans of architect.]—Architectural plans of a building submitted in competition and not accepted, were in the course of transit destroyed by fire:—Held, that the proper measure of damages is the value of the plans to the architect for exhibition purposes, and not the cost of their reproduction. *Nicolais* v. *Dominion Express Company*, 20 B.C.R. 8.

2. Delay.]—The measure of damages for delay in delivery is the amount of interest at the legal rate upon the value of the goods until the date of judgment. *Hamilton* v. *Hudson's Bay Co.*, 1 B.C.R., Pt. II., 1, 176.

F. Assault.

Assault.]—Where it is proved that an assault has been committed the plaintiff is entitled to redress, and the jury is bound to consider all the circumstances which may aggravate or mitigate the damages. *Slater* v. *Watts*, 16 B.C.R. 36.

G. Trespass to Land.

1. Wilful or negligent.]—In the case of a wilful or negligent trespass and wrongful cutting of timber, the trespasser must pay the fair market price of the timber cut, less the cost of felling the trees and fitting them for removal, and where, owing to the trespass, there results an increase in the cost of logging the timber remaining, such increased cost is recoverable as damages. *Adams Powell Timber Co.* v. *Canadian Puget Sound Co.*, 19 B.C.R. 573.

2. Continuing trespass after warning.]—Where the trespass complained of is committed through an error in the survey of lands, the trespasser, by continuing the trespass after being warned of the error, is not thereby to be deemed a deliberate and wilful trespasser, and the damages are to be limited to the value of the standing timber. *Joseph Chew Lumber Co.* v. *Howe Sound Timber Co.*, 18 B.C.R. 312.

3. Abstracting ore.]—It is the duty of a mine owner, when his workings approach his boundaries, to proceed with caution and make surveys to prevent encroachments on adjoining properties, and the least evidence of bad faith on his part will make every intendment in favour of the injured party. The measure of damages for ore negligently abstracted by trespass workings is the same as if the trespass is wilful, and only the cost of bringing the ore to the bank will be allowed. The value of the ore so abstracted is its value to its owner at the time of the taking. Observations upon the burdens which a trespasser must assume. *Last Chance Mining Co., Limited* v. *American Boy Mining Co., Limited,* 2 M.M.C. 150.

4. Nominal damages.] — Unless actual damages be shown, nominal damages only will be allowed for trespass. *Woodbury* v. *Hudnut,* 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

H. Injury to Personal Property.

Seeking damages.]—Where the plaintiff could have prevented the seizure of his goods for taxes by disclosing the true facts, but failed to do so, and instead encouraged the commission of the trespass, with an eye to damages, he was held entitled only to the auction price of the goods seized and sold. *Vedder* v. *Chadsey,* 1 B.C.R., Pt. II., 76.

IV. Loss of Profits.

1. Agreement to build and lease hotel.]—Upon a reference ordered to assess the damages in an action for breach by the defendant of an agreement to erect and lease a hotel to the plaintiff for a term of years at a rental agreed upon:—Held, on an application to vary the registrar's report, that the plaintiffs were entitled to the difference, if any, between the agreed rental and the value of the term, and the registrar improperly excluded, as too remote, the testimony of those who, as part of their business or calling, take part in the buying and selling of hotels or in the selection of sites for that purpose. This evidence should be received and considered. It is for the registrar to say what weight should be given to it. *Beatty* v. *Bauer,* 18 B.C.R. 161.

2. Agreement for lease.]—A plaintiff in an action for breach of an agreement to let a store to him is not entitled to recover damages for the loss of prospective profits from the sale of goods purchased with a view to their sale in the premises merely because he was unable to obtain other suitable premises for that purpose. *McLennan* v. *Millington,* 5 B.C.R. 345.

DEBTOR.

See Arrest and Imprisonment for Debt.

DECEIT.

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DEEDS.

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B. Falsa demonstratio non nocet, 347.
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I. Classes of.

Nature of.]—There is a substantial distinction between a conveyance and an agreement to convey. Where, therefore, an agreement provided for a formal conveyance by one party to the other party of the latter's moiety, upon the latter's request:—Held, that provisions respecting partition of the property did not come into effect until the execution of such conveyance. *Angus and Shaughnessy and the Columbia and Western Railway Company* v. *Heinze,* 14 B.C.R. 157; 42 S.C.R. 416.

II. Delivery.

Date of taking effect.]—A deed purporting to have been signed, sealed and delivered is complete and binding as from the date of execution, though it remains in the grantor's possession, unless there remains some act to be done by the other party to declare his adoption of it. *Elson* v. *North American Life Assurance Co.,* 9 B.C.R. 474.

III. Construction of.

A. Covenants.

1. Corporation sole—Covenant by.]—A covenant by a corporation sole, described in his corporate capacity, expressed to be on behalf of himself, his heirs, executors and

administrators, will not bind his successors in office. *Paris* v. *Bishop of New Westminster*, 5 B.C.R. 450.

2. Express and implied.]—An express covenant overrules and excludes an implied covenant. *Rithet* v. *Beaven*, 5 B.C.R. 457.

B. Falsa Demonstratio Non Nocet.

Statute of frauds—Misdescription—Parol evidence to explain.]—B., on behalf of D., negotiated with C. for the purchase of the 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 descriptions as lots 9 and 10, Block 10, and signed the receipt. Lots 9 and 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 reformed 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*, 10 B.C.R. 493; 35 S.C.R. 282.

C. Parcels.

1. Survey.] — In questions relating to boundaries and descriptions, and generally of parcel or no parcel, parol evidence is admissible to show the situation of the land, and the marking out of the boundaries on the land itself, and this evidence is entitled to prevail over the descriptions in the written instruments. *Johnston* v. *Clarke*, 1 B.C.R., Pt. II., 56, 81.

2. Access to tidal waters.] — The description "having a frontage of forty feet, more or less, on Store Street, and running back to the harbour" is sufficient to include all land within the side lines, extending from Store Street to the harbour or bay, according to the curvature of the shore line, up to which the tide flows. *McEwen* v. *Anderson*, 1 B.C.R., Pt. II., 308.

3. Exceptions.]—In the case of a contract to sell lands containing no exceptions, the purchaser is entitled to a conveyance without any exception of the minerals. *Hobbs* v. *Esquimalt and Nanaimo Railway Company*, 6 B.C.R. 228; 29 S.C.R. 450.

4. Peninsula.] — On the 8th of June, 1887, a portion of land near the City of Vancouver, and known as Stanley Park, was handed over to the municipality for an indefinite period for use as a public park. The land, which had been an Imperial military reserve, had been transferred to the Dominion on the 7th of March, 1884. The City's petition, presented in 1886 to the Dominion, asked for "that portion of land [described as within the City limits] known as the Dominion Government military reserve near the First Narrows . . . . bounded on the west by English Bay and on the east by Burrard Inlet." Adjacent to the peninsula known as Stanley Park, and within Vancouver harbour, is a small island, and there was some evidence that at certain stages of the tide during the year there was bare land between the island and the peninsula. Shortly prior to the 8th of June above mentioned, the City's boundaries, by an amendment to the charter, were stated so as to extend down to low water mark. It was contended for the City that this made the island a portion of the park. But in all charts and maps the land was shown as an island. The City assumed to use the island as a portion of the park, and built out to it a foot-bridge, which afterwards was allowed to fall into disuse and decay. Plaintiffs' predecessor, in 1898, applied for a lease of the island, and although the City was notified of such application, no reply was given until when, in February, 1899, an order was passed authorizing the Minister of Militia to grant a lease for 25 years, the City protested and asserted a right to possession of the island under the terms of the order of the 8th of June, 1887. A question then arose between the Province and the Dominion as to the ownership of the island, resulting in favour of the Dominion. In consequence, the City opened negotiations with the Dominion for a lease of Stanley Park, and sought to have Deadman's Island specifically included in such lease. Eventually a lease was executed of "all that portion of the City of Vancouver (and the foreshore adjacent thereto,

bounded by the western limit of district lot 185, group 1, New Westminster District, as shown on the official plan thereof filed in the Land Registry office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay, and being all that *peninsula* lying to the west and north of said district lot 185, known as 'Stanley Park.'" The lease was also "subject, until their determination, to any existing leases of portions of said land." Two small portions of Stanley Park were leased to athletic clubs:—Held, that, in all the circumstances, the City's lease granted in 1908 embraced only the portion of the reserve set out in the peninsula. *Vancouver Lumber Company* v. *The Corporation of the City of Vancouver*, 15 B.C.R. 432; 1911, A.C. 711.

5. Precious metals.]—Precious metals pass only by apt and precise words, and the use of the words "all mines, minerals and substances whatsoever," in a grant from the Crown did not pass such metals to the grantee. *Bainbridge* v. *Esquimalt and Nanaimo Railway Company*, 4 B.C.R. 181; 1 M.M.C. 98; 1896, A.C. 561.

6. Precious metals—Grant of.]—Where the Crown has granted the precious metals in a parcel of land, a conveyance of such parcel by the grantee of the Crown to a third person in the ordinary form will pass the precious metals, although not specially mentioned. *Re St. Eugene Co.*, 7 B.C.R. 288; 1 M.M.C. 406.

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E. Costs, 355.

I. Parties Entitled to Sue.

Corporation.]—A non-trading corporation, having the right to acquire property which may be the source of income or revenue, the transaction of the business incidental thereto creates a reputation, rights and interests similar to those of an individual or a trading corporation, and must have the same protection and immunities, and be given the same remedies, in case of injury, as a trading corporation. *Chinese Empire Reform Association* v. *Chinese Daily Newspaper Publishing Company, Limited*, 13 B.C.R. 141.

II. Who Liable.

Liability of husband for wife's libel.]—In an action against husband and wife for damages for a libel published by the latter, the jury returned a verdict for $10:—Held that the husband was liable, and that the costs should follow the event. *Mackenzie* v. *Cunningham and wife*, 8 B.C.R. 206.

III. What Actionable.

A. In General.

Black-leg.]—The epithet "black-leg" is libellous. *Hugo* v. *Todd*, 1 B.C.R., Pt. II., 369.

B. Injurious to Business Reputation.

1. Trade credit.]—In a mortgage foreclosure action, the Lion Brewery Company, as second mortgagees, was joined as a party defendant, and a mercantile agency published in a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Company claiming foreclosure of a mortgage and indicating by means of the words "et al." that there were other defendants:—Held, in an action by the Lion Brewery Company against the mercantile agency, that the publication was libellous and not privileged. *Lion Brewery Company, Limited* v. *The Bradstreet Company*, 9 B.C.R. 435.

2. Poster advertising accounts for sale.] — Defendant, a debt collector, printed a poster containing the names of persons from whom he was employed to make collections, showing the amounts and the nature of the accounts set opposite the respective names, under the heading, in large letters: "Accounts for sale, Victoria,

B. C. The British Columbia Commercial Agency offers the following accounts for sale at their office," etc. This poster, which showed the name of the plaintiff as a debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons on the list, together with a circular stating: "You may still have your name lifted by paying the amount on or before the 27th inst., after which date the posters will positively be issued." An interim injunction having been granted to restrain further publication:—Held, on motion to continue the injunction till the hearing, that the poster was libellous, and the innuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent; and held, on appeal that the poster was in fact in the eyes of the public a black list, implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent. *Wolfenden* v. *Giles*, 2 B.C.D. 279.

C. Charges Against Public Officials.

Corrupt partnership of Minister of Crown.]—W. a judge of the Supreme Court of British Columbia, brought an action against H., editor, for a libel contained in the following article, published in his paper:—"The McNamee-Mitchell Suit. In the sworn evidence of Mr. McNamee defendant in the suit of McKenna v. McNamee, lately tried at Ottawa, the following passage occurs: Six of them were in partnership (in the dry dock contract) out in British Columbia, one of whom was the Premier of the Province. The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. McNamee must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded." The innuendoes alleged by the declaration to be contained in this article were: 1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under the cloak of his public position and by fraudulently pretending that he acted in the interest of the Government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench:—Held, that the article was susceptible of the first of the above innuendoes but not of the others, which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial. On the trial the jury found a verdict for the plaintiff, with $2,500 damages:—Held, that the case was improperly left to the jury, but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to $500. *David W. Higgins* v. *The Honourable George Anthony Walkem*, 17 S.C.R. 225.

D. Slander by Words Actionable per se.

1. Imputation of offense.]—In an action of slander for words used imputing an offence, which though non-criminal, and not being an indictable offence under the Code, yet affects a person's status as a public officer, the plaintiff is entitled to have the case go to the jury without making out a prima facie case of special damage suffered. *W.* v. *A.*, 13 B.C.R. 333.

2. Prejudicial to a man in his calling.]—To impute unnatural sexual intercourse to a foreign consul is actionable without proof of special damage. *W.* v. *A.*, 13 B.C.R 333.

IV. PUBLICATION.

What constitutes.]—Defendant took a copy of an alleged libellous resolution to the editor of a newspaper, who dictated it to his stenographer and handed defendant's copy back to her. Before the stenographer extended his notes, another copy of the resolution was found in the office and from it the printer set up the type:—Held, there was evidence of publication to be submitted to the jury. *Mackenzie* v. *Cunningham*, 8 B.C.R. 36.

V. DEFENCES.

A. Fair Comment.

Soliciting public subscriptions.]—Defendants published on page 1 of their

newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution and on being questioned by the police had left town: on page 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf and that the tickets were being sold "in a manner similar to those for a recital by a gentlemen of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases:—Held, that the article on page 1 did not necessarily refer to the plaintiff and that the article on page 8 was fair comment on a matter of public interest and was true. *Wiles* v. *The Victoria Times Printing and Publishing Company, Limited Liability,* 11 B.C.R. 143.

B. Publication of Apology.

Apology must be unconditional.]—A statement of defence alleged that the defendants were willing to publish such an apology as the plaintiff could reasonably require:—Held, that the defendant should admit that the charge was unfounded, that it was made without proper information, and that he regrets that it was published in his newspaper. He should not offer to make, but actually make and publish at once such an apology expressing sorrow, and withdrawing the imputation. *Hoste* v. *Times Pub. Co.,* 1 B.C.R. Pt. II., 365.

VI. PRACTICE.

A. Function of Jury.

Libel or no libel.]—Plaintiff was in 1910 an alderman of the City of Vancouver. At a meeting of the City Council held in March, 1910, he moved a resolution calling the attention of the authorities of adjoining municipalities to proposed real estate subdivisions, and asking them to look carefully into all subdivision plans submitted for their approval. He made some remarks in support of his resolution, in which he referred to the undue boosting of real estate by dealers, wild cat subdivisions, hotels on mountain tops, etc. The resolution and the plaintiff's remarks were published in the News-Advertiser newspaper, and on the following day defendant wrote a letter to that paper commenting on plaintiff's remarks, and referred to plaintiff's connection with an hotel in Vancouver, the licence of which had been suspended by the licence commissioners, suggesting that plaintiff had used his position as alderman to secure the licence and was responsible for the conduct of the hotel business. Plaintiff then took action. A trial with a special jury resulted in a disagreement. On the second trial the verdict returned was that the article complained of "did not amount to a libel." Judgment was entered for the defendant accordingly, and plaintiff appealed. No objection was made to the charge to the jury:—Held, that the question of libel or no libel was for the jury, and that the verdict should not be disturbed. *Hepburn* v. *Beattie,* 16 B.C.R. 209.

B. Evidence.

Police Court proceedings.]—Where, in an action for libel against a newspaper for publishing an incorrect account of a police court trial, it is sought to prove what was said about the plaintiff by the witnesses in the police court, it is not permissible to cross-examine the plaintiff on this subject, but the depositions must be put in evidence. *Dickinson* v. *The World Printing and Publishing Co.* 17 B.C.R. 401.

C. Interlocutory Injunction.

Poster—Advertising accounts for sale.]—Defendant, a debt collector, printed a poster containing the names of persons from whom he was employed to make collections, showing the amounts and the nature of the accounts set opposite the respective names, under the heading, in large letters: "Accounts for sale, Victoria, B. C. The British Columbia Commercial Agency offer the following accounts for sale at their office," etc. This poster, which showed the name of the plaintiff as debtor for a drug bill of $9.67, defendant sent to him, and to each of the persons on the list, together with a circular stating: "You may still have your name lifted by paying the amount on or before the 27th inst., after which date the posters will positively be issued." An interim injunction having been granted to restrain further publication:—Held, on motion to continue the injunction till the

hearing: That the poster was libellous, and the innuendo implied was not merely that the plaintiff was justly indebted in the sum mentioned, but that he was dishonest and insolvent:—Held, on motion to dissolve injunction: The Court will interfere by interlocutory injunction restraining until the trial the publication of what clearly appears to be a libel. On appeal to Divisional Court:—Held, per Crease J., that the poster was libellous. It was in fact, in the eyes of the public, a black list, implying that all ordinary efforts to obtain payment had failed, and that the debtor was either dishonest or insolvent. That, though in England the Courts have not of late restrained publication before the question of libel had been submitted to a jury, there is undoubted power to do so under C.S.B.C., c. 31, sec. 14, and appeal should be dismissed:—Held, per Drake, J., that as the jurisdiction is one never admitted before the Judicature Act, and the exercise of it may prejudice the trial of the action, as being a conclusive opinion that the matter complained of is defamatory, it should be very sparingly used, and in practice confined to trade libels, and appeal should be allowed. *Wolfenden* v. *Giles*, 2 B.C.R. 279.

D. Pleadings.

Pleading matters in aggravation.]—In order to show malice in a libel action the plaintiff may plead all facts which he intends to rely upon in aggravation of damages and which are relevant thereto whether they arose before or after publication, but the words and conduct relied on must be reasonably proximate in time and character to the main offence. *Hallren* v. *Holden*, 20 B.C.R. 489.

E. Costs.

Nominal damages.]—In an action for libel, where the plaintiff recovered only five cents damages, it was held that he was entitled to costs, there being no evidence of any misconduct on his part or any reason shown to deprive him of costs other than the smallness of the verdict. *Emerson* v. *Ford-McConnell, Limited*, 16 B.C.R. 193.

DEFENCE.

See PLEADINGS.

DENTISTRY.

1. Unprofessional conduct.]—Where a professional class is governed by a statute applying specifically to that profession, and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise. *In re Moody and the College of Dental Surgeons*, 14 B.C.R. 206.

2. Powers of Council.]—Sec. 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. *The College of Dental Surgeons of British Columbia*, 14 B.C.R. 129.

3. Unqualified assistant.]—In an action by a qualified dental surgeon for a balance due for professional services, when, in fact, the work was performed by an unqualified assistant, whose remuneration under arrangement with his principal was a percentage of the price of the work he did:—Held, that there was a violation of the Dentistry Act, and the plaintiff was not entitled to recover. Held further, on the defendant's counterclaim for the return of moneys paid on account of the services so rendered, that as the defendant was not, at the time of payment, aware that the plaintiff was violating the law, he should recover the amount so paid. *Burgess* v. *Zimmerli*, 19 B.C.R. 428.

DISCONTINUANCE.

See PRACTICE.

DISCOVERY.

See PRACTICE.

DISORDERLY HOUSE.

See CRIMINAL LAW.

DISTRESS.

Costs.]—Where a landlord distrains for rent, and a settlement is effected without proceeding to replevin or sale, the bailiff is, under sec. 21 of the Distress Act, entitled

only to charge for levying the distress and for the man in possession. *Bancroft* v. *Richards*, 18 B.C.R. 38.

DIVORCE.

I. JURISDICTION, 358.
II. GROUNDS OF RELIEF, 358.
III. ALIMONY, 359.
IV. PRACTICE AND EVIDENCE, 360.

I. JURISDICTION.

1. Supreme Court.] — The Supreme Court of British Columbia has jurisdiction to entertain a petition for divorce between persons domiciled in that Province and in respect of matrimonial offences alleged to have been committed there. *Watt* v. *Watt*, 13 B.C.R. 281; 1908, A.C. 573.

2. Supreme Court.] — The Divorce and Matrimonial Causes Act, 1857, is in force in British Columbia, and the Supreme Court of the Province has jurisdiction thereunder. *Sheppard* v. *Sheppard*, 13 B.C.R. 486.

3. Matrimonial Causes Act.] — The Supreme Court of British Columbia has all the jurisdiction conferred on the Court for Divorce and Matrimonial Causes by the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), as amended by the 21 & 22 Vict. c. 108. *M——, falsely called S——* v. *S——*, 1 B.C.R., Pt. I., 25.

4. Appeal.]—There is no appeal to the Court of Appeal in matrimonial causes. *Scott* v. *Scott*, 4 B.C.R. 316.

5. Appeal.]—The Court of Appeal possesses no jurisdiction to hear appeals, final or interlocutory, in divorce proceedings. *Brown* v. *Brown*, 14 B.C.R. 142.

6. Domicile.]—The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, where the parties were domiciled, and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and, apprehensive of further cruelty, the wife commenced proceedings for a judicial separation. He opposed the suit, on the ground that there was not jurisdiction in the Court inasmuch as he was not domiciled or resident in British Columbia:—Held, that the husband had established sufficient residence to give the Court jurisdiction to entertain the suit. *Jamieson* v. *Jamieson*, 14 B.C.R. 59.

7. Domicile.]—Petitioner in 1895, when aged about 19 came from Ontario to British Columbia, where he spent some three or four years in different places. In 1899 he married and at once removed to the North-West Territories. In 1907, satisfied of his wife's infidelity, he "made her go away," and after some financial arrangements between the couple, she left for New York, since which time no communication has passed between them. In the autumn of 1908 he came to Vancouver, British Columbia, and took a position in a mercantile house, and in January, 1909, filed a petition for divorce, alleging that he and the respondent were domiciled in British Columbia:—Held, that he had not acquired a dimicile in British Columbia to entitle him to a divorce. *Adams* v. *Adams*, 14 B.C.R. 301.

8. Domicile.] — On a petition by a husband for a decree of divorce it appeared that the marriage had taken place in England and the wife's misconduct and her desertion of him in Manitoba. After her desertion he went to British Columbia, where he acquired a domicile. The wife had never been in British Columbia, nor had the petitioner invited her to join him there:—Held, that the domicile of the husband is also that of the wife; and the petitioner having acquired a domicile in British Columbia is entitled to a decree of divorce from the Supreme Court of that Province, *Cutler* v. *Cutler*, 20 B.C.R. 34.

II. GROUNDS OF RELIEF.

1. Petitioner guilty of adultery.]—The Court will not, unless under very exceptional circumstances of excuse or palliation, grant a divorce to a petitioner guilty of adultery. *A.* v. *A. and K.*, 14 B.C.R. 165.

2. Consummation impossible.]—Where consummation of the marriage is, on the part of the husband, a practical impossibility, the wife is entitled to a decree of nullity of marriage. *P.* (*otherwise C.*) v. *P.*, 11 B.C.R. 369.

3. Apprehension of cruelty.]—The conduct of a husband is insufficient to support a charge of cruelty where the wife states that she became nervous through his keeping a razor or sharp knife under his pillow, but does not state that she feared acts of violence, or that the weapons were kept by him for that purpose. *Walsh* v. *Walsh*, 20 B.C.R. 482.

4. Intemperance of wife—Separation—Adultery committed after.]—Where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation. *Forrest* v. *Forrest and Morton*, 8 B.C.R. 19.

5. Cruelty—By husband—Condonation of.]—Where the husband had been guilty of cruelty, which had been condoned, but within the six months subsequent to the condonation had been guilty of violent and harsh treatment, which would not originally of itself constitute a ground for separation the Court granted a separation to the wife. *Town* v. *Town*, 7 B.C.R. 122.

III. ALIMONY.

1. Divorce for impotence.]—It is no objection to granting permanent alimony that the wife has obtained a decree for divorce on the ground of impotence. *Brown* v. *Brown*, 13 B.C.R. 73.

2. Agreement to forego claims—Charge on property.]—A wife, while living with her husband, agreed in writing, in consideration of $1,000 in cash, and the transfer of certain furniture, to forego all claims against him as a husband. Subsequently, having discovered that he was guilty of bigamy and adultery, she secured a decree nisi for the dissolution of her marriage, and then filed a petition for maintenance:—Held, that the husband's conduct precluded him from setting up the agreement as a bar; and further, that as the agreement contained no covenant not to apply for alimony if legal grounds therefor arise, she is entitled to alimony. Held, further, that when the husband, although possessed of valuable real estate, swears that he has no income from that, or any other source the Court may, nevertheless, make an order for permanent alimony in favour of the wife, and will secure payment of it by charging the husband's property. *Miller* v. *Miller*, 19 B.C.R. 563.

3. Interim alimony.]—The Court has jurisdiction to grant interim alimony pending an action for divorce. *Mellor* v. *Mellor*, 11 B.C.R. 327.

4. Cancellation of judgment.]—Where a defendant in an alimony action, in default in his payments, applies for an order cancelling the judgment against him, he must make a full and frank disclosure of his affairs since the obtaining of the judgment, together with the reasons for his default. *Mellor* v. *Mellor*, 16 B.C.R. 1.

IV. PRACTICE AND EVIDENCE.

1. Compliance with rules of practice.]—There is necessity for careful and strict compliance with the rules of practice in the steps leading up to the hearing of proceedings under the divorce jurisdiction of the Supreme Court. *Timms* v. *Timms*, 15 B.C.R. 39.

2. Signature of petition.]—Where the petitioner for divorce resides within the jurisdiction, the petition must be signed by the petitioner personally, except when cause is shown to justify the Court in dispensing with that formality. *Plowman* v. *Plowman*, 14 B.C.R. 164.

3. Non-appearance.] — Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary. *Timms* v. *Timms*, 14 B.C.R. 410.

4. Defining charges.]—On a petition for divorce, the respondent is entitled to know clearly the charges he is called upon to meet. Thus, the cruelty alleged should be such as to cause danger to life, limb or health, bodily or mental, or a reasonable apprehension of it; and where there is an admission of adultery, corroboration will be required unless the admission is entirely free from suspicion. *Edmonds* v. *Edmonds*, 17 B.C.R. 28.

5. Specific allegations.]—In a petition by a wife for a judicial separation on the ground of cruelty, the petition should show specifically the series of acts of cruelty relied upon. *Timms* v. *Timms*, 15 B.C.R. 39.

6. Necessary allegations.]—In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties:—Held, that such allegation is a positive statutory requirement preliminary to the issue of a citation. *Timms* v. *Timms*, 14 B.C.R. 410.

7. Jury.]—The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for divorce having been pronounced, the judge proceeded to assess the damages, when the co-respondent invoked sec. 33 of the Divorce and Matrimonial

Causes Act, 20 & 21 Vict., c. 85 (Imperial), which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of a jury:—Held, that, having consented to a trial without a jury, he was estopped from availing himself of this provision. *Williams* v. *Williams and Hutton*, 14 B.C.R. 313.

8. Witness at former trial.]—The evidence of a witness who cannot be found, given at a former trial proving misconduct, may be read over to the petitioner at the trial, and verified by her as a correct note of such evidence. *Cunliffe* v. *Cunliffe*, 8 B.C.R. 18.

9. Decree nisi.]—There is no provision under the divorce law in force in this Province for granting a decree nisi in the first place. *Purdy* v. *Purdy*, 16 B.C.R. 493.

DOCTOR.

See MEDICINE.

DYING DECLARATION.

See EVIDENCE.

DYKING, DRAINAGE AND IRRIGATION.

Assessment.]—In assessing certain lands under the provisions of the Drainage, Dyking and Irrigation Act, the Commissioners fixed upon a uniform rate, reaching their conclusion from their personal knowledge of the lands, extending over many years, and without making a personal inspection:—Held, that the assessment so made was good. *British Columbia Land and Investment Agency, Limited* v. *Fetherstone*, 13 B.C.R. 190.

EASEMENT.

Extent of grant.]—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. *Tarry* v. *West Kootenay Power and Light Company*, 11 B.C.R. 229.

ECCLESIASTICAL LAW.

Columbia, Bishop of—Constitution and authority.]—Held, on an application for an injunction, that though the letters patent from which the Bishop of Columbia derives his authority do not confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the Civil Courts. This Court will, on proper application, supply coercive jurisdiction to enforce the sentence of an ecclesiastical tribunal of assessors, appointed in accordance with the provisions of the Church Discipline Act (3 & 4 Vict., c. 86) so far as its provisions are applicable to this country, when the finding of such tribunal is not unreasonable and the proceedings before it are conducted in a way consonant with the principles of justice, as understood in a Court of Equity. Subsequently, at the hearing, the injunction was made perpetual. Constitution and authority of the Bishop of Columbia and General Status of the Church of England in British Columbia considered. *Bishop of Columbia* v. *Cridge*, 1 B.C.R., Pt. I., 5.

ELECTIONS.

I. VOTERS, 362.
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I. VOTERS.

A. Right to Vote.

1. Right of naturalized Japanese to be registered as voters.]—Sec. 8 of the Provincial Elections Act, which purports to prohibit the registration of Japanese as Provincial voters, is intra vires. *In re the Provincial Elections Act and In re Tomey Homma, a Japanese*, 7 B.C.R. 368; 8 B.C.R. 76; 1903, A.C. 151.

2. Corporation.]—The authorized representative of an incorporated company is entitled, under the Municipal Elections Act,

to vote at elections for mayor or reeve, and aldermen or councillors:—Held, that the provision is intended to restrict such voting power to one representative only for a company. *Rex* v. *Municipal Council of North Saanich*, 15 B.C.R. 1.

B. Qualification: Municipal.

1. Owner of realty.] — In order to qualify as a voter at municipal elections under sec. 6 of the Municipal Elections Act, as enacted by sec. 2 of the Municipal Elections Act Amendment Act, 1902, with respect to real estate, it is necessary that the applicant should be the registered owner of such real estate under sec. 74 of the Land Registry Act, Cap. 23, 1906. *In re Kaslo Municipal Voters' List*, 12 B.C.R. 362.

2. Agreements to purchase.]—Holders of agreements for purchase of real property are not owners, within the meaning of the Municipal Elections Act, entitled to vote at municipal elections. Where, therefore, a voters' list had been compiled in accordance with a practice followed of placing the names of holders of agreements for purchase of real property on the list as registered owners:—Held, that such list was bad, and that an election had thereon should be set aside. *Perry* v. *Morley*, 16 B.C.R. 91.

II. Registration.

A. In General.

1. Commissioner — Jurisdiction.] — A commissioner appointed under the provisions of the Provincial Elections Act "for the purpose of acting under (the) Act in the electoral district in which he resides" is restricted in the scope of his duties to taking affidavits and declarations of persons claiming to vote under the Provincial Elections Act only. Where, therefore, certain persons, otherwise qualified, claiming to vote at a municipal election, but who made their declarations before such a commissioner, and whose names were rejected by a Court of Revision it was held that the names were properly struck off the list. *In re Municipal Elections Act*, 17 B.C.R. 31.

2. Provincial Elections Act—Affidavit.] —Under the Provincial Elections Act and amendments, an affidavit or application to be placed on the register of voters for an electoral district may be sworn outside the Province of British Columbia; and the venue and jurat of the affidavit, Form A, Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact. The affidavit may be sworn before a commissioner for taking affidavits in and for the Courts of the Province, or before any of the officers named in sec. 4 of the amending Act of 1902, provided they derive their power from Provincial authority, or ordinarily reside and perform their duties within the Province. The Lieutenant-Governor-in-Council has power under the Elections Act and sec. 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the Province may be received by collectors of voters, and the applicants' names be placed upon the register. *In re Provincial Elections Act*, 10 B.C.R. 114.

3. Provincial Act—Collector of votes.] —After the collector of votes under the Provincial Elections Act, (1897), as amended in 1899, has placed on the register of voters the names of persons objected to, an application for prohibition, on the ground that the collector proceeded without jurisdiction, is too late. *In re Provincial Elections Acts and In re O'Driscoll* v. *Wright*, 8 B.C.R. 424.

B. Roll.

Impugning.] — The proper method of obtaining the expungement of a voter's name from the roll is by way of certiorari or mandamus to have the roll amended, and not by application for an injunction. *R.* v. *Municipal Council of North Saanich*, 15 B.C.R. 1.

III. Recounts.

Jurisdiction of Court—Production of ballots for recount.]—The Court, or a judge thereof, has no jurisdiction, under sec. 154 of the Provincial Elections Act, to order the Deputy Provincial Secretary to produce ballots for the purpose of a recount before a County Court judge under sec. 43 of the amendment to the said Act in 1899. *Re Fernie Election (Provincial) Petition*, 10 B.C.R. 151.

IV. Controverted Elections.

A. Petition.

1. Copy of petition.]—In order to have due presentation of an election petition under the Dominion Controverted Elections

Act, a petitioner must, at the same time he files his petition, leave with the clerk of the Court a copy of the petition to be sent to the returning officer. *Duval* v. *Maxwell; Burrard Election Case,* 8 B.C.R. 65; 31 S.C.R. 459.

2. Presentation of.]—An election petition under R.S.B.C. 1897, c. 67, sec. 214, must be filed within twenty-one days of the exact time of the return. *Rae* v. *Gifford,* 9 B.C.R. 192.

B. Amendment of Petition.

Amendment of petition at trial.] — At the trial of an election petition based on bribery, the petitioner asked for leave to amend by setting up that the election was void on the ground that the list of voters used at the election was compiled and signed by an unauthorized official, this fact having been discovered only after the commencement of the trial:—Held, that the amendment must be refused. *Martin* v. *Deane; North Yale Election Case,* 7 B.C.R. 128.

C. Practice and Procedure.

1. Power of judge to fix time for trial.]—A judge has jurisdiction to fix a time and place for the trial of an election petition under the Municipal Elections Act, notwithstanding no rules for regulating such a trial have ever been made as provided by sec. 86 (d) of the Act. It is not necessary that judges should exercise power to make rules regulating the trial of election petitions if the ordinary machinery of the Court is sufficient for that purpose. *In re Slocan Municipal Election,* 9 B.C.R. 113.

2. Payment into Court—Appointment of master.]—Payment into Court in the usual way is a good payment in within the meaning of r. 16 of the Parliamentary Election Petition Rules, 1868 (Imperial). *Jardine* v. *Bullen; Esquimalt Election Case,* 7 B.C.R. 471.

3. Security—Notice of, by petitioner.]—In sec. 216 of the Provincial Elections Act "proposed security" means "intended security," and a notice by petitioner informing respondent that security would be given by depositing $2,000 with the registrar was held a good notice pursuant to the section. The additional rules made 27th January, 1875, (i.e., in addition to the Parliamentary Election Petition Rules, Michaelmas term, 1868), are in force in British Columbia. The petitioner, after serving notice of the presentation of the petition, and of the proposed security, omitted to file an affidavit of the time and manner of such service thereof:—Held, that the petition should not be struck off the files of the Court on that ground. *Stoddart* v. *Prentice; Lillooet Election Case,* 7 B.C.R. 498.

4. Stating case.]—Where the case raised by an election petition embraces several distinct grounds of complaint, the Court has no power to state only one part of the case. *Jardine* v. *Bullen; Esquimalt Election Case,* 6 B.C.R. 220.

D. Avoidance of Election.

1. Municipal election—Qualification of candidate.]—C., having paid all his taxes to municipal treasurer in due time, and being in all other respects qualified as candidate for councillor of a municipal ward returning only one councillor, W., the returning officer, refused him nomination, and a poll, for non-payment of taxes to the collector of the municipality. B., the only other candidate, declared elected by acclamation. Appeal by petition to judge of Supreme Court:—B.'s election avoided. Interim bona fide acts of B., as councillor, held good. New election declared and appointed. Apportionment of costs. *Cawley* v. *Branchflower and Webb,* 1 B.C.R., Pt. II., 35.

2. Revision.]—When the validity of an election is questioned under sec. 92 of the Municipal Elections Act, if it appears that the voters' list had been prepared and revised in accordance with the formalities required by the Act, it will be taken to have been revised "in accordance with law," and the Court will not go behind the revision to inquire into the qualifications of the voters. *In re Kerr and Gold,* 20 B.C.R. 589.

EMPLOYER'S LIABILITY.

See MASTER AND SERVANT.

ENGLISH LAW.

1. Adoption of, in British Columbia.]—The Supreme Court of British Columbia has in British Columbia all the jurisdiction conferred on the Court for Divorce and Matrimonial Causes under the Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85),

as amended by 21 and 22 Vict., c. 108. The legislative adoption by British Columbia in March, 1867, of the English law as it existed in England on the 19th November, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but, coupled with the language constituting the Supreme Court in British Columbia, was a direct legislative sanction and authority to carry out that law in the Province by local tribunals and local machinery, and clothed the Supreme Court of the Province with ample power to hear and determine divorce and matrimonial causes. *M., falsely called S——, v. S——*, 1 B.C.R., Pt. I., 25.

2. Charitable uses — Mortmain Act—Probate duty.]—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. Probate duty is in the nature of a legacy duty, and is payable in the first instance out of the estate. *In re Pearse Estate*, 10 B.C.R. 280.

3. Divorce.]—The Divorce and Matrimonial Causes Act 1857, is in force in the Province. *Sheppard* v. *Sheppard*, 13 B.C.R. 486.

4. Stamp Act, 1853.]—Sec. 19 of the Stamp Act, which exonerates bankers from liability if they pay on what purports to be an unauthorized endorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. *Hinton Electric Co.* v. *Bank of Montreal*, 9 B.C.R. 545.

5. Setting aside awards.]—Held (without deciding that the Imperial Statute 9 & 10 Wm. III., c. 15, was in force in British Columbia), that the time limited by sec. 2 of that Act was the time within which applications to this Court to set aside awards should be made. *In re W. C. Ward and the Victoria Water Works*, 1 B.C.R., Pt. I., 114.

6. Contract tainted with champerty.]—The law with regard to champerty and maintenance as it existed in England on the 19th November, 1858, is in force in British Columbia. *Briggs* v. *Fleutot*, 10 B.C.R. 309; 35 S.C.R. 327.

7. Crown costs.]—The Crown Costs Act (18 & 19 Vict., c. 90) is not in force in British Columbia. *Attorney-General* v. *Ruffner*, 12 B.C.R. 299.

See APPEALS.

See COURTS.

See CRIMINAL LAW.

EQUITY.

I. ACQUIESCENCE, 368.
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I. ACQUIESCENCE.

1. Forfeiture of shares.] — Where a member of a joint stock company elects to abandon her shares when they are forfeited at a time when the company's prospects are doubtful, such abandonment cannot be recalled when the company becomes prosperous. *Jones* v. *The North Vancouver, etc., Co.*, 14 B.C.R. 285; 1910, A.C. 317.

2. Obstruction to navigable waters.]—The remedy for personal loss sustained by reason of the obstruction of navigable waters may be materially affected by the party's silence after knowledge. *McEwen* v. *Anderson*, 1 B.C.R., Pt. II., 308.

3. Invalid sale for arrears of taxes.]—Default in payment of taxes illegally imposed, and inaction and silence with knowledge that the lands on which such taxes have been imposed have been sold for alleged arrears of taxes, does not disentitle the owner from availing himself of the statutory procedure provided for the contestation of sales for arrears of taxes. *Anderson* v. *The Municipality of South Vancouver*, 16 B.C.R. 401; 45 S.C.R. 425.

4. Passive submission.]—Mere submission to an injury, such as the erection of a building on one's land, for any time short of the period limited by statute for the enforcement of a right, cannot operate to deprive one of that right. In order to amount to acquiescence which would create an equitable estoppel there must have been some equivocal conduct on the part of the owner of the land whereby the person erecting the building was induced or encouraged to make expenditures. *The Byron N. White Co.* v. *The Sandon Waterworks and Light Co.*, 10 B.C.R. 361.

5. Abandonment of right.]—One Cook pre-empted certain Crown lands in British Columbia and, after doing some work on the property, died in 1900, unmarried and intestate, leaving heirs his mother and two brothers. The older brother, the defendant, completed the pre-emption duties and wrote

his mother and brother, asking them for quit-claim deeds, in order to facilitate his obtaining a Crown grant. The mother complied with the request but the brother (the plaintiff) refused, and on the strength of the mother's quit-claim deed he succeeded in obtaining the Crown grant in his name in December, 1892. The mother died in 1900. In 1901 the plaintiff and defendant met, when, according to the defendant, he offered to transfer to the plaintiff his half interest in the property if he would pay his share of the expense incurred, which the plaintiff refused to do, and in this he was corroborated by his wife and another witness. The plaintiff, on the other hand, denied this and said he offered to pay his share of the expense if he would make up his account. In an action for a declaration that the plaintiff was entitled to a half interest in the property, it was held by the trial judge that the defendant took the fee from the Crown as trustee for the heirs, but that the plaintiff had abandoned his interest, and he dismissed the action:—Held, that abandonment of a clear right cannot properly be inferred except upon very convincing evidence, and the evidence in this case fell far short of that, even giving the testimony of the defendant the greater credence. Held, further, that the plaintiff was not barred by laches, delay or acquiescence. *Cook* v. *Cook*, 19 B.C.R. 311.

6. Abandonment of rights.]—A mortgagee having obtained an order nisi for foreclosure never took out the order absolute. Negotiations were entered into and completed for the sale of the property to a third party in 1906. The mortgagor had knowledge of the sale. In 1911 he brought action to redeem the property:—Held, that he had agreed to and did in fact abandon his rights, and by his conduct and delay had induced the mortgagees to alter their position on the faith that he had done so. *Williams* v. *Sun Life Assurance Company of Canada and David Spencer, Limited*, 16 B.C.R. 370.

II. Election.

Legacy cum onere.]—Where shares in a joint stock company are bequeathed, and after the testator's death calls are made on the shares, the legatee is put to his election either to pay the amount of the calls or to take nothing under the will. *Manson* v. *Ross*, 1 B.C.R., Pt. II., 49.

III. Laches.

1. Irregularities in forfeiture of shares.]—In an action by husband and wife for a declaration that 240 shares in the defendant company standing in the name of the wife, but of which she had executed a transfer to the husband (on the back of the certificate), had not been validly forfeited by the company, and that the husband was owner thereof and entitled to be registered as such, it appeared that the husband was a director of the company, a party to the resolution of the board making calls on the said shares and to the subsequent resolutions declaring them to be forfeited, and that notice, dated May 22, 1895, of the call of that date and of the liability to forfeiture if unpaid was posted by the secretary to the wife's address in Vancouver, being the address given by her husband in all proceedings connected with the company from 1891 onward (no address being registered or given on the certificate):—Held, that the plaintiffs had by their conduct disentitled themselves to the relief prayed for, that the notice fulfilled all the requirements of the Companies Act and the bye-laws, and that any objection to the absence of due formalities in the service on the husband of notice of acts to which he was a party, and to the illegality of the allotment, calls, and forfeiture of the shares due to technical irregularities in the original appointments of the husband and others as directors, must be disallowed. *Jones* v. *North Vancouver Land and Improvement Co.*, 14 B.C.R. 285; 1910, A.C. 317.

2. Tax sale—Pre-emption—Cancellation of — Pre-emptor's right — "Land Amendment Act, 1878, sec. 2."]—In 1876, M. pre-empted land in Westminster district, and paid one instalment of the purchase money. The other instalment was payable on the 18th November, 1878. M. paid also the taxes for 1876, 1877 and 1878, but no further tax or instalment. The taxes for 1879 became delinquent on the 1st March, 1879. M. left the Province early in 1880, his address being wholly unknown. In December, 1879, the land was sold to W. by tax sale. Subsequently W. paid all arrears of taxes and the balance of the purchase money, and in 1881 a Crown grant issued to him, and he entered and improved and mortgaged the land. The Crown grant and mortgages were duly registered. In 1883 M. returned to the Province, and claimed

the land:—Held, that M., by his laches, had disentitled himself from sustaining such claim. *Loring* v. *Sonneman*, 5 B.C.R. 135.

3. Land sold for taxes.] — Where the plaintiff allowed his pre-emption to be sold for taxes in 1879 and claimed it in 1883, he was held to be barred by his laches. *Moriarty* v. *Wadhams*, 1 B.C.R., Pt. II., 145.

4. Interest.] — Laches may deprive a suitor of interest on his claim. *Smith* v. *Hansen*, 2 B.C.R. 153.

5. Share transfer.] — A transferor of shares who obtains an order to have his name removed from the register, and forbears to enforce it for nearly two years, is not guilty of laches. *In re Enterprise, etc., Co.*, 1 B.C.R., Pt. II., 94.

IV. MERGER.

Whether by conveyance of equity of redemption to mortgagee.]—A conveyance of the equity of redemption by a mortgagor to a mortgagee of lands does not constitute a discharge of the mortgage by merger, unless it is made to appear that such a result was intended by the parties; and when a mortgagee applies to register a conveyance of the equity of redemption the registrar shall not mark the mortgage merged unless at the request of the mortgagee. *In re Major*, 5 B.C.R. 244.

V. PURCHASE FOR VALUE WITHOUT NOTICE.

1. Bill of sale—Following trust funds.] —M. & Co., being then insolvent, upon demand of one of their creditors, O. Bros., and in fear of legal proceedings, executed a bill of sale to them of their stock in trade and effects. Before the commencement of this action by the other creditors to have the bill of sale declared void as being made with intent to give O. Bros. a preference, the latter had sold goods to a bona fide purchaser for value and received the purchase money:—Held, 1. The bill of sale was not made voluntarily or with intent to give a preference, but was made under pressure sufficient to take the transaction out of the statutes. 2. O. Bros. could not, in any event, be called upon to account for the purchase money to the other creditors. *Cascaden* v. *McIntosh*, 2 B.C.R. 268.

2. Contract running with chattels.]—The purchaser for value in good faith of a chattel is not bound by a contract relating to the use of that chattel of which he had no notice at the time of the purchase. *Baxter* v. *Jacobs*, 1 B.C.R., Pt. II., 370.

VI. RECTIFICATION.

1. Oral preliminary agreement.]—Where there is no previous agreement in writing, parol evidence is admissible to show what the agreement really was in an action to rectify a mistake in a written instrument. It is no defence to an action for rectification to plead that the antecedent contract was one which the Statute of Frauds requires to be in writing and that it was made by word of mouth only. *Fordham* v. *Hall*, 20 B.C.R. 562.

2. Mistake.] — The plaintiff brought action to recover possession of leasehold premises for breach of covenant to pay taxes. The lease was in the short form and contained in the printed form a covenant "to pay taxes." There was also a later covenant in writing "to pay taxes on any building that he (the lessee) may hereafter see fit to erect." The trial judge found that the first covenant (in print) had been retained in the lease by mistake, and that when the lease was entered into the terms were reasonable and neither party could foresee that three years later property would have become so valuable that taxes would be increased tenfold:—Held, that the action should be dismissed, and that the lease should be rectified by striking out the printed words "and to pay taxes." *Booth* v. *Callow*, 18 B.C.R. 499.

3. Evidence.]—Plaintiff purchased from one Peterson one-half of a piece of land, said to contain 82 acres, being a portion of lot 119, group 2, New Westminster District. The description and the conveyance of the land, which were drawn by a real estate broker who was neither a solicitor nor a surveyor, purported to state the metes and bounds, but declared the parcel to contain 41 acres more or less. There was also a mortgage of the parcel given by plaintiff, containing the same description as the deed, and drawn by the same person. The deed was registered without any description. Plaintiff sold to defendant on the basis of there being 41 acres, and the same description was used. Defendant inspected the property both before and after the sale, had no idea that the acreage was any more than stated, and so admitted at the trial. There was up to this time no proper survey of the subdivision, beyond a middle line drawn by a surveyor with a view to dividing the land into halves. Defendant, on seeing the location of this line, perceived that it excluded him from a piece of cleared land which he

alleged was on his half. The surveyor, on this, ran another line, the plan from which showed that defendant had within his line some 48 instead of 41 acres. Neither the surveyor, the draftsman of the conveyance, nor the parties could say that the original parcel contained 82 acres. The learned trial judge came to the conclusion that there was a mutual mistake, and directed the rectification of the conveyance:—Held, that there was a lack of conclusive evidence as to the true area of the original parcel on which to direct the rectification of the deed, and that there should be a new trial. *Falk* v. *Swenson*, 13 B.C.R. 359.

See ESTOPPEL.

See MISREPRESENTATION.

See NOTICE.

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ESTOPPEL.

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I. IN GENERAL.

1. Essentials of.]—The Acts relied on to effect an estoppel must be clear and unmistakable. *Hayden* v. *Smith*, 1 B.C.R., Pt. II., 312.

2. Crown.] — The Crown cannot be estopped. *R.* v. *Victoria Lumber and Manufacturing Co.*, 5 B.C.R. 288.

3. Acquiescence.] — The mere submission to an injury does not work an estoppel. *Byron N. White Co.* v. *Sandon Water Works*, 10 B.C.R. 361.

4. Invalid contract.] — The doctrine of estoppel or ratification cannot be evoked to enforce as against a municipal corporation a contract to which the corporate seal has not been fixed pursuant to sec. 82 of the Municipal Act, 1892. *United Trust Co.* v. *Chilliwack*, 5 B.C.R. 128.

5. Change of position.]—There can be no estoppel where the party sought to be estopped was unaware of the other party's change of position. *Hayden* v. *Smith*, 1 B.C.R., Pt. II., 312.

II. BY MATTER OF RECORD.

A. What Will Create.

1. Judgments inter partes.

1. Default judgment.]—A matter does not become res judicata by a default judgment upon which the parties are not heard on the merits. Notwithstanding that the Court has, on the ground of laches, waiver, etc., refused a motion upon affidavit to set a default judgment aside and admit a defence on the merits, the defendant is not thereby estopped from attacking the judgment, and the contract upon which it was founded, upon the ground that he was insane at the time of the contract, and at the time of the obtaining of the judgment and of alleged waiver, although his insanity was alleged on the affidavits on the motion. *Harper* v. *Cameron*, 2 B.C.R. 365.

2. Default judgment.]—Fresh action to recover back part of amount of judgment by default on ground that judgment was for too much:—Held, that the judgment constituted an estoppel, and was a bar to the present action, and that the proper course was to apply in the action in which it was obtained to set aside the judgment by default on the merits, which could only be done on the ground of surprise or mistake. *Goon Gun* v. *Moore*, 2 B.C.R. 154.

3. Recital in order of inferior Court—Prohibition.]—A party moving for a writ of prohibition against an order of an inferior Court is not estopped from denying statements of fact necessary to found the jurisdiction of the inferior Court appearing on the face of the order in question on the motion. *Re W. N. Bole, C.C. Judge, etc., In re Conviction of Ah Tim and others*, 2 B.C.R. 208.

4. Preference—Res judicata.] — K., a trader in insolvent circumstances, sold all his stock-in-trade to D., who knew that two

of K.'s creditors had recovered judgment against him. The goods so sold were afterwards seized by the sheriff under executions issued on judgments recovered after the sale. On the trial of an interpleader issue in the County Court, the jury found that K. had sold the goods with intent to prefer the creditors who then had judgments, but that D. did not know of any such intent. The County Court judge gave judgment against D., holding that the goods seized were now his goods, and that judgment was affirmed by the Court in banc. D. afterwards brought an action against the sheriff for trespass in seizing the goods, and obtained a verdict, which was set aside by the Court in banc, the majority of the judges holding that the County Court judgment was a complete bar to the action. On appeal to the Supreme Court of Canada:—Held, reversing the decision of the Supreme Court of British Columbia, that the evidence showed that D. purchased the goods from K. in good faith for his own benefit, and the statute against fraudulent preferences did not make the sale void:—Held, also, that the County Court judgment, being a decision of an inferior Court of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, and beyond the jurisdiction of the County Court to entertain:—Held, further, that if such judgment could be set up as a bar, it should have been specially pleaded by way of estoppel, in which plea all the facts necessary to constitute the estoppel must have been set out in detail, and from the evidence in the case no such estoppel could have been established. *Davies* v. *McMillan*, 1893, Canada Law Times, Vol. XIII., 267.

5. Interlocutory order.] — A railway company served a notice to treat which was held bad as not being accompanied by the statutory certificate. It then served a new notice, properly accompanied, and at the same time gave notice that they withdrew the original notice. The landowner treated this as a statutory abandonment, and applied to a judge for an order to tax his costs. The order was made and the costs were taxed and the taxation affirmed by the judge:—Held, that the company was not estopped, in an action to recover the taxed costs, from contending that there had in fact been no abandonment.. *Atwood* v. *Kettle Valley Railway Co.*, 15 B.C.R. 330.

6. Order of Full Court varying order of trial judge.]—In adverse action to establish plaintiff's title to certain mineral claims, the following points were decided by the judgment of the trial judge: In adverse proceedings, if the plaintiff wishes to attack the defendant's title, he must attack it while proving his own title, and not wait till rebuttal. The plaintiff must show the measurements of the ground in dispute in order to prove overlapping of claims. An affidavit by a re-locator that the ground is unoccupied may be regarded as a statutory abandonment of his former claim. *Dunlop* v. *Haney*, 7 B.C.R. 1. In the result, the action was dismissed without a declaration of title being made in favour of either party, and without costs. This judgment was varied by the following order of the Full Court: "Upon motion being made unto this Court at the Court House, Vancouver, on the 23rd day of November, 1899, and this day by counsel on behalf of the defendant Edmund Haney, by way of appeal from the judgment of the Honourable Mr. Justice Martin, pronounced herein on the 11th day of August, 1899, and upon hearing counsel for the above named plaintiff, and by consent of respondent (plaintiff), and it appearing that formal judgment hath not been entered, but parties consenting to proceed with appeal notwithstanding, this Court doth order and adjudge that the plaintiff's said action be as against the defendant Edmund Haney dismised out of this Court without costs to either party, and without any declaration affecting the title of either party to their respective mineral claims in the pleadings in this action mentioned, namely, the plaintiff to the Pack Train mineral claim and the defendant to the Legal Tender or the Legal Tender Fraction mineral claim; and this Court doth further order that the plaintiff do pay to the defendant, Edmund Haney, his costs of this appeal to be taxed. Let the cross-appeal be dismissed with costs." No order was drawn up in the original action, but the learned trial judge dismissed it on the grounds that the evidence of overlapping was not sufficiently proven. At the same time he found that the defendant Haney had not established his claim to two of the claims—Legal Tender and Legal Tender Fraction—but no reference was made to the third claim—Olivett—which was the main ground of action. On the appeal the above order was made, dismissing plaintiff's action, without costs and without any discretion affecting either party to the respec-

tive claims. The question of ownership was thus left at large. A fresh action was commenced before Drake, J., for a declaration of title, and defendants raised plea of res judicata:—Held, that to establish the plea of res judicata there must be a decision on the subject-matter of the litigation and between the same parties, and that the order of the Full Court above mentioned operated to prevent the plea of res judicata being set up by defendant in this action. *Dunlop* v. *Haney*, 7 B.C.R. 307.

7. Matters considered in former trial.]—In an action against an employer for injuries received by an employee [(1911), 16 B.C.] the evidence showed that when the employee was injured, the employers paid some $686.30 in conveying the man to the hospital and defraying his medical expenses. Counsel for the employers brought this fact to the notice of the Court and jury during the trial, when plaintiff recovered a verdict of $4,500. The Company claimed the amount disbursed, sued and recovered judgment:—Held, on appeal, that counsel for the employers, when he mentioned the amount in the former trial, did so with a view to mitigation of damages, and that the jury evidently so considered it in arriving at their verdict. *Brooks, Scanlon, O'Brien Company, Limited* v. *Rhine Fakkema*, 16 B.C.R. 351.

8. Ejectment.] — Although a judgment in an action for ejectment may not always create an estoppel, it does so where the title to the land itself and the permanent right of possession have been tried and determined. *The Dominion Trust Company, Limited* v. *Masterton*, 20 B.C.R. 389.

2. Judgments in rem.

Adverse action.] — A judgment in an adverse action is not a judgment in rem, and one co-owner of a mineral claim is not estopped by the result of such an action instituted against another co-owner who has applied for a certificate of improvements. *Fry* v. *Botsford*, 9 B.C.R. 234; 1 M.M.C. 520.

B. Parties Estopped by Record.

1. By judgment between the same parties in a former action as to a point involved though not raised.]—An action was brought by a public company to remove two of its trustees for refusing to obey an order of the Court made in a previous action directing them to join with the other trustee in assessing, as not being bona fide fully paid up, in order to raise funds for carrying on the company:—Held, that the defendant trustees were estopped by the judgment in the previous action from objecting to the status of directors who had ordered the assessment of the stock, as that was a question which should have been raised in that action. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

2. Adverse action.]—One co-owner of a mineral claim is not estopped by the result of an action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. *Fry* v. *Botsford and MacQuillan; MacQuillan* v. *Fry*, 9 B.C.R. 234; 1 M.M.C. 520.

3. Course of litigation.]—Where a party obtains a judgment providing that he is entitled to cut timber from off his debtor's pre-emption claim and apply the proceeds in satisfaction of the judgment, he is precluded from afterwards contending that the debtor has no right to dispose of the timber. *Manley* v. *O'Brien*, 8 B.C.R. 280.

C. Exceptions to Conclusiveness of Judgments.

1. Fraud.]—As between parties to the judgment, plea of res judicata is not conclusive in a case of fraud properly alleged and, if necessary, proved. *Spiers* v. *The Queen*, 4 B.C.R. 388.

2. Fraud.]—Where a judgment has been obtained by fraud the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside. *Richards* v. *Williams*, 11 B.C.R. 122.

3. Mineral claims.]—Where an adverse action is dismissed without any declaration affecting the title of either party to the mineral claims sought to be established, the matter is not res judicata. *Dunlop* v. *Haney*, 7 B.C.R. 307.

III. By Deed.

1. Inter alios.]—A statement in a bill of sale does not work an estoppel against a person not a party to it. *Gibson* v. *McArthur*, 7 B.C.R. 59.

2. Receipt.]—A principal paid to his agent $700 to be applied in payment pro tanto of certain lands to be bought by the agent. The agent paid $20 to the vendor and procured the vendor to execute an

agreement under seal containing a recital of the payment of and a receipt for $700 on account of the purchase price, which the agent delivered to his principal and then absconded with the balance:—Held, that the vendor was estopped from denying the receipt of the $700. *Tuytens* v. *Noble*, 13 B.C.R. 484.

3. Covenant.]—A bill of sale contained a recital that a certain sum was due from the mortgagor to the mortgagee, and a covenant by the mortgagor to pay that sum, and also any other sum which, on taking an account, might appear to be due thereon:—Held, that the mortgagee was not estopped by the recital from claiming that the debt due at the date of the bill of sale was larger than the sum therein named. An express covenant overrides and excludes an implied covenant. *Rithet* v. *Beaven*, 5 B.C.R. 457.

IV. By Conduct.

A. Assent or Request.

1. Plaintiff particeps fraudis.]—In an action to set aside a bill of sale as fraudulent against the plaintiff, who was a creditor, and, as far as the evidence disclosed, the only creditor of the grantor, it appeared that the plaintiff himself had advised upon and drawn up the bill of sale:—Held, that he had no locus standi to attack it; that on the facts the conveyance was not fraudulent. *Boultbee* v. *Rolls*, 4 B.C.R. 137.

2. Right of action for debt, by agreement to extend time for payment.]—An insolvent company had called its creditors together, and a deed was executed whereby the company assigned certain property to trustees to answer the creditors' claims, and the creditors agreed to extend the time for payment:—Held, that the creditors who had executed the deed were estopped from presenting a winding-up petition until the period of extension had expired. *Re Atlas Canning Co.*, 5 B.C.R. 661.

B. As to Realty.

1. Boundary dispute — Estoppel by adopting survey plan.]—Held, in a dispute between adjoining proprietors as to boundaries: An owner who adopts a corrected survey made by the Crown by filing, in 1880, a plan indicating the boundary in dispute as therein laid down, is estopped as against his adjoining proprietor from setting up any other boundary. *Johnston* v. *Clarke*, 1 B.C.R., Pt. II., 56.

2. Boundaries—Description of—Filing plan.]—In an action for the declaration of title to a piece of land claimed by plaintiff as part of lot 376, and by defendant as part of 202, defendant's title was derived through B., to whom, in 1870, a Crown grant was issued, granting that lot "numbered 202 on the official plan, said to contain 150 acres more or less." In 1876-77 the Lands and Works Department, having caused an official survey of the adjoining lots to be made, found the official plan by which the boundaries of B.'s lot were defined to be incorrect, and with a view to retain the acreage proper to each grant, and to make the boundaries run true to the cardinal points, moved his s.e. corner post four chains north, and his s.w. corner post two chains south, and without notifying the defendant gave him, in the new official plan or survey, a new southern boundary. This adjustment of B.'s southern boundary gave to Lot 376 the gore of land now in question. Three years after the completion of this survey, defendant filed in the Land Registry Office a plan of the greater part of Lot 202, according to a private survey made by his own directions, in which he implicitly followed, as to his southern boundary, the survey of 1876-77. In 1881 a Crown grant to Lot 376—the boundaries thereof being as determined by the survey of 1876-77—was issued to plaintiff:—Held, that in questions relating to boundaries and descriptions of land, the rule is that the work on the ground governs, and that the gore had been originally included in the grant to B. as part of 202:—Held, that the filing of the map in 1880 did not under the circumstances (if at all) estop the defendant from claiming land not included therein, and that the defendant was entitled to the gore of land originally granted as part of Lot 202. *Johnston* v. *Clarke*, 1 B.C.R., Pt. II., 81.

3. Dedication—No power to dedicate where none to alienate.]—Registering plan showing street and selling lots by it. The defendants, a railway company, by Dominion statute acquired the power to "take, hold and use" certain foreshore "to such extent as shall be required by the company for its railway and other works." The company were the owners in fee of the lands abutting on the foreshore, and in 1885 filed a certain plan of a portion of such lands in the Land Registry Office at Van-

couver, which plan showed a public street running at right angles to and opening upon the foreshore, and subsequently sold lots from said plan. The defendants in 1892 ran an embankment for their railway along the foreshore, cutting off access thereto and to the sea, by way of the street:—Held, dissolving the injunction and dismissing the action: (1) That the registration of their town-site plan in November, 1885, operated as a dedication by plaintiffs of a public way over the foreshore from the foot of Gore Avenue, shown as opening upon it, and as an estoppel against their setting up their subsequently acquired rights over the foreshore against such public right of way. (2) That if plaintiffs in 1886 acquired any title to the foreshore inconsistent with such public right of way, such title fed the estoppel. (3) A public right of way is extinguished by Act of Parliament only by express words, or when it clearly authorizes the doing of a thing which is physically inconsistent with the continuance of such right, and sec. 18a, supra, does not do so. (4) The Crown was a necessary party to the action. Upon appeal:—Held, giving judgment for plaintiffs, and reinstating and continuing the injunction: (1) The plaintiff's right to occupy the foreshore under sec. 18a, supra, was exclusive. (2) There was no dedication by plaintiffs by the registration of their map of 1885, as there can be no dedication except by owners of the soil. (3) There is no power of dedication where there is no power to alienate. (4) The Crown was not a necessary party. *The Canadian Pacific Railway Company* v. *The City of Vancouver*, 2 B.C.R. 306.

4. Land registry — Registered plan—Description of land by reference to plan—Boundaries—Mistake—Right to object to validity of plan.]—The owner of a district lot registered in 1885 a plan of it drawn to scale, but not showing the subdivisions, and afterwards had another plan made from a survey, and which differed from the registered one. From an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought, in 1889, lot 16, and registered the deed, which did not refer to the plan. On 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890 the defendant bought from Kilby lot 16, the deed showing the purchase to be according to the registered plan, but before the purchase she inspected the property and saw the boundaries, which were then according to the unregistered plan. Lot 16, according to registered plan, overlapped lot 15, according to the unregistered plan:—Held, in an action for possession by the owner of lot 16: (1) That both plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan, and to have registered their conveyances in conformity with the Land Registry Act: (2) It was not open to defendant, who had accepted and registered a conveyance of land according to a registered plan, to afterwards object, in an action respecting the title to the same land, to the validity of that plan. *Fowler* v. *Henry*, 10 B.C.R. 212.

C. Share Certificates.

1. Sale of shares issued at a discount.]—An applicant for shares which are issued at a discount, and are therefore void, who accepts them under the impression that they are valid, and sells a portion of them, is not estopped as against the company from repudiating the remainder. *Twigg* v. *Thunder Hill, etc., Co.*, 3 B.C.R. 101.

2. Issued at a discount.]—A portion of the shares in a joint stock company, purporting on the face of the certificates to be of a certain par value and paid up in full, were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the company directly to the purchasers, who were not aware that the shares were not fully paid up:—Held, in an action by the company, that the purchasers were not liable for the amount unpaid on the shares. *Kettle River Mines, Ltd.* v. *Bleasdell*, 7 B.C.R. 507.

3. Unauthorized.]—Where a certificate of shares in proper form has been issued, but the affixing of the company's seal was unauthorized, such certificate must be held to be void, and the issue does not operate as a warranty of genuineness or estop the company from denying the validity of the certificate. *Fire Valley Orchards, Ltd.* v. *Sly*, 20 B.C.R. 23.

D. Negotiable Instruments.

Bill of exchange—Blank spaces—Alteration after endorsement.] — The endorsers of a promissory note, containing blank spaces for the names of the payee and the

rate of interest, are estopped from denying that they have given the maker authority to fill in the blanks. *Burton* v. *Goffin*, 5 B.C.R. 454.

E. Receipts.

Payment not received.]—The plaintiffs, J. Coughlan & Company, Ltd., having during the course of construction given a receipt for payments which they had never received:—Held, that they were estopped from claiming such amount against the owner. *Coughlan* v. *Nat. Cons. Co.*, 14 B.C.R. 339.

F. Holding Out.

1. Agent of company.] — Where the registered agent of a foreign corporation advertizes his clerk, and the clerk also advertizes himself, as local manager of the corporation, the clerk must be treated as such local manager. *Richards* v. *British Columbia Goldfields*, 5 B.C.R. 483.

2. Mining partnership.] — A mining partnership is estopped from denying its legal ability for items of accounts passed at meetings of the partnership. *Gray* v. *McCallum*, 5 B.C.R. 462.

3. Court stenographer.]—A person who undertakes to act as Court stenographer cannot refuse to furnish parties to a suit with a transcript of his notes merely because his fees have not been paid by the Crown. *Pender* v. *War Eagle; ex parte Jones*, 6 B.C.R. 427.

See BILLS OF EXCHANGE.

See COMPANY.

See EQUITY.

See REGISTRATION OF LANDS.

EVIDENCE.

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I. JUDICIAL NOTICE.

A. Statutes and Orders in Council.

Imperial Order-in-Council.]—The Court will take judicial cognizance, without further proof, of an Imperial Order-in-Council, upon production of a copy purporting to have been printed by the Queen's printer in London. *The Minnie*, 3 B.C.R. 161.

B. Matters of Public Notoriety.

Census.]—Judicial notice will be taken of a Dominion census. Where, therefore, the Code, by an amendment, gives jurisdiction in certain cases to a police magistrate for cities having a population of over 25,000:—Held, that the census returns for the City of Vancouver, having been published by authority of a Dominion Act, the Court will take cognizance of such a notorious fact without requiring formal proof. *Rex* v. *Rhamat Ali (No. 2)*, 15 B.C.R. 175.

C. Conclusiveness.

Private Acts, recitals in.]—Recitals in private and local statutes are not conclusive evidence of the matters recited. *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 8 B.C.R. 242.

II. PRESUMPTION AND BURDEN OF PROOF.

A. Onus of Proof of Claims.

1. Crown grant — Surface rights.]—Plaintiff sued for cancellation of a lease from the defendant on the ground that the defendant's Crown grant did not pass the surface rights:—Held, that the action failed on the ground that the plaintiff had not affirmatively proved that the grant did not pass the surface rights. *Spencer* v. *Harris*, 6 B.C.R. 466.

2. Fraudulent conveyance — Onus of proof.]—When a voluntary conveyance has the effect of defeating creditors, it will be set aside, and it is not necessary to adduce evidence of fraud; the burden lies on the person executing the deed to show cause why it should not be set aside. *Cunningham* v. *Curtis*, 5 B.C.R. 472.

3. Evidence—Onus of proof—Duty of counsel to press objection at trial.]—In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title. *Caldwell* v. *Davys*, 7 B.C.R. 156.

B. Onus of Proof of Defences.

Statute creating offence — Exemption from—Proviso or exemption.]—The existence of an exception nominated in the description of an offence created by statute must be negatived in order to maintain the charge, but if a statute creates an offence in general with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso. *Regina* v. *Strauss*, 5 B.C.R. 486.

C. Onus of Proof by Reason of Particular Relations.

Undue influence.]—Where a will is procured by the person propounding or taking a benefit under it the onus of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the Court by the surrounding circumstances. *Adams* v. *McBeath*, 3 B.C.R. 513; 27 S.C.R. 13.

III. BEST AND SECONDARY EVIDENCE.

A. In General.

False pretences.]—The basis of a charge being false pretence, and that false pretence being contained in a written document, unless a foundation be laid by secondary evidence to make out a prima facie case, the document itself must be produced. *Re Johnston*, 13 B.C.R. 209.

B. Copies.

Mining recorder's certificates.]—Before a substituted certificate will be admitted in evidence there must be proof of loss of the

original. Copies of certain recorded instruments held admissible without proof of originals. *Pavier* v. *Snow*, 7 B.C.R. 80.

IV. DOCUMENTARY EVIDENCE.

A. Judgments and Judicial Records.

1. Exemplification.] — The exemplification of a judgment under the seal of the Court which pronounced it is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary. *Boyle* v. *V. Y. Trading Co.*, 9 B.C.R. 213.

2. Police Court proceedings.] — The proper method of proving, in an action for libel, what was said about the plaintiff by witnesses at a police court trial is by putting in the depositions. *Dickinson* v. *The World Printing & Publishing Co.*, 17 B.C.R. 401.

B. Official Records, Reports and Returns.

Seal Fishery (North Pacific) Act.]—The statement of the captain or officer in command of a warship making a seizure, purporting to be signed by such officer, is admissible in evidence upon proceedings for condemnation without proof of signature. *The Minnie*, 3 B.C.R. 161.

C. Minutes of Corporations.

Transcription.]—Minutes of a directors' meeting taken down in shorthand by the solicitor of the company, transcribed by him and re-transcribed into the minute book by the secretary, and not confirmed at any subsequent meeting, are not admissible in evidence per se, though the solicitor has died before the trial of the action. *Claudet* v. *The Golden Giant Mines, Ltd.*, 15 B.C.R. 13.

D. Evidence Previously Taken or Used: when Admissible.

1. In General.

1. Divorce proceedings.] — In divorce proceedings the evidence of a witness who cannot be found, given at a former trial proving misconduct, may be read over to the petitioner at the trial, and verified by her as a correct note of the evidence as given by the witness and used as proof of misconduct. *Cunliffe* v. *Cunliffe*, 8 B.C.R. 18.

2. Depositions.] — Where a deposition has been regularly taken down in writing by a magistrate at a preliminary hearing, and such deposition is available, that deposition is the best evidence of what the witness stated on that occasion. *Rex* v. *Prasiloski*, 15 B.C.R. 29.

3. Oral evidence to supplement deposition.]—Where the deposition is produced and put in evidence, then parol evidence is admissible to prove statements made by the witness on the occasion of the taking of the deposition, and not appearing therein. *Ibid.*

2. Absence of Witness.

1. Divorce proceedings.] — In divorce proceedings, the evidence of a witness who cannot be found, given at a former trial proving misconduct, may be read over to the petitioner at the trial, and verified by her as a correct note of the evidence given by the absent witness, and may be used as proof of misconduct. *Cunliffe* v. *Cunliffe*, 8 B.C.R. 18

2. Proof of absence.]—Upon a prosecution for wounding with intent to murder, the deposition of one C., taken before the police magistrate on the preliminary investigation, was read, upon the following proof that C. was absent from Canada: "C. is, to the best of my belief, in the United States. He was employed, about 10 days ago as one of the crew on a steamer running between Victoria and an American port He said when he left me he was going on board the steamer. The steamer has not been on that route since. She is running between two American ports":—Held, that there was sufficient proof of absence from Canada. *Regina* v. *Pescaro and Jim*, 1 B.C.R., Pt. II., 144.

3. Proof of Absence.]—Evidence that the schooner, the deposition of whose captain is sought to be used, cleared from a Canadian port a week before the trial and put to sea, is insufficient proof of the captain being out of Canada so as to admit his deposition taken on the preliminary examination. *R.* v. *Morgan*, 2 B.C.R. 329.

4. Sufficiency of evidence.]—The testimony of a chief constable to the effect that a constable in his district, from whom he had heard from Vancouver and later Seattle, had failed to report for duty and had absconded is sufficient to entitle the judge to infer that the constable is absent from Canada so as to render admissible his evi-

dence taken at the preliminary inquiry. *R.* v. *Angelo,* 19 B.C.R. 261.

V. PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITTEN INSTRUMENTS.

Contract.]—Where it is sought to give parol evidence of certain other alleged terms of a contract in addition to those terms which are in writing it should be left to the jury to say whether the written matter contained the whole of the contract. *Harris* v. *Dunsmuir,* 6 B.C.R. 505; 30 S.C.R. 334.

See CONTRACT.

VI. OPINIONS.

A. Expert Evidence.

Weight of.]—Conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse of a steam boiler, who were not present at the time of the accident, whose evidence was not founded upon knowledge but was mere matter of opinion, who gave no reasons and stated no facts to show upon what their opinion was based; and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern, which the evidence showed were in general use. *The William Hamilton Manufacturing Co.* v. *The Victoria Lumber & Manufacturing Co.,* 4 B.C.R. 101; 26 S.C.R. 96.

B. Physical Condition.

Murder.]—There is no rule requiring the cause of death to be proved by a post mortem examination. *R.* v. *Garrow,* 5 B.C.R. 61.

C. Handwriting.

1. Proof of.]—The signature of a prisoner to the statement of accused at the preliminary hearing may be tendered as evidence against him at his trial on a charge of forgery. *Rex* v. *Golden,* 11 B.C.R. 349.

2. Proof of.]—A prisoner, called as a witness on his own behalf, cannot be compelled to furnish a specimen of his handwriting. *Rex* v. *Grinder,* 11 B.C.R. 370.

3. Expert testimony.]—Where it is a question when an alteration has been made in a negotiable instrument, the evidence of an expert in handwriting is admissible to show whether the alteration was made before, at the time of, or after the signature of the instrument. *British Columbia Land and Investment Agency* v. *Ellis,* 6 B.C.R. 82.

VII. CONFESSIONS.

1. Statement before justices.] — The provisions of the Administration of Justice Act (11 & 12 Vict., c. 42, sec. 18) are directory, and a statement, not precluded by the statutory words, made by a prisoner to the committing justice was admitted in evidence upon the justice deposing that the caution had been given, though not in the statutory words. *R.* v. *Kalabeen,* 1 B.C.R., Pt. I., 1.

2. Voluntary statement.] — Any statement made by an accused person, if voluntary, is admissible in evidence, a fortiori if made in open Court and after being cautioned by the magistrate. *R.* v. *James,* 17 B.C.R. 165.

3. Voluntary statement.] — When a prisoner makes a statement to officers without being cautioned, and subsequently makes the same statement to the same officers after being cautioned:—Held, that the second statement is inadmissible. *Rex* v. *Kong,* 20 B.C.R. 71.

4. Voluntary statement.] — A prisoner, arrested and given the usual caution, was taken by motor to the police station, where he arrived about five minutes after the caution. There he made a statement in answer to questions put by the police:—Held, that the statement was admissible in evidence. *Rex* v. *Wallace,* 20 B.C.R. 97.

5. Concealment of character as policeman.]—A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer:—Held, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself. *Rex* v. *Regan,* 14 B.C.R. 12.

6. Different charge.]—The prisoner was arrested on a charge of burglary. After being given the usual caution he made certain statements to a constable; subsequently he was charged with murder, and on his trial the Crown sought to put his statements in evidence:—Held, that the statements were admissible. *Rex* v. *Van Horst,* 20 B.C.R. 81.

7. Different charge.]—The prisoner was arrested on a charge of stealing S.'s gun,

and in answer to questions put to him by a constable, who did not caution him, he made certain statements: he was afterwards charged with the murder of S. and on his trial the Crown sought to put in evidence his answers:—Held, not admissible. *Rex* v. *Kay*, 11 B.C.R. 157.

8. After arrest.]—A voluntary confession made by a prisoner to a constable after arrest is admissible in evidence. *R.* v. *Bogh Singh*, 18 B.C.R. 144.

9. Inducement.] — Held, that before making his confession the prisoner was duly cautioned and that the confession was admissible in evidence although on an occasion previous to his making it an inducement may have been held out to him. *R.* v. *Lai Ping*, 11 B.C.R. 102.

10. Inducement.]—The constable when arresting the accused, said: "I arrest you for assaulting old man McGarvey," and proceeded to handcuff him. Accused asked to be permitted to go to the office to get some money, and inquired: "How much will the fine be?" to which the constable replied that he did not know anything about that. Subsequently the accused asked to have the handcuffs removed as he had no intention of escaping, to which the constable answered that he was taking no chances, and that he "had not much sympathy with a man who would kick an old man and bite him":—Held, that these remarks of the constable were not an inducement to the accused to speak. *Rex* v. *Bruce*, 13 B.C.R. 1.

11. Statement made to person in authority.]—A rector of a cathedral held an inquiry into the circumstances of an assault in which several of the choir boys were implicated:—Held, that the rector was a person in authority, and that a statement made to him by one of the boys who was told to speak the truth, and that the statement was for the purpose of that inquiry only, was not voluntary. *Rex* v. *Royds*, 10 B.C.R. 407.

VIII. Admissions.

A. Parties Whose Admissions Are Receivable.

1. Partners—Opposite parties as defendants—Admissibility of statements by one as against other.]—When a prima facie liability to the plaintiff is made out against one defendant, then, upon the issue of whether another defendant is also liable as being his partner therein, such defendants, as between themselves, are "opposite parties" within the meaning of r. 723 upon the issue involved, as it is the interest of the first that the second be held as a contributor to the obligation, while it is the interest of the latter to be discharged, and therefore the examination before trial of one of such defendants for discovery is evidence at the trial on behalf of the other. The plaintiff sought to give evidence, in proof of the partnership, of ante litem statements by the former defendant that the latter was his partner in the transaction in question:—Held, inadmissible, as the foundation for the admission of such evidence is the implied authority and agency of the person making the statement to make it on behalf of the person sought to be bound by it, arising from the nature of their relationship, which was itself the matter sought to be proved. *British Columbia Iron Works Co.* v. *Ernest Buse, John G. Bugbee, and Rosa Mueller, carrying on business as The Buse Milling Company, and Ernest Buse*, 4 B.C.R. 419.

2. Evidence of acts of agency as binding the company without proof of express authorization.]—Statements made by the officers of the company to the plaintiff, indicating to him that he was dismissed from its service, are admissible on evidence upon an issue raised by a denial of the dismissal, without proof that the company authorized the same, or by resolution authorizing a dismissal of the plaintiff. *Varrelmann* v. *The Phœnix Brewery Company, Ltd. Liab.*, 3 B.C.R. 135.

3. Agent.] — The defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. (who was agent for the plaintiff) that the ends of the two claims between which the fraction in question was located adjoined each other. *Gibson* v. *McArthur and Lukeman*, 7 B.C.R. 59.

B. Statements Made in Presence of Party.

Conditions of reception.] — Deceased, while working on a building as an independent contractor, was struck and instantly killed by the falling of the boom of a derrick that had been erected on the building by the defendants, who were the building contractors. The evidence showed that the machine was of the best type and in good repair, and was operated by a competent man, who was not guilty of any negligence or misconduct. The plaintiffs alleged that

there was a defect in the machine, in that the dog did not fit properly in the cog-wheel and at times slipped. The only evidence of knowledge of the alleged defect by the defendants was that of two witnesses, one of them stating that the operator of the hoist told him, after the accident, that the machine was defective and that he had notified the defendants of the defect prior to the accident, and that this statement was made by the operator 15 or 20 feet from the defendant W. (one of the members of the defendant firm), who did not contradict the statement. The other witness, who stood beside W. at the time the statement was made, testified that he heard what the operator said. The plaintiffs contended that when W. did not contradict the operator's statement, the evidence was admissible as an acquiescence by W. in the statement. The evidence was allowed in on the trial and the jury returned a verdict for the plaintiffs:—Held, setting aside the verdict of the jury, that the evidence that W. heard the statement was of the vaguest character; that the remark was not addressed to him; that the allegation was not that he, but the firm (of which he was a member), had been notified, as to which he may have had no knowledge, so that even if he heard what the operator said, he may not have been in a position to contradict it. In view, therefore, of the loose character of all this evidence, it should not have been admitted, and without it the plaintiff could not succeed. *Watson* v. *Booker*, 18 B.C.R. 538.

IX. Hearsay.

A. Generally.

Surveys.]—In an action to determine the boundary line between two lots, two surveyors were called at witnesses, neither of whom had personally surveyed the lots in question, but testified from the plans and field notes of surveys made by their articled clerks, who ran the lines:—Held, that the evidence of the two surveyors was improperly admitted. *Anticknap* v. *Scott*, 19 B.C.R. 81.

B. Complaints.

1. Lapse of time.]—The accused was found guilty of an indecent assault upon a girl six years of age. The child's mother was dead, and she was cared for by her grandmother, who, while bathing her, noticed an inflammation and asked the child if she had hurt herself, to which she replied that she had not. About two weeks after the event, without being asked, the child described to her grandmother an indecent assault upon her by the accused. This was the first complaint she had made:—Held, admissible in evidence. *Rex* v. *McGivney*, 19 B.C.R. 22.

2. Rape.]—Where the prosecutrix, on a charge of rape makes a statement to a third party, not in the presence of the accused, such statement is admissible in evidence, provided it was made at the first opportunity which reasonably offered itself after the commission of the offence, and was not elicited by questions of a leading or inducing or intimidating nature. *R.* v. *Jimmy Spuzzum*, 12 B.C.R. 291.

C. Dying Declarations.

1. Conditions of admissibility.] — Two facts must concur to render a declaration admissible: (1) that the deceased was in danger of dying in a short time, and (2) that the deceased had a settled hopeless expectation of death. *R.* v. *Woods*, 5 B.C.R. 585.

2. Conditions of admissibility.] — An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled, hopeless expectation of immediate death as to render the statement admissible as a dying declaration. Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following way: A justice of the peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter, and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answer by nodding her head. At the trial the statement was tendered as a dying declaration, and the doctor, the justice of the peace and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—Held, that the statement was admissible as a dying declaration; also that it had been properly proved. A dying declaration may be obtained by means of questions and answers,

and if it is reduced to writing it is sufficient if the answer only appear in the writing. Nodding is a sufficient answer where witness has been warned to talk as little as possible. *Rex* v. *Louie*, 10 B.C.R. 1.

3. Expectation of death.]—The injured woman said to another Indian woman "Fellows hurt me and make me die," and to her father she said "I am going to die, hurry up and get the priest"; "Sure, I am going to die, hurry up and get the priest for me":—Held, that this was sufficient indication of apprehension of imminent death and hopelessness of recovery to be admitted in evidence as a dying declaration. *R.* v. *Walker and Chinley*, 15 B.C.R. 100.

D. Entries in Course of Business.

Entries in private book.]—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 and others*, 11 B.C.R. 177.

X. Relevancy and Materiality.

A. Character: Reputation.

Chinese Immigration Act.]—Evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in habeas corpus proceedings directed against the collector of customs, who is detaining such immigrant for deportation to China on the ground that she is a prostitute. *In re Fong Yuk*, 8 B.C.R. 118.

B. Motive.

Letters of persuasion.]—Prisoner was indicted for having, at the City of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one B. R., being under the age of sixteen years, out of the possession and against the will of her father, contrary to sec. 283 of the Criminal Code. The evidence showed that the girl, by persuasion of letters written by the prisoner in Victoria, Canada, addressed to and received by her within the State of Washington, U.S.A., was induced to leave her father's house in that State and meet the prisoner at Victoria. Upon meeting her there he suggested that it was not too late for her to return home, but she declined, and the prisoner thereupon took her to a house near Victoria, where they spent the night together:—Held, that the reception by the girl of the letters was the motive cause of her abandoning her father's possession and therefore a material factor in the offence, which, consequently, in part took place outside the jurisdiction. *Regina* v. *Blythe*, 4 B.C.R. 276.

C. Similar Acts and Facts.

1. Fraud in former transactions.]—In an action to set aside a bill of sale of a mineral claim on the ground that it was a forgery by one of the defendants, evidence was given by plaintiff and his witnesses as to matters which, whether material or not, were intended to make the judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to give evidence showing that the plaintiff and his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to show that a like fraudulent scheme was being attempted in this case, and the result was that the judge was so influenced by this evidence that he gave judgment for the defendants:—Held, by the Full Court, that the said evidence on behalf of defendants was properly admitted. *D'Avignon* v. *Jones*, 9 B.C.R. 359.

2. Indecent assault.]—In a prosecution for indecent assault, evidence of a prior offence of the same nature is not admissible. *R.* v. *Inman Din*, 15 B.C.R. 476.

D. Compliance with Statutory Requirements.

Certificate of work—Admissibility of.]—The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898 and 1899. In December, 1899, the ground covered by the original Parrot claim was re-located as the Defiance No. 1 Fraction by the defendants' predecessors in

title:—Held, in adverse proceedings, that so much of the Parrot claim as was overlapped by the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location. At the trial plaintiffs attacked the validity of defendants' location, and defendants sought to put in evidence a certificate of work issued the day before:—Held, not admissible, as it was obvious that such certificate was to be used to cure irregularities. *Rammelmeyer* v. *Curtis; Powers* v. *Curtis,* 8 B.C.R. 383.

XI. Weight: Effect: Sufficiency.

A. In General.

1. Murder—Abortion.]—On a trial of accused for murder, by committing an abortion on a girl, it appeared in evidence that a post mortem examination of the girl had been made by a medical man, which was, however, confined to the pelvic organs, and was, upon the medical evidence, inconclusive as to the cause of death, but there was other evidence pointing to the inference that death was caused by the operation:—Held, that there is no rule that the cause of death must be proved by post mortem examination, and that there was evidence to go to the jury of the cause of death notwithstanding the absence of a complete post mortem examination. *Regina* v. *Garrow and Greech,* 5 B.C.R. 61.

2. Certificate of a commissioner of lands.] — The certificate of an assistant Commisisoner of Lands and Works under the Mineral Ordinance, 1869, is not conclusive evidence of compliance with the statutory conditions. *Peck* v. *Reg.,* 1 B.C.R., Pt. II., 11; 1 M.M.C. 13.

3. Lapse of time.]—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. *Camsusa* v. *Coigdarripe,* 11 B.C.R. 177.

B. Corroboration.

1. Evidence of Young Children.

1. Some other material evidence.]—As sec. 16 of the Canada Evidence Act specially requires that a statement taken in Court from a child of tender years, not understanding the nature of an oath, must be corroborated by "some other material evidence," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by this section of the testimony similarly taken from another child of tender years. The unsworn testimony, whether of one child or of several children, is not to be acted upon unless fortified by other material evidence corroborating it of a different character, i.e., evidence which is legal evidence apart from this section. *Rex* v. *McInulty,* 19 B.C.R. 109.

2. Sufficiency of.] — Evidence that a child is suffering from a venereal disease which could have been contracted at the time of the alleged assault, and that the child was at the house of the accused on the day of the alleged assault is sufficient to corroborate the unsworn evidence of the child on a charge of indecent assault. *R.* v. *McGivney,* 19 B.C.R. 22.

3. All the evidence to be considered.] —In a prosecution for indecent assault, in order to find corroboration of the evidence of a boy too young to take an oath, the judge may consider the whole of the evidence, including that adduced for the accused. *R.* v. *Inman Din,* 15 B.C.R. 476.

2. Claims Against Estate of Deceased.

Character of evidence.] —The corroboration required by sec. 50 of the Evidence Act (British Columbia Stat. 1900, c. 9, sec. 4) must refer specifically to the contract on which the action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Blacquiere* v. *Corr,* 10 B.C.R. 448.

XII. Admissibility Under Pleadings.

Amendment to cover evidence.]—The Court, after a trial, may always order such amendments to be made in the pleadings as will conform to the evidence that may hap-

pen to have been given. *Holten* v. *Vandall*, 7 B.C.R. 331.

XIII. In Particular Actions.

A. Adverse Actions.

1. Onus of proof.]—In adverse proceedings the burden of proof is on the adverse claimant, who has to give affirmative evidence of his own title. *Caldwell* v. *Davys*, 7 B.C.R. 156.

2. Prima facie case.]—A prior locator, who is the plaintiff in adverse proceedings, makes out a prima facie case by proving (1) his free miner's certificate; (2) prior location and due record; and (3) the overlapping of the claims in dispute. *Schomberg* v. *Holden and others*, 6 B.C.R. 419.

3. Attacking defendant's title.] — In adverse proceedings, if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title, and not wait till rebuttal. The plaintiff must show the measurements of the ground in dispute in order to prove overlapping of claims. *Dunlop* v. *Haney*, 7 B.C.R. 1.

B. Conspiracy.

Foundation for.] — Before the acts of alleged conspirators can be given in evidence there must be some preliminary proof of an acting together, but it is not necessary that a conspiracy should first be proved. *R.* v. *Hutchinson*, 11 B.C.R. 24.

C. Contempt of Court.

Particularity.]—Contempt of Court being a criminal offence, on the hearing of an application to commit nothing will be inferred, and it is necessary to prove the charge with particularity. *In re Scaife*, 5 B.C.R. 153.

D. Perjury.

Explanatory statements.] — A person charged with perjury alleged to have been committed in a civil action is entitled to have adduced those parts of his testimony in the civil action explanatory of the statements alleged to constitute perjury. *R.* v. *Cooto*, 10 B.C.R. 285.

XIV. Witnesses.

A. Impeaching Character.

Party's own witness.]—A party may not introduce general evidence to impeach the character of his own witnesses, but he may proceed with the proof of the facts in issue, although the consequences of so doing may be to discredit his own witness. *R.* v. *Hutchinson*, 11 B.C.R. 24.

B. Accused Testifying.

1. In general.]—A prisoner, at his trial, has the option of making a statement not under oath or of giving evidence under oath. *R.* v. *Aho*, 11 B.C.R. 114.

2. Statement by prisoner defended by counsel.]—A prisoner on his trial, defended by counsel, may, at the conclusion of his counsel's address, himself make a statement of facts to the jury, but the prosecution will be entitled to reply. *R.* v. *Rogers*, 1 B.C.R., Pt. II., 119.

3. Admissibility on new trial.]—Where an accused submits himself to give evidence and be cross-examined, the evidence so given is admissible on a new trial. *R.* v. *Deakin*, 17 B.C.R. 13.

4. Cross-examination.]—Counsel for the Crown may ask the prisoner who testifies on his own behalf if he had been charged with or committed certain offences in the past, but unless there is evidence to warrant the imputation being made, counsel should not make it by question. A prisoner charged with murder, who testifies on his own behalf, may be cross-examined on his alleged testimony at the inquest in the absence of the original depositions. *R.* v. *Mulvihill*, 19 B.C.R. 197.

5. Demonstration.]—A prisoner on trial for murder cannot try on a pair of boots in the presence of the jury in order to show that he cannot put them on his feet, under the pretext of making a statement. *R.* v. *Spintlum*, 18 B.C.R. 606.

6. Failure to testify.]—A direction to the jury that an accused has failed to account for a particular occurrence, when the burden has been cast upon him to do so, does not amount to a comment on his failure to testify. *R.* v. *Aho*, 11 B.C.R. 114.

C. Cross-examination.

1. Vexatious and irrelevant questions.]—The judge presiding at the trial of a

cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on appeal. *Brownell* v. *Brownell*, 42 S.C.R. 368.

2. Question by juror.]—Where a juror asks a question of a witness in order to ascertain if he has a fact already deposed to rightly in his mind, there can be no cross-examination on the answer made. *R.* v. *Spintlum*, 18 B.C.R. 606.

3. Disposition of property.]—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. *Camsusa* v. *Coigdarripe*, 11 B.C.R. 177.

D. Evidence in Reply.

1. Admissibility of explanatory statements.]—A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged. *Rex* v. *Coote*, 10 B.C.R. 285.

2. Alibi.]—After the case for the Crown and the accused was closed, the Crown called witness in reply whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses, and which tended to weaken the alibi set up by the accused:—Held, that to allow the evidence was entirely in the discretion of the judge, and there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine and meet the evidence. *R.* v. *Wong On*, 10 B.C.R. 555.

E. Refreshing Memory.

Note of accident.]—Where a witness of an accident made notes of the occurrence and these original notes were expanded on the following day, and the loss of the original notes, the transcript thereof on the following day, and the accuracy thereof had been proved, the witness was held to be entitled to refresh his memory by referring to the copy. *Daynes* v. *British Columbia Electric Railway Company*, 17 B.C.R. 498; 49 S.C.R. 518.

F. Oath and Affirmation.

1. Incompetency by reason of want of religious belief—Examination on voir dire—Duty of trial judge.]—It is not the duty of the trial judge to examine a witness on the voir dire as to his religious belief, for the purpose of testing his competency as a witness, even if requested to do so by counsel for the opposite party, and a party who has not been examined on the voir dire at the trial will not be heard upon affidavit on appeal against the competency of the evidence. *Gray* v. *McCallum*, 2 B.C.R. 104.

2. Religious belief.]—At the trial the evidence on which the accused was convicted was given by a witness who was a Church of England minister, but not actively following his profession. On being offered the Bible to take the oath in the usual form, he said: "I affirm." No objection was made at the time, but on the cross-examination being reached, he was asked: "What is your objection in making an affirmation, then, instead of taking an oath on the Bible?" He answered: "I believe it is optional with the Court," and, "I consider that that is a private matter of my own discretion." To a statement that for private reasons he had retired from the diocese of British Columbia, he was asked: "Are those reasons that you do not believe in Christian doctrines?" He answered: "I appeal to the judge whether I have to reveal my private conscience to the gentleman." He was not asked whether he had conscientious scruples against the taking of an oath on the Scriptures. His appeal was sustained and the defence was not allowed to cross-examine witness on his religious belief. Two questions were reserved for the opinion of the Court of Appeal: (1) Could I consider the statements of the said William George Hollingworth Ellison as evidence, inasmuch as he did not state that his objection to taking an oath was on grounds of conscientious scruples? (2) Should I have allowed accused's counsel to cross-examine said witness on the question of his belief in Christian doctrines, and was the accused prejudiced in his defence by my refusal:—Held, on appeal, that a witness claiming the right to affirm instead of taking the oath must make it clear to the Court that he has conscientious scruples to the taking of an oath. *Rex* v. *Deakin*, 16 B.C.R. 271.

G. Interpretation.

Stenographer's notes.]—A transcript of the stenographer's notes of what an interpreter said was the testimony of the witness must govern in the absence of evidence to the contrary. *Rex* v. *Bogh Singh*, 18 B.C.R. 144.

XV. EVIDENCE OUT OF COURT.

A. Where Examination Out of Court Will Be Ordered.

1. Witnesses Within the Jurisdiction.

1. Illness.] — The serious illness of a witness is ground for granting an order for his examination de bene esse. *Bank of Montreal* v. *Home*, 6 B.C.R. 68.

2. Distant residence.]—A witness who lives in a remote part of the Province is examinable under r. 368 while temporarily in Victoria. *Hyland* v. *Canadian Development Co.*, 9 B.C.R. 32.

2. Witnesses Abroad.

1. Plaintiff's application.] — Where a plaintiff has selected British Columbia as the place where the action should be brought, it is his duty prima facie to bring his witnesses to this Province or to show that it would not be in the interests of justice that he should be compelled to do so. Where a plaintiff seeks to have a material witness examined abroad and the nature of the case is such that it is important he should be examined here, the party asking must show that he cannot bring him to this Province to be examined on the trial. The principal officer of a plaintiff company, who is a material witness, cannot be examined on the plaintiff's behalf under cover of a general leave given by an order for a commission to examine "other persons." *Stewart Iron Works Company* v. *British Columbia Iron, Wire and Fence Company*, 20 B.C.R. 515.

2. Defendant's application.]—A defendant resident outside the jurisdiction has a prima facie right to a commission to take his own evidence for use at the trial. *Cranstoun* v. *Bird*, 5 B.C.R. 140.

3. Commission to take evidence—Second one to same place—Costs of.]—A second commission to New York granted to defendant to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action. *Gill* v. *Ellis*, 5 B.C.R. 137.

4. Commission to examine witnesses—Preponderance of convenience.]—In an action on a promissory note for $65.40 the defendant pleaded that the note was obtained from him under duress, and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there:—Held, that as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiffs' attending the trial, and the application was made bona fide, it should be granted. *Thompson* v. *Henderson*, 9 B.C.R. 540.

B. Procedure to Obtain.

1. Sufficiency of affidavit.]—A defendand resident outside the jurisdiction has a prima facie right to a commission to take his own evidence for use at the trial. An affidavit that such defendant was resident in Australia, and manager of a woollen factory, held sufficient to support an order for a commission to examine him, though it did not state that he could not personally attend at the trial. The fact that he could not do so without great inconvenience was a reasonable inference from the facts deposed to. *Cranstoun* v. *Bird*, 5 B.C.R. 140.

2. Affidavit in support.]—A party desiring a commission for his own examination outside the jurisdiction should himself make an affidavit of the facts relied on. *Tollemache* v. *Hobson*, 5 B.C.R. 216.

3. Necessity to state names of witnesses in affidavit.]—An affidavit for an order for a commission to examine witnesses abroad must state the names of the witnesses proposed to be examined. *Hermann* v. *Lawson*, 3 B.C.R. 353.

C. Return and Use of the Evidence.

Manner of use at trial.]—Whether all the evidence taken upon commission in an action shall be read at length, or read in part, or stated in part, or stated by counsel at the trial is a matter in the discretion of the trial judge. *Marks* v. *Marks*, 13 B.C.R. 161.

XVI. AFFIDAVITS.

A. Who May Take.

1. Notary public.] — A notary public within the Province of British Columbia has

not authority to take an affidavit in an action in the Supreme Court. *Laitnen* v. *Tynjala*, 14 B.C.R. 246.

2. Sworn outside the Province.]—An affidavit sworn out of the Province before a notary public and certified under his hand and official seal is admissible in evidence. *First National Bank* v. *Raynes*, 3 B.C.R. 87.

3. Ante litem solicitor—Affidavit sworn before.]—The affidavit of a party to a suit sworn before an ante litem solicitor in his employ, acquainted with the facts of the case, although not the solicitor on the record, is insufficient under r. 417. *Dunsmuir* v. *Klondike & Columbian Goldfields, Ltd.*, 6 B.C.R. 200.

4. Agent for solicitor of party.]—An affidavit sworn before a notary public in Manitoba who had been acting as agent for defendant's solicitor is insufficient under r. 417. *McLellan* v. *Harris*, 6 B.C.R. 257.

B. Jurat.

1. Omission of date.]—Where the jurat to an affidavit did not mention the date upon which the affidavit had been sworn, this was not a fatal defect, and even if it could be so considered at common law, such a defect would be cured by the Oaths Act and the Supreme Court Rules of 1890, No. 415. *Paulson* v. *Beaman*, 9 B.C.R. 184; 32 S.C.R. 655.

2. Omission on jurat of place of swearing.]—The Bills of Sale Act, C.S.B.C. 1888, c. 8, sec. 3, as to the affidavits of execution to be filed with the instrument, provides "the affidavit aforesaid may be in the form in the schedule hereto annexed marked A." In this form, and also in the affidavit filed with the chattel mortgage in question, no mention was made in the jurat of the place of swearing the affidavit:—Held, that the affidavit was sufficient as complying with the statute. Apart from its statutory sufficiency it would be presumed from the fact that the affidavit was, on the face of it, sworn before a commissioner for taking affidavits in British Columbia, that the official acted within the territorial limits of his authority, and not elsewhere. *Brown and Erb* v. *Jowett*, 4 B.C.R. 44.

C. Foreign Deponent.

1. Foreigner — Affidavit by.]—An affidavit drawn in a language not understood by deponent may be read in Court if it appears from the jurat that it was first read over and interpreted to deponent. *In re Fong Yuk and the Chinese Immigration Act*, 8 B.C.R. 118.

2. Affidavit must be drawn up and sworn to in the language of the deponent.]—An affidavit drawn up in a language not understood by the deponent cannot be read in Court; it must be drawn up and sworn to in the language of the deponent, but a sworn translation of it may be read in Court. *In re Ah Gway*, 2 B.C.R. 343.

D. Style of Cause.

Intituling—Irregularity.]—The affidavits in support of a motion for an order for payment into Court of moneys realized under an execution to answer claims of third persons against the execution debtor for wages were not intituled in the cause, but "In the Matter of the Execution Act and of A. E. Clarke, judgment debtor":—Held, irregular. *McKay* v. *Clarke*, 2 B.C.R. 213.

E. Grounds of Information and Belief.

1. Writ for service out of the jurisdiction.]—Affidavit leading to an order for ex juris writ should show grounds of deponent's belief that plaintiff has good cause of action. *Northern Counties Investment Trust* v. *Nathan*, 7 B.C.R. 136.

2. Source of information.] — An affidavit leading to an order for an ex juris writ, containing allegations of fact which must necessarily have been founded on information and belief only, must state source of information. *Tate* v. *Hennessey*, 8 B.C.R. 220.

F. Cross-Examination of Deponent.

1. Right of.]—Rules 385 and 429, taken together, compel the production for cross-examination of a deponent on his affidavit if required by the opposite party, before such affidavit can be used. *Westphalen* v. *Edmonds*, 7 B.C.R. 175.

2. Right of.]—Rules 385 and 429, taken together, compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used. *Russell* v. *Saunders*, 7 B.C.R. 173.

3. Conduct money.]—On an interlocutory application to change the venue the

defendant filed his own affidavit in support of the application, and on being served with an order and appointment for his cross-examination on such affidavit, attended for such cross-examination, but refused to be sworn or answer until paid his expenses of attendance:—Held, that he was not entitled to conduct money. *Emerson* v. *Irving*, 4 B.C.R. 56.

4. On application for injunction.]—As a general rule an order under r. 401 will not be made for the attendance for cross-examination of a plaintiff who has made an affidavit leading to an interim injunction before the defendant files an affidavit of merits. *Leavock* v. *West*, 6 B.C.R. 404.

See CONTRACT.

See MINES AND MINERALS.

EXECUTION.

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I. SEIZURE.

By notice.]—A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods. Semble, goods cannot be seized by telephone. *Dickinson* v. *Robertson*, 11 B.C.R. 155.

II. AGAINST CHATTELS.

1. Mineral claim—Seizure by sheriff of the interest of a co-owner.]—A sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under sec. 4 of the Mineral Act Amendment Act of 1899, in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse. *McNaught* v. *Van Norman*, 9 B.C.R. 131; 1 M.M.C. 516.

2. Shares in a ship.]—The equity of redemption in the shares in a ship cannot be seized by any common law process. *Wilson Bros.* v. *Donald*, 7 B.C.R. 33.

3. Ship.]—Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action in rem to enforce a mortgage of the ship, such property cannot be seized by a sheriff under a writ of fieri facias. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

III. AGAINST LANDS.

1. Certificate of judgment—Registration as against lands — Whether superseded by giving security.]—The registration of a certificate of judgment against the lands of a judgment debtor is not an execution within the meaning of the Supreme Court of Canada Act, sec. 47, sub-sec. (e), and the giving security to the satisfaction of a judge of the Supreme Court of British Columbia for the whole amount of the debt and costs does not supersede the registration of such certificate. *Foley* v. *Webster*, 2 B.C.R. 251.

2. After delivery of fi. fa.]—The registration of a judgment in the Land Registry Office before the delivery of the writ of fi. fa. to the sheriff is a condition precedent to the efficacy of the writ in the sheriff's hands and sale thereunder under secs. 31 and 32 of the Execution Act, C.S.B.C. 1888, c. 42. *Spiers* v. *Reg. and Corbould*, 4 B.C.R. 388.

IV. PRIORITY, AS AGAINST OTHER TRANSACTIONS.

1. Unregistered mortgage.]—Registered judgment binds only the interest of the debtors existing at the time of registration, and therefore cannot affect a mortgage already given by debtor, although such mortgage is not registered before the judgment. *Yorkshire Guarantee, etc., Corp.* v. *Edmonds*, 7 B.C.R. 348.

2. Intervening execution — Time for recording.]—The claimant of an interest in a mineral claim seized under an execution on 18th May, 1903, relied on a bill of sale obtained by him on 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the Mining Recorder's office. The bill of sale was not recorded until 22nd May, 1903:—Held, that as the time for recording mineral claims, fixed by sec. 19 of the Mineral Act, is dependent upon the distance of the claim (not of the locator) from the Recorder's office, therefore, by sec. 49 of the Act, the bill of sale was of no effect as against the intervening executions, as it was not recorded within the time limited by said sec. 19. *Dumas Gold Mines, Limited* v. *Boultbee,* 10 B.C.R. 511; 2 M.M.C. 137.

3. Claim of general legatee recovering judgment—Position of, as regards assets of estate.] — In 1874 one E. H. became entitled to a general legacy of $10,000, bequeathed to him by his brother J., who appointed as his executor another brother, T., with whom he was in partnership. On J.'s death T. entered into possession of the whole partnership property, and paid half the legacy to E. in 1875. E. sued T. and recovered judgment by default for the balance, on January 24th, 1889, which judgment was registered February 28th, 1889. In the meantime T. had charged the whole property for large sums to various creditors, who obtained and registered judgments before January 24th, 1889, before which date also judgment was obtained against T. and registered by a simple contract creditor, C. Receivers having been put in possession of T.'s estate, sold the same under order of Court, and after certain mortgage debts and expenses were paid off, with the sanction of the Court, the balance left was insufficient to pay off the charges registered before E.'s judgment. In an action by E. for an inquiry as to what assets of J. came into hands of T. or the receivers, to have his judgment declared entitled to priority over the other registered charges, and to restrain the receivers:—Held, per Begbie, C.J., that the action must fail as against all the defendants, for E. was a mere judgment creditor of T., and no longer a legatee, and he had not shown that any moneys in the receiver's hands were impressed with a trust in his favour. But held, on appeal, per McCreight and Walkem, JJ., that the action lay as against the simple contract creditor C., but not, semble, as against the secured creditors, by reason of secs. 32-36 of the Land Registry Act. Per Drake, J., dissenting, the action was misconceived and should have been launched as an administration action. *Ezeliek Harper* v. *Thaddeus Harper, Thomas Dixon Galpin, Henry Slye Mason, The Canadian Pacific Land and Mortgage Company, Limited, The British Columbia Land and Investment Agency, Limited, John Cameron and Henry Slye Mason, and James Charles Prevost, as receivers of the estate of the said Thaddeus Harper,* 2 B.C.R. 15; 21 S.C.R. 273.

V. Exemption From Seizure.

A. What Property Exempt.

1. Homestead Amendment Act, 1890—Exemption from execution.]—A horse, the only exigible personalty of defendant, was taken in execution. It was appraised at $1,000. Defendant, under sec. 2, Homestead Amendment Act, 1890, c. 20, providing: "2. It shall be the duty of every sheriff or other officer seizing the personal property of any debtor under a writ of fieri fiacias, or any process of execution, to allow the debtor to select goods and chattels to the value of $500 from the personal property so seized," claimed that he was entitled to select the horse to the extent of $500, and to be paid that amount by the sheriff out of the proceeds of its sale:—Held, that the debtor was so entitled. *Vye* v. *McNeill,* 3 B.C.R. 24.

2. Exemption from seizure and sale of goods and chattels—Whether book debts within.]—Book debts are not within the exemption of the following provision of the Homestead Act, C.S.B.C. 1888, c. 57, sec. 10: "The following personal property shall be exempt from forced seizure and sale by any process at law or in equity; that is to say, the goods and chattels of any debtor . . . . to the value of $500," as not being within the description of personal property capable of seizure, or capable of being dealt with conformably to the provisions of the Act relating to the mode claiming the exemption. *Hudson's Bay Co.* v. *Hazlett,* 4 B.C.R. 450.

3. Notice of exemption claim.]—Held, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realized by the sheriff on the sale of a steamship, the only exigible personalty of the debtor. Semble, notice of

claim of exemption is necessary. *Yorkshire Guarantee & Securities Corporation* v. *Cooper*, 10 B.C.R. 65.

B. Conditions of.

1. Assignment for benefit of creditors —Exemption.]—P. & Y., partners, on the 26th of July, 1894, executed a deed of assignment to S., for the benefit of their creditors, of "all their and each of their personal estate which might be seized and sold under execution (save and except the household furniture of Agnes York), and all their and each of their real estate," and S. immediately entered into possession thereof, and afterwards converted the same into money. Subsequently, on December 28th, 1894, P. claimed from S. $500 of the proceeds as an exemption from execution to which he was entitled under the Homestead Act (C.S.B.C. 1888, c. 57), Amendment Act, 1890, sec. 2, and implied reservation in the deed:—Held, that the $500 exemption from execution under the Act is not an absolute right, but a privilege or option to be effectuated only by claiming it within a reasonable time in regard to the specific goods seizable, or which have been seized under execution, and does not apply to the proceeds of the goods after sale and conversion into money. Quære, as to the effect of a claim of exemption by one partner only where some of the goods seized are partnership, and others individual property. *Pilling* v. *Stewart*, 4 B.C.R. 94.

2. Costs of seizure and possession money.] — Sheriff's costs of seizure and possession money are payable by the execution debtor claiming the exemption, which is a privilege arising only when claimed. *Sehl* v. *Humphreys*, 1 B.C.R., Pt. II., 257.

3. Privilege.] — A right of exemption from execution is a privilege exercisable at the option of the debtor and to take effect must be claimed. *Johnson* v. *Harris*, 1 B.C.R., Pt. I., 93.

4. Small Debts Court—Jurisdiction of magistrate to decide claim for.]—A magistrate sitting as judge of the Small Debts Court has no jurisdiction to decide the validity of a claim of exemption, under the Homestead Act, of goods seized under process of execution issued from that Court. *Auberg* v. *Anderson; Stewart* v. *Anderson*, 5 B.C.R. 622.

5. Whether absolute.] — Whether the right of exemption is absolute or a privilege to be claimed within two days. *Dickinson* v. *Robertson*, 11 B.C.R. 155.

6. Exception.]—The burden is on the party claiming the exemption to show that the goods in respect of which exemption is claimed were not seized "in satisfaction of a debt contracted for or in respect of such identical goods." *In re Sharp*, 5 B.C.R. 117.

C. Time to Claim.

After sale.]—Exemption from execution does not apply to the proceeds of the goods after sale and conversion into money. *Pilling* v. *Stewart*, 4 B.C.R. 94.

D. Selection.

1. Value of chattel exceeding limit of exemption.]—A horse, the only exigible personality of defendant, was taken in execution. It was appraised at $1,000. Defendant, under sec. 2, Homestead Amendment Act, 1890, c. 20, providing: "2. It shall be the duty of every sheriff or other officer seizing the personal property of any debtor under a writ of fieri facias, or any process of execution, to allow the debtor to select goods and chattels to the value of $500 from the personal property so seized," claimed that he was entitled to select the horse to the extent of $500, and to be paid that amount by the sheriff out of the proceeds of its sale:—Held, that the debtor was so entitled. *Vye* v. *McNeill*, 3 B.C.R. 24.

2. Onus of proof.]—A deed of assignment of the estate and effects of insolvents for the benefit of their creditors, executed on March 26th, 1896, pursuant to the Creditors' Trust Deeds Act, 1890, excepted "such personal property as may be selected by the said debtors under the Homestead Act and Homestead Amendment Act, 1890":—Held, that the onus was on the claimants to show that the claim was not within the exception to the right of exemption provided by sec. 10 of the Homestead Act, 1890, as amended by the Act of 1893, sec. 2, in regard to goods seized in "satisfaction of a debt contracted for or in respect of such identical goods," and in the absence of evidence upon the point the claim was disallowed. Semble, the Homestead Act Amendment Act, 1896, c. 23, sec. 2, directing the method of selecting the goods proposed to be exempted is retroactive in its effect, as regulating procedure, and applied to the claim under the deed in question, though passed after date

of the deed, and that the claim was also invalid for want of compliance with that statute. *In re Sharp,* 5 B.C.R. 117.

E. Waiver of.

Assignment for creditors.]—Exemption is not an absolute right, but a privilege which may be waived, and where debtors assigned all their property that might be seized and sold under execution:—Held, that by the form of the assignment the privilege had been waived. *In re Ley and others,* 7 B.C.R. 94.

VI. Rights of Purchaser at Sheriff's Sale.

Locus standi in action attacking judgment.]—A purchaser at sheriff's sale under a writ of fi. fa. had no status to question a subsequent judgment of the Court setting aside the judgment except by intervening. *Spiers* v. *The Queen and Corbould,* 4 B.C.R. 388.

VII. Claims Entitled to Preferential Payment.

A. When Entitled.

1. Appointment of receiver is not an execution—Creditors' Relief Act, 1883—Preference claims of workmen.]—M. had obtained a judgment in the action against L. The defendant, being examined as a judgment debtor, swore that he had no goods nor lands upon which execution could be levied in a fi. fa., but that there were some contingent payments which he expected to receive shortly. Thereupon M. procured an order appointing himself receiver, without having previously taken out a writ of fi. fa. Afterwards certain unpaid workmen of L. claimed, under the above Act, that M. should be ordered to satisfy their claims, preferentially, out of any moneys coming to him as receiver:—Held, that as there was no writ of fi. fa. the statute did not authorize the application. Semble, it is not sufficient, in such a case, that the workmen should claim to be in arrear of wages; the claim should be established against both the judgment debtor and the execution creditor, or at least against the judgment debtor. Semble, a receiver is not within the Act; an Act which takes away the legal right of a diligent litigant, to bestow it gratis on a stranger, is to be construed strictly according to its letter. *Muirhead* v. *Lawson,* 1 B.C.R., Pt. II., 113.

2. Receiver—Appointment of, is not an execution.]—The appointment of a receiver of the estate of a judgment debtor at the instance of his judgment creditor by way of recovering upon the judgment is not an "execution" within the meaning of the Execution Act, sec. 21, and clerks and servants of the execution debtor have no right to an order for payment of their wages out of the amount realized by the receiver in priority to the claim of the judgment creditor. *Aspland* v. *Hampson & Co.,* 3 B.C.R. 299.

3. Administration of estate of intestate.]—Plaintiff having obtained judgment and execution against an administratrix of the estate of John Gilmour, deceased, John A. Gilmour claimed, under C.S.B.C., c. 42, sec. 21, to be paid the amount of wages due to him by the administratrix as manager of her farm, part of the estate of the intestate, in priority to the execution creditor:—Held, that the Act only applies to claims for wages against the execution debtor, and that the administratrix, and not the estate, was responsible for the wages. *Alexander Gilmour* v. *Ellen Gilmour, John A. Gilmour (claimant),* 3 B.C.R. 397.

B. Procedure to Establish.

Jurisdiction.] — The plaintiff having recovered judgment and execution in this action in the Supreme Court, the sheriff levied the amount thereof from the goods of the defendant. Five persons to whom the execution debtor was indebted for wages obtained an ex parte order from a County Court judge, professing to sit as a judge of the Supreme Court—under Stat. British Columbia, 1891, c. 8, and Rules of Court printed in British Columbia Gazette, 4th November, 1891—for the sheriff to pay into Court out of the moneys levied the amount claimed by them, in order that they might be at liberty to establish their claims thereto, in preference to the execution creditor, under C.S.B.C. 1888, c. 42, sec. 21. Neither the order nor the affidavits in support of it were intituled in any cause, but "In the matter of the Execution Act, and of A. E. Clarke, judgment debtor":—Held, 1. The order and affidavits were irregular, as not being intituled in any pending cause. 2. The order ought not to have been made ex parte. 3. Sec. 31, supra, only authorized the

order therein provided for to be made by a "judge of the Court out of which the process issues," and "upon proof of the claim," and the County Court judge had no jurisdiction. 4. An order for payment into Court of the moneys levied is unauthorized. *McKay* v. *Clarke*, 2 B.C.R, 213.

VIII. EQUITABLE EXECUTION.

A. When a Receivership Order may be Made.

1. Legal remedies exhausted.]—A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguishable from equitable) remedies. *Davidge* v. *Kirby*, 10 B.C.R. 231.

2. Shares in a ship.]—A receiver will be appointed, at the instance of execution creditors, of the equity of redemption of the shares in a ship. *Wilson Bros.* v. *Donald*, 7 B.C.R. 33.

B. Effect of.

Appointment of receiver without taking out fi. fa.]—M. had obtained a judgment in the action against L. The defendant, being examined, swore that he had no goods nor lands upon which execution could be levied on a fi. fa., but that there were some contingent payments which he expected to receive shortly. Thereupon M. procured an order appointing himself receiver, without previously taking out a useless fi. fa. Afterwards certain unpaid workmen of L. asked, under the above Act, that M. should be ordered to satisfy their claims, preferentially, out of any moneys coming to him as receiver:—Held, that as there was no writ of fi. fa. nor any execution thereon, nor any lands or goods, the statute did not authorize the application. Semble, it is not sufficient, in such a case, that the workmen should claim to be in arrear of wages; the claim should be established against both the judgment debtor and the execution creditor, or at least against the judgment debtor. Semble, a receiver is not within the Act. An Act which takes away the legal right of a diligent litigant, to bestow it gratis on a stranger, is to be construed strictly according to its letter. *Muirhead* v. *Lawson, In re Creditors Relief Act, 1883; McLean's Case*, 1 B.C.R., Pt. II., 113.

IX. COSTS.

1. Exemption—Sheriff's costs of goods seized.]—Held, that where a judgment debtor claims the benefit of the Homestead Amendment Act, 1873, in respect of goods seized by the sheriff under a fi. fa., the judgment debtor must pay the sheriff's costs of seizure and possession moneys. *Sehl* v. *Humphreys*, 1 B.C.R., Pt. II., 257.

2. Compromise.]—Where a sheriff has seized under a writ of fi. fa. and a compromise payment is made by the execution debtor, the sheriff is not entitled to poundage unless the payment is the result of seizure, and the onus is on the sheriff to show that the payment was so made. *Richards* v. *Producers Rock and Gravel Company, Limited*, 20 B.C.R. 109.

See RECEIVER.

EXECUTORS AND ADMINISTRATORS.

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I. PROBATE.

A. In General.

1. Will validated by codicil.]—Where a codicil was legally executed and the will (imperfectly attested) was identified by parol evidence to be the document referred to in the codicil as the last will of the testator, the will and codicil will be admitted to probate. *Lafond* v. *Lafond*, 19 B.C.R. 287.

2. Corporation administrator.]—On an application for probate of the will of a deceased person, letters may be issued direct to a corporation, but the corporation must

first appoint some person to take the executor's oath and swear to the administration of the estate by the company. *Re William Comer, Deceased,* 20 B.C.R. 432.

3. Revocation of.]—Where, in an action brought for the purpose of revoking a probate, the rule requiring the filing of an affidavit verifying the indorsement on the writ 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.

B. Probate Duties.

Payment of.]—Probate duty is in the nature of a legacy duty, and is payable in the first instance out of the estate. *In re Pearse,* 10 B.C.R. 280.

II. THE OFFICIAL ADMINISTRATOR.

1. When entitled to grant as against next of kin.]—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction but having an attorney in fact within the Province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property although he died possessed of considerable real estate within the Province subject to a mortgage. *In re Lelaire,* 9 B.C.R. 429.

2. Mineral claim.]—The official administrator, administering the estate of a free miner dying intestate, is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown. *Windsor* v. *Copp,* 12 B.C.R. 213.

III. DUTIES OF THE REPRESENTATIVE.

Legacy—Judgment for—Priority as to.]—In 1874, one E. H. became entitled to a legacy of $10,000, bequeathed to him by his brother J., who appointed as his executor another brother, T., with whom he was in partnership. On J.'s death, T. entered into possession of the whole partnership property, and paid half the legacy to E. in 1875. E. sued T. and recovered judgment by default for the balance on January 24th, 1889, which judgment was registered February 28th, 1889. In the meantime T. had charged the whole property for large sums to various creditors, who obtained and registered judgments before January 24th, 1889, before which date also judgment was obtained against T. and registered by a simple contract creditor, C. Receivers having been put in possession of T.'s estate, sold the same under order of Court, and after certain mortgage debts and expenses were paid off, with the sanction of the Court, the balance left was insufficient to pay off the charges registered before E.'s judgment. In an action by E. for an inquiry as to what assets of J. came into the hands of T. or the receivers, to have his judgment declared entitled to priority over the other registered charges, and to restrain the receivers:—Held, that the action lay as against the simple contract creditor C., but not, semble, as against the secured creditors, by reason of sub-secs. 32-36 of the Land Registry Act. *Ezekiel Harper* v. *Thaddeus Harper, Thomas Dixon Galpin, Henry Slye Mason, The Canadian Pacific Land and Mortgage Company, Limited, The British Columbia Land and Investment Agency, Limited, John Cameron and Henry Slye Mason, and James Charles Prevost, as receivers of the estate of the said Thaddeus Harper,* 2 B.C.R. 15; 21 S.C.R. 273.

IV. POWERS AND RIGHTS OF THE REPRESENTATIVE.

A. Carrying on Testator's Business.

1. Mixing private funds with estate—Judgment by general legatee for amount of legacy—Priority of, as against prior judgment against executor personally—Merger — Following assets into mixed fund.]—In 1874 one E. H. became entitled to a general legacy of $10,000, bequeathed to him by his brother T., with whom he was in partnership. On E.'s death T. entered into possession of the whole partnership property and paid half the legacy to E. In 1875 E. sued T. and recovered judgment by default for the balance in the usual form of a judgment against an executor admitting assets de bonis testatoris et si non de bonis propriis, which judgment was registered February 28th, 1889. In the meantime T. had charged the whole property for large sums to various credi-

tors, who obtained and registered judgments before January 24th, 1889, and a simple contract creditor, C., had also before that date obtained and registered a judgment against him. Receivers having been put in possession of T.'s estate, sold the same under order of the Court. The balance left was insufficient to pay off the registered charges prior to E.'s judgment. In an action by E. for an enquiry as to what assets of J. came into the hands of T. or the receivers, to have his judgment declared a charge upon such assets prior to the personal judgment creditors, and to restrain the receivers:—Held, per Begbie, C.J., that the plaintiff, by bringing his action and obtaining judgment against T. became a mere creditor of T., and that his claim was no longer that of a legatee, and also that he had not shown that any of the moneys in the receiver's hands were impressed with a trust in his favour. But held, by the Full Court, on appeal, per McCreight and Walkem, JJ., that the action lay as against C., but not semble as against the mortgagees, by reason of secs. 32-36 of the Land Registry Act. *Harper* v. *Harper*, 2 B.C.R. 15; 21 S.C.R. 273.

2. Claim of priority for wages.] —Plaintiff having obtained judgment and execution against defendant as administratrix of the estate of John Gilmour, deceased, John A. Gilmour claimed, under C.S.B.C., c. 42, sec. 21, to be paid the amount of wages due to him by the administratrix as manager of a farm, part of the estate of the intestate, in priority to the execution creditor:—Held, that the Act only applies to claims for wages against the execution debtor, and the administratrix, and not the estate, was responsible for the wages. *Gilmour* v. *Gilmour*, 3 B.C.R. 397.

B. Right of Retainer.

Postponement of payment till final distribution.]—The plaintiff obtained judgment against the defendant as an executor of the deceased, an insolvent. Afterwards an administration decree was made. The plaintiff applied for payment to him of the amount of the judgment out of funds in Court, being proceeds of the estate:—Held, making the order, that C.S.B.C., c. 68, sec. 4, does not take away the priority of a creditor under a judgment obtained prior to the making of the administration decree:—Held, on appeal, it appearing that there might not be sufficient funds to satisfy an undecided right of retainer by the executor, and other judgments, that payment out of Court to plaintiff should be postponed till final distribution of the estate under the decree in the administration suit. *Wilson* v. *Marvin*, 3 B.C.R. 327.

V. Ranking of Claims.

Priority, against assets of estate, of judgment against executors obtained before administration decree — C.S.B.C., c. 68, sec. 4.]—The plaintiff obtained judgment against the defendant as an executor of the deceased, an insolvent. Afterwards an administration decree was made. The plaintiff applied for payment to him of the amount of his judgment out of funds in Court, being proceeds of the estate:—Held, making the order, that C.S.B.C., c. 68, sec. 4, does not take away the priority of a creditor under a judgment obtained before the making of the administration decree:—Held, on appeal, it appearing that there might not be sufficient funds to satisfy an undecided right of retainer by the executor, and other judgments, that payment out of Court to plaintiff should be postponed till final distribution of the estate under the decree in the administration suit. *Wilson* v. *Marvin*, 3 B.C.R. 327.

VI. Testamentary Expenses and Debts.

Succession duties—Taxes.]—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 parties taking the lands under the will claimed the right to have the taxes paid out of moneys which had been realized by 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, testamentary expenses and debts. On this state of facts the following questions were submitted: (1) Do the succession duties payable under the Succession Duty Act in respect of the real estate of the said deceased form part of the testamentary expenses of the deceased and become payable out of the residuary estate, or are they to be charged against the different properties devised under the will? (2) Are the taxes payable to the City of Victoria

and the Provincial Government debts of the deceased and payable out of the residuary estate, or are they to be charged against the different properties in respect of which the said taxes have been assessed?:—Held, (1) That the succession duty payable under the Succession Duty Act (R.S.B.C. 1897, Cap. 175), in respect of the real estate of a deceased person, does not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will. (2) The taxes due by deceased are payable out of the residuary estate, and not chargeable against the different properties in respect of which said taxes have been imposed. (3) To allow taxes to fall into arrear 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 Estate of Elizabeth Watkins, Deceased,* 12 B.C.R. 97.

VII. ACTIONS AGAINST REPRESENTATIVES.

Corroboration.] — The corroboration required to substantiate a claim against the estate of a deceased person must refer specifically to the contract on which the action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Blacquiere* v. *Corr,* 10 B.C.R. 448.

VIII. ADMINISTRATION OF INSOLVENT ESTATES.

Judgment creditor.]—The provisions of sec. 4 of c. 68 of the Consolidated Statutes, 1888, does not take away the priority of a creditor under a judgment obtained prior to the making of the administration decree. *Wilson* v. *Marvin,* 3 B.C.R. 327.

See WILL.

EXPERT EVIDENCE.

Grounds of opinion.]—Conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse of a boiler, who were not present at the time of the accident, whose opinion was not founded upon knowledge but was merely matter of opinion, who gave no reasons and stated no facts to show upon what their opinion was based, and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern which the evidence showed were in general use. *The William Hamilton Manufacturing Co.* v. *The Victoria Lumber & Manufacturing Co.,* 4 B.C.R. 101; 26 S.C.R. 96.

EXTRADITION.

1. General conditions.]—(1) Perjury is an extradition crime within the meaning of the Treaty and the Act. (2) Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country. (3) A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed. (4) Such warrant, issued by an Extradition Commissioner under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act. (5) The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent. (6) Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way. (7) Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States. (8) One test of determining whether the evidence is such as would justify the committal of the accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged. *In re George D. Collins,* 11 B.C.R. 436.

2. Evidence.]—Where an application for extradition is founded upon deposition evidence it will be required to strictly conform to the conditions prescribed by the Act for such evidence, and nothing will be inferred in its favour. The warrant of the magistrate in the foreign jurisdiction was dated before the date of the swearing of the deposition. The evidence consisted in part of

admissions stated to have been made by the accused, but there was nothing to show that the admission was not procured by an inducement to the prisoner to make a statement:—Held, the evidence was insufficient upon which to extradite the accused. *In re Ockerman*, 6 B.C.R. 143.

3. Evidence.]—A commissioner acting under the powers vested in him by the Extradition Act is justified in proceeding upon the complaint laid before him, without taking any evidence in support of such complaint. Evidence in support of the charge may be submitted by affidavit. When the commissioner has decided that there is evidence justifying an order for extradition, his decision cannot be reviewed if the judge to whom the application is made is of the opinion, from the record, that there was such evidence. *In re O'Neill*, 17 B.C.R. 123.

FALSE IMPRISONMENT.

See TORT.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE REPRESENTATIONS.

See MISREPRESENTATION AND FRAUD.

FIERI FACIAS.

See EXECUTION.

FISHERIES.

See CONSTITUTIONAL LAW.

FIXTURES.

See BILL OF SALE.

See LANDLORD AND TENANT.

See MORTGAGE.

FORESHORE.

1. Bed of the sea.]—The provisions of sec. 41 of the Land Act (S.B.C. 1901, c. 30) do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters. *Capital, etc., Co.* v. *Anglo-British, etc., Co.*, 11 B.C.R. 333.

2. Right of passage.]—Power given to appropriate the foreshore includes a power to obstruct any right of passage previously existing across it. *Attorney-General for British-Columbia* v. *Canadian Pacific Railway Company*, 11 B.C.R. 289; 1906, A.C. 204.

See CONSTITUTIONAL LAW.

FRANCHISE.

See ELECTION.

FRAUD.

See MISREPRESENTATION AND FRAUD.

FRAUDULENT AND VOIDABLE TRANSACTIONS.

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B. *Voluntary assurances*, 425.
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I. PARTIES TO ACTIONS TO SET ASIDE.

1. On behalf of all the creditors.]—The plaintiff in an action to set aside a conveyance as a fraudulent preference, if not a judgment creditor, must bring the action on behalf of himself and all other creditors, but his omission to do so is a mere informality, which may be amended

on application after the trial. *Drinkle* v. *Regal Shoe Co.*, 20 B.C.R. 314.

2. Execution debtor.] — The execution debtor is not always a necessary or proper party to an action by an execution creditor to set aside a conveyance as fraudulent. *Gallagher* v. *Beale*, 14 B.C.R. 247.

3. Action by mortgagee before realization of security.]—A mortgagee whose security is admittedly insufficient may bring an action to set aside a fraudulent conveyance without first realizing his security. *Sun Life Assurance Co.* v. *Elliott*, 7 B.C.R. 189; 31 S.C.R. 91.

II. CONVEYANCES IMPEACHABLE AS FRAUDULENT AGAINST CREDITORS GENERALLY.

A. Fraudulent Intent.

Disposition to avoid execution.]—Before the trial of an action for damages for tort the defendants' solicitors 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 defendants and pending argument on the motion for judgment counsel (who was also one of the solicitors) for 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 plaintiffs for $12,500 and costs, and plaintiffs obtained the apointment of a receiver and issued executions, but nothing was realized:—Held, that the solicitor, in obtaining the transfer to himself of the property, was guilty of a fraud on plaintiffs and that he should restore it or pay its value into Court under penalty of attachment. *Centre Star Mining Company, Limited* v. *Rossland Miners Union, No. 38, Western Federation of Miners*, 11 B.C.R. 194.

B. Voluntary Assurances.

1. Gift by husband to wife.]—C. in 1896 gave his wife $600, which she kept in the house, and he shortly after commenced to receive it back in small portions, and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement, and he agreed to give her a bill of sale on the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture:—Held, that there was no legal obligation binding upon the husband to repay the $600, and that the bill of sale must be treated in the same was as if the gift had been made to the wife at the time of the execution of the bill of sale, and was therefore void. *Cordingley* v. *MacArthur*, 6 B.C.R. 527.

2. Assignment — Collusion.] — V., a miner and prospector, engaged, in 1896, B. as a servant in an hotel kept by him in Revelstoke, on the understanding that the rate of wages would be fixed when he found out what she was worth, and some weeks afterwards he fixed the rate at $50 per month. A few months after V. built a house, and he and B. lived there as man and wife. In November, 1898, V. made an assignment for the benefit of his creditors, having seven days previously conveyed to B. the house property for an alleged consideration of $1,200, as representing her wages for two years. She had never asked for wages before October, 1898, and then V. was hopelessly in debt:—Held, in an action to set aside the conveyance on the ground of its being fraudulent under the statute of 13 Eliz., c. 5, that there was collusion between V. and B. to defeat V.'s creditors. *Holten* v. *Vandall*, 7 B.C.R. 331.

3. Exclusion of separate creditors of partners.]—Under a trust deed assigning the assets of a partnership business upon trust to sell the same and divide the proceeds "into and among all the creditors of the parties of the first part," (viz., the assignors), without any words of distribution, such as "or either of them" being added:—Held, that the deed provided only for the payment of the joint creditors, and not the separate creditors of the partners, and, in the absence of any satisfactory arrangement being agreed upon, the deed must be set aside on the ground that it constituted a preference. When a voluntary conveyance has the effect of defeating creditors it will be set aside, and it is not necessary to adduce evidence of fraud; the burden lies on the person executing the deed to show cause why it should not be set aside. *Cunningham* v. *Curtis*, 5 B.C.R. 472.

C. Void as Against Subsequent Creditors.

1. Trade of hazardous character—Previous transfer.] — Where a settler, not indebted at the time, transfers the bulk of

his property shortly before engaging in a trade of hazardous character, such settlement may be declared void as against subsequent creditors, and the burden of proof of bona fides of the settlement rests on the settler. *Lai Hop* v. *Jackson*, 4 B.C.R. 168.

2. By solvent grantor.]—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. *Sun Life Assurance Co.* v. *Elliott*, 7 B.C.R. 189; 31 S.C.R. 91.

III. CONVEYANCE IMPEACHABLE AS GIVING PREFERENCE TO PARTICULAR CREDITORS.

A. Intent to Defeat, Hinder or Delay.

1. Mala fides of preferred creditor—Burden of proof as to.]—In order to defeat a transfer of property to a creditor on the ground of fraudulent preference the creditor must be shown to have concurred therein, and the burden of proof to establish the mala fides of the creditor rests upon the complainant. *Koop* v. *Smith*, 20 B.C.R. 372.

2. Intent to defraud.]—So long as the intent to defraud is proved, it is immaterial whether consent was given under pressure. *Edison General Electric Co.* v. *The Bank of British Columbia and another*, 4 B.C.R. 460; 1897, A.C. 193.

3. Estoppel.]—In an action to set aside a bill of sale as fraudulent against the plaintiff who was a creditor, and, as far as the evidence disclosed, the only creditor, of the grantor, it appeared that the plaintiff himself had advised upon and drawn up the bill of sale:—Held, that he had no locus standi to attack it. *Boultbee* v. *Rolls*, 4 B.C.R. 137.

4. Consent judgment.]—Under sec. 1 of the Fraudulent Preferences Act (C.S.B.C. 1888, c. 51) a consent judgment obtained by the respondent bank against the insolvent respondent tramway company, with intent to defeat or delay the creditors of the latter, was held to be null and void against them. *Edison General Electric Co.* v. *Westminster & Vancouver Tramway Co. and The Bank of British Columbia*, 4 B.C.R. 460; 1897, A.C. 193.

5. What constitutes fraudulent preference—Pressure.]—A chattel mortgage to two of his principal creditors, made by a trader when unable to pay his debts in full and knowing himself to be on the eve of insolvency, covering all his property except a leasehold interest and his book debts, held void, as being made with intent to defeat or delay his other creditors, and to give the mortgagees a preference over them. The mortgagees had requested the trader to secure them by chattel mortgage, he stating to them at the time that he was solvent, that his other creditors were small, and that he could arrange to pay them off and concentrate the business:—Held, insufficient to bring into question the doctrine of pressure. *Anderson* v. *Shorey*, 1 B.C.R., Pt. II., 325.

B. Pressure.

1. Refusal to lend.]—Where the holder of a bill of sale by way of security had refused to make the advances unless secured, it was held that this constituted pressure sufficient to rebut the charge of preference. *Matheson* v. *Pollock*, 3 B.C.R. 74.

2. Whole of debtor's property.]—Where there is good consideration a mortgage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances to the knowledge of the mortgagee and that the effect of the mortgage is to defeat, delay and prejudice the creditors, if there is pressure. *Adams and Burns* v. *Bank of Montreal*, 8 B.C.R. 314; 32 S.C.R. 719.

3. Legitimate and bona fide attempt to get payment.]—To constitute pressure which will authorize an assignment by way of security there must be a legitimate and bona fide attempt by the creditor to get payment of his debt, or security therefor. It is not bona fide pressure for a creditor, knowing of his debtor's insolvency, to take an assignment of all his property. *Doll* v. *Hart*, 2 B.C.R. 32.

4. Threat of action.]—D. B., A. O. B. and T. G. W. carried on business in partnership as hardware merchants under the name of the Greenwood Hardware Company, the money being supplied by D. B. and A. O. B., and the business being managed by W. The firm became indebted to both the McClary Company and the Howland Company, and the latter, under threat of commencing an action, obtained on the 27th day of June, 1900, a bill of sale by way of mortgage of all the firm's assets, and immediately took possession. The bill of sale was executed on behalf of the firm by W., and also by W. personally, D. B. and A. O. B. both being

absent. When A. O. B. returned he protested against the execution of the bill of sale, but subsequently withdrew his protest, and consented to a sale of the goods on the understanding that plaintiffs and defendants should share pro rata in the proceeds. The arrangement that plaintiffs and defendants should share in the proceeds was not carried out. On the 27th of July, 1900, the McClary Company recovered a judgment in respect of their claim against the firm and obtained judgment under Order XIV., the judgment being entered up against D. B. and A. O. B., and also against the Greenwood Hardware Company, although not a party to the action, and an execution issued was returned nulla bona. The McClary Company thereupon sued to have the bill of sale set aside on the ground that it was fraudulent and void, as being given with the intent to defeat and delay creditors, and that W. had no authority to give it on behalf of the firm. Under an order of Court the goods were sold and the proceeds paid into Court to abide the result of the action. The Howland Company recovered a judgment in January, 1901, against the firm for the amount of its indebtedness to them, and an execution issued thereunder was returned nulla bona:—Held, that the bill of sale was not a fraudulent preference, but was given bona fide under pressure. *The McClary Manufacturing Co.* v. *H. S. Howland, Sons & Company, and the Greenwood Hardware Company,* 9 B.C.R. 479.

5. Demand.]—Wilson Bros., creditors of P. and Y., a firm of general storekeepers, demanded security for their overdue account, and agreed to supply further goods and not register the instrument if it was given. Plaintiffs objected that it would be unfair to other creditors to accede, but finally did so on the terms proposed, and gave the security by bill of sale on part of their stock of goods. The debtors were at the time in insolvent circumstances, but it was not proved that Wilson Bros. were aware of it:—Held, the bill of sale was not made with intent to give Wilson Bros. a preference over the other creditors of plaintiffs, but was made under pressure sufficient to take the transaction out of the statute. *Stewart* v. *Wilson,* 3 B.C.R. 369.

6. Demand for payment or security.]—A bona fide demand by a creditor upon his insolvent debtor for payment or security is pressure sufficient to rebut any inference of "intent to prefer" in the execution of a mortgage in response to the demand, and takes the transaction out of the prohibition of the Fraudulent Preferences Act, C.S.B.C. 1888, c. 15, sec. 2. *Brown and Erb* v. *Jowlett,* 4 B.C.R. 44.

7. Fear of legal proceedings.]—M. & Co., being then insolvent, upon demand of one of their creditors, O. Bros., and in fear of legal proceedings, executed a bill of sale to them of their stock-in-trade and effects:—Held, 1. The bill of sale was not made voluntarily or with intent to give a preference, but was made under pressure sufficient to take the transaction out of the statutes. *Cascaden* v. *McIntosh,* 2 B.C.R. 268.

8. Statement of solvency by debtor.]—A chattel mortgage to two of his principal creditors made by a trader while unable to pay his debts in full, and knowing himself to be on the eve of insolvency, covering all his property except a leasehold interest and his book debts, held void, as being made with intent to defeat or delay his other creditors, and to give the mortgagees a preference over them. The mortgagees had requested the trader to secure them by chattel mortgage, he stating to them at the time that he was solvent, that his other creditors were small, and that he could arrange to pay them off and concentrate the business:—Held, insufficient to bring into question the doctrine of pressure. *Anderson* v. *Shorey,* 1 B.C.R., Pt. II., 325.

9. Knowledge of debtor's difficulties.]—If bona fide pressure is exercised by the transferee upon the debtor, the transfer should be upheld even if the inference that the transferee knew of the debtor's financial difficulties is justified on the evidence. The absence of the defendant at the trial is not a ground to give rise to suspicion that the transaction in question was fraudulent, when a reputable physician testifies that it was on his advice and not at the desire of the defendant that she did not attend for examination. *Koop* v. *Smith,* 20 B.C.R. 372.

10. Mortgage for good consideration.]—Where there is good consideration, a mortgage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances to the knowledge of the mortgagee, and that the effect of the mortgage is to defeat, delay and prejudice the creditors, if there is pressure. *Adams and Burns* v. *Bank of Montreal, The Kootenay*

Brewing, Malting and Distilling Company, Limited Liability, and John R. Myers, 8 B.C.R. 314; 32 S.C.R. 719.

C. Present Advance.

Fraud.]—Where a creditor receives an assignment of certain assets from a debtor as security for both a present advance and a pre-existing debt, and it appears from the evidence that the present advance was made to enable the creditor to afterwards plead the validity of the assignment under sec. 4 of the Fraudulent Preferences Act:—Held, that the assignment in invalid both as to the present advance and the pre-existing debt. *Hazell* v. *Cullen,* 20 B.C.R. 603.

D. Assignment of Impeachable Security.

Transfer of mortgage.]—Where, shortly before an assignment for the benefit of creditors, the assignor's bookkeeper transferred to a bank a mortgage given him by the assignor, not however to secure advances, the bank was in the same position as if it had received the mortgage directly from the assignor. *Houston* v. *Merchants Bank,* 31 S.C.R. 361.

E. Right to Impeach Transaction.

1. Arrest of debtor.]—A creditor is not prevented from suing on behalf of himself and all other creditors to set aside judgments alleged to have been fraudulently recovered against the debtor by reason of having arrested the debtor upon a judgment recovered in a former action. *Robert Ward & Co.* v. *Clark,* 4 B.C.R. 71.

2. Assignee for creditors.] — Apart from statutory provision, an assignee for the benefit of creditors is in no better position than his assignor to impeach previous conveyances by the assignor, and cannot be treated as occupying the place of the creditors for that purpose. *McKenzie and McGowan (assignees for the benefit of the creditors of H. T. Read & Co.)* v. *Bell-Irving, Paterson & Co. and Alexander McEwen,* 2 B.C.R. 241.

3. Estoppel.] — Where the plaintiff in an action to set aside a bill of sale as fraudulent against creditors, of whom he appears to be the only one, himself advised upon and drew up the bill of sale, he is estopped from complaining of it. *Boultbee* v. *Rolls,* 4 B.C.R. 137.

IV. Following Property and Proceeds.

1. Purchaser, rights against.] — The estate acquired by a purchaser from a party against whom a judgment has been recovered declaring him to have obtained the property in fraud of creditors remains subject to the rights of the creditors. *Peck* v. *Sun Life Assurance Co.,* 11 B.C.R. 215.

2. Purchaser, extent of liability.]—In such a case the creditors have a charge on the lands to the extent of the purchase money unpaid, but the purchaser is not bound to pay over again the purchase moneys already paid. *Ibid.*

3. Proceeds.]—M. & Co., being then insolvent, upon demand of one of their creditors, O. Bros., and in fear of legal proceedings, executed a bill of sale to them of their stock in trade and effects. Before the commencement of this action by the other creditors to have the bill of sale declared void, as being made with intent to give O. Bros. a preference, the latter had sold the goods to a bona fide purchaser for value and received the purchase money:—Held, O. Bros. could not, in any event, be called upon to account for the purchase money to the other creditors. *Cascaden* v. *McIntosh,* 2 B.C.R. 268.

V. Costs.

Lien for, as between solicitor and client.] — Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred are a first lien upon the fund recovered, and are allowed as between solicitor and client. *In re The Judgment Acts; Hood, Aldridge & Co.* v. *Tyson,* 9 B.C.R. 233.

FRAUDS, STATUTE OF.

See Contract.

GARNISHMENT.

I. In General, 433.
II. Property Subject to Garnishment, 433.
III. Priorities, 434.
IV. Practice, 434.
A. Jurisdiction, 434.
B. Order, who may make, 435.
C. Affidavit, 435.
D. Appearance of garnishee, 435.
E. Issue, 436.
V. Costs, 436.

I. In General.

1. New action.]—An order made by a County Court judge that moneys paid in under a garnishee order do remain in Court to abide the result of a new action to be commenced forthwith, the former action in respect of the same subject matter being dismissed by the same order, is not a nullity, and if not appealed against is valid. *King* v. *Boultbee*, 7 B.C.R. 318.

2. Default summons.] — A garnishee summons may be issued based on a default summons as well as on an ordinary summons. *Jowett* v. *Watts*, 10 B.C.R. 172.

II. Property Subject to Garnishment.

1. Money in hands of the sheriff.]—A private creditor of a sheriff will not be permitted to garnishee moneys of judgment creditors placed to the credit of the sheriff's official trust account in a bank. *Stebbings, Spinning and Walker* v. *Williams and Sears*, 20 B.C.R. 240.

2. Money in hands of receiver.]—Money in the hands of a receiver is not a debt due from him to the persons interested in the estate, and cannot be attached by garnishing process. *Gray* v. *Purdy; Armstrong (Garnishee)*, 5 B.C.R. 241.

3. Sum due on a contingency.]—A sum of money payable under a building contract as soon as the building shall be finished is not attachable before the performance of the condition, as not being a debt. The fact that the creditor has assigned the debt to a third person, though there be no notice of the assignment to the debtor, is a good answer to an attaching order, as the attaching creditor can only take that which the debtor can lawfully part with, having regard to the rights of others. *Gray* v. *Hoffer; Bostock, garnishee*, 5 B.C.R. 56.

4. Promissory note.] — A promissory note not yet due constitutes a debt owing and accruing, and is attachable to answer a judgment debt within the meaning of r. 497. *Girard* v. *Cyrs*, 5 B.C.R. 45.

5. Equitable assignment.] — Defendant, under contract to build for one Walker, purchased the materials from plaintiffs, who subsequently got judgment against him, and who garnisheed the moneys due from Walker to defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect, Grant. Before the garnishee proceedings defendant had accepted the following order drawn upon him by Nicholas & Barker, to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270, and charge the same to my account, for plastering Place Block, Hastings Street W., in full to date," which order the defendant thus indorsed in favour of Grant: "Please pay that order and charge to my account on contract for Rovery Walker Block on Hastings Street, City":—Held, that apart from the order there was a parol assignment specifically appropriating to the assignees the sum in question of the moneys to arise out of the contract. *British Columbia Mills Lumber and Trading Co.* v. *Mitchell; Walker, garnishee, and Champion & White, claimants*, 8 B.C.R. 71.

III. Priorities.

1. Creditors' Relief Act.]—In a dispute between a number of attaching creditors for the moneys paid into Court by garnishees:—Held, that such moneys should be paid to the sheriff for distribution under the provisions of the Creditors' Relief Act. *Robert Ward & Company, Limited Liability* v. *Wilson; W. H. Malkin Company, Limited, garnishee*, 13 B.C.R. 273.

2. Several garnishee orders.] — The right of a judgment creditor to an order for payment into Court by a garnishee and payment out to himself after having served an attaching order on the garnishee is not affected by attaching orders subsequently served on the garnishee. *Slinger* v. *Davis; Stevenson and Crum, garnishees*, 20 B.C.R. 447.

3. Equitable assignment.] — An oral equitable assignment has priority over a subsequent garnishee order. *Todd* v. *Phœnix*, 3 B.C.R. 302.

4. Equitable assignment.] — A parol assignment specifically appropriating to the assignee the sum in dispute has priority over a subsequent garnishee order. *British Columbia Lumber, etc., Co.* v. *Mitchell*, 8 B.C.R. 71.

IV. Practice.

A. Jurisdiction.

County Court.]—On proceedings under the Attachment of Debts Act in the County Court, to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the said debt was made. On an application for a writ of prohibition

to the County Court judge, prohibiting him from dealing with said Supreme Court judgment:—Held, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied. *Belyea* v. *Williams; Richards, garnishee,* 12 B.C.R. 226.

B. Order, Who May Make.

Deputy District Registrar.] — In an action in the Supreme Court for an account of certain rents and profits, plaintiff obtained an order attaching all debts, obligations and liabilities payable or accruing due from the garnishee to the defendant, to answer a judgment to be recovered by the plaintiff against the defendant up to the amount of $6,245. The order was made and issued by the Deputy District Registrar at Vancouver, acting under the provisions of sec. 3 of the Attachment of Debts Act, 1904:—Held, that as the term "District Registrar" is expressly defined by the Attachment of Debts Act, 1904, to mean District Registrar of the Supreme Court, therefore District Registrars are personæ designatæ, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intendment of a special statute. *Richards* v. *Wood; Shaw, garnishee,* 12 B.C.R. 182.

C. Affidavit.

Form—Defect—Waiver.]—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) A defect in an affidavit is an irregularity only, and payment into Court by the garnishees is a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnisheed. *Harris* v. *Harris* (two suits); *Cregan, garnishees, and Rogers, claimants,* 8 B.C.R. 307.

D. Appearance of Garnishee.

Garnishee disputing liability—Trial of issue.]—Where a garnishee disputes his liability to a judgment debtor, the Court has no power to order execution against him, but will direct an issue to try the same, and where the garnishee's alleged indebtedness is to a third party, such party must be summoned, and, if necessary, an issue ordered to try his liability to the judgment debtor. *Mount Royal Milling, etc., Co. (Limited), judgment creditors* v. *Kwong Mau Yuen, judgment debtor, and James Leamy, garnishee,* 2 B.C.R. 171.

E. Issue.

1. Estoppel.]—On service of garnishee orders under the Attachment of Debts Act, 1904 (c. 7.), the garnishees admitted a debt owing to the judgment debtor, but asked the protection of the Court as against mechanics' lien-holders claiming the fund. Thereupon an order was made directing the garnishee to pay the fund into Court to abide the determination of an issue between the attaching creditors and the lien-holders. In this issue the lien-holders failed, and proceeded upon their liens against the property:—Held, that the garnishees were not estopped from requiring an issue between themselves and the attaching creditors to ascertain what, if anything, was owing by the garnishees to the judgment debtor at the time of the service of the garnishee orders. *Power* v. *The Jackson Mines, Limited,* 13 B.C.R. 202.

2. Alleged indebtedness to third party.]—Where a garnishee disputes his liability to a judgment debtor the Court has no power to order execution against him, but will direct an issue to try the same, and where the garnishee's alleged indebtedness is to a third party such party must be summoned, and, if necessary, an issue ordered to try his liability to the judgment debtor. *Mount Royal Milling, etc., Co. (Limited), judgment creditors* v. *Kwong Mau Yuen, judgment debtor, and James Leamy, garnishee,* 2 B.C.R. 171.

V. Costs.

Defendant paying into Court within 5 days—No costs allowed.]—Where a defendant in a County Court action pays the full amount of the claim and costs called for in a default summons within the five days limit mentioned in the summons the plaintiff will not be allowed the costs of a garnishee summons. *Shawnigan Lake Lum-*

ber Co. v. *Fairfull*; *Coburn, garnishee,* 7 B.C.R. 58.

GIFT.

Inter vivos.]—C. in 1896 gave his wife $600, which she kept in the house, and he shortly after commenced to receive it back in small portions, and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement, and he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture:—Held, that there was no legal obligation binding upon the husband to repay the $600, and that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale, and was therefore void. *Cordingley* v. *MacArthur*, 6 B.C.R. 527.

See FRAUDULENT AND VOIDABLE TRANSACTIONS.

GRAND JURY.

See CRIMINAL LAW.

GUARANTEE.

I. IN GENERAL, 437.
II. RIGHTS OF SURETY, 437.
III. LIABILITIES OF SURETY, 438.
IV. DISCHARGE OF SURETY, 439.

I. IN GENERAL.

Personal liability.] — Where an agreement was executed on behalf of a company by the president and secretary-treasurer, and underneath the execution the words were added: "We, the undersigned, guarantee payment of the obligation as noted above. Imperial Fisheries, Ltd., J. O. Hearn, president; S. J. Levy, secretary-treasurer; William Kilroy, vice-president," the three signatories of the guarantee were held personally liable. *Johnson Lieber* v. *Imperial Fisheries, Ltd.*, 16 B.C.R. 445.

II. RIGHTS OF SURETY.

1. Ex post facto constitution of relationship.]—When two or more persons, bound as debtors, arrange either at the time when the debt was contracted or afterwards, that as between themselves one of them shall be liable only secondarily, and this arrangement is communicated to the creditor, the latter, in dealing with the principal debtor, must not do anything to prejudice the interests of the surety. *Stone* v. *Rossland Fuel and Ice Co.*, 12 B.C.R. 66.

2. Assignment of securities.]—There is nothing in the relationship of principal debtor, creditor, and surety to prevent the creditor from assigning the debt or any securities therefor. *Milne* v. *Yorkshire Guarantee, etc., Corp.*, 11 B.C.R. 402; 37 S.C.R. 331.

3. Payment of costs in disputing debt.]—Where the surety had undertaken to settle a debt of the principal debtor for $500 and the creditor refused to accept this amount and took proceedings to enforce payment of the full amount, which proceedings were resisted by the principal debtor, the surety undertaking to the creditor to be responsible for the costs and being made a party to the proceedings, which were unsuccessful, the surety was held to be entitled to recover the costs paid by him from the principal debtor. *O'Brien* v. *Mackintosh*, 10 B.C.R. 84; 34 S.C.R. 169.

4. Not bound by decision between creditor and principal debtor.]—A contract for the execution of certain work was guaranteed by the bond of a surety company conditioned to indemnify the plaintiff Company against loss or damage by reason of failure of the Construction Company to perform its contract. The contract provided that in certain circumstances the work might be taken out of the hands of the Construction Company and executed by the plaintiff Company, the cost and charges thereof to be ascertained by the architect and paid for by the Construction Company:—Held, that the Surety Company was not bound by the decision of the architect as to the cost of executing the work by the plaintiff Company, and therefore the Surety Company was entitled to particulars of the plaintiff Company's loss and damages in executing the work taken over from the Construction Company. *Powell River Paper Company, Limited* v. *Wells Construction Company and American Surety Company of New York*, 17 B.C.R. 37.

III. LIABILITIES OF SURETY.

No privity of contract.]—A guaranty company, which gave a bond of indemnity

to the owner of a building about to be constructed, for the due completion of said building by a construction company under contract, and to whom the construction company assigned the contract to take effect only on the default of the construction company, agreed, when the default had taken place, to allow the owner to complete the building. The construction company had sub-contracted to the plaintiff for certain work on the building, part of which was done before and part after the construction company's default. In an action for the value of the work against the guaranty company as assignee of the contract:—Held, that no liability could be attached to the guaranty company for the sub-contractor's debt. *Ramsay* v. *Westwood and United States Fidelity and Guaranty Company*, 20 B.C.R. 85.

IV. Discharge of Surety.

1. Release of principal debtor.]—K. owed the defendant corporation $33,527.94 on two judgments recovered on notes for $10,000 given by him to R. and a subsequent loan to him and R. for $20,000. M., at the request of and for the accommodation of R., had indorsed the notes for $10,000 and deposited certain shares and debentures as security for his liability as indorser. K. and R. deposited further security on negotiating the second loan, but K. remained in ignorance of M.'s indorsements, and deposited security long after the release hereafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities and without making any appropriation of any of the funds towards either of the debts. On the 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for $15,000 provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the $15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. The negotiations and the final settlement with K. were not made known to M., and K. was not informed of his continuing liability towards M. as a surety:—Held, that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety, and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to his use. *Milne* v. *Yorkshire Guarantee & Securities Corporation*, 11 B.C.R. 402; 37 S.C.R. 331.

2. Giving time.] — In order that a surety may be discharged by the giving of time to the principal debtor there must be a binding agreement in that behalf between the creditor and the principal debtor, founded on valuable consideration. *Stone* v. *Rossland Fuel and Ice Co.*, 12 B.C.R. 66.

3. Material variation.]—Where there is a material variation in the terms of the contract between the creditor and principal debtor without the assent of the surety, the surety is discharged. *Drinkle* v. *Regal Shoe Co.*, 20 B.C.R. 314.

4. When not discharged.]—A surety is not discharged by dealings between the creditor and the principal debtor, subsequent to the contract, which are manifestly to the advantage of the surety, or which are contemplated in the contract between the creditor and the principal debtor, or which do not amount to a binding contract founded on valuable consideration. A surety may be bound by a term annexed by custom to the contract between the creditor and the principal debtor. *Wright* v. *The Western Canada Accident and Guarantee Insurance Company, Limited*, 20 B.C.R. 321.

See Contract.

HABEAS CORPUS.

I. Jurisdiction, 441.
II. Right to Discharge, 442.
A. *Proceedings for custody of child*, 442.
B. *Alien*, 442.
III. Procedure, 443.
A. *Application for writ*, 443.
B. *Issue of writ*, 443.
C. *Quashing writ*, 443.
D. *Return*, 443.
E. *Evidence*, 443.
F. *Costs*, 444.

I. JURISDICTION.

1. Summary conviction.]—The decision of the County Court on appeal from a summary conviction is final and conclusive, and a Supreme Court judge has no power to interfere by writ of habeas corpus. *R.* v. *Beamish*, 8 B.C.R. 171.

2. After conviction.]—After a conviction for felony by a Court having general jurisdiction over the offence charged, a writ of habeas corpus is an inappropriate remedy. *In re Sproule*, 12 S.C.R. 140.

3. Immigration Act.]—Habeas corpus is not an appropriate proceeding whereby to question the decision of the controller of customs on a claim for exemption under the Chinese Immigration Act. *In re Lee Him*, 15 B.C.R. 163, 390.

4. Application for, to different judges.]—A person imprisoned may make fresh application for a habeas corpus to every judge or Court in turn, who are each bound to consider the question independently. *Re George Bowack*, 2 B.C.R. 216.

5. Deportation under proclamation.]—A proclamation was issued and published in the Canada Gazette, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, c. 14, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited:—Held, that the statute and the proclamation issued thereunder merely authorizes the deportation of the diseased person; that it does not take away the right of the Court to decide the question of fact on a proper application, and the judges are bound to inquire into the matter on an application for habeas corpus. Parliament not having made the examination by the immigration officer final, the statute is not to be construed as ousting the jurisdiction of the Court to examine into the legality of the detention on a proper application. *Ikezoya* v. *Canadian Pacific Railway Company*, 12 B.C.R. 454.

6. Ultra vires order-in-council.]—Where the prohibition of an order-in-council exceeds that contained in the statute by which it is authorized, the order-in-council is ultra vires. Where certain immigrants from Hindustan were ordered to be deported under orders-in-council so held to be ultra vires:—Held, that they were entitled to be discharged, upon habeas corpus, from confinement under the deportation order. *In re Narain Singh*, 18 B.C.R. 506.

II. RIGHT TO DISCHARGE.

A. Proceedings for Custody of Child.

1. Lawfully entitled.]—The Court will not interfere by habeas corpus to take an infant out of the custody of a person not lawfully entitled thereto for the purpose of enabling a person equally unentitled to obtain possession of it. *In re Ah Gway*, 2 B.C.R. 343.

2. Infant, a female over sixteen years.]—The parents of an infant who is under the age at which it may elect as to its custody may be deprived of that custody if the Court is satisfied that such a course is necessary for the child's welfare. Where an infant has attained the age of election, the Court ought to separately examine the infant and adopt its wishes on the subject. *Regina* v. *Redner*, 6 B.C.R. 73.

3. Adoption.]—In habeas corpus proceedings to recover possession of a female child stated to have been adopted and brought up by the applicant and to have been taken away from him, against his will, by a refuge home:—Held, adoption is not recognized by the law of England, and a foster-parent has no more legal right to the custody of the child of his adoption than a stranger. *In re Quai Shing, an infant*, 6 B.C.R. 86.

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

B. Alien.

Chinaman refused admittance to United States—Deportation by railway company.]—Where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on habeas corpus proceedings, as the contract is not illegal, and under the

Chinese Immigration Act, 1900, deportation is proper. *In re Lee San*, 10 B.C.R. 270.

III. PROCEDURE.

A. Application for Writ.

1. Vacation.]—An application in vacation for a rule nisi for a writ of habeas corpus should be made in chambers. *In re Soy King*, 7 B.C.R. 291.

2. Suppression or omission of material fact.]—Where an order is obtained ex parte for a writ of habeas corpus, granted through the suppression or omission of a material fact, it will, on application, be reversed. *Re Bhagwan Singh*, 19 B.C.R. 97.

B. Issue of Writ.

Discharge.] — A prisoner may be discharged without the actual issue of the writ and without the prisoner being personally brought before the Court. *Ex parte Ettamas*, 2 B.C.R. 232.

C. Quashing Writ.

Absence of prisoner.]—An application to the Court to quash a writ of habeas corpus as having been improvidently issued may be entertained in the absence of the prisoner. *In re Sproule*, 12 S.C.R. 140.

D. Return.

1. Sufficiency.]—A return by the sheriff to the writ setting out the conviction and sentence and the affirmation thereof by the Court of error is a sufficient return. If actually written by him or under his direction, the return need not be signed by the sheriff. *In re Sproule*, 12 S.C.R. 140.

2. General reference to section of a statute.]—Where the section of a statute contains a number of clauses prohibiting different acts, it is not a good return to a writ of habeas corpus to refer generally to the section. *In re Narain Singh*, 18 B.C.R. 506.

E. Evidence.

1. Jurisdiction of inferior Court.]—If the record of a superior Court, produced on an application for a writ of habeas corpus, contains a recital of facts requisite to confer jurisdiction, it is conclusive, and cannot be contradicted by extrinsic evidence. *In re Sproule*, 12 S.C.R. 140.

2. Evidence of general reputation.]—Evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in habeas corpus proceedings directed against the collector of customs, who is detaining such immigrant for deportation to China on the ground that she is a prostitute. *In re Fong Yuk and the Chinese Immigration Act*, 8 B.C.R. 118.

3. Jurisdiction of inferior Courts.]—An Indian agent, acting in a magisterial capacity, in committing an accused person for an offence under the Indian Act, must show on the warrant of commitment the district for which such agent is acting. *R.* v. *McHugh*, 13 B.C.R. 224.

F. Costs.

1. Wife.] — Where a wife leaves her husband without justification, she is not entitled to her costs of unsuccessfully resisting his application for the custody of the children. *In re McPhalen*, 10 B.C.R. 40.

2. Against the Crown.] — Where the applicants have been unlawfully deprived of their liberty they ought to be indemnified as to their costs. *In re Narain Singh and others*, 13 B.C.R. 477.

3. Jurisdiction to award.]—The Court has power to award costs upon a rule nisi for a writ of habeas corpus. *In re Quai Singh*, 6 B.C.R. 86.

4. Costs of appeal.]—The Court has power to award costs of an appeal from a refusal to grant the writ. *Ibid.*

See CRIMINAL LAW.

See HEALTH.

See IMMIGRATION.

See INFANTS.

HEALTH.

I. REGULATIONS MADE BY LIEUTENANT-GOVERNOR, 445.
II. STATUTORY REGULATIONS, 445.
III. MUNICIPAL BYE-LAWS, 445.
IV. CONTAGIOUS DISEASES, QUARANTINE AGAINST, 446.
A. When detention justified, 446.
B. Expenses of detention, 447.

I. Regulations Made by Lieutenant-Governor.

Effect of regulations.]—(1) A Provincial statute having given to the Lieutenant-Governor-in-Council power to make and alter such regulations as he might deem expedient in regard to certain matters affecting the public health, the same to have the force of law, such regulations, when passed, superseded all Provincial and municipal enactments inconsistent with themselves. (2) It is competent to the Lieutenant-Governor-in-Council, by regulation under the provisions of the Health Act, 1888, to dismiss a health officer appointed by municipal bye-law. *The Attorney-General of British Columbia* v. *Milne*, 2 B.C.R. 196.

II. Statutory Regulations.

Ambiguity.]—Sec. 20 of the Provincial Board of Health regulations governing the sale of milk not being clear as to what was intended to be prohibited, or what allowed, the Court refused to interfere with a judgment quashing a conviction thereunder. *Rex* v. *Garvin*, 14 B.C.R. 260.

III. Municipal Bye-Laws.

1. Detention of person exposed to infection.] — A municipal bye-law of the City of Vancouver, authorized by Provincial statute, provided, "In case any traveller coming from without the city is infected with, or exposed to, any of the diseases mentioned in this bye-law (of which smallpox was one), the medical health officer, or board of health, may make effective provision, in the manner which to them shall seem meet and best for the public safety, by removing such persons to a separate house, or by otherwise isolating them, if it can be done without danger to life, and by providing nurses and other assistance necessary for them at his own cost and charges," etc. B., having been for 36 hours in Victoria, a city of 20,000 inhabitants, in which there were 55 cases of smallpox, came directly thence to Vancouver, where he landed. He was thereupon, by direction of the medical health officer of Vancouver, under colour of above bye-law, arrested and confined in quarantine as a traveller, etc., "exposed to" the disease:—Held, that the detention was unlawful and not within the scope of the bye-law. The authority to detain, isolate and nurse could only apply to persons suffering from the disease. B. could not be said to be a person "exposed" to the disease merely because he came from and had been 36 hours in a city infected with it to the extent proved. *In re George Bowack*, 2 B.C.R. 216.

2. Evidence of guilty knowledge.]—In order to support a conviction under the clause in the Victoria Consolidated Health Bye-law, 1886, providing: "17. No person shall let, occupy, or suffer to be occupied as a dwelling or lodging, any room which (a) does not contain at least 384 cubic feet of space for each person occupying the same," it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged. *Re Wing Kee*, 2 B.C.R. 321.

IV. Contagious Diseases, Quarantine Against.

A. When Detention Justified.

1. Detention of person exposed to infection.]—Sec. 75 of the Health Act provides that when smallpox, scarlet fever, diphtheria, cholera or any other contagious or infectious disease dangerous to the public health is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—Held, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles. *Mills* v. *The City of Vancouver*, 10 B.C.R. 99.

2. Detention under bye-law of ship.]—A municipal bye-law providing, "The medical health officer shall have power to stop, detain, and examine every person, or persons, freight, cargoes, boats, coming from a place infected with a pestilential or infectious disease, in order to prevent the introduction of the same into the city," does not authorize the medical health officer, or other municipal authorities, to detain a steamship and its passengers and crew coming from an infected place, or to prevent them from landing within the municipal limits, without reference to a proper examination for the purpose indicated, and its results, as showing danger of their introducing the disease. 2. That the stopping of all the passengers without examination was not an exercise of the powers reposed in the cor-

poration by the bye-law, but was an interference with trade and commerce, and was ultra vires. 3. That the bye-law and the statute authorizing it were intra vires. *The Canadian Pacific Navigation Co.* v. *The City of Vancouver*, 2 B.C.R. 193.

3. Detention, by medical officer under bye-law.]—Action of trespass against the medical health officer of the City of Victoria for causing the plaintiff, one of a number of Chinamen who landed at Victoria in a steamer last from Hong Kong, in China, to be removed to the "Suspect Station," and there detained and subjected to cleansing process under colour of sec. 55 of the Municipal Health Act, which gives medical health officers power "to stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place infected with a malignant or infectious disease," in order to prevent the introduction of such into Victoria. The plaintiff had been passed by the Dominion Government quarantine officer as entitled to land at Victoria. The white passengers from Hong Kong on the same steamer were not interfered with. The only evidence of Hong Kong being a place infected, etc., was that of a medical man resident in Victoria, who said "that in China smallpox was endemic, because there inoculation was the universal practice; that there was danger of infection from white passengers, but not the same danger as from Chinamen." There was no direct evidence of the existence of smallpox to a dangerous extent in Hong Kong at the time of the departure thence of the steamer, or that it was "a place infected," etc., or that the plaintiff had been "exposed to infection":—Held, that the facts were insufficient to justify the action of the health officer under the bye-law. *Wong Hoy Woon* v. *Duncan*, 3 B.C.R. 318.

B. Expenses of Detention.

Cost of provisioning and heating building in quarantine.]—Where a medical health officer (appointed by a City Council), acting in pursuance of a Provincial statute, places a quarantine on a building and its inmates within the limits of a city municipality, the latter cannot be held liable for the cost of provisioning and heating the building during the period of isolation. *Taylor and Taylor* v. *The Corporation of the City of Revelstoke*, 13 B.C.R. 211.

See MUNICIPAL LAW.

HIGHWAYS.

I. ESTABLISHMENT, 448.
II. USE BY RAILWAYS, 448.
III. REPAIR, 448.

I. ESTABLISHMENT.

1. Dedication.]—There is no power to dedicate where there is no power to alienate. There can be no dedication except by owners of the soil. *Canadian Pacific Railway* v. *City of Vancouver*, 2 B.C.R. 306; 23 S.C.R. 1.

2. Non-essentials.]—Although a by-law and notice thereof in the Gazette are necessary, under the Highway Act, whereon to found expropriation proceedings, they are not essential to the establishment of a public highway where a road is set apart by the combined action of all parties interested. *Hope* v. *Municipality of Surrey*, 20 B.C.R. 434.

II. USE BY RAILWAY.

Right of way over, for tramcars—Whether includes right to enforce sufficient repair to carry.]—A railway company had a right under its statutory charter (sec. 12 of 57 Vict., c. 63) to construct, maintain and operate a street railway along certain highways and bridges. One of the bridges over which the company had lawfully run its cars under the Act was destroyed, and the municipal corporation commenced the construction of another in its place which was of insufficient strength to carry the cars. Upon motion for a mandatory injunction to compel the corporation to construct the bridge of sufficient strength to maintain the car traffic of the company:—Held, that the company were merely grantees of the right-of-way, and as such had no right to compel their grantors to repair the bridge, and that, in the absence of a special arrangement to do so, the right did not exist. The corporation were not liable for non-repair even if it amounted to a nuisance. *Consolidated Railway Company* v. *Victoria*, 5 B.C.R. 266.

III. REPAIR.

1. Inhabitants at large.]—The common law obligation under which the inhabitants of parishes in England through which highways pass are responsible for their

repair has no application in British Columbia. *McPhalen* v. *City of Vancouver*, 15 B.C.R. 367; 45 S.C.R. 194.

2. Municipal corporation.]—No action could be maintained at common law against a municipal corporation for an injury arising from the non-repair of a highway, but a duty may be cast by statute upon the corporation to repair, and if that is clearly done, the corporation will be liable. *Lindell* v. *Victoria Corporation*, 3 B.C.R. 400.

See MUNICIPAL CORPORATION.

HUSBAND AND WIFE.

I. RIGHTS AND LIABILITIES, 449.
A. *Of husband*, 449.
1. Liabilities, 449.
2. Rights, 450.
B. *Of wife*, 450.
II. PROPERTY RIGHTS: TRANSACTIONS BETWEEN, 451.
A. *Effect of marriage on mutual rights of property*, 451.
B. *Gifts*, 451.
III. ACTIONS, 452.

I. RIGHTS AND LIABILITIES.

A. *Of Husband.*

1. Liabilities.

1. Goods supplied to wife.] — The defendant's wife purchased goods from plaintiffs from time to time during three years to an amount of more than $1,000. The price of the goods was charged to the wife, who occasionally made payments on account. Finally this action was brought against the husband to recover a balance of account amounting to $346.75. The plaintiffs had no dealing with defendant until he issued a notice that he would not be responsible for his wife's debts, when they sought to fix the debt upon him. It was proven at the trial that defendant had always furnished his wife with sufficient money to clothe and feed herself and her children and that he knew nothing about the goods having been obtained from plaintiffs, and had expressly forbidden his wife to pledge his credit:—Held, that the husband has rebutted the presumption placed upon him by law that he authorized his wife to purchase the goods. *Finch & Finch* v. *Minnie*, 20 B.C.R. 331.

2. For wife's tort.] — In an action against husband and wife for damages for a libel published by the latter the jury returned a verdict for $10:—Held, that the husband was liable and that the costs should follow the event. *Mackenzie* v. *Cunningham and wife*, 8 B.C.R. 206.

3. Funeral expenses.] — A husband is liable for the funeral expenses of his wife, and cannot claim to be indemnified therefor out of her separate estate. *In re Sarah Elizabeth Sea*, 11 B.C.R. 324.

2. Rights.

Joint investment.] — A husband who hands over all his earnings to his wife upon an agreement between them that any balance saved from the cost of living be invested in real estate for their mutual benefit, share and share alike, is entitled, in the event of a separation, to an undivided half interest in all investments so made. *McKissock* v. *McKissock*, 18 B.C.R. 401.

B. *Of Wife.*

1. Costs of habeas corpus.]—Where a wife leaves her husband without justification she is not entitled to her costs of unsuccessfully resisting his application by habeas corpus for the cutody of the children. *In re C. T. McPhalen*, 10 B.C.R. 40.

2. Partnership—Allegation of—Whether admitted.]—The action was tried and evidence given pro and con upon the question whether defendant Celia Mylius, a married woman, was liable to the plaintiff as being the partner of the defendant Jackson. The plaintiff's claim alleged: "2. The defendants entered into partnership as watchmakers and jewellers on, etc. 3. That while defendants were carrying on such business the plaintiff advanced to them the following (claimed) sums." The statement of defence of Celia Mylius alleged: "1. The defendant denies that on, etc., or at any other time, she entered into partnership with the defendant Jackson, as alleged in paragraph 2 of the statement of claim. 2. Neither at the times therein alleged or at any other times did plaintiff advance to defendants the sums alleged, or any of them, and if . . . . advanced, they were advanced to defendant Jackson alone." Crease, J., who tried the action, entered judgment for the plaintiff, on the ground that the partnership was proved. There was no evidence that the defendant Celia Mylius had any separate property at the time of the alleged

contract. On appeal to the Full Court:—Held, that the partnership was admitted on the pleadings, and that such objection was then open to the plaintiff. *Margaret Jackson* v. *Alexander Jackson and Celia Mylius*, 3 B.C.R. 149; reversed, 23 S.C.R. 485.

II. PROPERTY RIGHTS: TRANSACTIONS BETWEEN.

A. Effect of Marriage on Mutual Rights of Property.

Contract of marriage made in foreign country.]—Contracts of marriage made in a foreign country, the domicile of parties, by the terms of which, in accordance with the laws of that country, the alienation by a testator (one of the parties to the contract) of his real estate away from his wife and family is forbidden, will prevent a contrary disposition of the same, even though according to the lex loci rei sitae there be no such restriction. By the comity of nations the contract travels abroad, and, as between the parties to that contract and their representatives, attaches to the testator's real estate in places other than the domicile. Marriage, carried out in accordance of such a contract and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between those parties and their representatives, be respected and sustained, as to those incidents, in countries other than the domicile, where there is no direct local legislation to the contrary. *In re Klaukie's Will*, 1 B.C.R., Pt. I., 76.

B. Gifts.

Bill of sale.]—The plaintiff in 1896 gave his wife $600, which she kept in the house, and he shortly afterwards commenced to receive it back in small portions, and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement, and he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture:—Held, that there was no legal obligation binding upon the husband to repay the $600, and that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale, and was therefore void. *Cordingley* v. *MacArthur*, 6 B.C.R. 527.

III. ACTIONS.

Replevin action.]—A replevin action is an action for a tort, and therefore a husband cannot maintain it against his wife. *McGregor* v. *McGregor*, 6 B.C.R. 432.

See DIVORCE.

IMMIGRATION.

I. WHO LIABLE TO DEPORTATION, 452.
II. JURISDICTION, 453.
III. PRACTICE, 454.

I. WHO LIABLE TO DEPORTATION.

1. Acquisition of Canadian domicile.]—Applicant, who had resided in British Columbia for over three years, went to the State of Washington for a few days' visit. A couple of months before her visit she had been convicted of being an inmate of a house of ill-fame. On her returning to British Columbia she was detained for deportation under sub-sec. (d) of sec. 3 of the Immigration Act, 1910: — Held, that she had acquired a Canadian domicile at common law. *In re Margaret Murphy*, 15 B.C.R. 401.

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

3. Japanese.] — The provisions of the Immigration Act, 1908, are inoperative insofar as the subjects of the Japanese Empire are concerned. *In re Nakane and Okazake*, 13 B.C.R. 370.

4. Alien tourist.] — The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order in council passed since the coming into force of the Act could not be held to deal with such a person. *In re Rahim (No. 2)*, 16 B.C.R. 471.

5. Transient alien.]—Where a Chinese, who contracts with a carrying company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the United States he will be deported to China by the company, is refused admittance to

the United States and is being deported, he will not be granted his discharge by the Court, as the contract is not illegal, and under the Chinese Immigration Act, 1900, deportation is proper. *In re Lee San*, 10 B.C.R. 270.

II. JURISDICTION.

1. Appeal from board of inquiry.]—The Canadian Parliament, as incident to its control of immigration, has power to authorize deportation from Canada of any rejected immigrant. There is no distinction in favour of immigrants being British subjects. The authority delegated by sec. 37 of the Immigration Act to the Governor in Council to make regulations providing "as a condition to land in Canada that immigrants and tourists shall possess money to a prescribed minimum amount which amount may vary according to race" is validly exercised by a regulation imposing the condition upon immigrants of any Asiatic race not otherwise dealt with by treaty or regulation. Objection that there was no authority to exempt tourists, or immigrants who were not of Asiatic race, or to discriminate between Asiatics who were or were not subject to existing treaties or regulations, overruled. The authority, by sec. 38 of the Act, to the Governor in Council to make regulations or proclamations "to prohibit the landing in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native" is not conditional, or predicated upon any such immigrant having actually come to Canada at the time of the making of the regulation, but is validly exercised by a regulation following the words of the Act, and is applicable to any such immigrant as may thereafter come to Canada. The order of a board of inquiry rejected an immigrant as being an "unskilled labourer" within the meaning of an admittedly valid regulation, and ordered his detention and deportation. The order of the Board and the evidence and proceedings were removed into the Supreme Court under application for certiorari and habeas corpus, and, the application being dismissed without argument so as to admit a speedy appeal, an appeal was taken to the Court of Appeal. The evidence showed that the immigrant testified before the Board that he was not a labourer, but a farmer. The only evidence contra was that of an official of the Board, who testified that he did not believe the immigrant, and the fact that he had only $20 in his possession:—Held, by the Court of Appeal, overruling a contention that there was no evidence before the Board sufficient to found its jurisdiction to find that the immigrant was an "unskilled labourer," that in view of sec. 16 of the Act, authorizing the Board to "base its decision on any evidence considered credible or trustworthy," and sec. 23, providing "that no Court shall have jurisdiction to review or reverse any decision of any Board of Inquiry," (1) there was sufficient evidence; (2) the decision of the Board of Inquiry was not open to review. *Re Munshi Singh*, 20 B.C.R. 243.

2. Appeal from controller of customs.]—The Chinese Immigration Act, by sec. 7, imposes an entry tax upon all immigrants of Chinese origin coming into Canada, but by sub-sec. (c) exempts merchants and certain other persons, who are required to substantiate their status to the satisfaction of the controller of customs, subject to the approval of the minister of customs:—Held, that an applicant dissatisfied with the controller's decision should proceed by way of appeal to the minister of customs, and that if it should ultimately become necessary to apply to the Court for assistance, the proceeding should be by mandamus and not by habeas corpus. *In re Lee Him*, 15 B.C.R. 163, 390.

3. Delegation of powers.]—The power conferred upon the Governor-General in Council, by sec. 30 of the Immigration Act, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior. *In re Behari Lal*, 13 B.C.R. 415.

III. PRACTICE.

Evidence of general character.]—Evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in habeas corpus proceedings directed against the collector of customs, who is detaining such immigrant for deportation to China on the ground that she is a prostitute. *In re Fong Yuk, etc.*, 8 B.C.R. 118.

See CONSTITUTIONAL LAW.

See HABEAS CORPUS.

See INJUNCTION.

INDEMNITY.

1. When enforceable.]—A covenant to indemnify is not enforceable until the obligee has paid or been called upon to pay the claim indemnified against. *Baker* v. *Dalby*, 3 B.C.R. 289.

2. Extent of.]—Where land is conveyed as security to indemnify an indorser of a promissory note, the conveyance enures to indemnify the indorser against liability in respect of indorsements of all subsequent notes given as renewals of the originals or as security for the original debt. *Westfall* v. *Stewart*, 13 B.C.R. 111.

3. Principal and agent.]—Where an act is done innocently, under the express directions of another, which occasions injury to the rights of a third party, the principal must indemnify the agent against consequent liability. *Board of School Trustees* v. *Muirhead*, 4 B.C.R. 148.

4. Misfeasance of corporation.]—Where a municipal corporation, in replacing a wooden path with a cement pavement, made an opening for an area previously excavated by the third party's predecessor in title and covered it in by replacing a wooden grating which previously covered the excavation, and the plaintiff, injured by falling through the grating, recovered damages against the corporation, it was held that the third party was not liable to indemnify the corporation. *Macpherson* v. *City of Vancouver*, 17 B.C.R. 264.

INDIAN ACT.

Jurisdiction.]—An Indian agent, acting in a judicial capacity, in committing an accused person for an offence under the Indian Act, must show on the warrant of commitment the district for which such agent is acting. *R.* v. *McHugh*, 13 B.C.R. 224.

INDUSTRIAL AND PROVIDENT SOCIETIES.

Insurance — Contract — Indemnity.]—By the terms of a contract made by an association with its members it was agreed, in consideration of certain subscriptions to be paid by them, that the association would indemnify any member against and pay him such losses up to a stipulated amount as he might incur from disability by reason of sickness. In an action to recover upon the contract it appeared that the plaintiff had been disabled by sickness for a considerable period, but it also appeared that he was a person of no occupation, who had lived upon his private means:—Held, that the contract was one of indemnity, and that the plaintiff could recover nothing for disability from work. *Bone* v. *Columbia Lodge of Oddfellows*, 1 B.C.R., Pt. II., 349.

INFANTS.

I. Guardianship of Person and Estate, 456.
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III. Sale by Infant, 458.
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V. Mortgage by Infant, 458.

I. Guardianship of Person and Estate.

A. Custody of Person.

1. Rights of father.]—An agreement by a father to surrender his paternal rights will neither relieve nor bind him. Where a father, on the death of his wife, allowed his child to be given into the custody of other persons owing to his being then so situated that he could not properly care for it, and, when able to do so, sought to have the child restored to him:—Held, that there was nothing in the circumstances to justify the continuance of the separation between father and son. *In re Porter*, 15 B.C.R. 454.

2. No legal claim to.]—The Court will not interfere by habeas corpus to take an infant out of the custody of a person not lawfully entitled thereto for the purpose of enabling a person equally unentitled to obtain possession of it. *In re Ah Gway; Ex parte Chin Su*, 2 B.C.R. 343.

3. Whether foster parent enjoys a legal right to custody of child.]—In habeas corpus proceedings to recover possession of a female child, stated to have been adopted and brought up by the applicant and to have been taken away from him against his will by a refuge home:—Held, that adoption is not recognized by the law of England, and a foster parent has no more legal right to the custody of the child of his adoption than a stranger. *In re Quai Shing*, 6 B.C.R. 86.

4. Foster parent.]—An infant duly committed to the care of the Children's Aid Society of Vancouver under the provisions of the Children's Protection Act of British Columbia was by such Society placed with P. as a foster parent. Subsequently another society, upon notice to the Children's Aid Society of Vancouver, but without notice to P., applied to the magistrate who made the order originally, and, under sec. 39 of the Act, obtained an order for the surrender of the child, on the ground that it was of a different religion from the Society with which it was first placed. Upon such application the fact was ascertained that the child had been placed in a foster home, but its whereabouts was not disclosed by the officer appearing for the Society. Later the second society, on obtaining this information, procured an order for and served a writ of habeas corpus on P., directing him to produce the child. He appeared and moved to set aside the writ and the order:—Held, that although the first Society was the legal guardian of the child when the second order was made, yet P. could not be deprived of his legal rights without notice and without an opportunity of being heard, that, under sec. 7 of the Act, the contract placing the child with P. divested the Society of any authority to interfere with his rights unless the child's welfare demanded that it should be withdrawn from his care. *In re Pilkington*, 15 B.C.R. 456.

5. Religion of parent.]—A magistrate made an order, under the provisions of the Children's Protection Act of British Columbia, awarding the custody of an infant to the Children's Aid Society of Vancouver, an undenominational society, but, upon further evidence being submitted, made a second order committing the child to the care of the Children's Aid Society of Our Lady of the Holy Rosary, a Roman Catholic institution:—Held, that the magistrate had power to make the second order in the circumstances. *In re Howard*, 14 B.C.R. 307.

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

7. Custody of female over sixteen years.]—The parents of an infant who is under the age at which it may elect as to its custody may be deprived of that custody if the Court is satisfied that such a course is necessary for the child's welfare. Where an infant has attained the age of election, the Court ought to separately examine the infant and adopt its wishes on the subject. *Regina* v. *Redner*, 6 B.C.R. 73.

B. Guardianship of Estate.

For purpose of Settled Estates Act.]—Where a guardian to an infant has already been appointed by the Court it is not necessary to appoint a guardian for the special purpose of presenting a petition for sale of the infant's estate under the Settled Estates Act, 1877, sec. 49 (a). *In re Ash Estate*, 5 B.C.R. 672.

II. CONTRACTS.

Right to repudiate.]—An infant having been injured in the course of employment fraudulently obtained, signed a release, but subsequently tendered repayment of the consideration for the release:—Held, that this was not a bar to his recovering. *Darnley* v. *Canadian Pacific Railway Company*, 14 B.C.R. 15.

III. SALE BY INFANT.

Fraudulent representation.]—The plaintiff, an infant, conveyed certain land to the defendant Law, who had no knowledge of her minority. She made an acknowledgment representing herself to be of full age, knowing that she was not, and was aware of the legal effect of a minor attempting to convey land:—Held, that she could not be assisted in obtaining advantages based entirely on her own fraudulent act. *Gregson* v. *Law and Barry*, 19 B.C.R. 240.

IV. MORTGAGE TO INFANT.

Security against mechanic's liens.]—The Court will not sanction a loan of infants' moneys on mortgage of realty without a covenant by the mortgagor to procure a binding agreement with those who may be entitled to liens under the Mechanics' Lien Act, 1891, to forego their rights under the Act. *In re Brown and Brown; Ex parte Brown*, 2 B.C.R. 110.

V. MORTGAGE BY INFANT.

Repudiation.]—A mortgage executed by an infant before the passing of the Infants'

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

INHERITANCE ACT.

Widow's interest.] — By proclamation, the Revised Statutes of British Columbia, 1897, were declared in force on and after the 21st of February, 1898. Sec. 22 of the Inheritance Act, being chapter 97 of the said Revised Statutes, provided: "Nothing in this Act contained shall be held to impair or affect the right of the widow of an intestate to her dower out of her deceased husband's lands, nor the right of a husband to his curtesy out of his deceased wife's lands." By c. 40 of the statutes of 1898, being The Statutes Revision Act, 1898, it was enacted that the following sub-section should be added to sec. 5 of said c. 97: "(5) If the intestate shall leave a widow or husband him or her surviving, such widow or husband, as the case may be, shall be entitled, in case the intestate has left no lawful descendants, to one-half of such real estate absolutely, and in case the intestate has left lawful descendants him or her surviving, then to one-third of such real estate for life:—Held, on appeal, that sec. 22 of c. 97 was repealed by said c. 40. Therefore, in the circumstances here, where a husband, entitled upon the death of his wife to a tenancy by the curtesy in her lands, and the lands were put up for sale for taxes and bought in by him and subsequently sold to third parties, it was held that such parties acquired only the one-third interest for his life to which he was entitled. *Romang* v. *Tamburri*, 17 B.C.R. 166.

INJUNCTION.

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I. Right To and When Granted.

A. In General.

1. Substantial injury.] — An injunction will only be granted where the plaintiff can show that substantial or irreparable injury will be otherwise sustained. *Cotton* v. *City of Vancouver*, 12 B.C.R. 497.

2. Prevention of recurrence of injury.] —An injunction may be granted although the defendant makes affidavits that he has taken precautions against the recurrence of the injury complained of. *Attorney-General for Canada* v. *Ewen*, 3 B.C.R. 468.

3. Acquiescence.]—Where in the case of a trespass to land there has been acqui-

escence equivalent to a fraud upon the defendant an injunction ought not to be granted, even where the legal right of the plaintiff has been proved. *Sandon Water Works & Light Co.* v. *Byron N. White Co.*, 10 B.C.R. 361; 35 S.C.R. 309.

4. Statutory duty or power—Exercise of, causing damage.]—There is no remedy for damage caused by the exercise of a statutory duty or power unless it is given by statute, or unless the duty or power had been negligently exercised. The Court generally requires three things to be shown before granting an interlocutory injunction: (1) There must be a strong prima facie case that the plaintiff will succeed at the hearing. (2) There must be some wrong suffered or threatened not sufficiently or appropriately to be covered by a money payment. (3) The preponderance of convenience must be in favour of the injunction. *Jones* v. *The Corporation of the City of Victoria*, 2 B.C.R. 8.

B. Violation of Public Rights.

1. Tidal river—Right of Dominion of Canada to restrain pollution of.]—The Crown in the right of the Dominion of Canada has the right to take proceedings to restrain by injunction the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney-General to restrain any public nuisance caused by the conduct in question. The fact that a statute makes the conduct in question an offence, and imposes fines and imprisonment for its commission, does not derogate from the right of the Court, on the motion of the party injured, to restrain its commission by injunction. An injunction may be granted although the defendant makes affidavits that he has taken precautions against the recurrence of the injury complained of. *The Attorney-General for the Dominion of Canada* v. *Ewen*, 3 B.C.R. 468.

2. Foreshore.] — The Attorney-General may sue for the demolition of an embankment erected on the foreshore without alleging that the ownership of the foreshore is vested in the Crown. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, 10 B.C.R. 108.

3. Coal mine—Employment of Chinamen.]—Held, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground, in contravention of r. 34, sec. 82 of the Act, that the matter was not one affecting the public, or likely to affect the public to such an extent as to call for the granting of an injunction. *Attorney-General* v. *Wellington Colliery Co.*, 10 B.C.R. 397.

4. Independence of Parliament Act, 1875 — Barrister's fees — Injunction — Crown officers.]—On an application for an injunction under the Independence of Parliament Act, 1875, to restrain a member of the Legislative Assembly and a Minister of the Crown from sitting and voting in the House:—Held, per Gray, J., that a barrister's fees being in the nature of an honorarium, the acceptance of employment as counsel in an arbitration by a barrister was not the acceptance of such an office as to disqualify a member from sitting and voting. Held, per Begbie, C.J., and Crease, J., that the acceptance of such an employment was an infringement of the provisions of sec. 1 of that Act. *Barnard* v. *Walkem*, 1 B.C.R., Pt. I., 120.

C. Contract Rights.

1. Removal of property.]—Where there has been no order for the payment of money the Courts will not restrain the removal of property out of the jurisdiction by the owner. *Baxter* v. *Jacobs and Moss*, 1 B.C.R., Pt. II., 370.

2. Lease.]—Before the construction of a building by the defendant, the plaintiff agreed to take on lease a shop in the proposed building. The lease, in pursuance of the Leaseholds Act, described the premises by metes and bounds, without specifying any privileges. The plaintiff, after entering, demanded the use of a privy and a place for storing coal, and the defendant conceded the rights asked for:—Held, that the plaintiff was entitled to an injunction restraining the defendant from interfering with his right of access to the privy and his right to store coal in the rear of the premises. *Ross* v. *Henderson*, 8 B.C.R. 5.

D. Transfer and Disposition of Property.

1. Crown lands.] — The Court should not, upon the ground that his claim appears to be invalid, restrain a party from applying to the proper department of the Government for a Crown grant of lands, for the Court cannot presume that the Crown will

not do right. *Nelson and Fort Sheppard Railway Company* v. *Parker*, 6 B.C.R. 1.

2. Minerals.]—Where a party holds a certificate of improvements for mineral claims, he will not be restrained by injunction from applying for a Crown grant. *Nelson and Fort Sheppard Railway Co.* v. *Dunlop*, 7 B.C.R. 411.

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

4. Partnership property.] — Where a firm consists of three partners, and one dies, and the other two three months afterwards execute an assignment for creditors, a general creditor, who has not acquiesced in the assignment, is entitled to an injunction against the surviving partners and the trustee of the deed of assignment. *Hudson's Bay Co.* v. *Oppenheimer Bros.*, 1 B.C.R., Pt. I., 247.

E. Trespass to Land.

Compulsory purchase.]—Where a trespasser, by taking proper steps to that end, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken and compensation made. *Sandon Water Works & Light Co.* v. *Byron N. White Co.*, 10 B.C.R. 361; 35 S.C.R. 309.

F. Legal Proceedings.

Restraining actions.]—The Court will not usually restrain a number of actions in an inferior Court merely because the question upon which they depend may be decided once for all in an action in the superior Court. *Belrose* v. *Corporation of Chilliwack*, 3 B.C.R. 115.

G. Railways.

Crossing track of another railway.]—The defendant company had obtained from the Railway Committee of the Privy Council an order permitting it to cross the Canadian Pacific Railway track. Pending an appeal by the Canadian Pacific Railway Company from the order to the Full Cabinet the defendant company proceeded to lay the crossing, and the Canadian Pacific Railway Company applied for an injunction:—Held, that defendant company was not exceeding the terms of the order, which was binding in a Court until reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing notice should be given of the time at which it is intended to commence the work. Failure by a company to give such notice constitutes good cause for depriving it of the costs of successfully resisting a motion for an injunction. *Canadian Pacific Railway Company* v. *Vancouver, Westminster and Yukon Railway Co.*, 10 B.C.R. 228.

H. Municipal Corporations.

1. Contracts.]—An injunction will not be granted to restrain a corporation from proceeding with a contract award to other than the lowest tenderer. *Haggerty* v. *City of Victoria*, 4 B.C.R. 163.

2. Diversion of corporate funds to unlawful purpose.]—The municipal corporation of the City of Victoria having, by special resolution, appropriated $5,200 to defray the cost of constructing a bridge over navigable water, part of a public harbour within the city limits, did not obtain the sanction of the Dominion Government to the work, and proceeded to execute it in such a way as to interfere with navigation. Upon information by the Attorney-General of Canada an injunction was granted restraining the continuance of the work. This action was then brought by the plaintiff individually as a ratepayer to restrain the corporation from expending any part of the $5,200 in payment for the work:—Held, that an injunction should be granted restraining the application of the money to any further construction of the bridge, but refused as to payment for work bona fide done upon that part of it already completed. *Elworthy* v. *Victoria*, 5 B.C.R. 123.

3. Disqualification of aldermen by reason of interest in contract.] — An injunction is a competent and appropriate remedy for a complaint that an alderman is, on the facts alleged, disentitled by statute to sit and vote, where the prayer is to restrain him from so doing. *Coughlan & Mayo* v. *The City of Victoria*, 3 B.C.R. 57.

II. INTERLOCUTORY INJUNCTIONS.

A. When Granted.

1. Libel—Discretion to grant in action of.]—Held, on a motion to dissolve an injunction restraining until the hearing the further publication of matter charged to be libellous, that the Court will interfere by interlocutory injunction restraining until the trial the publication of what clearly appears to be a libel. On appeal:—Held, per Crease, J., that though in England the Court have not of late restrained publication before the question of libel has been submitted to a jury, there is undoubted power to do so under C.S.B.C., c. 31, sec. 14, and the appeal should be dismissed. Per Drake, J., that as the jurisdiction is one never admitted before the Judicature Act, and the exercise of it may prejudice the trial of the action, as being a conclusive opinion that the matter complained of is defamatory, it should be very sparingly used, and in practice confined to trade libels, and the appeal should be allowed. *Wolfenden* v. *Giles*, 2 B.C.R. 279.

2. Watching and besetting.]—An interlocutory injunction will be granted to restrain the members of a trade union from alleged "picketing." *Le Roi Mining Co.* v. *Rossland Miners' Union*, 8 B.C.R. 370.

B. Undertaking as to Damages.

When to be given.]—An undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made ex parte, but even when it is made upon hearing both sides. *New Vancouver Coal Company* v. *Esquimalt and Nanaimo Railway Company*, 6 B.C.R. 222.

C. Dissolution and Continuance.

1. Grounds for maintaining.] — Upon motion to dissolve an injunction retaining property in dispute in statu quo pendente lite, it is not necessary in order to maintain the injunction for the Court to inquire further into the rights of the parties, if it appears upon the affidavits that the plaintiff has made, upon his own showing, a good case for the interference of the Court, and that there is, upon all the facts before the Court, a reasonable prospect of his succeeding at the trial. *Robert Ward & Co.* v. *John Clark, John Clark, Jr., and Henniger*, 3 B.C.R. 356.

2. After dismissal of action to preserve property pending appeal.] — An injunction may be continued, after the dismissal of an action, to preserve property in dispute pending appeal, though such jurisdiction will only be exercised under exceptional circumstances. *Dunlop* v. *Haney*, 7 B.C.R. 300.

III. PROCEDURE.

A. In General.

Formalities.]—Since the Judicature Act, the formal matters which used to be essential on an application for an injunction are no longer necessary, but the substantial matters necessary to be proved continue as before. Thus the application may be made in a case sounding in damages or the like; but the applicant must still, as heretofore, show some claim upon the subject matter of the suit, or some special relation with the defendant against whom the injunction is asked. *The Hudson's Bay Company* (for themselves and all the creditors of Oppenheimer Bros), *plaintiffs* v. *A. R. Green and G. A. Sargison, Lina Oppenheimer, the executrix of Godfrey Oppenheimer, deceased, and Oppenheimer Bros., defendants*, 1 B.C.R., Pt. I., 247.

B. Ex Parte Applications.

1. Conditional appearance.]—An application for an interlocutory injunction is properly made ex parte where the defendant has entered a conditional appearance. *Fletcher* v. *McGillivray*, 3 B.C.R. 40.

2. Irregular appearance.] — Where the defendant enters an irregular appearance, but the plaintiff waives the irregularity, it is improper for the plaintiff then to apply ex parte for an interlocutory injunction. *Fletcher* v. *McGillivray*, 3 B.C.R. 49.

C. Affidavit.

1. Cross-examination.] — As a general rule a defendant will not be given leave to cross-examine the plaintiff on his affidavit before the defendant has filed an affidavit showing the merits of his case. *Leavock* v. *West*, 6 B.C.R. 404.

2. Cross-examination.] — Order XXXVII, Rules 21 and 29 of the Rules of the Supreme Court, 1890, taken together,

compelled the production for cross-examination of a deponent on his affidavit in all cases. *Russell* v. *Saunders*, 7 B.C.R. 173. (See now, however, Order XXXVII, r. 22.)

D. Motion to Dissolve.

Appearance.]—A defendant cannot move to discharge an injunction before appearance in the action. *Fletcher* v. *McGillivray*, 3 B.C.R. 40, 49.

E. Mode of Trial.

Jury.]—An action for an injunction is proper for trial by jury. *Canadian Pacific Railway Company* v. *Parke*, 5 B.C.R. 507.

F. Appeal.

1. When appeal lies.]—No appeal lies from order granting injunction, but only from an order refusing to dissolve the injunction. *Attorney-General* v. *Milne*, 2 B.C.R. 196.

2. Appeal from refusal to grant—Commencement of trial.]—Where a motion to dissolve an interlocutory injunction has been refused and notice of appeal given before trial, but not brought on to be heard until after the trial has commenced, but not concluded, the Full Court will not interfere. *Dunlop* v. *Haney*, 7 B.C.R. 455.

3. Obedience to injunction.]—A party obeying a mandatory injunction, for disobedience to which he is liable to attachment, is not thereby prevented from appealing against the injunction. *Cons. Ry. Co.* v. *City of Victoria*, 5 B.C.R. 266.

IV. Breach.

A. What Constitutes.

1. Evasion of order.] — A mandatory injunction required "the defendants, their officers, their agents, etc., to permit all passengers on the plaintiffs' steamers to land at the port of Vancouver, subject only to such detention, examination and inspection as may be reasonably necessary in order to ascertain the existence among them of the disease of smallpox, or of actual danger of said passengers or crew or any of them having been actually exposed to contagion thereof," etc. Notice of the effect of the amendment was telegraphed to the defendants' solicitor by his agent in Victoria, upon whom the amended order had been served. Defendants afterwards, by their agents, met plaintiffs' steamships at the wharf at Vancouver, and, without any inspection or examination of them, informed the passengers that they could land, but if they did so they would be subject to quarantine for 14 days, under the City Health Bye-law, and thereby prevented them from landing:—Held, 1. That the defendants had sufficient notice of the terms of the injunction as amended. 2. That the conduct of the defendants was a breach of the injunction, and attachment ordered to bring before the Court those proved to have been actively concerned in the breach. *The Canadian Pacific Navigation Co. (Ltd.)* v. *The City of Vancouver*, 2 B.C.R. 298.

2. Person not named in the injunction.]—Persons not named in an injunction are not liable to be committed for breach of it, unless, with knowledge of the injunction, they interfere and commit the act enjoined, in which case they are liable for contempt of Court. *DeCosmos* v. *The Victoria and Esquimalt Telephone Co. (Ltd.)*, 3 B.C.R. 347.

3. Undertaking not to proceed until trial.] — An undertaking not to proceed further until the trial of the action is observed although proceedings are taken before the formal order or decree is drawn up, but after judgment delivered. *Dunlop* v. *Haney*, 7 B.C.R. 300.

B. Proceedings on.

Prohibitory injunction — Disobeying—Remedy—Attachment or committal—Rule 451—Endorsement.]—Upon motion for a writ of attachment against the manager of the defendant company for disobeying an injunction restraining the company, its agents, servants, etc., from blasting or depositing rock upon the plaintiffs' mineral claim, it was objected: (1) Under r. 451, that there was no memorandum of the consequence of the disobedience endorsed on the order. (2) That the notice of motion for attachment was not personally served on the manager, but only on the solicitor for the defendant company. Counsel had appeared for the manager, and obtained several adjournments of the motion to obtain affidavits on the merits, which, finally, were not forthcoming: — Held, allowing the appeal: That committal and not attachment is the appropriate remedy for breach of a

prohibitory injunction. That personal service of a notice of motion is an essential pre-requisite to committal, and that the party applying in a case proper for committal is not absolved from the necessity for such personal service by moving for attachment instead of committal. That the objection of want of personal service of the notice was not waived by the adjournments. *The Golden Gate Mining Company* v. *The Granite Creek Mining Company,* 5 B.C.R. 145.

See COMPANY.

See CONSTITUTIONAL LAW.

See HEALTH.

See MINES AND MINERALS.

See MUNICIPAL CORPORATIONS.

See NUISANCE.

See TORT.

See WATERS AND WATERCOURSES.

INNKEEPERS.

Lien—Measure of care.]—An innkeeper retaining goods under his lien is bound to take reasonable care of them. *Frank* v. *Berryman,* 3 B.C.R. 506.

INSANITY.

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INSOLVENCY.

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INSURANCE.

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I. COMPANIES, OFFICERS, AND AGENTS.

A. Foreign Companies.

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

2. Carrying on business without license.]—H. was the authorized agent at Vancouver of the Equity Fire Insurance Company, a company incorporated in Ontario, but which was not registered nor licensed under the provisions of any British Columbia statute or of the Insurance Act of Canada. He was convicted under the provisions of the Insurance Act for carrying on an insurance business without a license:—Held, confirming the conviction, that the Act is intra vires of the Parliament of Canada. *Regina* v. *Holland,* 7 B.C.R. 281.

B. Officers and Agents.

1. How Far Company Bound by Acts of.

Return of policy—Authority of agent.]—Defendant agreed to take a policy of life assurance for $10,000 from the plaintiff company, which was issued and transmitted to, and stood in the hands of plaintiffs' British Columbia agent, for defendant. Defendant wrote to the agent that he was unable to pay his premium notes or carry out the transaction, but that he was confident of being in a better financial position within the next six or eight months, and continued: "I promise to take a new policy with you within that time. In the meantime I return the policy and $5 for the

medical examination," whereupon the agent signed and delivered to him the following: "Received back from Mr. T. R. E. McInnis our policy No. 30,574, together with $5 for medical attendance, in accordance with terms submitted in his letter." Defendant offered to take out a fresh policy in plaintiff company for $1,000. The company refused this offer, or to take back the original policy, and returned it, together with the $5, to defendant, who declined to receive same. It was a term of the policy that agents of the company were not authorized to alter or discharge contracts. Upon action upon the premium notes:—Held, that there was no acceptance by the plaintiffs of the proposal contained in the letter or release or accord and satisfaction of the original contract. *The Confederation Life Assurance Co.* v. *McInnis*, 4 B.C.R. 126.

2. Knowledge or Notice.

1. Estoppel.]—A life policy was subject to a condition making it void if the insured took a hazardous employment, without the written permission of the president, vice-president or managing director of the company. The assured did take such employment without the written permission of any of the officers named, but with the assent of the company's provincial agent, and after the change of occupation paid a premium which was retained by the company with knowledge of the change of occupation:—Held, that the company was estopped from taking advantage of the forfeiture clause. *Elson* v. *The North American Life Assurance Company*, 9 B.C.R. 474; 33 S.C.R. 383.

2. Application filled in by agent.]—The manager for British Columbia of a fire insurance company, with power to accept risks and issue policies without reference to the head office of the company, received an application from the plaintiffs for insurance for $2,100 on merchandise, furniture and fixtures contained in a building described as a store and dwelling house. The application was accepted and a policy issued by him apportioning the insurance upon the three classes of property separately. A loss having occurred, payment was refused on the grounds that the stock was overvalued and the premises improperly described as a dwelling house, whereas, in fact, it was also used as a lodging house. At the trial it appeared that a portion of the premises was fitted up for lodgers. The plaintiffs testified that the manager inspected the premises before the policy was issued and that they had made no apportionment of the insurance, but left the matter in the hands of the manager. The manager testified that he sent an agent to have the application signed and the apportionment made, and that he filled in the figures upon the blanks in the application from the agent's report. The jury found that the manager inserted the description of the premises and apportioned the insurance:—Held, that the company was affected by the manager's knowledge of the premises and of the property insured; that the questions as to who had made the apportionment was properly left to the jury; that the evidence justified the jury in finding that it had been made by the manger, and that the assured, therefore, had made no valuation as to the stock or the apportionment thereof, and could not have misrepresented its value. *Mahomed* v. *The Anchor Fire & Marine Insurance Co.*, 17 B.C.R. 517; 48 S.C.R. 546.

3. Fraud of agent and assured.]—Where the assured conspires with the local agent of the insurer to defraud the company, the knowledge of the agent is not imputable to the insurer. *R.* v. *Clarke*, 2 B.C.R. 191.

4. Agent privy to a fraud.]—A company is not to be held to have knowledge of the truth when the applicant and the agent conspire together to suppress the truth, which is known to both of them. *Bastedo* v. *The British Empire Insurance Co.*, 18 B.C.R. 377.

5. Imputed notice.] — The plaintiff applied to the defendants' agent for insurance against his liability as employer. The plaintiff was engaged in waggon-road making, in the course of which it was necessary to use a certain amount of explosives. The defendants' agent was aware that the use of explosives was necessary in road construction. The plaintiff filled up and signed an application form, leaving a blank against the question which asked "are machinery, boilers or explosives to be used?" The plaintiff's reason for not answering this question was that there was no intention of using any machinery or boilers, but there was an intention to use explosives. The plaintiff explained this circumstance to the defendants' agent, asking the agent to answer this question correctly, who, however, for some unexplained reason, wrote the word "no" against the above question. The

policy contained the usual clause making the application the basis of the contract and declaring the contract void if there were any material omission or any misrepresentation in the application. An accident happened owing to the use of explosives, and the defendant Company refused to indemnify the plaintiff against his liability to make compensation:—Held, that the defendants were bound by the knowledge of their agent, and that there was no omission or misrepresentation in the application so as to prevent the plaintiff from recovering. *Carlin* v. *The Railway Passengers Assurance Company,* 18 B.C.R. 477.

C. Misrepresentations and Warranties.

1. What constitutes misrepresentation.] —An application for insurance on a horse stated that the horse was of the value of $2,000, and in answer to the question "What did you pay for this animal?" was written: "Got in trade." The plaintiff testified that he had told the defendant Company's agent that he had paid $550 for the horse, and that the agent who was writing out the application said "I will put it 'got in trade,'" to which the plaintiff replied "All right. I do not care how you put it." The application and statements therein were part of the contract, and the policy provided that the Company should not be liable where material statements in the application should be found to be untrue:—Held, that the untrue answer to the question "What did you pay for this animal?" amounted to concealment or misrepresentation of fact of such a character as to influence the mind of a reasonable and prudent insurer in accepting or refusing the risk. *Bastedo* v. *The British Empire Insurance Company, Limited,* 18 B.C.R. 377.

2. Value.] — Statements as to value, being matters of opinion, do not constitute a warranty. *Cope* v. *Scottish Union and National Insurance Co.,* 5 B.C.R. 329.

II. Fire Insurance.

A. Parties Entitled to Sue.

Mortgagee.] — Semble, a mortgagee of property may sue on a contract of insurance of the property. *The Trites-Wood Company, Limited* v. *Western Insurance Company,* 15 B.C.R. 405.

B. Description.

Dwelling - house.] — A dwelling - house does not lose its character as such from the fact that it is occupied by one or more lodgers. *Mahomed* v. *The Anchor Fire & Marine Insurance Co.,* 17 B.C.R. 517; 48 S.C.R. 546.

C. Statutory Conditions.

1. In General.

1. Variations.] — Where conditions are sought to be inserted in a policy in addition to the statutory conditions, but are not indicated as variations in accordance with the Act, they are superseded by the statutory conditions. *Cope* v. *Scottish Union and National Insurance Co.,* 5 B.C.R. 329.

2. Conspicuous type.]—A party will not be allowed to amend on appeal by pleading that the variations are not printed in conspicuous type. *Pratt* v. *Connecticut Fire Insurance Co.,* 19 B.C.R. 449.

2. Just and Reasonable.

1. Forest fires—Vacant premises.]—The onus of proof that a condition is not just and reasonable within the Fire Insurance Policy Act, R.S.B.C. 1911, c. 114, lies on the assured. An assurance policy contained a condition that the insurer should not be liable for loss caused by forest fires, and a further condition as follows: "This policy will not cover vacant or unoccupied premises . . . . and if the premises shall become vacant or unoccupied . . . . this policy shall cease and be void unless the company shall by indorsement on the policy allow the policy to be continued":—Held, that these were just and reasonable conditions. *The Hall Mining and Smelting Co., Ltd.* v. *The Connecticut Fire Insurance Co.,* 18 B.C.R. 113.

2. Forest fires—Vacant premises.]—The defendant Company insured the plaintiffs' buildings situated about the entrance to a mine in heavily-wooded country. The policy contained two conditions varying the statutory conditions, whereby they would not be responsible, first, for loss occurring through forest fires and, secondly, for loss if the insured premises should become vacant or unoccupied. The property was partially destroyed by a forest fire. In an action for the recovery of amount of the loss it was held by the trial judge that the variations

from the statutory conditions inserted in the policy were just and reasonable, but that upon the evidence there was no justification for an allegation by the defendant Company that the policy was cancelled under the authority of an employee of the plaintiffs prior to the fire. The action was dismissed without costs:—Held, on appeal (Martin and McPhillips, JJ.A. dissenting), that the plaintiffs' appeal should be dismissed. Held, further (Irving and Galliher, JJ.A. dissenting), that the defendant Company's cross-appeal be dismissed. Per Macdonald, C.J.A.: A condition as to vacancy must be judged with reference to the facts of the particular cases under consideration. In the circumstances here the variation was a just and reasonable one, and the defendant Company was entitled to succeed upon the defence that the buildings insured were vacant when destroyed. Per Irving, J.A.: The defendant Company is entitled to succeed on the defence that the loss was caused by a forest fire, which, by one of the varied conditions, was excepted from the risk, and it was just and reasonable that it should be. *Pratt* v. *Connecticut Fire Insurance Co.*, 19 B.C.R. 449.

3. Change of Interest.

Interest of assured not stated.]—Certain parcels of cotton warp were consigned in April, 1910, by Cookson & Co., of Manchester, England, to one Matthews, in Vancouver, the Bank of Montreal acting as receiving agent for Cookson & Co. A contract of insurance was entered into between the Bank of Montreal, through their Vancouver office, and the defendant, on the 9th of May, 1910, covering the cotton warp, and the contract was evidenced by the policies expiring on the 9th of May, 1911. Each of the policies purported to insure the Bank of Montreal against loss by fire on certain bales of cotton warp, "their own or held by them in trust, or on commission, or sold but not delivered or on which they may have an interest or a liability," and by these five policies concurrent insurance was permitted. Matthews failed to take delivery and pay for the warp, and on the 26th of July, 1910, the Bank of Montreal sold the warp to the British Columbia Hop Company. The sale was negotiated through the Chilliwack office of the Bank and was made by it on behalf of Cookson & Co. The consideration for the warp was $2,704.91, $704.91 being payable in cash, and $2,000 by a promissory note given to the Bank. Subsequent to the sale, the location of the warp was changed, and in consequence the agents of the defendant were applied to to sanction and provide for the change of location. The defendant assented to the change, and on the 3rd of August, 1910, the five policies were cancelled and a single policy issued in their stead. The single policy, like the five policies, expressed the insurance to continue till the 9th of May, 1911, and was in the sum of $3,300, the total insured by the five policies, but, unlike the five policies, it contained no clause permitting concurrent insurance. The words descriptive of the subject-matter insured were identical with those used in the five policies. All the policies contained the statutory conditions. On the 5th of August, 1910, the Bank took from the British Columbia Hop Company a warehouse receipt for the cotton warp. The warp was destroyed by fire on the 30th of October, 1910, and the promissory note for $2,000 was paid to the Bank by the plaintiff company on the 3rd of November, 1910. It was proved that the accountant of the Bank at Vancouver had stated that the Bank were only insuring their own interest; but the manager of the Bank at Chilliwack lodged a claim with the defendant, wherein the warp was valued at $4,400. The British Columbia Hop Company held floating policies in American companies covering all goods, "as far as relates to any excess of value beyond the amount of liability of any specific insurance":—Held, that no interest other than that of the Bank was insured; that the condition precedent in the 10th statutory condition, requiring the interest of the assured to be stated where the assured is not the owner of the property insured, had not been complied with, and that, therefore, the defendant was not liable for the loss. Held, further, that the Bank's interest alone was insured, and that the change of ownership avoided the policy under statutory condition 4. *The British Columbia Hop Company, Limited, E. Clemens-Horst Co. and the Bank of Montreal* v. *The Fidelity-Phenix Fire Insurance Company*, 20 B.C.R. 165.

4. Double Insurance.

Floating policies.]—Certain parcels of cotton warp were consigned in April, 1910, by Cookson & Co., of Manchester, England, to one Matthews, in Vancouver, the Bank

of Montreal acting as receiving agent for Cookson & Co. A contract of insurance was entered into between the Bank of Montreal, through their Vancouver office, and the defendant, on the 9th of May, 1910, covering the cotton warp, and the contract was evidenced by five policies, expiring on the 9th of May, 1911. Each of the policies purported to insure the Bank of Montreal against loss by fire on certain bales of cotton warp," their own or held by them in trust, or on commission, or sold but not delivered or on which they may have an interest or a liability," and by these five policies, concurrent insurance was permitted. Matthews failed to take delivery and pay for the warp, and on the 26th of July, 1910, the Bank of Montreal sold the warp to the British Columbia Hop Company. The sale was negotiated through the Chilliwack office of the Bank and was made by it on behalf of Cookson & Co. The consideration for the warp was $2,704.91, $704.91 being payable in cash, and $2,000 by a promissory note given to the Bank. Subsequently to the sale, the location of the warp was changed, and in consequence the agents of the defendant were applied to to sanction and provide for the change of location. The defendant assented to the change, and on the 3rd of August, 1910, the five policies were cancelled and a single policy issued in their stead. The single policy, like the five policies, expressed the insurance to continue till the 9th of May, 1911, and was in the sum of $3,300, the total insured by the five policies, but, unlike the five policies, it contained no clause permitting concurrent insurance. The words descriptive of the subject-matter insured were identical with those used in the five policies. All the policies contained the statutory conditions. On the 5th of August, 1910, the Bank took from the British Columbia Hop Company a warehouse receipt for the cotton warp. The warp was destroyed by fire on the 30th of October, 1910, and the promissory note for $2,000 was paid to the Bank by the plaintiff company on the 3rd of November, 1910. It was proved that the accountant of the Bank at Vancouver had stated that the Bank were only insuring their own interest; but the manager of the Bank at Chilliwack lodged a claim with the defendant, wherein the warp was valued at $4,400. The British Columbia Hop Company held floating policies in American companies covering all goods, "as far as relates to any excess of value beyond the amount of liability of any specific insurance":—Held, that there was a double insurance. *British Columbia Hop Co.* v. *Fidelity-Phenix Fire Insurance Co.*, 20 B.C.R. 165.

III. Life Insurance.

A. Incontestability.

1. Effect of incontestable clause.]—The object of the clause is to provide an automatic scission of all defences arising after the coming into force of the policy except such as are reserved in the clause itself. *Elson* v. *North American Life Assurance Co.*, 9 B.C.R. 474; 33 S.C.R. 383.

2. Breach of condition.] — Where a policy of life insurance provided that, after it should have been in force for three years only certain specific conditions therein should be binding on the holder, and in all other respects the liability of the company thereunder should not be disputed, and the insurer before the expiration of the three years violated a condition, not being one so specified, but which apart from this clause would have avoided the policy, it was held that the clause covered breaches of conditions committed during the first three years, and was not confined to those committed subsequently thereto. *Elson* v. *North American Life Assurance Co.*, 9 B.C.R. 474; 33 S.C.R. 383.

B. Cause of Death.

Direct cause.]—Deceased was insured in the defendant Company "against loss of life while sane, resulting directly and independently of all other causes from bodily injuries effected from external, violent and accidental means." There was evidence that he had been drinking heavily just previous to his death, which occurred while he was on a fishing trip. His companion had left him cooling his bare feet in a stream, but on returning to him in less than half an hour afterwards found him lying in about 27 inches of water, his boots and socks on his feet, and his fishing rod on the bank, with the handle in the water. There was an ante-mortem bruise on the back of the head. It was suggested that he was subject to fainting spells, or dizziness, and evidence was given that he had had one of such spells a few weeks before the accident. There was also evidence that he was not in

a firm condition, physically, and had to take a rest several times during his walk to the fishing place on the day of the accident:—Held, that the direct cause of death was by drowning, and that the Company was liable. *Young* v. *Maryland Casualty Company*, 14 B.C.R. 146.

C. Forfeiture.

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

D. Reinstatement.

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

IV. Marine Insurance.

Constructive total loss.] — In determining whether a damaged ship can be treated as a constructive total loss, the test is, would a prudent uninsured owner repair her, having regard to all the surrounding circumstances. Where an insurance company, having insured a boat, is entitled to take possession for repairing, and has substantially made the repairs within a reasonable time, the insured is not justified in refusing to accept the boat, without having objected to the sufficiency of the repairs and pointed out the deficiencies, so that the same may be made good.* *Cunningham* v. *St. Paul Fire and Marine Insurance Company*, 19 B.C.R. 33.

INTEREST.

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A. As damages, 480.
B. On judgments and verdicts, 480.
II. Computation: Amount: Rate, 481.

I. When Recoverable.

A. As Damages.

1. Promissory note — Laches.] — It is discretionary with the tribunal on the trial of an action upon a promissory note not providing for interest, to allow interest after maturity by way of damages, or not:—Held, that a plaintiff by laches, in not pressing for or suing to recover on the note for a period of over three years, had disentitled himself to interest. *Smith* v. *Hansen*, 2 B.C.R. 153.

2. Delay in delivery.]—Interest at the legal rate may be allowed as damages for delay in delivery of goods. *Hamilton* v. *Hudson's Bay Company*, 1 B.C.R., Pt. II., 1.

B. On Judgments and Verdicts.

1. On judgment—Rate of.]—The interest carried by a judgment in this Province is governed by 1 & 2 Vict., c. 110, sec. 17 (Imp.), and is therefore 4 per centum per annum. *Foley* v. *Webster*, 3 B.C.R. 30.

2. On judgment entered by Full Court, in accordance with verdict, reversing trial judge—When computed from.]—The plaintiff obtained a verdict at the trial, but the judge dismissed the action. The Full Court allowed the plaintiff's appeal, and ordered that judgment be entered in plaintiff's favour for the amount of the verdict:—Held, that plaintiff was entitled to interest from the date of the verdict. *Gor-*

don v. *The Corporation of the City of Victoria*, 7 B.C.R. 339.

3. Costs.] — Where a judgment orders "that the defendants do pay forthwith after taxation thereof to the plaintiffs the costs of the action," interest on the costs runs from the date of the judgment. *Star Mining and Milling Co.* v. *Byron N. White Co.*, 15 B.C.R. 11, 161.

II. COMPUTATION: AMOUNT: RATE.

1. Interest Act.]—Where by virtue of the Bills of Exchange Act and the Interest Act, interest is claimed by way of liquidated damages on a promissory note, dated prior to the passing of the amendment to the Interest Act in 1900, when the rate was reduced from 6 per cent. to 5 per cent.:—Held, that the word "liabilities" in the proviso to the amending Act referred to the original debt, and the interest should, therefore, be computed at the rate in force prior to the passing of the amending Act. *McKinnon* v. *Lewthwaite*, 20 B.C.R. 55.

2. Mortgage.]—Interest on a mortgage, after maturity, in the absence of any proviso for payment thereof at a specified rate, is recoverable at the statutory rate of six per cent. *Cunningham* v. *Hamilton*, 5 B.C.R. 539.

3. Judgment.]—The interest borne by a judgment in this Province is governed by the 1 & 2 Vict., c. 110, sec. 17 (Imp.), and is, therefore, to be calculated at the rate of four per centum per annum. *Foley* v. *Webster*, 3 B.C.R. 30.

4. Until paid.]—Where a promissory note is made payable with interest at 7 per cent. until paid, the holder is entitled to recover interest at that rate to date of payment. *Merchants Bank of Canada* v. *McLeod*, 15 B.C.R. 290.

See ARBITRATION.

See BANKS AND BANKING.

INTERNATIONAL LAW.

See CONFLICT OF LAWS.

INTERPRETATION ACT.

1. Majority.]—Sec. 10, sub-sec. 36, of the Interpretation Act (R.S.B.C. 1897, c. 1), which provides that when any act or thing is required to be done by more than two persons, a majority of them may do it, does not apply to the construction of a document inter partes, but to something to be done pursuant to statute. *McLeod* v. *Hope*, 14 B.C.R. 56.

2. Time expiring on a holiday.]—The provision in the Interpretation Act with regard to the expiration of time for doing any act under any statute is not confined to matters of procedure. *In re City of Nelson*, 6 B.C.R. 163.

INTOXICATING LIQUORS.

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I. PROHIBITION AND REGULATION.

A. Statutes.

1. Liquor License Law.]—The Liquor License Regulation Act, B.C. 1891, sec. 4, providing for the closing of saloons on Sunday, is intra vires of the Provincial Legislature. *Sauer* v. *Walker*, 2 B.C.R. 93.

2. Liquor Act, 1910.] — The sale of liquors to travellers, guests at hotels and restaurants, and for medical purposes, is governed by sec. 74 of the Liquor Act, 1910, within municipalities as well as without, notwithstanding that bye-laws restricting the rights given by the statute have been passed. *In re Levy*, 16 B.C.R. 354.

B. Bye-laws.

1. Early closing powers.]—A municipality has no power under sec. 50, sub-secs. 109 and 110, of the Municipal Clauses Act, to pass a bye-law closing any kind of licensed premises, except saloons. A municipality is not empowered, by sec. 7 of the Liquor Traffic Regulation Act, to pass any

closing bye-law, the intention of the section being to prohibit the sale during, inter alia, such hours as may be prescribed by the municipality under the authority of some other statute. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a bye-law to put it in force is unnecessary and bad. *Hayes* v. *Thompson*, 9 B.C.R. 249.

2. Renewal—Early closing.]—A liquor license bye-law provided that upon information of an infraction of its provisions by a holder of a license, he might be summoned to attend the next meeting of the Licensing Commissioners to make application for a renewal of his license. It was contended that the holder could not be compelled to make application for a renewal until the expiry of his license:—Held, that the Council had authority to pass such an enactment under sub-sec. (d.) of sec. 205, Municipal Clauses Act, c. 32, 1906:—Held, also that a provision to enforce, inter alia, the closing of hotel bar-rooms during such hours of the night as may be thought expedient, was bad as exceeding the powers conferred by sec. 50, sub-sec. 122 of said c. 32. *In re Moloney and the Corporation of the City of Victoria*, 13 B.C.R. 194.

3. Saloon licenses.]—A "saloon" license under the Municipality Act of 1881, the fee for which is paid in advance under the provisions of the Act, is a statutory contract with the municipality, and during the statutory term for which it is given, cannot be so altered or varied by a bye-law, passed by the corporation or municipality granting the license, as to destroy the object for which it is granted, or materially reduce its value. Like other contracts it carries the elements of mutuality. The Municipality Act provides fixed periods of six months, 30th June and 31st December, for the expiration and renewal of saloon licenses. New restricting regulations must come in at those periods, form part of the implied contract, and be in force concurrently with the license when granted. This construction in no way interferes with the power of suspension, forfeiture, fines or punishment otherwise existing for misconduct, under laws specially or generally applicable. *In re Clay and the Corporation of the City of Victoria*, 1 B.C.R., Pt. II., 300.

4. Prohibiting sales.] — By a bye-law passed in November, 1900, the Licensing Board, pursuant to secs. 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The Board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till 6 of the clock on Monday morning thereafter," and provided that "such portions of any and all bye-laws heretofore passed regulating the sale of intoxicating liquors in the City of Vancouver as conflict with the provisions of this bye-law are hereby repealed." Sub-sec. 19 of sec. 125 of the Vancouver Incorporation Act, 1900, empowers the City Council to pass bye-laws for "the closing of saloons, hotels and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-sec., the council, in May, 1902, passed a bye-law preventing the sale of liquor between the hours of 11 o'clock on Saturday night and 6 o'clock on Monday morning:—Held, that the council, in passing this last mentioned bye-law, had gone beyond the powers meant to be conferred by sub-sec. 19 of sec. 125. *In re Roberts*, 14 B.C.R. 76.

II. Licenses.

A. In general.

1. Population.]—Sec. 11a of the Liquor License Act, 1900, as enacted by c. 26 of the Statute of 1906, contemplates an actual population of 1,500 before a fourth license may be granted. *Harel* v. *Handley*, 13 B.C.R. 278.

2. Court house.]—A school-house which has been used on several occasions as a place of meeting by a licensing court is not a court-house within the meaning of the Licensing Act. *In re Close*, 2 B.C.R. 131.

B. Necessity for.

Inland Revenue Act.] — A brewer, although holding a license under the Inland Revenue Act to carry on business as such, may not sell beer within the Province unless he has first obtained a license under the Provincial Liquor License Act. *Rex* v. *Neiderstadt*, 11 B.C.R. 347.

C. Avoidance of.

1. Lack of jurisdiction.]—Non-compliance with the provisions of the Municipal

Act by a Board of License Commissioners, in granting an application for a liquor license, renders the license null and void. *Freeman* v. *License Commissioners of New Westminster*, 20 B.C.R. 438.

2. Omission of statutory requirements.] A retail liquor license which is obtained clandestinely and without observing the preliminary statutory requirements will be cancelled. *In re Close*, 2 B.C.R. 131.

D. Petition.

1. Registered townsite.] — The expression "registered townsite" in sec. 355 of the Municipal Act includes a de facto townsite having a duly registered sub-division of town lots. *R.* v. *Point Grey License Commissioners*, 18 B.C.R. 648.

2. Resident.]—Where a man enters into the employment of another person for an indefinite period he thereby becomes, within the meaning of the Liquor License Act, actually resident. *Labelle* v. *Bell*, 13 B.C.R., 328.

3. Householder.] — Under the Liquor License Act, 1900, the persons to sign a petition in respect of an hotel license are those who have occupied the same premises for a period of three months preceding the date of signing the petition. *Labelle* v. *Bell*, 13 B.C.R., 328.

E. Discretion as to granting.

1. Exercise of discretion.]—A licensing board may refuse a license notwithstanding the compliance with statutory requirements if under all the circumstances the board is satisfied it ought not to be granted. *Re Close & Berry*, 2 B.C.R. 131.

2. Discrimination.] — The Vancouver licensing board refused to consider an application for a wholesale liquor license because the applicant was a Japanese:—Held, that the board should have considered the application regardless of the fact that he was a Japanese, but as the personnel of the board had been changed, no order would be made. *In re Kanamura*, 10 B.C.R. 354.

F. Appeals.

1. Evidence on.]—In an appeal from the decision of Commissioners under the Liquor License Act, 1900, proof of such decision is not necessary. *Harel* v. *Handley*, 13 B.C.R. 278.

2. Signature of.]—It is not necessary that the notice of appeal be signed by the party or parties affected by the decision. *Ibid.*

3. Authority of.]—The appellant is not called upon to prove that the Commissioners have exhausted their authority by having granted the full number of licenses. *Ibid.*

III. Unlawful Sales.

A. In general

1. Selling by retail—Distilled spirit.] —Sec. 208 of the Municipal Act, 1892, providing: "No person shall sell liquors by retail, and no person shall use, practice, carry on, or exercise in the municipality any trade or business described or named in sec. 204 and the sub-secs. thereof, without having taken out and had granted to him a license in that behalf, under a penalty not exceeding $250, together with the amount which he shall have paid for such license, which penalty shall, for the purposes of recovery, be held to be one penalty," made it an offence to sell liquor by retail, without a license in that behalf, independently of whether a bye-law providing for the issue of such licenses and fixing the amount of fees thereon, had been passed or not. It appearing that the liquor sold was intoxicating, but no evidence being given as to its having been produced by distillation, the evidence was insufficient to sustain a charge of selling spirituous liquor. *Re Kwong Wo*, 2 B.C.R. 336.

2. One act of vending.]—Sec. 22 of the Liquor License Act authorizes the superintendent of police to issue hotel licenses empowering the licensee to vend liquor by retail in quantities not exceeding one imperial quart in any one act of vending to any one person. The accused in this case sold a quantity of liquor to the one person, who was said to be purchasing for others. The bottles were placed upon the counter, and the price of each quart was "rung up" on the cash register separately:—Held, that there had been an infringement of the statute, and that the conviction had by the magistrate should be sustained. *Rex* v. *Campbell*, 18 B.C.R. 32.

3. Sale of liquor.] — Y., with a companion, taking a meal in an unlicensed restaurant, of which the defendant was proprietor, asked the waiter to buy him three bottles of beer, for which he gave him the money. The waiter purchased the beer at a saloon next door, and on returning with

it, Y. and his companion drank part of it and gave what was left to the defendant:—Held, that there was not any disposal of liquor by the defendant to Y. within the meaning of the Act. *Rex* v. *Bogeotas*, 18 B.C.R. 123.

B. Prohibited persons.

Quarter-breed.]—A quarter-breed is as much entitled to purchase liquor as a white man, provided he does not come within the purview of the amendment to the Indian Act enacted by sec. 6, c. 32, 1894. In this case, there being nothing to show that the defendant knew or had cause to suspect that the person to whom he sold the liquor was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted reasonably in the circumstances. *Rex* v. *Hughes*, 12 B.C.R. 290.

C. Exempted persons.

1. Meal — Whether mere excuse to supply liquor.] — By the Liquor License Regulation Act, 54 Vict. B.C., c. 21, sec. 4, the sale of liquor in licensed premises is prohibited between the hours of 11 o'clock on Saturday night and 1 o'clock on Monday, and by sub-sec. 2 of s. 4. "the provisions of this section shall not apply to the furnishing of liquor to bona fide travellers nor to the case of hotel or restaurant keepers supplying liquor to their guests with meals." The defendant was the holder of a saloon and restaurant license. A customer called for liquor during the prohibited hours, which was refused unless he ordered a "meal," whereupon he ordered crackers and cheese, for which no extra charge to that for the liquor was made:—Held, sustaining a conviction of the defendant, that the word "meal" applied to food eaten to satisfy the requirements of hunger, and, on the facts, that the supply of food by defendant was a mere excuse to enable defendant to supply liquor. *Regina* v. *Sauer*, 3 B.C.R. 308.

2. Constable—A bona fide traveller.]—A constable, who, by order visits saloons on Sundays to see whether or not the law with respect to the sale of liquor is being obeyed, is a bona fide traveller within the meaning of the Liquor License Regulation Act, 1891. *Regina* v. *Harris*, *Regina* v. *Duval*, 2 B.C.R. 177.

D. Liability for Acts of Servant.

Respondent superior.]—A hotel keeper, having delegated authority to his porter or bartender to sell intoxicating liquors on the hotel premises, is responsible for his servant's infraction of the law regulating such sale. *Rex* v. *Gates*, 14 B.C.R. 280.

See MUNICIPAL CORPORATIONS.

ISLAND RAILWAY ACT.

1. Alienation.]—The reservation of Crown lands for school purposes is an "alienation" within the meaning of sec. 6 of The Island Railway Act (B.C. statutes, 1884, c. 14.) *The Attorney-General for the Province of British Columbia* v. *The Esquimalt and Nanaimo Railway Company, James Islay Mutter, and Kenneth Forrest Duncan*, 17 B.C.R. 427.

2. Alienation.]—By the 47 Vict., c. 14, sec. 22, certain lands granted to the Esquimalt & Nanaimo Railway Company were not to be subjected to taxation, "unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold or alienated." In January, 1889, the railway company contracted to give the lumber company the right to enter and select 50,000 acres of the lands, on the terms, inter alia, that the lumber company should pay $5 per acre in certain instalments, and the railway company agreed to convey as soon as the purchase price was fully paid. The lumber company had entered and surveyed, but had never occupied the lands, nor was the purchase price fully paid. It was held that the lands had not been leased, sold, nor alienated. *Victoria Lumber Co.* v. *Reginam*, 3 B.C.R. 16.

3. Alienated.] — On the same state of facts as those present in the case reported in 3 B.C.R. 16, it was held that the transaction was an alienation within the meaning of the Act. *R.* v. *Victoria Lumber Co.*, 5 B.C.R. 288.

JUDGES AND JUDICIAL OFFICERS.

Interest in the litigation.]—The fact that the fines imposed by a police magistrate appointed by a municipal corporation are paid into the consolidated municipal fund, and that he holds another office under

the corporation, the salary of which is paid out of such fund, does not incapacitate him from sitting as a magistrate by reason of having an interest in the prosecution. *R.* v. *Hart*, 2 B.C.R. 264.

See COURTS.

JUDGMENT.

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I. RENDITION: ENTRY: AMENDMENT.

A. In general.

1. By Court of own motion.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:—Held, by the Full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 10 B.C.R. 449.

2. Delivery of.]—A judgment signed by the judge, and enclosed in a letter directed to the proper district registrar, and left in the law Courts in the customary place for deposit in the mail, is pronounced on that day, though it did not reach the registrar in due course of the mail. *Attorney-General* v. *Dunlop*, 7 B.C.R. 312; 1 M.M.C. 408.

B. By confession.

Confession of judgment — Fraudulent preferences — Pressure.] — The Tramway Company being insolvent, the plaintiffs, on 29th December, obtained a default judgment against it, but did not issue execution thereon. On 13th January the Tramway Company obtained a Chamber summons, signed by a judge, to set aside the plaintiffs' judgment as irregular and in breach of an agreement not to proceed. The summons contained the words "in the meantime let all proceedings be stayed." On 17th January the Bank of British Columbia commenced an action against the Tramway Company by specially endorsed writ, and on the morning of the 24th January, before the hour for the regular sitting of the judge in Chambers, the Tramway Company by their counsel, attended without summons in the judge's private room and consented to an order for judgment thereon, which was immediately registered and execution issued. Afterwards, on the same morning, in Chambers, the summons of the Tramway Company to set aside the plaintiffs' judgment was argued; judgment was reserved, and on the 27th was delivered, dismissing the application. In an action to set aside or postpone the judgment and execution of the bank, as being a confession of judgment by the Tramway Company obtained by collusion, and therefore void within the meaning of the Fraudulent Preference Act:—Held, per Crease, J., at the trial: (1) That what took place was not a confession of judgment within the Act. (2) That there was pressure on the part of the Bank on the Tramway Company to do what they did, rebutting the inference that it was done with intent to prefer. Upon appeal to the Full Court:—Held, per Davie, C.J., and McCreight, J., that what took place was a confession of judgment. Per Davie, C.J., and Drake, J., that there

was pressure rebutting the intent to prefer. Per McCreight, J., that the plaintiffs' cause of action was not governed by the Act, but lay to the general equitable jurisdiction of the Court to relieve against a transaction whereby the plaintiffs, through no fault of their own, had, through the operation of the dilatory process of the Court by the Tramway Company, and its combination with the bank to expedite the latter, been deprived of the fruits of their prior judgment, and that there should be a new trial to obtain such findings of fact as would determine whether the bank was entitled, as against the plaintiffs, to take advantage of its priority of execution. Per Drake, J.: (1) A term in a summons signed by a judge, "In the meantime let all proceedings be stayed," does not operate as a stay, but only as an intimation that upon its return a stay will be asked for. (2) The registration of a judgment against lands is not a breach of an order staying proceedings upon it. (3) Judgment for a bona fide debt consented to with the object of giving one creditor a priority over another, is not a collusive judgment or within the prohibition of the Act. *The Edison General Electric Company* v. *The Vancouver & New Westminster Tramway Company and The Bank of British Columbia*, 4 B.C.R. 460; 1897, A.C. 193.

C. Drawing up.

Ambiguity.]—It is incumbent on a successful party to take care that any order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous record or other competent document, should be given to the party aggrieved. *Belcher* v. *McDonald*, 9 B.C.R. 377.

D. Amendment.

Excessive amount.]—Where judgment in default of defence is entered for an excessive amount, the Court may have it amended by the insertion of the proper amount. *McKinnon* v. *Lewthwaite*, 20 B.C.R. 55.

E. Modification.

1. Alteration of.]—A judge has power to alter his decree in matters of detail before it has been drawn up and settled, but has no power to virtually reverse it. *The Zambesi* v. *The Dutard*, 2 B.C.R. 91.

2. Re-argument after, and varying before order drawn up.]—Upon an appeal from an order discharging a defendant from ca. sa., the Court held that the defendant was entitled to be discharged on a point not taken by counsel, and delivered a verbal judgment dismissing the appeal without costs. The next day, before the order was drawn up, counsel for plaintiff brought authorities to the attention of the Court contrary to the view upon which the appeal was dismissed, and asked leave to re-argue: —Held, that it is the discretion of the Court to vacate an order before it is drawn up. *Kimpton* v. *McKay*, 4 B.C.R. 196.

II. Effect and Conclusiveness.

A. In general.

Precedent—Pronouncement effects a.] —An order once pronounced will be given effect to and followed by every judge and Court of inferior or co-ordinate jurisdiction, and no order will be made inconsistent therewith. *Gabriel* v. *Mesher*, 3 B.C.R. 159.

B. Setting aside.

1. Fraud.]—Where a judgment has been obtained by fraud, the Court has jurisdiction in a subsequent action brought for that purpose, to set the judgment aside. *Richards* v. *Williams*, 11 B.C.R. 122.

2. Election.]—The plaintiff brought an action against the defendant company and sought also to recover in debt against the defendant bank under sec. 88 of the Bank Act (Can. Stat., 1913, c. 9); the defendant company not having entered an appearance, judgment was signed against the defendant company and the plaintiff proceeded with his action against the bank; the bank contended that the plaintiff had elected by signing judgment against the company and was thereby debarred from proceeding against it; the plaintiff thereupon obtained an order vacating the judgment against the company and sought to recover solely from the bank:—Held, that assuming that the judgment against the company was improperly set aside, yet the fact of so signing judgment did not operate as a conclusive election and did not therefore bar the action

against the bank. *Edborg and others* v. *The Royal Bank of Canada,* 19 B.C.R. 514.

3. Vacation—Setting aside of judgment delivered in.]—Where a trial was called before vacation, but not proceeded with, and was adjourned to a day in vacation and then proceeded with in the defendant's absence, the judgment may be set aside, as the trial was not "pending" within the meaning of Rule 736 (d) and so could not be heard in vacation. *Green* v. *Stussi,* 6 B.C.R. 193.

C. Who may attack.

Purchaser at sheriff's sale.]—A purchaser at sheriff's sale under a writ of fi. fa., has no status to question a subsequent judgment of the Court setting aside the judgment, except by intervening. *Spiers* v. *The Queen and Corbould,* 4 B.C.R. 388.

III. THE LIEN.

1. Registration of.]—A registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. *Yorkshire Guarantee and Securities Corporation* v. *Edmonds,* 7 B.C.R. 348.

2. Sale of land under Judgments Act—Equitable mortgagee—Notice.]—In 1891, O'Brien pre-empted provincial Crown land, and in 1898, Manley obtained a judgment against him which provided that he might cut timber from off O'Brien's pre-emption and apply the proceeds in satisfaction of the judgment, and which restrained O'Brien for six months from cutting or selling timber. Manley registered his judgment in 1899. In January, 1900, O'Brien agreed to sell to Mackintosh the timber for $1,500 payable at various times, part of the consideration being the fees payable to the Crown for Crown grant and on these being advanced by Mackintosh, the Crown grant was delivered to him as security for such advance. Plaintiff moved for liberty to sell the land under his judgment, and Drake, J., made an order for sale, and holding that Mackintosh, being an equitable mortgagee, was excluded by the statute:—Held, that the sale should be subject to Mackintosh's interest. *Manley* v. *O'Brien: In re Mackintosh,* 8 B.C.R. 280.

3. Unregistered interest in land.]—The Judgments Act (B.C.S. 1908, c. 26, sec. 3), gives the judgment creditor only a right to register his judgment against the interest in lands beneficially owned by the judgment debtor. *Entwisle* v. *Lenz & Leiser,* 14 B.C.R. 51.

4. Rights of, with respect to legatee.]—In 1874, one E. H. became entitled to a general legacy of $10,000, bequeathed to him by his brother J., who appointed as his executor another brother T., with whom he was in partnership. On J.'s death, T. entered into possession of the whole partnership property, and paid half the legacy to E. in 1875. E. sued T. and recovered judgment by default for the balance on January 24th, 1889, which judgment was registered February 28th, 1889. In the meantime T. had charged the whole property for large sums to various creditors, who obtained and registered judgments before January 24th, 1889, before which date also judgment was obtained against T., and registered by a simple contract creditor C. Receivers having been put in possession of T.'s estate, sold the same under order of Court, and after certain mortgage debts and expenses were paid off with the sanction of the Court, the balance left was insufficient to pay off the charges registered before E.'s judgment. In an action by E. for an inquiry as to what assets of J. came into hands of T., or the receivers, to have his judgment declared entitled to priority over the other registered charges and to restrain the receivers:—Held, that the action lay as against the simple contract creditor C., but not, semble, as against the secured creditors, by reason of sub-secs. 32-36 of the Land Registry Act. *Ezekiel Harper* v. *Thaddeus Harper, Thomas Dixon Galpin, Henry Slye Mason, The Canadian Pacific Land and Mortgage Company, Limited, The British Columbia Land and Investment Agency, Limited, John Cameron and Henry Slye Mason and James Charles Prevost, as Receivers of the Estate of the said Thaddeus Harper,* 2 B.C.R. 15; 21 S.C.R. 273.

See APPEAL.

See CONFLICT OF LAWS.

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JURY.

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I. Right to Trial by Jury.

1. Waiver of.]—An action by an engineer for making an examination and report upon a mineral claim, in which the defence denied the contract and set up that the report made was unsatisfactory and of no value, is within r. 333, and either party is entitled to trial by a jury. The action had been brought down to trial without a jury, and been postponed, and the evidence of a witness subsequently taken, de bene esse:—Held, that the facts did not amount to a waiver of the right to a jury, or constitute an agreement to try without a jury. *Ferguson* v. *Thain*, 3 B.C.R. 447.

2. Adverse action.]—In an action to enforce an adverse claim, and for a declaration that the plaintiff was entitled to the right of possession to that portion of the "Paul Boy" mineral claim in conflict with the "Lookout" mineral claim and that the "Lookout" be declared invalid, the defendants asked for a jury:—Held, that as the relief prayed was such as could not have been obtained in a common law action prior to the Judicature Acts, the issues were not proper for trial by a jury. *Corbin* v. *Lookout Mining and Milling Company (Foreign)*, 5 B.C.R. 281.

3. Scientific investigation.] — By Rule 331, a judge may direct a trial without a jury of any issue, which previous to the Judicature Act could, without any consent of parties, have been tried without a jury, and by r. 332 he may direct the trial without a jury of any issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury. In a mining suit respecting extra lateral rights, the plaintiff company sued for an injunction restraining the defendant company from sinking an incline shaft in plaintiff's claim, and for damages. The defence was that the incline shaft was commenced within the lines of defendant's location upon a vein, the apex of which lay inside such surface lines extended downward vertically, and that that vein had been followed upon its dip. The plaintiff company applied for a trial with a jury:—Held, that before the Judicature Act the plaintiff company would have had the right to have the case tried by a jury, and that it has it now under r. 331, but that there was an issue in the action requiring scientific investigation which could not conveniently be tried by a jury. *Iron Mask* v. *Centre Star*, 6 B.C.R. 474.

4. Local investigation — Expert witnesses.]—Order refusing a jury in which the principal issue was the amount of damage caused by fire to standing timber, which would have to be found by a large number of expert witnesses, upheld as coming within the authority conferred by Order XXXVI., r. 5. *Clarkson* v. *Nelson and Fort Sheppard Railway Company*, 17 B.C.R. 24.

5. Prolonged examination of documents.] — The defendants applied for an order for a trial with a jury on the ground that the pleadings showed a common law action. The plaintiffs relied upon their affidavit for discovery in answer, the schedule of documents setting forth 900 documents. The application was dismissed. On appeal, the schedule of documents was not included in the record:—Held, that as it might appear from the schedule that the trial would involve a prolonged examination of documents, the Court cannot review the order in its absence. *Wilson* v. *Henderson (No. 2)*, 19 B.C.R. 46.

6. Injunction.] — An action for an injunction is proper for a trial by a jury. *Canadian Pacific Railway Co.* v. *Parke*, 5 B.C.R. 507.

7. Rectification, etc., of deeds.]—Rule 330, providing, "causes or matters referred to in r. 81 of these rules shall be tried by a judge without a jury" is imperative, and, as one of the matters referred to in r. 81 is "the rectification, setting aside or cancellation of deeds, or other written instruments," any action claiming such relief must be tried without a jury, though the issue involved might otherwise be proper for trial by a jury. *Stewart* v. *Warner*, 4 B.C.R. 298.

8. Will—Action to set aside—Fraud—Undue influence.]—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 r. 81, and as such, according to r. 330, must be tried without a jury. *Hopper* v. *Dunsmuir (No. 1)*, 10 B.C.R. 17.

II. APPLICATION FOR.

A. In general.

1. Discretion.] — While on the facts here, the judge at Chambers was right in refusing a jury, yet, in any event, having exercised his discretion, the Court of Appeal will decline to interfere. *McArthur* v. *Rogers*, 17 B.C.R. 48.

2. Extending time for.]—In an action for libel, notice of trial without a jury was served on defendants on the 11th of May, and on the 6th of June defendants gave notice under Order XXXVI., r. 2, of an application for an order extending the time for giving notice of trial before a judge and a common jury. The cause of the delay in giving this latter notice was due to an oversight of the solicitor's clerk:—Held, that the time should have been extended in the circumstances. *Clarke* v. *Ford-McConnell, Limited, and W. McConnell*, 16 B.C.R. 344.

3. Extending time for.]—A judge has power, under r. 430, to extend the time for filing a notice of trial by jury. Here, the action being one for negligence, and peculiarly fitted for a jury, the discretion should be exercised. *Williams* v. *British Columbia Electric Railway Company, Limited*, 17 B.C.R. 338.

B. Time for Application.

1. Application for, before joinder of issue.]—An application to try a case before a jury made before joinder of issue or the time for the filing of same is premature. *Bank of Montreal* v. *Major and Eldridge*, 5 B.C.R. 155.

2. Summons for, before order amending defence delivered—Whether premature.]—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.

C. On Disagreement.

Order not exhausted.]—Where an issue has been ordered to be found by a jury, and the jury have disagreed, and been discharged without giving a verdict, the order for trial by jury is not exhausted, and the judge, on motion for judgment, cannot direct judgment to be entered for either party. *Loo Chu Fan* v. *Loo Chock Fan*, 1 B.C.R., Pt. II., 172.

III. IMPANELLING: SELECTION: COMPETENCY.

A. In General.

1. Separate judicial district.]—A jury drawn from a limited part of the shrievalty is a good panel, when such part is made a separate judicial district for the purpose of criminal trials. *Sproule* v. *The Queen*, 1 B.C.R., Pt. II., 219; 12 S.C.R. 140.

2. Special direction to sheriff—When necessary.]—Where an action is to be tried at the Victoria or Vancouver Civil Sittings, held pursuant to sec. 5 of the Supreme Court Act Amendment Act, 1901, a special direction (under sec. 69 of the Jurors' Act) to the sheriff to summon a jury is necessary. *Tanaka* v. *Russell*, 9 B.C.R. 336.

3. Summoning of — Procedure on — Whether 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 Railway Co., Ltd.*, 7 B.C.R. 394.

B. Number.

1. Civil cases in Cassiar and Kootenay.]—The provisions of C.S.B.C., c. 31, sec. 57, providing for trial of civil cases before a jury of eight, are in force in the electoral districts of Cassiar and Kootenay. *Hogg* v. *Farrell*, 4 B.CR. 534.

2. Panel.]—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. *Ross* v. *British Columbia Electric Railway Co., Ltd.*, 7 B.C.R. 394.

C. Challenge.

Juror serving twice.]—The fact that a member of a special jury was one of the

jurors at a previous trial of the same action is a good ground of challenge. *Harris* v. *Dunsmuir*, 9 B.C.R. 303.

IV. SPECIAL JURY.

1. When granted.]—The granting of a special jury under C.S.B.C., c. 31, sec. 44, as amended by 58 Vict. (B.C.), c. 12, sec. 11, and C.S.B.C., c. 64, sec. 71, as amended by 52 Vict. (B.C.), c. 8, sec. 5, and Order XXXVI., is not as of right, but is a discretion to be invoked upon special circumstances. *Cranstoun* v. *Bird*, 5 B.C.R. 210.

2. When granted.]—A certificate for a special jury will not be granted unless it is shown that a common jury cannot adequately pass upon the facts in issue. *Cross* v. *Esquimalt and Nanaimo Railway Company*, 14 B.C.R. 329.

3. Order exhausted.]—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.

4. Order exhausted.]—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 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. *Alaska Packers Association* v. *Spencer*, 11 B.C.R. 280.

5. Special jury — Striking of, when more than two parties.]—Defendants, in the original action, counterclaimed against the plaintiff and one R. On defendants' 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 plaintiff then applied, under r. 157, to strike out the counterclaim because of the impossibility of properly striking a special jury where there are more than two parties:—Held, dismissing the summons, that 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., Limited Liability*, 9 B.C.R. 49.

6. Fees when not serving.]—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 entitled to mileage. *Taylor* v. *Drake*, 9 B.C.R. 54.

V. GENERAL VERDICT AND QUESTIONS.

1. Negilgence.]—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. *Alaska Packers Association* v. *Spencer*, 10 B.C.R. 473; 35 S.C.R. 362.

2. Duty of judge.]—A judge is bound to submit questions to the jury if requested to do so. *Alaska Packers Association* v. *Spencer*, 10 B.C.R. 473.

3. Right to general verdict.]—If either party asks that the jury return a general verdict, then the jury must do so unless they are unable to agree. *Macleod* v. *McLaughlin*, 13 B.C.R. 16.

4. Questions.] — It is unnecessary for the trial judge to invite the jurors to decline to answer questions he is about to submit to them. Jurors are a part of the Court, and it should be assumed that they desire to do their duty and assist the Court in rightly deciding the case. *McElmon* v. *British Columbia Electric Railway Company*, 18 B.C.R. 522.

5. Questions.]—Observations as to the duty of trial judges, particularly in negligence actions, to submit questions to be considered by the jury, and of counsel not to interfere in the exercise of that duty. *Armishaw* v. *British Columbia Electric Railway Company*, 18 B.C.R. 152.

6. General verdict.]—In an action for damages under the Families Compensation Act the jury, in answering questions, found that the defendant's negligence consisted of "insufficient precautions," but they did not answer the question, "Was the defendant's system defective?" In answer to questions put to him by the judge, the foreman explained "that the jury looked at it as if proper precautions were not taken, but that they do not feel that they are able to find whether there was a defective system or not." Further conversation between the judge and the foreman made it appear that the jurors were confused as to the meaning of the word "system." The judge then sent the jury

back, when they returned a general verdict in favour of the plaintiff:—Held, on appeal, that when the jury found the precautions taken were insufficient they, in effect, found that the system was defective, and they were justified in bringing in a general verdict. *Ellis* v. *British Columbia Electric Railway Company, Limited,* 20 B.C.R. 43.

7. Cross-examining.] — A jury should not be cross-examined, as such a procedure is calculated to induce the jury to insist on its undoubted right to return a general verdict. *Steves* v. *District of South Vancouver,* 6 B.C.R. 17.

8. Construction of answers.]—In construing a jury's verdict, consisting of a number of answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial. *Marshall* v. *Cates,* 10 B.C.R. 153.

9. Findings equivalent to a general verdict.]—Where a jury make special findings and also find damages, this is equivalent to a general verdict for the plaintiff, supplementing the special findings and importing such as are necessary to a general verdict. *Scott* v. *British Columbia Milling Co.,* 3 B.C.R. 221.

10. New trial.]—The only object in submitting questions to the jury is to ascertain if they apprehend the case. But if the judge does not submit questions, it is no ground for a new trial if he has properly instructed the jury on the law. *Snow* v. *Crow's Nest Pass Coal Co.,* 13 B.C.R. 145.

VI. DISCHARGE.

After discharge.] — Whatever is done with reference to the jury after its discharge is a nullity. *Waterland* v. *City of Greenwood,* 8 B.C.R. 396.

See CONTRACT.

See CRIMINAL LAW.

See NEGLIGENCE.

See PRACTICE.

LANDLORD AND TENANT.

I. AGREEMENT FOR LEASE, 502.
II. LEASE, 502.
A. *General words,* 502.
B. *Termination,* 502.
1. By surrender, 502.
2. By forfeiture, 503.
3. By operation of law, 504.
C. *Assignment: sub-letting,* 504.
III. FIXTURES, 505.

I. AGREEMENT FOR LEASE.

Agreement for lease — Uncertainty— Statute of Frauds — Damages.] — In an action for not delivering possession of premises, the document set up as a lease was: "Received from J. C. McLennan, the sum of $15, being part payment on premises now occupied as a barber shop, on west side of Fourth Street, between A. Avenue and Front Street, said sum to apply on rent for premises aforesaid, from November 1st, 1896. Rent to be paid in advance. S. Millington." The only evidence of damages was that the plaintiff had purchased a tobacconist's stock in view of occupying the premises at the date mentioned, and being unable to get other suitable premises, had made a loss on the goods:—Held, that there was no evidence of legal damage. *McLennan* v. *Millington,* 5 B.C.R. 345.

II. LEASE.

A. General Words.

Privileges not specified in lease conceded.] — Before the construction of a building by the defendant the plaintiff agreed to rent a shop in the proposed building. The lease, in the short form, made in pursuance of the Leaseholds Act, described the premises by metes and bounds, without specifying any privileges. Plaintiff, after entering, demanded use of water closet and a place for storing coal, and defendant conceded the right:—Held, that the plaintiff was entitled to an injunction restraining defendant from interfering with his right of access to the closet and his right to store coal in rear of premises. *Ross* v. *Henderson,* 8 B.C.R. 5.

B. Termination.

1. By Surrender.

1. Giving up keys.] — Plaintiff let a store to H. A. & Co., who afterwards executed an assignment for the benefit of creditors to defendant, who did not take possession of the premises. Plaintiff, on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises, which she proceeded to clean up and put in repair, and she took down a sign board having on it the firm name of H. A. & Co. and painted the name out. Plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against

the estate for rent accruing due after the assignment:—Held, that there had been a surrender of the premises to the landlord by act and operation of law. *Gold* v. *Ross*, 10 B.C.R. 80.

2. Notice.]—Under a lease for a term of five years, commencing from the 22nd of September, 1902, the lessee had an option of a further term of five years, provided he gave six months' notice of his intention to exercise such option. He continued in occupation after the termination of the first five years, but on the 8th of February, 1908, he wrote to one of the owners who had purchased from the original landlord, agreeing to "take off" two years from his lease:—Held, that the lessee had surrendered his lease. *Greenwood* v. *Bancroft*, 17 B.C.R. 151.

3. Recovery of rent on.]—The defendant leased the plaintiff a business premises for 23 months at $500 a month, it being a term of the lease that the first and last months' rent be payable in advance. The plaintiff paid the two months' rent and took possession. During the term the parties agreed in writing to cancel the lease and grant a new lease to another person on similar terms. The agreement was carried out, the old lease being cancelled and a new lease given the second lessee, who entered into possession and paid the first and last months' rent in advance. In an action for the recovery of the last month's rent paid by the first lessee:—Held, that the agreement for cancellation of the lease made no provision in respect of the last months' rent, and all the terms of the lease (except as provided for in said agreement) were finally settled by its cancellation. *Perrin* v. *Antlers Realty Company, Limited*, 20 B.C.R. 28.

2. By Forfeiture.

1. Re-entry.]—There is no forfeiture for non-payment of rent until the lessor re-enters and declares the lease forfeited. *Balagno* v. *Le Roy*, 18 B.C.R. 127.

2. Relief against.]—Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall into arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced:—Held, that, no third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within r. 976 of the Supreme Court Rules, 1906, plaintiff should also get the costs of the action. *Huntting* v. *MacAdam*, 13 B.C.R. 426.

3. Relief against.]—Where under a lease the rent was payable monthly, but the lessee, without objection by the lessor, was in the habit of paying several month's rent at one time, and five months' rent was in arrear and a notice of re-entry had been served, whereupon the lessee at once tendered to the lessor all rent due, which was not accepted, the lessee was held to be entitled to relief. *Balagno* v. *Le Roy*, 18 B.C.R. 127.

3. By Operation of Law.

Hotel premises—Lease of, where not up to requirements of bye-law.]—Premises in Vancouver, leased for use as a hotel, did not fulfil the requirements of a bye-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was stopped using the premises as a hotel by the authorities:—Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio, and the maxim in pari delicto potior est conditio defendentis applied. Even if the lease were not void ab initio it became void by the action of the authorities in stopping the further use of the premises as a hotel. *Hickey* v. *Sciutto*, 10 B.C.R. 187.

C. Assignment: Sub-letting.

Covenant not to assign — Whether includes sub-letting.]—A lease of land for 25 years, containing a covenant by the lessee not to assign without leave, was executed contemporaneously with an agreement by

the lessee to purchase from the lessor a building on the land, which agreement contained a covenant by the lessee to pay the purchase money by instalments and to insure, and gave the lessor the right to cancel the agreement "upon breach of any of the covenants herein contained." The only reference to the agreement in the lease was contained in a proviso, "The first month's rent to be paid on the execution of an agreement of even date," etc. The lessee sub-let the premises for ten years, and did not pay the instalments of purchase money under the agreement, or insure. The action was to cancel the agreement, lease and sub-lease for such breaches. The sub-lessee set up in his defence that the lease and sub-lease were registered, and that the agreement was not, and claimed the benefit of the Land Registry Act, sec. 35 (a):—Held, that a sub-lease is not a breach of a covenant in a lease not to assign. *Griffiths* v. *Canonica*, 5 B.C.R. 67.

III. FIXTURES.

1. Onus of proof as to annexation.]—In a dispute as to the degree and object of the annexation of buildings erected upon demised land by the tenant, the onus of showing that in the circumstances in which they were placed upon the land there was an intention that they should become part of the freehold lies upon the party who asserts that they have ceased to be chattels. *Bing Kee* v. *Yick Chong*, 43 S.C.R. 334.

2. Sale of Goods Act.]—Grill and kitchen fixtures were supplied and installed by their owners in a hotel, under a conditional sale agreement with the lessee of the hotel whereby they were to remain the property of the owner until they were paid for. The agreement was not filed under the Sale of Goods Act. The landlord allowed the lessee to attach the said fixtures to the premises upon the understanding that the articles were to remain attached to the freehold and become the landlord's property:—Held, in an action by the vendors for the recovery of the articles, that they had no title to them as against the landlord. *Hayward & Dods* v. *Lim Bang*, 19 B.C.R. 381.

3. Trade fixtures.] — Plaintiff Bank rented a building into which it moved a safe for the purpose of its banking business. The landlords, at the request of the Bank, built around the safe a brick vault. After occupying the building about a year the Bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the Bank and its landlords as to the right to remove the safe after the Bank had left the premises. During the interim between the removal of the Bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe:—Held, that although the safe, when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when the defendants bought the premises. *The Canadian Bank of Commerce* v. *Lewis and Lewis*, 12 B.C.R. 398.

LAND REGISTRY.

See REGISTRATION OF LAND.

LEGISLATIVE ASSEMBLY.

Disqualification.] — The employment by the Dominion Government of a member of the British Columbia Legislative Assembly, a barrister, as counsel upon an arbitration involving 35 days' attendance in Victoria, Toronto and Ottawa, though he refused to receive counsel fees therefor, disqualified the member under Stat. B.C. 1875, sec. 1, providing: "No person accepting or holding any office or employment, permanent or temporary, to which an annual salary or any fee, allowance or emolument or profit of any kind or amount whatever from the Dominion of Canada is attached, shall be eligible to sit or vote in the Legislative Assembly." *Barnard* v. *Walkem*, 1 B.C R., Pt. I., 120.

LIBEL.

See DEFAMATION.

LICENSING LAW.

See INTOXICATING LIQUORS.

LIEN.

I. IN GENERAL, 507.
II. BANKERS, 507.
III. VENDORS, 507.
IV. INNKEEPERS, 508.

I. In General.

As against the true owner.]—R. had purchased a quantity of furniture from plaintiffs under a hire purchase agreement, which was duly registered, but, before completing her payments, she stored the furniture with defendant, a warehouseman, but without the knowledge of plaintiffs, who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Defendant refused to deliver until his warehouse charges were paid:—Held, that defendant was not entitled to retain the goods until his charges were paid. *D. A. Smith, Limited* v. *Campbell*, 16 B.C.R. 505.

II. Bankers.

Overdrawn accounts—Partner's separate account.]—Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts. *Richards* v. *Bank of British North America*, 8 B.C.R. 143, 209.

III. Vendors.

1. Interposition of nominal purchaser.]—Where the original vendor and the ultimate purchaser are the real parties to a sale of property, the vendor's lien is not destroyed by the interposition of a nominal purchaser as vendor to the ultimate purchaser. *Kirk and Musgrave* v. *Harvey*, 18 B.C.R. 645.

2. Personal property.]—The doctrine of vendor's lien for unpaid purchase money is applicable to every sale of personal property over which a Court of Equity assumes jurisdiction. *Vaughan-Rhys* v. *Laidlaw*, 44 S.C.R. 458.

3. Timber licenses.]—A sale of rights under licenses to cut timber on Crown lands is a contract for the sale of an interest in land, and the timber limits are subject to a vendor's lien for unpaid purchase money. *Ibid.*

4. Purchase for value without notice.]—In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the defence of purchase for value without notice is bound to allege and prove a purchase for value and lack of notice of the lien. *Ibid.*

IV. Innkeepers.

Lien for board — Care of goods detained.]—A person retaining goods under an innkeeper's lien for board must take reasonable care of them. Defendant, an innkeeper, detained plaintiff's trunk for the amount owed to him for board and lodging. Plaintiff assisted in carrying his trunk to the reading room, the ordinary baggage room being full. The trunk was broken open and several articles lost:—Held, that the fact that plaintiff had assisted to place trunk in the reading room, there being no evidence that he requested that the trunk should be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care. *Frank* v. *Berryman*, 3 B.C.R. 506.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

I. In General, 508.
II. Special Statute, 509.
III. Acknowledgment, 509.
IV. Part Payment, 509.

I. In General.

1. Obstruction to navigable waters.]—The right to continue an obstruction to navigable waters cannot be acquired by virtue of the statute, as there can be no presumption of a grant. *McEwen* v. *Anderson*, 1 B.C.R., Pt. II., 308.

2. Mortgage—Redemption.]—An execution purchaser of an equity of redemption is entitled to redeem only upon payment of the whole arrears of principal and interest legally recoverable from the mortgagor, and twenty years of such arrears are recoverable under the usual covenant to pay. *Keary* v. *Mason*, 2 B.C.R. 48.

3. Mortgage.]—Under a deed of conveyance intended to be security only, dated July 1, 1889, of wild land without value, the mortgagee, for over twenty years before the mortgagor's suit for redemption, performed the only act of possession of which it appeared to be capable, namely, he paid, with the mortgagor's acquiescence, all the

taxation upon it, and the mortgagor made no payment of either principal or interest and had repudiated all connection with the property:—Held, that the suit to redeem was barred. *Kirby* v. *Cowderoy*, 1912, A.C. 599.

II. SPECIAL STATUTE.

Municipal Act.]—The statutory provision limiting to one year the bringing of actions against a municipality does not apply to actions in rem in the Admiralty Court. *Kennedy* v. *The Surrey*, 11 B.C.R. 499.

III. ACKNOWLEDGMENT.

Promise to pay.]—A debt collector having accounts placed in his hands by both plaintiffs and defendant for collection, applied to the defendant for payment of his account which was statute-barred. Defendant stated that plaintiffs would never press him for payment, but on the collector insisting, defendant instructed him to hand over to plaintiffs some of the money collected for defendant. The collector accordingly paid in $11.65:—Held, that from the instructions of defendant to the collector to pay to plaintiffs some of the moneys collected for him (defendant) could be inferred a promise to pay sufficient to take the debt out of the statute, and was not an appropriation of a particular fund. *Goodacre & Sons* v. *Simpson*, 15 B.C.R. 492.

IV. PART PAYMENT.

After writ issued.]—Part payment of a note after the commencement of an action upon it will not support the action in answer to a plea that the cause of action did not accrue within six years. *Walsh* v. *Herman*, 13 B.C.R. 314.

LUNACY.

I. DISABILITIES.
II. PRACTICE.

I. DISABILITIES.

Contract — Fraud.] — Action to cancel promissory notes as being obtained by defendant, without consideration, from plaintiff while he was, to defendant's knowledge, of unsound mind and incapable of transacting business; and to set aside a judgment by default of appearance obtained December 10th, 1888, in an action by defendant against the plaintiff upon the notes. The jury found that the plaintiff, at the time of the contract represented by the notes in question, was of unsound mind; (2) that the transaction was not fair and bona fide; (3) that there was no consideration; (4) that the transaction was without deliberation; (5) without independent advice; (6) that the defendant at the time of making the notes was aware that the plaintiff was of unsound mind. The jury also stated that they were all for a verdict for the plaintiff. Upon motion for judgment:—Held, (1) That the plaintiff was not estopped by the default judgment in Cameron v. Harper. (2) That the issues were not res judicata by a decision in Chambers in Cameron v. Harper, affirmed by the Divisional Court, refusing to set aside the default judgment and admit plaintiff to defend, and set up in that action the plaintiff's case herein. (3) That the answer and general verdict of the jury included a finding that the plaintiff was in fact non compos mentis at the time of and ever since the transaction impeached, and he was consequently not estopped by conduct. (4) A finding by inquisition of the insanity of the plaintiff was not a necessary preliminary to this action. Upon motion for new trial and appeal:—Held, per Begbie, C.J., Walkem and Drake, JJ. (sitting both as a Full Court and Divisional Court), judgment of Crease, J., affirmed. (2) The verdict of a jury should not be disturbed as against evidence, unless it is one which the jury on the evidence could not reasonably have found. (3) An action lies to set aside a judgment in another action. (4) Where documentary evidence is rejected at the trial, and the propriety of the rejection is not made a ground of appeal, the Court will not allow that evidence to be read on appeal as fresh evidence under r. 874. (5) Per Walkem, J., insanity once established is presumed to continue. (6) Per Drake, J., where a contract is attacked, the defence of ratification must be pleaded to admit evidence of ratification. *Harper* v. *Cameron*, 2 B.C.R. 365.

II. PRACTICE.

Inquisition as to lunacy—Costs payable out of estate.]—K., a person alleged to be

of unsound mind, died during the progress of an inquisition as to his lunacy, and before verdict. On an application by the petitioner in lunacy, supported by an affidavit that the proceedings were taken bona fide, and for the sole and only purpose of protecting K.'s estate, Drake, J., made a declaration that the costs of the inquisition had been properly incurred, and ought to be paid out of K.'s estate in due course of administration. *In re Kaye*, 6 B.C.R. 61.

MACHINERY.

See MASTER AND SERVANT.

MAGISTRATE.

See CERTIORARI.

See CRIMINAL LAW.

See MANDAMUS.

See PROHIBITION.

MAINTENANCE.

See TORT.

MALICIOUS PROSECUTION.

I. WANT OF PROBABLE CAUSE: MALICE, 511.
II. PROOF OF CRIMINAL PROCEEDINGS, 513.

I. WANT OF PROBABLE CAUSE: MALICE.

1. Belief of defendant—Malice—Questions to jury.]—In an action for malicious prosecution, the judge intimated that he thought there was no evidence to go to the jury, but he decided to let the case go to the jury, so that the Full Court might have the benefit of the findings in case an appeal was taken. The jury found that defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz.: to obtain recompense for the loss of his horse. Damages were assessed at $200. On motion for judgment, McColl, C.J., dismissed the action, holding that there was not a want of reasonable and probable cause:—Held, by the Full Court, that on the findings the plaintiff was entitled to judgment. *Baker* v. *Kilpatrick*, 7 B.C.R. 150.

2. Case for the jury.]—Where the act, in respect of which the criminal proceedings were launched, was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief. *Tanghe* v. *Morgan*, 11 B.C.R. 455.

3. No case for the jury.]—Plaintiff was employed, in Vancouver, to proceed to the defendant Company's logging camp and work there as an engineer. He was given a pass, and also supplied with his meals on the journey. He arrived on Saturday, and before going to work on Monday morning he obtained a pair of working gloves at the Company's store. He worked for a few hours, had his dinner and left the camp without any explanation. The cost of transportation, meals and gloves were to have been deducted from his wages. The Company's manager having been advised of the facts, consulted the Company's solicitor, on whose advice an information was laid charging plaintiff with obtaining credit and goods under false pretences, and plaintiff was arrested, tried and convicted, but afterwards released on the order of a judge. Plaintiff then brought action against defendant Company for malicious prosecution, and a jury found (1) that defendant Company had not taken reasonable care to ascertain the facts; (2) that they honestly believed the case laid before the magistrate; (3) that they were actuated by malice. Damages $500:—Held, that the plaintiff should have been nonsuited, as there was no ground for the first finding; that there was not absence of reasonable and probable cause, and no malice had been shown. The appeal was therefore allowed. *Prentiss* v. *Anderson Logging Company, Limited, and Jeremiason*, 16 B.C.R. 289.

4. Legal advice.]—A person who institutes a criminal proceeding, honestly believing in his case, is entitled to act on the advice of his counsel, but the duty is placed upon him to put before counsel everything, including all circumstances in mitigation of the accused's action. *Momsen* v. *Rudolph*, 18 B.C.R. 631.

5. Admission of innocence — Legal advice.]—Plaintiff, who was in the employ of defendants, was discharged. Subsequently

one of the defendants obtained a search warrant and had plaintiff's rooms searched for certain tracing paper, etc., alleged to have been taken by plaintiff from their place of business. The detectives who made the search arrested the plaintiff and he was prosecuted in the police court for stealing a lamp shade, a show case reflector and $4. The magistrate dismissed the charge, and plaintiff brought action, claiming $3,000 damages. The claim for wrongful dismissal was abandoned on the opening of the trial. The defendants, as to the charge of malicious prosecution, did not deny the falsity of the charge, but submitted that they had reasonable and probable cause and did not proceed with malice:—Held, that this plea amounted to an admission of plaintiff's innocence, under Order XIX., r. 13, and this being supported by the depositions in the magistrate's Court, upon which the charge against him was dismissed, the plaintiff had proved his innocence. Held, on the facts, that there was want of reasonable and probable cause. That whilst the taking of counsel's advice was evidence in defendant's favour, it was not a complete answer. Therefore, a motion for nonsuit was refused. *Harris* v. *Hickey & Co.*, 17 B.C.R. 21.

II. PROOF OF CRIMINAL PROCEEDINGS.

True bill.]—There cannot be a record of proceedings between the King and an accused person in a criminal proceeding until at least a "true bill" has been found by the grand jury. The production by the proper officer of a certified copy of the Bill of Indictment, returned "no bill," is sufficient in view of the provisions of the Evidence Act, R.S.B.C. 1897, c. 71. *Tanghe* v. *Morgan*, 11 B.C.R. 455.

MANDAMUS.

I. WHEN GRANTED, 514.
A. In general, 514.
B. To Court or Judicial Officer, 515.
C. To officer of the Crown, 515.
D. To municipal corporations and officers, 515.
E. To school officers, 516.
F. To governing bodies or officers of voluntary associations, 516.
G. To railway companies, 517.
II. HEARING AND DETERMINATION, 517.

I. WHEN GRANTED.

A. In General.

1. Sole remedy — Effectiveness.] — A mandamus will not be granted unless it is the applicant's only remedy, and clearly appears that it will be effectual. *Tuck* v. *City of Victoria*, 2 B.C.R. 179.

2. Change in personnel of Court.]—The Vancouver licensing board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a mandamus was refused. The applicant appealed, and at the time of the hearing of the appeal the personnel of the Board had been changed:—Held, that the Board should have considered the application regardless of the fact that he was a Japanese, but as the personnel of the Board had been changed, no order would be made. *In re Kanamura*, 10 B.C.R. 354.

3. Change in personnel of Court.]—On the 17th of October, 1910, P. was granted a liquor license for his hotel for a period ending on the 15th of January, 1911. On the 14th of December following, at the next regular meeting of the Board, he applied for a renewal. There was no objection lodged, nor was there any charge against the applicant as a licensee. After a number of adjournments, the application was eventually refused, on the 11th of January, 1911. The composition of the Board was changed on the 15th of January, 1911. P. applied to the new Board for a renewal, or, in the alternative, for a fresh license. These applications were also finally refused on the 28th of March, 1911. On application to Clement, J., a writ of mandamus was issued to the new Board ordering the granting of a license unconditionally. On appeal from this order the Court was evenly divided. Per Macdonald, C.J.A., and Galliher, J.A., that the successors of the old Board, who ought to have renewed the license, could be compelled to perform the duty which they refused to perform, and the change in the bye-law, subsequently effected, making it discretionary with the new Board to grant or refuse a renewal, does not affect the position, as at the time of the commission of the wrong complained of no discretion was required, but simply a ministerial act. Per Irving, J.A.: P. had no vested right to a renewal under the bye-law in force at the time he obtained his license, and that the Court had no power to order the new Board to consider P.'s application according to such bye-law. Per Martin, J.A.: As there

was no evidence of mala fides on the part of the Commissioners in refusing the application, the writ of mandamus could not be supported. *Prudhomme* v. *The Board of Licence Commissioners for the City of Prince Rupert*, 16 B.C.R. 487.

B. To Court or Judicial Officer.

Magistrate—Discretion to try or commit.]—A magistrate has absolute jurisdiction, under sec. 785, sub-sec. (f), and sec. 784 of the Criminal Code, to hear and determine in a summary way a charge of keeping a disorderly house. The exercise of the summary jurisdiction is, under those sections, and sec. 791, discretionary with the magistrate, and he may commit the accused for trial, and a mandamus will not lie to compel him to hear and determine the charge summarily. *Re Farquhar Macrae*, 4 B.C.R. 18.

C. To Officers of the Crown.

1. Crown—Minister of—Free miner's license.]—Mandamus will lie to compel the Chief Commissioner of Lands and Works, as said Commissioner, to issue a free miner's certificate to a Chinaman on payment of the usual fee. *Reg.* v. *Gold Commissioner of Victoria*, 1 B.C.R., Pt. II., 260.

2. Crown grant—Minister of Crown to compel issuance.]—Mandamus does not lie to compel a Minister of the Crown (the Commissioner of Lands and Works) to issue a Crown grant; the remedy is by petition of right. *Clarke* v. *The Chief Commissioner of Lands and Works*, 1 B.C.R., Pt. II., 328.

3. Immigration Act.]—Where an applicant for exemption, under the Chinese Immigration Act, is dissatisfied with the decision of the controller of customs, his proper remedy is by way of mandamus. *In re Lee Him*, 15 B.C.R. 163, 390.

D. To Municipal Corporations and Officers.

1. Trade license.]—A mandamus will lie to compel a municipal council to issue a trade license. *Reg.* v. *Victoria Corporation*, 1 B.C.R., Pt. II., 331.

2. Subdivision plan.]—A writ of mandamus will not be granted to compel a municipal council to approve a plan of subdivision of land where the council has refused its approval on the ground that the subdivision does not comply with the law, and where it has not exercised unreasonably the discretion given to it. *Moffet* v. *Ruttan*, 16 B.C.R. 342.

3. Awarding contract.]—A mandamus will not lie to enforce the award of a contract by a municipal council to the lowest tenderer. *Haggerty* v. *City of Victoria*, 4 B.C.R. 163.

E. School Officers.

Expulsion of pupil.]—Mandamus does not lie to force a teacher, against his bona fide judgment on reasonable grounds, to keep a pupil at his school, but the Court will, if necessary, force him to hold a proper inquiry. *Phelps* v. *Williams*, 1 B.C.R., Pt. I., 257.

F. To Governing Bodies or Officers of Voluntary Associations.

1. Pharmacy Act.]—One who resided out of the Province until the coming into force of the Pharmacy Act, 1891, and was a partner of a druggist practising within the Province, is not entitled to be registered under sec. 12 of the Act as having practised as a druggist. *Ex parte Henderson, appellant; In re the Pharmacy Act, 1891*, 2 B.C.R. 103.

2. Medical Act—Inquiry by council under.]—Under sec. 36 of the Medical Act, 1898 (previous to its amendment in 1903), the council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—Held, that mandamus did not lie to compel the council to hold an inquiry. *In re The Medical Act; Ex parte Inverarity*, 10 B.C.R. 268.

3. Refusal to register in British Columbia an English registered practitioner.]—A medical practitioner registered in England prior to June 1st, 1887, under the Imperial Medical Acts, is entitled to be registered and admitted to practice in British Columbia pursuant to Imp. Stat. 31 Vict., c. 29, sec. 3, subject to such laws as the Provincial Legislature may have made for the purpose of enforcing the registration within its jurisdiction of persons registered under the Imperial Medical Acts. (2) General provisions in the British Columbia Medical Act (Con. Stats. B.C. 1888, c. 81) relating to

examination of candidates, payment of fees and registration of medical practitioners, do not affect the right to be registered in the colony acquired under the Imperial Statute by English registered practitioners. (3) The British Columbia Medical Act (Con. Stat. B.C. 1888, c. 81, sec. 31) authorizes the making by the British Columbia Medical Council of rules pursuant to Imp. Stat. 31 Vict., c. 29, sec. 3, for admitting English registered practitioners upon the Provincial register. (4) The British Columbia Medical Council having made no such rules, plaintiff was entitled to be admitted upon the British Columbia register upon such proof of his English registration as would be admitted in a Court of law. *Metherell* v. *The Medical Council of British Columbia*, 2 B.C.R. 186.

G. To Railway Companies.

Arbitration.] — Where a railway company declines or neglects to proceed to make compensation for land taken or injuriously affected the landowner may bring an action for a mandamus to compel it to take those proceedings. *McDonald* v. *Vancouver, Victoria and Eastern Railway and Navigation Co.*, 15 B.C.R. 315; 44 S.C.R. 65.

II. HEARING AND DETERMINATION.

1. Limitation of action against municipality—Whether includes mandamus proceedings.]—The limitation of one year prescribed by sec. 244 of the Municipal Clauses Act for commencing actions against a municipality applies to mandamus proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes. *The Queen* v. *The Municipal Council of the Corporation of the District of Mission*, 7 B.C.R. 513.

2. Interference with discretion.] — Accused was one of 16 Chinamen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. Upon application for a mandamus requiring the magistrate forthwith to commit the accused for trial:—Held, that a writ of mandamus will not issue directing a magistrate to commit prior to his adjudication of the case. That it is the duty of the magistrate to take the evidence of all concerned, and that the Court must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally and in good faith. *In re Ying Foy*, 14 B.C.R. 254.

3. Interference with discretion.] — The Court will not grant a writ of mandamus to compel a municipal authority to approve a plan of subdivision where the authority has refused its sanction on the ground that the subdivision did not comply with the law, and has not exercised unreasonably the discretion allowed by the statute. *Moffet* v. *Ruttan*, 16 B.C.R. 342.

MANSLAUGHTER.

See CRIMINAL LAW.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

Heathen marriage — Performance of ceremony—Validity of.]—A clergyman is not bound to perform the ceremony of marriage, but if he does, the rites and usages of his church or denomination, and the accustomed form, although unmeaning, must be followed. Semble, marriage between non-Christians ought to be left to their own officiants or to the registrar:—Held, that a marriage purporting to have been solemnized by a Wesleyan minister between two Chinese was void for want of understanding on the woman's part of the nature of the ceremony, and of any intention to contract. *In re Ah Lie, an infant; Regina* v. *Chin Ah You, ex parte Shub Look; Regina* v. *Shub Look, ex parte Chin Ah You*, 1 B.C.R., Pt. I., 261.

MASTER AND SERVANT.

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I. Creation of the Relation.

A. Form of Contract Creating the Relation.

Contract of hiring by election to office.]—"At the first meeting of the council in every year, or as soon as possible thereafter, the council may elect a clerk, water commissioner, surveyor, or such other officers as may be deemed necessary, who shall hold office during the pleasure of the council, and may receive such remuneration as the council shall by bye-law appoint." The plaintiff was thereunder duly elected to the office of city engineer of the City of Victoria, the salary of which was fixed by bye-law:—Held, that he became thereby the servant of the city without further evidencing of the contract of hiring under the corporate seal or otherwise. *Tuck* v. *The Corporation of the City of Victoria*, 2 B.C.R. 179.

B. Remuneration.

Consideration — Remuneration other than wages—Agreement to pay what is right.] — Plaintiff had performed services for a mining company for over three years, when the following resolution was passed: "Resolved and carried unanimously, that Mr. H. E. Croasdaile be requested to accompany Messrs. Hall and McDonald to England and assist them in negotiating the sale of the mines, and that he be paid for his expenses $70 by each of the aforesaid 13 interests, and such further sum as Mr. Winslow Hall shall consider right, upon the sale of the mines, in consideration of his general services to the partnership." The plaintiff proceeded to England accordingly, and in the result a sale of the mines was effected. W. H. declined to allow plaintiff anything, and the defendants refused to pay him anything for his services either before or consequent on the resolution. At the trial the jury found a verdict, and judgment was entered for the plaintiff for $1,350 for the former, and $4,350 for the latter services. On appeal:—Held, 1. That the resolution affected subsequent services only, and that it contained no contract upon which the plaintiff could recover anything. 2. Its acceptance constituted an agreement by the plaintiff to abide by the decision of W. H. to the exclusion of any right of action for the subsequent services upon a quantum meruit, and that the judgment as to the $4,350 should be set aside. 3. A vested right of action can only be discharged by

payment, release under seal, or accord and satisfaction, and, as plaintiff had at the date of the resolution such a right in respect of his prior services, the resolution could not be construed as affecting it, and that the judgment for $1,350 should stand. *Croasdaile* v. *Hall*, 3 B.C.R. 384.

C. Master and Servant Act.

1. Bank clerk.]—The engagement of a clerk in Scotland to serve in a bank in Canada falls within the Master and Servant Act Amendment Act, 1899 (B.C.S. 1899, c. 43, sec. 3), but where the clerk has elected to treat the contract as valid for two years he cannot be allowed to approbate and reprobate. *Ashmore* v. *Bank of British North America*, 18 B.C.R. 257.

2. Farm servant.]—P. entered into an agreement with D. in London, England, whereby D. was to go to British Columbia and enter into possession of and work P.'s farm for at least a year at a salary of $700 a year. P. was to advance £100 for D.'s transportation expenses, which was to be repaid from D.'s salary as it came due. P. advanced the £100 and D. went to British Columbia, where he lived upon and worked P.'s farm for two and a half months, when he left. In an action by P. for the return of the money advanced for transportation, it was held by the trial judge that the agreement being void under sec. 19 of the Master and Servant Act, the action should be dismissed:—Held, on appeal, that there should be a new trial. *Pretty* v. *Dodd*, 18 B.C.R. 640.

II. Duration and Termination of the Contract.

A. Termination of Hiring and Rights Thereon.

1. Officer of municipal corporation.]—Under sec. 45 of the Municipal Clauses Act, a municipal officer holds office during the pleasure of the mayor or council, and so may be removed at any time without notice or cause shown therefor. *Municipality of North Vancouver* v. *Keene*, 10 B.C.R. 276.

2. Restaurant manager.]—A manager of a restaurant who is employed by the month is not entitled to a month's notice of dismissal. In the absence of custom, or special agreement, the length of notice must only be reasonable. *Lamberton* v. *Vancouver Temperance Hotel Company, Limited*, 11 B.C.R. 67.

3. Mill manager.]—It is an implied term of a hiring as mill manager that the service may be determinated on reasonable notice, and where the jury in such a case find that three months would be reasonable, their verdict will not be disturbed. *Henderson* v. *Canadian Timber & Saw Mills, Ltd.*, 12 B.C.R. 294.

4. Surveyor's assistant.]—Plaintiff was engaged by defendant Company as a surveyor's assistant, but stipulated that his hiring was to be on a "monthly basis." During the progress of the work, and while the survey party was in the field, a dispute arose between the Company and the surveyor in charge, which resulted in the entire party being recalled. Plaintiff was paid his fare home, and was offered his wages up to the date on which he reached Victoria, and in the action brought by him to recover in lieu of a month's notice defendant Company set up a custom among surveyors terminating employment without notice:—Held, that plaintiff was not entitled to recover. *Andrews* v. *Pacific Coast Coal Mines, Limited*, 15 B.C.R. 56.

5. Harbour master.]—Where a harbour master was appointed, to be paid "at the rate of $600 per annum of the fees collected by him from vessels entering the port," and he was dismissed at the end of the first month of the year:—Held, that the appointment was a hiring at will, terminable at the pleasure of the Crown, that the appointee was entitled to be paid only for the month served "at the rate of $600 per annum," and that the fees collected during that period belonged to the Crown. *The King* v. *McLeod*, 17 B.C.R. 189.

B. Termination by Operation of Law.

Appointment of receiver.] — Plaintiff was engaged as accountant of defendant Company in April, 1904. In the following August the debenture holders seized the property and put in charge a receiver and manager, to whom plaintiff delivered the books of account, plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—Held, that there had been an actual seizure known to the plaintiff, and that the appointment of a receiver and manager operated as a discharge of the servants of the Company,

and the plaintiff could not recover. *Rolfe* v. *Canadian Timber and Saw Mills, Limited,* 12 B.C.R. 363.

C. Refusal or Inability of Master to Continue Employment.

Brewmaster.]—A contract by defendants to employ plaintiff as brewmaster in its lager beer brewery in Victoria for three years, and during that period pay him as such brewmaster a salary of $250 a month, at the end of each month, is broken by the company incapacitating itself from continuing the plaintiff in that employment, and is not satisfied by a readiness to pay the salary at the end of each month. *Varrelmann* v. *The Phœnix Brewery Co.*, 3 B.C.R. 135.

III. Remedies for Breach of Contract.

A. When Breach by Master.

1. Breach of contract—Yearly hiring—Monthly salary.]—The plaintiff, who had been engaged for one year from August, 1902, by defendants at a monthly salary, was dismissed wrongfully in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—Held, that plaintiff was entitled to recover damages covering the unexpired term of his engagement. The statement of claim alleged a contract of hiring plaintiff as superintendent of a mill, arising from two letters, without setting them out, and without alleging the continuance of the construction of the mill, which was one of the conditions stated by defendants in their second letter. The defence denied the allegation in the statement of claim and alleged the contract was contained in the second letter:—Held, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill. *Hopkins* v. *Gooderham,* 10 B.C.R. 250.

2. Mitigation of damages.]—In order to recover damages for dismissal without reasonable notice a plaintiff must show an endeavour and failure to obtain other employment. *Lamberton* v. *Vancouver Temperance Hotel Company, Limited,* 11 B.C.R. 67.

B. When Breach by Servant.

1. Bank clerk.]—Plaintiff was engaged in Scotland by the defendant Bank for service in Canada for a period of three years at a salary of $700 per annum, the service to be terminated by three months' notice in writing on either side, or three months' salary, except in case of misconduct on the part of the plaintiff. At the end of the three years' term, if plaintiff remained in the service, plaintiff had to give six months' notice. Plaintiff, before the expiration of the term, gave three months' notice, which, not being accepted, he left the service and went into other business. He sued for his salary due and "risk money" to his credit at date of leaving, which the Bank contested and counterclaimed for $400 damages for breach of the agreement of service:—Held, on appeal, that the plaintiff should have judgment for the salary due at time of leaving, and also the "risk money," but that the defendant Bank should have judgment on the counterclaim. *Ashmore* v. *Bank of British North America,* 18 B.C.R. 257.

2. Sunday labour.] — Where a servant engages himself for work which he knows has to be performed on a Sunday, he cannot justify a refusal to work on Sundays by relying on the Lord's Day Act (R.S.C. 1906, c. 153). *Murray* v. *The Coast S.S. Co.*, 17 B.C.R. 469.

IV. Liability of Master in Case of Accident or Death.

A. Master's Duty at Common Law.

1. In General.

1. Duty of employer to employee.]—An employer of mill hands is bound to take reasonable care that the mill is properly and safely constructed and fitted with machinery such as to ensure a reasonable degree of security to a careful workman, and to provide reasonably skillful and careful supervision. *Foley* v. *Webster*, 2 B.C.R. 137.

2. Notice.]—At common law a workman is not precluded from obtaining compensation for injuries received by reason of defective machinery or a defective system of using machinery by reason of his failure to give notice to the employer of such defect. *Foley* v. *Webster*, 2 B.C.R. 137; 21 S.C.R. 580.

2. Plant, Machinery, Place of Work.

1. Machinery.]—An employer of mill hands is bound to take reasonable care that the mill is properly and safely constructed

and fitted with machinery such as to ensure a reasonable degree of security to a careful workman. *Foley* v. *Webster*, 2 B.C.R. 137.

2. Cutting machine.] — Plaintiff was injured by a cutting machine "tripping," or coming down a second time through, as he submitted, a defect in the mechanism. He operated the machine by working a lever with his foot, and if he kept his foot on such lever it would cause the knife to continue cutting or descending. There was some evidence that the machine had "tripped" a second time without the operator's foot being on the lever. The jury gave a general verdict of $500:—Held, sustaining the verdict, that on the evidence, it was open to the jury to find the verdict which they did. *McMullen* v. *Coughlan & Sons*, 17 B.C.R. 491.

3. Hole in permanent way.] — The plaintiff, whilst engaged as a switchman on the defendants' electric-motor tramway, running between their ore-bins and smelter furnaces, after having set the switch for the motor which was about to return from the furnaces, started to re-cross the track in order to take his usual seat on the head end of the motor. His foot got caught in a hole in the floor between the rails. He shouted to the motorman, who immediately cut off the current and applied the brakes, but the motor did not stop soon enough to prevent the accident, with the result that the motor ran upon the plaintiff, breaking his leg in three places. The evidence disclosed the facts that the hole in question had been there some time previous to the accident; that the accident occurred just before daybreak, and that the plaintiff had not been at work for more than one shift. There was also some suggestion in the evidence that the hole was left there for the purpose of making room for a bar connecting the two rails in the track:—Held, that the accident was caused by a structural defect in the ways of the defendant Company, and that the plaintiff was entitled to recover. *Barnes* v. *British Columbia Copper Company, Limited*, 14 B.C.R. 397.

4. Lifts.]—Leaving one of two counterbalancing lifts unlocked constitutes a defect in plant and machinery. *Hatch* v. *Powell River Paper Company, Limited*, 18 B.C.R. 1.

5. Forbidden use of lifts.]—The plaintiff was a foreman carpenter employed on a building in course of construction. Connected with the structure was a rectangular scaffold containing two lifts for taking up building materials. These lifts were of the character known as balancing lifts, one being up while the other was down and controlled by a brake or clutch worked by the motorman's foot, so that the ascending or descending lift could be stopped at the desired floor. When the lifts were not in use they remained at the last stopping place and balanced each other by their own weights. Inside the scaffold and between the two lifts was a staircase for the use of the workmen, who were forbidden to use the lifts. The plaintiff was at the top of the building on the occasion of the accident and was intending to descend when he stepped on to one of the lifts in order to pass across and reach the staircase. The lift being merely held in position by the weight of the other lift fell with the plaintiff, who was injured:—Held, that leaving the lift thus unsecured was in effect laying a trap. *Hatch* v. *Powell River Paper Co., Ltd.*, 18 B.C.R. 1.

6. Temporary obstruction.]—The temporary obstruction of a railway yard by a heap of earth arising from an excavation for the construction of a tool house, which is in charge of a competent foreman, does not alter the nature of the yard from that of reasonable safety to that of a dangerous place to work in. *Hall* v. *Canadian Pacific Railway Company*, 20 B.C.R. 293.

3. Observance of Statutory Regulations.

1. Metalliferous Mines Act.]—The provisions of the 3rd section of the Inspection of Metalliferous Mines Act, 1897, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mine are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the negligence of the proper officials to plot the plans up to date according to the surveys. *Hosking* v. *Le Roi No. 2, Ltd.*, 9 B.C.R. 551; 34 S.C.R. 244.

2. Metalliferous Mines Inspection Act.] —Sec. 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precaution against accidents to miners. *McDonald* v. *The Canadian Pacific Exploration Company, Ltd.*, 7 B.C.R. 39.

3. Metalliferous Mines Inspection Act.] —A cage used for lowering and hoisting men is not "falling material" within the meaning of that term as used in r. 20 of sec. 25 of the Metalliferous Mines Inspection Act, and the amendment of 1899 (c. 49, sec. 12) does not create any duty on the mine owner to provide protection from a falling cage. *McKelvey* v. *Le Roi Mining Company, Limited*, 9 B.C.R. 62; reversed, 32 S.C.R. 664.

4. Metalliferous Mines Inspection Act —Protection of winze—Statutory obligation.]—Rule 18 of sec. 25, c. 134, R.S.B.C. 1897, does not require that a winze extending through several levels of a metalliferous mine shall be protected at each level. The rule is sufficiently complied with if the winze is protected at the top level only:—Held, on the facts, the negligence had not been shown. *Stamer* v. *Hall Mines Co.*, 6 B.C.R. 579; 1 M.M.C. 314.

5. Coal mine — Gas explosion.] — A report of a committee appointed by a meeting of a miners' union to inspect a mine is not, nor is it equivalent to the report of a committee appointed by "the persons employed in a mine" to make such inspection under r. 31, even though a majority of such persons may be members of that union. A statutory meeting of such employees may be called by due notice posted at the pit's mouth. The bonneted clanny lamp is a locked safety lamp within the meaning of r. 8:—Held, on the facts, that the explosion in question was a gas and not a dust explosion. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, 2 M.M.C. 145.

6. Factories Act.]—Sec. 32 of the Factories Act, R.S.B.C. 1911, c. 81, which requires dangerous machinery in a factory to be, as far as practicable, securely guarded, applies only to machinery which is part of the plant used in the manufacture of the product of the factory, and does not include a machine which is in course of construction in the factory, although such machine, for the purpose of being tested, is connected with the motive power of the factory, and is being operated as a machine for the purpose of testing. The plaintiff, having received personal injuries while testing a machine, by reason of the machine being unguarded, the trial judge charged the jury that if they considered the machine to be dangerous, the defendants were liable at common law for breach of duty imposed by the Factories Act, and further charged the jury that under such circumstances, it was no defence that the plaintiff voluntarily assumed the risk:—Held, that the Factories Act did not apply, and the action at common law must be dismissed. *Everett* v. *Schaake Machine Works, Limited*, 17 B.C.R. 271.

4. System.

1. Neglect of rules.]—In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found, inter alia, that the system adopted for lowering the men was faulty, and that the plaintiff did not comply with the printed rules of the mine:—Held, that the plaintiff was entitled to judgment, although adherence by him to the rules would have prevented the accident. *Warmington* v. *Palmer and Christie*, 7 B.C.R. 414; 8 B.C.R. 344; 32 S.C.R. 126.

2. Established by the workmen.]—Where a defective system of "kicking in" cars into a drift in a mine has been long established and a workman continues to use that system as he found it on entering the master's service, the master is liable at common law for injury resulting to the workman from such use. *Carrigan* v. *The Granby Consolidated Mining, Smelting and Power Company, Limited*, 16 B.C.R. 157.

3. Common employment.] — Plaintiff's duty in a logging camp was to work a donkey-engine intended to extricate logs which might become jammed or stopped in their progress down a long chute leading to the water. The engine was placed near the water and close to the foot of the chute, down which the logs came with considerable speed. There was a foreman in charge of the logging operations, and plaintiff was subject to the directions of such foreman. The latter had made two changes in the position of the engine within a few days, the place it occupied at the time of the accident being the first location. There was no dispute as to the foreman's fitness. A log coming down jumped the chute and, striking the plaintiff, broke his leg and carried him into the sea:—Held, that the system was defective, and that the verdict of the jury giving common law damages should stand. *Fakkema* v. *Brooks Scanlan O'Brien Company, Limited*, 15 B.C.R. 461; 44 S.C.R. 412.

4. Common employment.]—The plaintiff's husband was a linesman employed on

piece-work, by the defendants with a gang of men setting posts in holes previously dug by the company with which they had contracted to erect the posts and prepare them to carry electric wires. A post set in one of these holes was insufficiently sunk or set in position without proper packing to hold it rigidly in the light soil of an embankment. The deceased was sent up the post to attach cross-bars, which were being hoisted to him by fellow-workmen by means of a block and tackle, when, owing to the strain, the post fell, causing injuries which resulted in his death. The post-holes, as dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their servants engaged in setting up the posts and preparing them for wiring:—Held, that the failure to sink the post-holes to a sufficient depth and obtain proper filling to secure the post, and ensure the safety of the servant required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow servant. *Slater* v. *Vancouver Power Co. and Waugh-Millburn Construction Co.*, 18 B.C.R. 429; 48 S.C.R. 609.

5. Watchmen.]—Where the practice was for the defendant company's trams leaving Vancouver on a double track as far as a place called Cedar Cottage to run thereafter on a single track, and on foggy nights a watchman was stationed at Cedar Cottage to advise conductors and motormen as to the condition of traffic, and the injured men in charge of two colliding trams were killed, so that it was impossible to ascertain whether the watchman had done his duty, the jury were justified in finding that the system was defective. *McDonald* v. *British Columbia Electric Railway Company*, 16 B.C.R. 386.

6. Defective system of user.]—A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. *Foley* v. *Webster*, 2 B.C.R. 137; 21 S.C.R. 580.

7. Common employment.]—The plaintiff was permanently injured by the fall of an elevator in the works of the defendant Company, where he was employed, he being in the elevator at the time. The cable supporting the elevator broke from its fastenings, and although the elevator was provided with safety devices, as required by the Factories Act, they did not check the elevator in its fall. The system adopted by the defendant Company provided for a monthly inspection of the elevator. There was evidence that the elevator should have been inspected twice a week, as the sugar which was carried in open barrels escaped and mixed with the grease and oil in the working parts of the elevator and prevented the safety devices from working properly. In an action by the plaintiff the jury found there was negligence on the part of the defendants in construction of repairs, and owing to inadequate inspection of repairs and the safety device, and gave damages in $12,000:—Held, that there was evidence upon which the jury might find the adoption by the defendants of a defective system, the result of which was the injury to the plaintiff. The plaintiff was therefore entitled to recover at common law, and it was not open to the defendants to answer that the accident resulted from the negligence of a fellow servant. *Hitchin* v. *The British Columbia Sugar Refinery Company, Limited*, 18 B.C.R. 397.

8. Negligence of foreman.]—The plaintiff was injured by falling from false work on a wall in course of construction owing to the tipping up of a loose plank on which he stood. The defendant was in the course of constructing a concrete refuse burner in connection with its mill, which was to be about 20 feet in diameter, with a concrete wall six feet thick. Skeleton walls made of planks were erected six feet apart for the reception of the cement, and false work was erected outside with an inclined runway up which the cement was carried in wheelbarrows. At the top of the inclined runway 2 x 4 scantling was placed across the top of the skeleton walls, upon which rested two two-inch planks close together, forming a runway on which the wheelbarrows were run from the inclined runway and from which the cement was dumped into the centre. These planks were moved from time to time as the wall grew in height. At first the planks were nailed to the scantling, but on their last removal, when about six feet from the ground, they were not nailed. At the time of the accident the plaintiff was standing on the planks, tamping the cement and cleaning

out the wheelbarrows:—Held, that the employer was not liable at common law, as the runway did not form part of a system, being something which the employer must of necessity have left to the care of the foreman. *Liset* v. *The British Canadian Lumber Corporation, Limited,* 19 B.C.R. 480.

5. The Doctrine of Common Employment.

1. Burden of proof.]—Deceased, an employee of defendant Company, was killed in a collision between the car of the defendant Company on which he was travelling to his work, and a freight car which had been allowed to get loose and run down grade alone. There was no proof of how this car got away. Some evidence was given of a pass from the Company having been found on deceased, but not to show that a pass had been issued to him over that portion of the line, nor was the pass produced:—Held, that the onus was on the defendant Company to show that deceased was travelling on a pass, and that it was not shown that he was being carried in such circumstances as to make him a fellow servant with those operating the line. *Wilkinson* v. *British Columbia Electric Railway Company, Limited,* 16 B.C.R. 113; 45 S.C.R. 263.

2. Former fellow servant.]—The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service. *Hosking* v. *Le Roi No. 2, Ltd.,* 9 B.C.R. 551; 34 S.C.R. 244.

3. Servant pro hac vice.]—H. & M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers. The defendants were to provide all necessary appliances, etc., H. & M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of, or unsatisfactory to, such superintendent should be dismissed on request. A hoisting bucket hung on a clevis was supplied to H. & M. by defendants, and through the negligence of the defendants' superintendent, master mechanic, or shift boss, a hook substituted for the clevis, by defendants, at the request of H. & M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. & M.'s workmen engaged in sinking the winze:—Held, that the plaintiff, being subject to the orders and control of the defendants, was acting as their servant, and the doctrine of common employment applied, and the action was not maintainable. *Hastings* v. *Le Roi No. 2, Limited,* 10 B.C.R. 9; 34 S.C.R. 177.

4. Competent fellow servants.] — The plaintiff, a conductor, in employ of defendant company, was injured while uncoupling cars on a side track, the accident being caused by the plaintiff's foot becoming entangled in the long grass which had been allowed to grow on the track. The company had a sectionman and roadmaster whose duties were to keep the road in order:—Held, in a common law action for damages, that the company was not liable. A railroad company is not liable for personal injuries sustained by an employee by reason of a defect in the track, provided the track was properly constructed and competent workmen were employed to keep it in order. *Wood* v. *The Canadian Pacific Railway Company,* 6 B.C.R. 561.

5. Competent foreman.] — Plaintiff, a workman in the defendants' employment, lost the sight of an eye through being struck with an iron splinter from the ring of a wooden hammer used in caulking operations. The condition of the tool was brought by plaintiff to the foreman's notice immediately before the accident, not in the sense of its being dangerous, as similar tools in similar condition were often used, but as to its condition to do the work effectively. The foreman directed plaintiff, as time was important, to try to do the work with the hammer, and the accident occurred. There was no question of the foreman's competence, or that the tool as supplied by the employers was defective or dangerous:—Held, setting aside the verdict of the jury in favour of the plaintiff, that there had been no negligence on the part of the defendants; that if there was any negligence it was on the part of the foreman, a fellow servant, and it was shown that he was a competent person for the position. *Kellett* v. *British Columbia Marine Railways Company, Limited,* 16 B.C.R. 196.

6. Temporary obstruction of place of work.]—The plaintiff, employed as a switchman, when about to climb to the top of a train in the night time, while being shunted, in order that he might more effectively signal the engineer, stumbled over an

unlighted pile of dirt formed by an excavation made by the defendant Company's workmen in construction work, and was severely injured by the train. The defendant Company had delegated to a competent foreman, who was in charge of a construction gang, the duty of "seeing that everything was left safe." He was supplied with sufficient resources for that purpose, including lights for dangerous places, and it was his duty to decide as to where lights should be placed on obstructions. At the trial the learned judge refused to submit to the jury the question of common-law liability:—Held, that although the plaintiff could receive compensation under the Employers' Liability Act, as the accident was due to the negligence of a fellow servant in failing to place lights upon the mound over which the plaintiff stumbled, the doctrine of common employment precluded him from recovering damages at common law. The temporary obstruction of a railway yard by a dirt pile, arising from an excavation preliminary to the erection of a tool-house, which was in charge of a competent foreman, did not alter the nature of the yard from that of reasonable safety to a dangerous place to work in. *Hall* v. *Canadian Pacific Railway Company,* 20 B.C.R. 293.

7. Defective system.]—An incorporated company carrying on dangerous operations is liable at common law for damages sustained by a servant in consequence of injuries occasioned by the use of a system which failed to provide a safe and proper place in which the servant could do his work. It is not relieved from this responsibility by the fact that the operations were superintended by a competent foreman. *Fakkema* v. *Brooks Scanlon O'Brien Co.,* 15 B.C.R. 461; 44 S.C.R. 412.

8. Defective plans.]—In an action for personal injuries the jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers, who were competent, and who had left the defendants' employment before the injured person entered their employment:—Held, the defendants were not liable at common law. *Hosking* v. *Le Roi, No. 2, Ltd.,* 9 B.C.R. 551; 34 S.C.R. 244.

9. Defective system.]—The mate of a steamer was injured by the bursting of the capstan and brought a common law action against the owners for damages for his injuries, and also for aggravation of his injuries owing to his unauthorized detention on the steamer after the accident:—Held, that in the absence of evidence of a defective system, the defendants were not liable for the negligence, if any, of a competent engineer who was a fellow servant of plaintiff and not a representative of defendants. If there was any negligence on the part of the captain in keeping the plaintiff on the steamer, the defendants were not liable for it, as such interference was not within the scope of his employment. *Morgan* v. *The British Yukon Navigation Company, Limited,* 11 B.C.R. 316.

10. Defective apparatus.] — Where a miner getting into a bucket by which he was to be lowered into the mine, owing to the chain not being checked, was carried down by his own weight and badly hurt, and the jury found that the system for lowering the men was faulty, that the man in charge of it was negligent, and that the engine and brake by which the bucket was lowered were not fit and proper, for the purpose, it was held that as the negligence causing the accident was not that of the persons having control of those going down the mine, it was not a case of negligence at common law. *Warmington* v. *Palmer,* 8 B.C.R. 344; 32 S.C.R. 126.

11. Negligence in working good system.]—The plaintiff, while in the employ of the defendant company, was struck and injured by a "box" or "skip" filled with broken cement as it was hoisted by a derrick for removal, after having been filled by the plaintiff and other workmen. The derrick was in charge of a signalman whose duty it was to warn the men immediately before he signalled the engineer to hoist. In an action for damages the jury found that the defendant's system of warning their workmen to stand clear of the "skip" before hoisting it, was a defective one:—Held, that the finding was contrary to the evidence, and that even if the signalman did not, on the occasion on which the plaintiff was injured, give the signal, it was not the fault of the system, but the fault of the signalman, who was the plaintiff's fellow servant. *Hvynczak* v. *British Columbia Electric Railway Company, Limited,* 20 B.C.R. 31.

12. Failure to carry out system.]—The plaintiff brought action at common law, and in the alternative under the Employers' Liability Act, to recover damages for injuries sustained by him while working for the defendant company on a bridge in course of construction. Rails were laid on the bridge and a "traveller," worked by steam, travelled backward and forward on the rails. The engineer had orders to blow the whistle when starting to move in either direction. The plaintiff's hand was crushed on one of the rails by the "traveller," when it was making a forward movement. On this occasion the engineer had not blown the whistle before starting:—Held, that the system of warning would have been a sufficient protection if it had been carried out, and the plaintiff had no cause of action at common law. *Crevelling* v. *Canadian Bridge Company*, 20 B.C.R. 137.

B. Employers' Liability Act.

1. Defective Ways, Works, Machinery and Plant.

1. Proof of negligence.]—The plaintiff in an action under the Employers' Liability Act, for damages caused by a defect in his employers' "works and ways," cannot succeed if on the facts proved the jury can only conjecture how the injury occurred. *Stamer* v. *Hall Mines*, 6 B.C.R. 579.

2. Apparatus causing injury, necessity to use.]—To entitle plaintiff to judgment in an action under the Employers' Liability Act, the jury's findings must show that it was reasonably and practically necessary for him to use the apparatus causing the injury. Where the facts proved show absence of such necessity a new trial will not be granted. *Davies* v. *Le Roi Mining and Smelting Company*, 7 B.C.R. 6.

3. Neglience—Accident in mine.]—In an action under the Employers' Liability Act the jury found that defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel, and that plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000:—Held, that the defendants were liable, but that the damages should be reduced to $500. *Pender* v. *War Eagle Consolidated Mining and Development Co., Limited*, 7 B.C.R. 162.

4. Decisive cause of accident.]—Plaintiff, while engaged in replacing on their track some cars which had run off, was struck through a car becoming released on a down grade, and was thrown on a set of exposed cog-wheels some nine or ten feet to one side of where he was working. He lost the use of his arm in the cogs. His duties did not usually bring him in contact with the machinery which caused his injury, nor had he any control over or concern in its working:—Held, that the leaving of the cogs unguarded was the decisive cause of the accident, and whether that was negligence in the particular circumstances was properly left to the jury. *Snow* v. *Crow's Nest Pass Coal Company, Limited*, 13 B.C.R. 145.

5. Cause of accident.]—The defendant had under construction the erection of a fire-escape on the wall of a theatre, his foreman superintending the construction. The plaintiff and a fellow-workman, F., were working on one of the floors or landings of the fire-escape, which consisted of an iron grating in two parts, supported at the ends by two bars of angle iron, the ends of which were imbedded in and supported by the east and west walls of the enclosure in which the fire-escape was constructed, one two inches wide touching the wall to the north for its full length, and the other three inches wide supporting the grating at its outside edge. Riveted to the outside of the latter were upright posts of angle iron of smaller size supporting and forming part of the railing guarding the outside edge of the platform. While these upright posts remained in place the grating was held secure. The foreman ordered the plaintiff and F. to drive out two rivets that held the upright post to the outside of the three-inch bar on the fifth floor, and put in their place two stove bolts. Upon F. driving out the rivets, the upright post being loose and no longer holding the grating in place, the grating slipped off the bar along the wall and fell with the two men to the floor below, injuring the plaintiff. In an action for damages under the Employers' Liability Act the jury brought in a verdict for the plaintiff:—Held, that the jury might reasonably conclude that the release of the upright post brought about the fall of the grating, and that there was, therefore, evidence upon which to find the

defendant negligent through his foreman not seeing that the platform was properly secured. *McGraw* v. *Hall*, 19 B.C.R. 441.

6. Negligence—Operating colliery with statutory manholes.]—In defendant's coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with man-holes at intervals of not more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient man-holes it was the custom of the company not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by defendant's negligence in letting the trip down, and on the verdict judgment was entered for plaintiff for $1,424 and costs. An appeal to the Full Court was dismissed, the Court refusing to reverse the findings of fact or interfere with the damages as excessive. *Booker* v. *Wellington Colliery Company, Limited*, 9 B.C.R. 265.

7. Dangerous place — Duty to warn workman.]—Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. G. had been working in the defendant's mine on the floors immediately below the 600 foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600 foot level, and of which the superintendent was aware and G. not aware. The jury found that the superintendent was negligent inasmuch as he did not advise G. of the probable danger:—Held, in an action under the Employers' Liability Act, that the defendants were liable. *Gunn* v. *Le Roi Mining Company, Limited*, 10 B.C.R. 59.

8. Buildings in course of erection.]—Buildings in course of erection are "the works" of the person erecting them within the meaning of the Employers' Liability Act. *McGraw* v. *Hall*, 19 B.C.R. 441.

2. Negligence of Superintendents.

Duty of employer to warn workmen of danger.]—Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment, and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. G. had been working in the defendants' mine on the floors immediately below the 600 foot level, and on the night of the accident when he was going to work he was told by the shift whom he was relieving that the place was in pretty bad shape, and to look out for it. He proceeded to make an examination, but while engaged, the mine superintendent directed him to do some blasting, and while doing it a slide occurred and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600 foot level, and of which the superintendent was aware, and G. not aware. The jury found that the superintendent was negligent, inasmuch as he did not advise G. of the probable danger:—Held, in an action under the Employers' Liability Act, that the defendants were liable. *Gunn* v. *Le Roi Mining Company, Limited*, 10 B.C.R. 59.

3. Railways.

1. Trolley.]—Where a steam trolley is being worked backwards and forwards on rails used in the construction of a bridge, it is being operated on a railway within the meaning of the Employers' Liability Act. *Crevelling* v. *Canadian Bridge Co.*, 20 B.C.R. 137.

2. Mine track.]—A train of cars, worked by a stationary engine outside the mine, running on a line leading out of the mine and used for hauling coal out of the mine is a railway. *Booker* v. *Wellington Colliery Co.*, 9 B.C.R. 265.

4. Notice of Injury.

Want of reasonable excuse.]—In an action for damages under the Employers'

Liability Act for injuries sustained by plaintiff, it was shown that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendants' business manager and representative saw the accident and arranged for plaintiff's admission into the hospital, where a few days later he discussed with him the cause of the accident:—Held, the circumstances excused the want of notice of injury. At the close of the plaintiff's case a non-suit was moved for on the ground that plaintiff had not proved notice of injury, and plaintiff then adduced evidence which the Court held showed a reasonable excuse for want of notice and the trial proceeded. Before closing his case defendant's counsel tendered evidence of being prejudiced by want of notice:—Held, excluding the evidence, that the proper time to show prejudice was while the question of reasonable excuse was still open. *Lever* v. *McArthur*, 9 B.C.R. 417.

5. Employments Within the Act.

Pile-driving.]—A servant employed to work a pile-driver is a workman within the Act. *McMillan* v. *Western Dredging Co.*, 4 B.C.R. 122.

C. Defences Open to Master in Actions at Common Law and Under Employers' Liability Act.

1. Acceptance of Risk.

1. Voluntarily incurred the risk.]—Plaintiff in the course of his duties as defendants' employee in their mill, walked upon a roller way constructed for the purpose of carrying lumber from the saws out of the mill, consisting of a platform through which rollers moved by connecting uncovered cog wheels at the sides, slightly projected. The jury found that there were other passage ways for the plaintiff, but none of them sufficient. That the non-covering of the cogs was a defect. That the plaintiff was cognizant of the danger of using the roller platform, but was not unduly negligent, and found damages:—Held, upon motion for judgment, dismissing the action, that if the defendants had covered the cogs the accident would not have happened, and that, upon the findings of the jury, the negligence of defendants was primarily the cause of the accident, but that the plaintiff was guilty of contributory negligence in using the roller way as a passage way, and was volens in regard to the risk of injury:—Held, by the Full Court entering judgment for the plaintiff—that, to support the defence of contributory negligence, it was necessary that there should be a direct and positive finding that the plaintiff voluntarily incurred the risk, and that there was no such finding. *Scott* v. *British Columbia Milling Co.*, 3 B.C.R. 221; 24 S.C.R. 702.

2. Undertaking risk.]—The defendant company, in carrying on blasting operations after drilling, first blasted the bottom of the holes with a small amount of powder in order to widen them for the reception of sufficient powder for the main blast. This operation is known as "springing" holes. After the springing operation the hole is charged with powder for the main blast. While the plaintiff, a workman employed by the defendants, was engaged in the final loading of a hole, the "springing" of other holes was being carried on close to where he was working. An explosion in the springing operation caused the blast at the hole where the plaintiff was working to go off, and he was injured. There was evidence of a warning of the blast for "springing" being given, which the plaintiff, who was a foreigner, did not hear. The trial judge took the case from the jury and dismissed the action:—Held, that the trial judge properly withdrew the case from the jury and dismissed the action, that the particular thing that caused this accident was the failure of the plaintiff to hear the warning (if given), and if not given, it was the neglect of a fellow servant. *Beck* v. *Guthrie, McDougal & Co.*, 18 B.C.R. 482.

3. Plaintiff causing accident.]—The plaintiff had been engaged on a steam-shovel of the defendant company for six years, during the latter two and a half of which he had acted as engineer. The steam-shovel, which travelled by its own power on the track at about three miles an hour, had a cab in front for operating the engine and another at the back for firing. The boiler stood between the cabs and its back portion was between two water tanks about seven inches from its outer bulge four feet above the deck, the engine being below the boiler. A break staff stood about 15 inches in front of the tank to the right of the boiler, and about two feet out from a pinion that was connected with a gear-

wheel in front, by which the machine was moved on the tracks. The lubricator was about three and a half feet back of the pinion, between the boiler and the water-tank. In order to get to the lubricator from the front cab, the engineer had to pass between the gear-wheel and the break staff and then between the boiler and the water-tank. While the steam-shovel was in motion, the plaintiff went from the front cab to the lubricator and after adjusting it was backing out, when his overall caught between the pinion and the gear-wheel, and his arm being pulled in, it was crushed between the wheels, necessitating amputation. It was the duty of the engineer to report what was necessary in the way of repairs or improvements to the steam-shovel, but the plaintiff had never requisitioned for a guard or other protection on the gear-wheel. On the trial the jury found in favour of the plaintiff for $5,000 damages, for which judgment was entered:—Held, on appeal, that the defence arising from the maxim Volenti non fit injuria applied in this case, and the plaintiff was not entitled to recover. *McPhee* v. *The Esquimalt and Nanaimo Railway Company*, 18 B.C.R. 450. Reversed, 49 S.C.R. 43.

4. Non sciens.]—In an action under the Employers' Liability Act, the jury found that defendants were guilty of negligence in not having a platform so fixed as to prevent drills which were thrown down from bounding into the tunnel, and that plaintiff was unaware that drills were being thrown down when he was about to pass through the tunnel; and the jury assessed the damages at $3,000:—Held, that the defendants were liable but that the damages should be reduced to $500. *Pender* v. *War Eagle Consolidated Mining and Development Co., Limited*, 7 B.C.R. 162.

5. Apparatus causing injury—Necessity to use.]—To entitle plaintiff to judgment in an action under the Employers' Liability Act, the jury's findings must show that it was reasonably and practically necessary for him to use the apparatus causing the injury. Where the facts proved show absence of such necessity a new trial will not be granted. *Davies* v. *Le Roi Mining and Smelting Company*, 7 B.C.R. 6.

2. Contributory Negligence.

1. Burden of proof.]—From the moment the plaintiff makes out a prima facie case that the injury was caused by the negligence of the defendant, the onus is cast on the defendant, if he sets it up, to show contributory negligence. *McMillan* v. *Western Dredging Co.*, 4 B.C.R. 122.

2. Ordinary course of employment.]—In an action for damages for personal injuries from an accident happening because of plaintiff's failure to withdraw himself from danger in response to a signal, the jury found that the defendant was negligent, and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy may not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the judge, was "we do not consider that plaintiff was doing anything but his regular work." Judgment was entered for plaintiff:—Held, that the judgment must be affirmed. *Marshall* v. *Cates*, 10 B.C.R. 153.

3. Breach of rules.]—One of the rules of the defendant company was that cars running in the same direction should be kept five minutes apart, except when approaching stations, when the motorman was to so manage his car that it could be stopped within the range of vision. Plaintiff, a motorman, ran his car into the rear end of another car standing at a station, and sustained injuries for which he claimed damages, alleging a defective system. The jury found defendants guilty of negligence and gave damages in $2,500:—Held, that as the rules had not been enforced by the defendants nor pleaded by them, they could not be relied upon in support of a charge of contributory negligence. *Daynes* v. *British Columbia Electric Railway Company, Limited Liability*, 17 B.C.R. 498; 49 S.C.R. 578.

D. Workman's Compensation Act.

1. Employer.

Option holder of a mine.]—A working bondholder or option holder of a mine is not the owner thereof and is not an employer within the meaning of the Act. *Scott* v. *McCarter*, 2 M.M.C. 569.

2. Accident.

Flying chips of steel.]—While engaged in chipping the burs from a steel plate

with a cold-chisel, the plaintiff was injured by a piece of the steel so chipped off, striking him in the eye and destroying its sight:—Held, that the injury was an accident within the meaning of the Workmen's Compensation Act, 1902. *Neville* v. *Kelly Brothers and Mitchell, Limited,* 13 B.C.R. 125.

3. Arising Out and in the Course of Employment.

1. Personal convenience.]—Where there is conflicting evidence, the finding by an arbitrator under the Workmen's Compensation Act, 1902, that the applicant was not engaged on his employers' business at the time of the accident, is a conclusive finding of fact on that point. An accident occurring to a workman while doing something purely for his personal convenience, and foreign to his duty, is not an accident arising out of and in the course of his employment. *Scalzo* v. *Columbia Maccaroni Factory,* 17 B.C.R. 201.

2. Obedience to orders.]—A chuteman and his helper, employed in the defendant company's mine, entered the chute before being told by the "mucker boss," according to orders, that it was safe to do so. There was some evidence that the chuteman told his helper that the "mucker boss" had given orders to proceed. The helper was injured by a fall of rock, the cause of which was unknown:—Held, that the injury arose out of and in the course of his employment, and that in accepting the statement of the chuteman, in a sense a person of authority over him, he was not guilty of wilful disobedience. *Cervio* v. *Granby Consolidated Mining, Smelting and Power Company,* 15 B.C.R. 192.

3. Abnormal conditions of weather.]—While deceased, employed as a fan-tender for a colliery company, was attending to his duties within a shelter house built on the side of a gulch under a cliff for the protection of the workmen, a snowslide coming down in an unusual direction and under abnormal conditions, smashed in the shelter house and killed him:—Held, that in the situation in which he was placed in the course of his employment, he was exposed to risk not common to others in the locality not so employed, and the applicants were entitled to compensation. The fact that there were abnormal conditions of weather does not affect the liability. *Culshaw* v. *Crow's Nest Coal Company,* 19 B.C.R. 13.

4. Dependents.

1. Son.]—Where the injured man left his father's house several years before the accident, sent money to his parents at irregular intervals, amounting altogether to $400 in six years, remitted nothing within a year before his death except a sum to pay the passage to America of a younger brother, and it appeared that the family consisted of father, mother, adult brother, and a hired boy of 19, and that the father was the owner of about five acres unencumbered, and worked another plot of the same size on shares, the whole being cultivated as an olive orchard, the injured man's family were held not to be dependents. *Varesick* v. *British Columbia Copper Co.,* 12 B.C.R. 286.

2. Non-resident widow of alien.]—The widow of an alien workman who has lost his life by an accident in the course of his employment is entitled to compensation as a dependent of the deceased, notwithstanding that she was resident in a foreign country at the dates, both of the accident and the death, and the legal personal representative of the deceased is entitled to payment thereof in trust for her. *Mike Krzus* v. *Crow's Nest Pass Coal Co.,* 16 B.C.R. 120; 1912, A.C. 590.

3. Race or residence.]—The principle governing Lord Campbell's Act, governs in the Workmen's Compensation Act, viz.: given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to the deceased in any of the relationships mentioned in the Act. *Varesick* v. *The British Cloumbia Copper Company, Limited,* 12 B.C.R. 286.

5. Notice.

Given by workman enures to benefit of dependents.]—A notice of injury given by a workman is sufficient to entitle those dependent upon him, after his death, to the benefits of the Workmen's Compensation Act, Revised Statutes of British Columbia, 1911, chapter 244, without any other or further notice. *In re Moffatt and the Crow's Nest Pass Coal Company,* 18 B.C.R. 303.

6. Misconduct and Neglect.

1. Consequences.] — Misconduct is not "serious" merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself. *Hill and Another* v. *Granby Consolidated Mines, Limited,* 12 B.C.R. 118.

2. Exposure to risk of injury.]—Any neglect is "serious neglect" within the meaning of the Act which, in the view of reasonable persons in a position to judge, exposes anybody, including the person guilty of it, to the risk of serious injury. If the danger to be apprehended is a danger of serious injury, or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. *Ibid.*

3. Disobedience.]—Deceased, a foreigner, but able to speak and understand, though not to read or write English, entered the employment of defendants at work in which he had had no previous experience. Before commencing work, a fellow labourer was cautioned by the foreman, in presence of the deceased, not to allow the latter to use a freight lift. He nevertheless attempted to use it, and was cautioned not to do so. He was later in the day killed in the lift:—Held, that he was not guilty of serious and wilful misconduct. *Granick* v. *British Columbia Sugar Refinery Company,* 14 B.C.R. 251; 15 B.C.R. 198; 44 S.C.R. 105.

4. False representation of age.]—The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 1902, it not appearing that the accident in question was "attributable solely" to such misrepresentation. *Darnley* v. *Canadian Pacific Railway Company,* 14 B.C.R. 15.

5. Question of fact.]—Serious and wilful misconduct. Whether or not there is any evidence to support a finding of wilful and serious misconduct is a question of law. *Granick* v. *The British Columbia Sugar Refining Co.,* 15 B.C.R. 198; 44 S.C.R. 105.

7. Assessment Under, When Action Dismissed.

1. By Court of appeal.]—Plaintiffs at the trial recovered damages for the death of their son, killed while in defendant company's employment. The Court of Appeal reversed the trial judgment. Thereafter plaintiffs applied to the Court of Appeal for a direction to assess damages under the Workmen's Compensation Act, 1902, sec. 6, sub-sec. 4:—Held, that the Court of Appeal could not assess the damages or make any order directing an assessment. *McCormick and McCormick* v. *Kelliher Lumber Company,* 17 B.C.R. 422.

2. After appeal.] — In a common law action for damages for the death of a workman by reason of the negligence of the employers, plaintiffs recovered $1,500. This judgment having been reversed by the Court of Appeal, plaintiffs applied to that Court to assess the damages under the Workmen's Compensation Act, 1902, which application was refused (1912), 17 B. C. 422. On application to the trial judge he assessed the damages at $1,500, and defendants appealed:—Held, that the judgment of the Court of Appeal placed the parties in the position which they occupied at the close of the common law action, if the trial judge had given the judgment which the Court of Appeal held he should have given, when the plaintiffs could have asked for an assessment under the Workmen's Compensation Act, 1902. *McCormick and McCormick* v. *The A. T. Kelliher Lumber Company, Limited,* 18 B.C.R. 57.

3. Appeal from assessment.] — Where plaintiff's counsel, on the opening, in an action launched under the Employers' Liability Act and the Workmen's Compensation Act, expressed a doubt that his evidence was not strong enough to support a claim under the former, but that he hoped to succeed under the latter Act, the trial judge was right in proceeding to hear the evidence. The learned trial judge in the above circumstances having heard the plaintiff's evidence, dismissed the action under the Employers' Liability Act, and came to the conclusion that no compensation was payable under the Workmen's Compensation Act:—Held, that an appeal lay from him in the action as a judge. *Granick* v. *British Columbia Sugar Refinery Co.,* 15 B.C.R. 198.

4. Right of appeal.] — The right of appeal from a decision in the course of proceedings to which article 4 of the second schedule of the Act applies is available only for questioning the determination of the Court or judge upon some question of law: Decisions upon questions of fact in

adjudicating upon a claim under sub-sec. 4 of sec. 2 of the Act are not subject to appeal. *Granick* v. *The British Columbia Sugar Refining Co.*, 15 B.C.R. 198; 44 S.C.R. 105.

8. Measure of Compensation.

Chances of employment lessened.]—In estimating compensation under the Workmen's Compensation Act for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, and his earning power consequently reduced. *Roylance* v. *Canadian Pacific Railway Company*, 14 B.C.R. 20.

9. Arbitration.

(*a*) *Practice.*

1. Rules.]—The effect of sec. 34 of the Workmen's Compensation Rules, 1904, is to make the proceedings subject to the same rules as an action. *Cizowski* v. *West Kootenay, etc., Co.*, 12 B.C.R. 63.

2. Amendment.] — An arbitrator appointed under the Workmen's Compensation Act, 1902, has the same powers as to amendments of pleadings in proceedings before him as a judge has in a civil action. *Moore* v. *Crow's Nest Pass Coal Company, Limited*, 15 B.C.R. 391.

3. Commission.]—Sec. 2 of the second schedule to the Act and Rules 2, 34 and 81 of the Workmen's Compensation Rules, 1904, give the arbitrator power to direct the taking of evidence on commission. *Follis* v. *Schaake Machine Works*, 13 B.C.R. 471.

(*b*) *Stated Case.*

Functus officio.]—An arbitrator having made his award is functus officio, and has no power to then submit a question of law for the decision of a judge under sec. 4 of the Second Schedule of the Workmen's Compensation Act. *In re Lewis and Grand Trunk Railway Company*, 18 B.C.R. 329.

(*c*) *Referring Back.*

To proceed with arbitration.]—On a case stated in an arbitration under the Workmen's Compensation Act, 1902, the Full Court referred the question back to the arbitrator to make definite findings of fact and have the questions of law clearly formulated. Upon the reference back, the case was re-stated to a single judge, and the learned judge to whom the questions were submitted found that they were questions of fact, and referred the matter back to the arbitrator to "proceed with the arbitration":—Held, on appeal, that there was jurisdiction for such an order; that the arbitrator had not finished his work, and that he is not functus officio until the award is made. *Armstrong* v. *St. Eugene Mining Company*, 13 B.C.R. 385.

(*d*) *Award: Reviewing.*

1. Appeal.]—No appeal lies from the decision of an arbitrator appointed by a Supreme Court Judge under clause 2 of the second schedule to the Workmen's Compensation Act, 1902. *Lee* v. *The Crow's Nest Pass Coal Company, Limited*, 11 B.C.R. 323.

2. Stated case.]—An arbitrator under the Workmen's Compensation Act, 1902, sec. 2, sub-sec. (3) having jurisdiction to settle any question as to whether the employment is one to which the Act applies:—Held, that the only way to review the arbitrator's finding thereon is by a case submitted under sec. 4 of the Second Schedule. *Basanta* v. *Canadian Pacific Railway Company*, 16 B.C.R. 304.

3. Neglect to ask for stated case.]—Where parties to an arbitration under the Workmen's Compensation Act neglect to ask the arbitrator to state a special case for the opinion of the Court, the award should not, in the absence of misconduct, be remitted to the arbitrator or set aside. *Cozoff* v. *Welch*, 20 B.C.R. 552.

4. Motion to set aside.]—The Arbitration Act applies to an award under the Workmen's Compensation Act, and a motion to set aside an award may be made under the former Act. Where, therefore, an award was attacked by a motion for a writ of prohibition, the motion was properly dismissed, particularly as the applicant admitted that the award should have provided for weekly payments instead of a lump sum and undertook to have the register amended in this particular. *Disourdi* v. *Sullivan Group Mining Company*, 14 B.C.R. 241.

5. Action to set aside award.]—Where the award of an arbitrator under the

Workmen's Compensation Act is filed under paragraph 8 of the Second Schedule, and thereby becomes enforceable as a County Court judgment, an action to set aside the judgment and execution issued thereon is properly brought in the Supreme Court. *The British Columbia Copper Company, Limited* v. *McKittrick*, 18 B.C.R. 129.

10. Insurer, Liability of.

1. Enforcement of.] — The plaintiff, a workman employed by the defendant Mining Company was injured in November, 1907. In October, 1908, he obtained an award for compensation under the Workmen's Compensation Act, 1902. At the date of the award the Mining Company were insolvent and in the course of winding up. The plaintiff alleged that the defendants, the Casualty Company, were liable to indemnify the Mining Company against losses or liability under the award, and an order was asked for directing payment by the Casualty Company of the amount of the award into a chartered bank, pursuant to sec. 6 of the Act, and a judge of the Supreme Court granted the order, but it was set aside by the Full Court: (1909), 14 B. C. 256. A subsequent application by the plaintiff for an issue to determine the liability of the Casualty Company to indemnify the Mining Company was dismissed (1909), 14 B.C. 273. The plaintiff then brought this action for a declaration that he had a first charge upon the moneys which the Mining Company were entitled to receive from the Casualty Company, and for an order for payment pursuant to sec. 6. The defendants admitted that they had issued a policy which was valid and subsisting at the date of the plaintiff's injuries, by which they agreed to indemnify the Mining Company against loss for damages on account of bodily injuries suffered within the period of the policy by any employee. The trial judge (Hunter, C.J.B.C.), dismissed the action on the ground that there was no privity of contract between the plaintiff and the Casualty Company, in other words, that the plaintiff had no status:—Held, that the judgment should be affirmed. Per MacDonald, C.J.A.: Unless sec. 6 gave the plaintiff a status to maintain the action, he had none; and it was not open to the plaintiff to ascertain the liability of the insurers to the Mining Company in an action such as this. The creation of the charge alone, without reference to that part of the section which gives a remedy for enforcing it, does not effect the subrogation mentioned in *Northern Employers' Mutual Indemnity Company, Limited* v. *Kniveton* (1902), 1 K.B. 880, 18 T.L.R. 504, and *Morris* v. *Northern Employers' Mutual Indemnity Company, Limited* (1902), 2 K.B. 165, 18 T.L.R. 635. Were it not for the decision of the Full Court in 1909, 14 B.B. 256, sec. 6 might be construed as intended not only to give the workman a charge on the insurance moneys, but also to provide the means of enforcing it, whether the insurers disputed their liability or not. Per Irving, J.A.: The liability of the Casualty Company under sec. 6 can be determined only in an action by the liquidator of the Mining Company. Per Martin, J.A.: Sec. 6 affords a novel measure of relief to the working man, which can be obtained or enforced only in the way specified in the section, which at the same time creates a first charge upon the amount due from the insurer to the employer, and directs how the workman shall assert his rights in the premises, viz.: by means of an application to a judge of the Supreme Court. An action in the Supreme Court cannot be deemed to be an application to a judge of the Supreme Court, because the judge is persona designata: aliter, had the appeal been to the Supreme Court or a judge thereof. *In re Vancouver Incorporation Act*, 1900, *and B. T. Rogers* (1902), 9 B.C.R. 373, and Semble, that the judge would be a competent tribunal to make a finding that the employer was entitled to a sum from the insurers, notwithstanding the absence of rules. *Disourdi* v. *Sullivan Group Mining Company and Maryland Casualty Company*, 15 B.C.R. 305.

2. Finding of.] — There must be an admission of liability on the part of the insurer, or a finding by a competent tribunal, before the provisions of sec. 6 of the Workmen's Compensation Act, 1902, as to payment into Court, can be invoked. *Disourdi* v. *Sullivan Group Mining Company and Maryland Casualty Company*, (*No. 2.*) 14 B.C.R. 256.

3. Enforced by action.]—The applicant was injured in the employment of the defendant mining company, which during the proceedings to establish his claim against them, went into liquidation. He was

awarded compensation in $1,500. The Insurance Company disputed their liability, under their policy of insurance issued to the Mining Company. Under these circumstances the applicant applied under sec. 6 of the Act for an order that the Mining Company and the insurers proceed to the trial of an issue with him:—Held, that any right which the applicant might have against the insurers under said sec. 6 must be decided in an action commenced in the ordinary way:—Held, further, that the rules made under sec. 6 are ultra vires. *Disourdi* v. *Sullivan Group Mining Company, Limited. Disourdi* v. *Maryland Casualty Company* (*No. 3.*) 14 B.C.R. 273.

11. Costs.

1. Jurisdiction.] — In a memorandum handed down by a judge of the Supreme Court on a special case under the Workmen's Compensation Act, 1902, no mention was made of costs. The memorandum was duly recorded under the Act and Rules, which makes it enforceable as a County Court judgment. On an application for an order to tax the costs:—Held, that the judge had jurisdiction to deal with the costs of the special case under r. 42. *Darnley* v. *Canadian Pacific Railway Company,* 15 B.C.R. 324.

2. Assessment of compensation.]—Where, after the dismissal of an action, the judge proceeds to assess compensation under the Act, he has a discretion to refuse to order that the costs of the abortive action be deducted from the compensation. *Follis* v. *Schaake Machine Works,* 13 B.C.R. 471.

3. Abortive trial.]—Where the defendant is not deprived of the costs of the action he is entitled to tax them in the ordinary way, and then after reducing the taxed costs by the amount of the costs which would have been occasioned by proceedings under the Act, to deduct them from the amount of the compensation; and where the compensation is payable by instalments, the deduction must be made correspondingly. *Ibid.*

4. Dismissal of action.]—Where after the dismissal of an action for damages, the Court assesses compensation under the Workmen's Compensation Act, the defendant having filed an admission of liability under the Act, the defendant is entitled to the costs of the action, and the plaintiff to the costs of an undefended proceeding under the Act. *Wilson* v. *Kelly,* 14 B.C.R. 436.

5. Dismissal of action.] — Where the plaintiff fails in his common law action, the Court has power in its discretion to deal with the costs of the action or of proceedings under the Workmen's Compensation Act:—Held, in the circumstances in this case, the plaintiff having been awarded compensation under the Workmen's Compensation Act, that he should have costs following the event upon the dismissal of the action. *Wilson* v. *Kelly,* 14 B.C.R. 436.

6. As in action.]—The object of rule 34 of the Workmen's Compensation Rules, 1904, is to make the proceedings under it subject to the same rules as an action. *Cizowski* v. *West Kootenay Power and Light Company, Limited,* 12 B.C.R. 63.

7. Arbitrator's fees.]—The schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act, and the arbitrator's fee must be dealt with by a practice analagous to that prevailing prior to the Arbitration Act on a reference directed by the Court. *Chisholm* v. *Centre Star Mining Company,* 12 B.C.R. 16.

8. Security for costs.]—An application for security for costs in an arbitration under the Workmen's Compensation Act should be made to the arbitrator and not to a judge in Chambers; and should be made promptly. *Krzus* v. *Crow's Nest Pass Coal Co., Ltd.,* 14 B.C.R. 385.

9. Security for costs.]—The Supreme Court has jurisdiction to order the applicant to give security for the costs of the arbitration, when he resides out of the jurisdiction. *Cizowski* v. *West Kootenay, etc., Co.,* 12 B.C.R. 63.

V. Liabilities of Master to Third Persons.

1. Respondeat superior — Corporation —Ultra vires—Agency — Ratification.]—A corporation is liable for a trespass committed by its servant while conducting its business, although committed in the doing of an act ultra vires of the corporation itself. Where the servant of a corporation forms an erroneous judgment, and, in the supposed scope and discharge of the duty delegated to him commits a trespass, the corporation is liable for it. *Adams* v. *The National Electric Tramway and Lighting Co.,* 3 B.C.R. 199.

2. Trespass — Respondeat superior — Agency—New trial — Misdirection—Rule 446.]—A servant of the defendant corporation, employed to cut timber on its lands, knowingly trespassed and cut timber off plaintiff's lands, which adjoined, and the defendants' manager, general foreman, and other servants, knowingly took it and included it in defendants' boom, and hauled it away. It was afterwards cut up and sold along with defendants' lumber. Evidence was given for plaintiff, and denied by defendants, that the trespass was committed by instructions of the manager. The jury found a verdict for the plaintiff:—Held, on motion for judgment: If a servant of a company commits a tort in the course of his employment, and for the benefit of his employer, whether by his direct orders or not, the employer is liable, even if the act was unknown to or actually forbidden by him. *Harris* v. *Brunette Saw Mill*, 3 B.C.R. 172.

3. Hospital doctor.]—While employed as a labourer in a sawmill the plaintiff made a monthly payment of $1 to a hospital in order to secure treatment and medical attendance in the event of illness. Under this arrangement he entered the hospital and was treated by the superintendent, Dr. Tidey, who was the resident physician and an employee of the hospital, and subject to dismissal. He was treated for rheumatism in the shoulder, and, not improving, was sent to another hospital, where it was found he had a dislocated shoulder. He brought action for damages, alleging negligence against both the hospital and the superintendent, basing the action on the contract. At the trial the jury found negligence on the part of the superintendent, assessing the damages at $1,000, and the learned trial judge directed that judgment be entered against both defendants:—Held, on appeal, that the judgment against the defendant Tidey be affirmed, but that the appeal of the Columbia Coast Mission be allowed, as their legal obligation, which they discharged, extended only to providing reasonably skilled and competent medical attendance for the patient. *Thompson* v. *Columbia Coast Mission*, 20 B.C.R. 115.

See NEGLIGENCE.

See PRINCIPAL AND AGENT.

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MECHANIC'S LIEN.

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I. THE RIGHT: WHEN LIEN EXISTS.

A. Against Whose Interest.

Vendor and purchaser — Free miner's lien—Bonded claim.]—Miners employed by a bondholder, who has a working bond on a mine by which, if the mine were worked, a certain number of men were to be employed by the bondholder, and the proceeds applied on the purchase, have, in the absence of an express request by the owner, no lien on the mine if the bondholder does not exercise his option of purchase. The words "at the instance" in sec. 7 bear a different construction from those "at the request" of the owner in sec. 4. *Anderson* v. *Godsal*, 7 B.C.R. 404; 1 M.M.C. 416.

B. For What Work or Material.

1. Cooking.]—There is no lien given for cooking under the Act. *Anderson* v. *Godsal*, 7 B.C.R. 404.

2. Preparing plans.] — An architect is not entitled to a mechanic's lien for pre-

paring plans, and where a lump sum is to be paid for preparing plans and for superintendence, he is not entitled to a lien for any amount. *Fripp* v. *Clark*, 18 B.C.R. 216.

3. Carting material.]—A person delivering upon the land material to be used in preparing such property is not a person who has done work or service upon the land within the meaning of sec. 6 of the Mechanics' Lien Act so as to be entitled to a claim for lien. A number of claimants supplied teams, waggons and drivers to the contractors, at so much per diem, for hauling sand, gravel and earth upon the property, and these equipments and drivers were at all times subject to the orders of the foremen of the contractors:—Held, that these claimants came within sec. 6 of the statute, and were entitled to claim. *Baker* v. *The Uplands, Ltd.*, 18 B.C.R. 197.

C. Part Performance.

Substantial performance.] — A substantial performance of a contract to supervise the building of a house is sufficient to entitle an architect to a lien though some portion of the material contracted for has not been supplied by one of the contractors at the time he received his final certificate from the architect. *Sickler* v. *Spencer*, 17 B.C.R. 41.

D. To What Property Attaches.

1. Mineral claim.] — Under the Mechanics' Lien Act a free miner may enforce a mechanic's lien against a mineral claim. *Holden* v. *Bright Prospects Gold Mining and Development Co.*, 6 B.C.R. 439.

2. Mine.] — The lien upon a mine as provided in sec. 8 of the Mechanics' Lien Act, R.S.B.C. 1897, c. 132 (as enacted by sec. 12 of c. 20, 1900), is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine. *Law* v. *Mumford*, 14 B.C.R. 233.

3. Timber license.] — Sec. 54 of the Land Act, which vests in the holder of a special timber license all rights of property in all trees, timber and lumber cut within the limits of the license during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse* v. *Hunter*, 12 B.C.R. 126.

4. Roads and sewers.]—A workman is entitled to a lien upon the part of a sewer extending below low-water mark into the ocean, upon which he worked. Where an owner of property is subdividing and preparing it for sale as a residential section, and undertakes, with the consent of the municipal body of the district, to prepare the roads and streets therein for public passage by persons residing in or passing along or through the subdivision, and it is expressly stipulated that the streets are not to be deemed public streets, such roads or streets are not to be considered as highways in the sense that they are exempt from claims for mechanics' or workmen's liens for the labour bestowed upon them. *Baker* v. *The Uplands, Ltd.*, 18 B.C.R. 197.

5. Railways.] — The Mechanics' Lien Act does not apply to Dominion Railways. *Lorson* v. *Nelson and Fort Sheppard Railway Co.*, 4 B.C.R. 151.

II. Perfecting Lien.

A. Notice by Material Men.

1. Sub-contractor.] — A sub-contractor who not only supplies material, but works it into the building, is not obliged to give notice to the owner of the material supplied, in order to make his claim for a lien valid in respect of the material: sec. 6 of the Mechanics' Lien Act applies to a material man pure and simple. *Irvin* v. *Victoria Home Construction and Investment Company, Limited*, 18 B.C.R. 318.

2. Contractor.] — Where the contractor also supplies the materials, and no notice of claim is filed by any material man within the statutory period, the conditions of sec. 6, as to notice, do not apply to the contractor. *Gidney* v. *Morgan*, 16 B.C.R. 18.

3. Contractor.]—A sub-contractor supplying material and performing the work in which the material is used may obtain a lien without giving notice under sec. 6 of the Mechanics' Lien Act. *Fitzgerald* v. *Williamson*, 18 B.C.R. 322.

4. Manufacturer.]—A person who accepts an order from a contractor for structural steel to be used in the construction of a building, fashions it at his factory to meet specified requirements, and delivers it so made ready at the building site, but takes no part in the construction thereof, is a "material man" only; his status is not affected by the fact that he expended labour on the material before delivery. He is bound, therefore, to give the notice prescribed by sec. 6, sub-sec. (1), of the Mechanics' Lien Act, and, in order to pre-

serve his lien, to file his claim within 31 days after the last delivery of material, as prescribed by sec. 19, sub-sec. (2), of said Act. *J. Coughlan & Sons* v. *John Carver & Company*, 20 B.C.R. 497.

5. Doing work and supplying material.]—The plaintiff, in pursuance of an agreement, having done work and supplied material in connection with the construction of a building, brought action for the enforcement of a lien. He gave no notice of his intention to obtain a lien, but he was able to segregate the amount due for labour from the value of the material supplied. It was held by the trial judge that he was entitled to a lien for the amount due for labour:—Held, on appeal, that by sec. 6, sub-sec. 1, of the Mechanics' Lien Act, the plaintiff was a person who "does such work or causes such work to be done"; and even if his claim for materials failed, there was no reason why he should not succeed for labour. *Brown* v. *Allen & Jones*, 18 B.C.R. 326.

6. Delivery.]—The term "delivery" in sec. 6 of the Mechanics' Lien Act, means actual, physical delivery. Where, therefore, a material man, who had contracted to furnish all the materials for a building, and after some of the material had been delivered, gave notice of intention to claim a lien in respect of more material than had been delivered:—Held, that the notice was bad as to the material not delivered. *Rat Portage Lumber Company, Limited* v. *Watson and Rogers*, 17 B.C.R. 489.

B. Time for Filing.

1. Time of completion.]—By agreement dated the 23rd of December, 1907, the defendant, National Construction Company, Limited, agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course of construction. The Construction Company got into financial difficulties and was unable to complete its contract. On the 24th of October, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the Land Registry Office with the application to register same. On the 28th of October, 1908, the plaintiffs' solicitors in the Coughlan case sent to the defendant, Jsong Mong Lin, by registered mail, a notice addressed to her, care of Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Company intend to file a mechanic's lien against your property in the City of Vancouver, being lots 1 and 2 westerly 10 feet of lot 3, in block 29, district lot 541, for the balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above mentioned lots, if not paid to us at once." On the same day that this notice was posted the plaintiffs filed a mechanic's lien in respect of their claim in the County Court Office at Vancouver, and on the 27th of November, 1908, commenced action to enforce same. McLean Bros. and other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on the 7th of December, 1908, an order was made by Grant, Co. J., upon the application of Loo Gee Wing, consolidating this and the other actions pending. McLean Bros. had served upon Loo Gee Wing a notice similar in terms to the above. On the trial the claim of the present plaintiffs (J. Coughlan & Company) came on first for hearing, and upon the conclusion of the evidence the learned judge dismissed the plaintiffs' action on the ground that Loo Gee Wing, the owner of the property, was not before the Court in the Coughlan case, that there was no notice given to the owner of the property in the terms of sec. 3 of the Mechanics' Lien Act Amendment Act, c. 27 of the statutes of 1907, and that such notice as was given was not given within 15 days before the completion of the work. Held, that sec. 2 of the Mechanics' Lien Act Amendment Act, 1907, has no application where action is begun more than 15 days before the conpletion of the work. Held, further, that "15 days before the completion of the work" means 15 days before the completion of the work of the building as a whole, and not 15 days before the completion of the delivery of the material by the vendor. *J. Coughlan & Company, Limited* v. *National Construction Company and Jsong Mong Lin* and *McLean* v. *Loo Gee Wing*, 14 B.C.R. 339.

2. Completion of contract.]—Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial judge, and his decision on such fact should govern. *Say-*

ward v. *Dunsmuir and Harrison*, 11 B.C.R. 375.

3. Separate deliveries of material.]—F. contracted to supply the hardware for the construction of the defendant Company's building in accordance with the drawings and specifications of the architect at a contract price, subject to additions or deductions for alterations made by the architect's written order during the work. F. delivered the last of the material for which the fixed price in the contract was payable on the 2nd of November, 1912, but before such delivery a verbal arrangement was entered into between the parties for the purchase and delivery of additional goods in January, the last of which was delivered on the 15th of January, 1913. On the 14th of February following a lien was filed, to secure not only the amount due for the material supplied under the verbal arrangement, but for the balance due under the original contract:—Held, per Martin and McPhillips, JJ.A.: That the whole transaction was so linked together as to constitute a single cause of action, and the lien was filed in time for the balance due for the supply of materials in respect of the whole bill. Per Macdonald, C.J.A., and Galliher, J.A.: That the later deliveries of material were not embraced in the contract, which was not a continuing one, and the time for registration of the claim for lien in respect of the goods actually delivered under the contract ran from the last delivery made thereunder. The Court being evenly divided, the appeal was dismissed. *J. A. Flett, Limited* v. *World Building, Limited, and John Coughlan & Sons*, 19 B.C.R. 73.

4. Certificate of action.]—The certificate of action required under sec. 24 of the Mechanics' Lien Act must be filed within the time therein limited, otherwise the lien ceases to exist. *Dunn* v. *Holbrook and Bain*, 7 B.C.R. 503.

III. Posting Pay Rolls.

1. Partners.]—A contractor, building a house under a profit-sharing arrangement with his helpers, on completion of the work, not having any wages to pay, is not subject to sec. 15 of the Mechanics' Lien Act providing for the posting of a receipted pay roll. *Gidney* v. *Morgan and Morgan*, 16 B.C.R. 18.

2. Failure to keep pay-roll.] — The failure of the contractor to keep a pay roll, as required by sec. 15, prevents any one bringing an action against the owner for payment. The section does not prevent a sub-contractor from filing a lien. *Irvin* v. *Victoria Home, etc., Co.*, 18 B.C.R. 318.

3. Sub-contractors.]—A sub-contractor is not entitled to take advantage of the failure by the owner to obtain duly receipted pay-rolls under sec. 15 of the Mechanics' Lien Act (R.S.B.C. 1911, c. 154). *Rosio* v. *Beech*, 18 B.C.R. 73.

IV. Assignment.

Assignment of remedies.]—Where the assignee of an architect, who superintended for the defendant the work of constructing a building, brought action to recover the money due for the architect's services, and to enforce payment thereof by filing a lien for the sale of the land and building, it was held that, the lien being assignable, every remedy for its enforcement went with it. *Sickler* v. *Spencer*, 17 B.C.R. 41.

V. Priority of.

1. Over equitable assignments.] — R. contracted with N. to build for him a house, the last instalment ($1,125) to be paid 31 days after the completion. The contract contained a condition that R. should pay his sub-contractors and protect N. and his estate in the premises from registration of any liens; in case of default N. was to be at liberty to satisfy such liens and deduct the amount payable, or to become payable, to R. by virtue of the contract. The building was completed on the 30th October, and on the 3rd November R., by a number of instruments in writing, directed N. to pay the defendants (sub-contractors who had supplied materials) sums amounting to $920.50 out of moneys due or to become due from N. to R. on the contract. About one hour after the last of these documents had been presented to N. (who refused to accept them), the plaintiffs notified N. that they claimed a lien for $889 for materials supplied, and on the same day they instituted proceedings to enforce it:—Held, that notwithstanding that these documents were good as equitable assignmnts without any acceptance by N., the lienholders were entitled to be paid in preference to the defendants. The plaintiffs' statement of claim omitted to state the kind of material supplied:—Held, that the statement was

inoperative. By the Mechanics' Lien Act (unless there is an express agreement to the contrary), every mechanic or other person shall, by virtue of being employed upon a building or furnishing materials, have a lien without any preliminary registration of a statement of claim, provided he institutes an action to enforce the lien and registers a certificate of lis pendens in the land registry office within 30 days:—Held, therefore, that the filing of the defective statement did not prejudice the plaintiff's lien. *Johnson and others* v. *Braden and others*, 1 B.C.R., Pt. II., 265.

2. Prior mortgage.]—The provisions of sec. 9 of the Mechanics' Lien Act do not give relief to lienholders as against prior mortgagees, unless, from the proceedings at the trial, the increase in the value of the mortgaged premises can be ascertained. Lien holders for work consisting entirely of the taking out of ore from a mine cannot, except when it is strictly development work, enforce their liens as against a prior mortgagee. *Anderson* v. *Kootenay Gold Mines, Ltd.*, 18 B.C.R. 643.

3. Winding-up order — Priority as against lienholders—Right of lienholders to notice.]—The holders of mechanics' liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in the County Court the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid. The liquidator applied to the Court for leave to accept the proposal and an order was made, without notice to the lienholders, giving Holmes a first charge on the claims for his debt and the amount advanced by him. Afterwards, on Holmes' application, an order was made, on notice to the liquidator, but without notice to the lienholders, that the claims be sold to pay his charge. The lienholders did not appeal from either of the last orders, but applied for leave to enforce their security and that they be declared to have priority over Holmes:—Held, that the order giving Holmes priority over the lienholders was made without jurisdiction, and the lienholders were not bound by it. *Re Ibex Mining and Development Company of Slocan, Limited Liability*, 9 B.C.R. 557.

VI. How Waived or Defeated.

A. Defences by Owner.

Judgment against contractor — Expiration of time for filing.]—In an action to enforce a mechanic's lien the owner is entitled to defend on any ground available to the contractor, even where judgment has gone against the latter by default. Quære, whether if credit has originally been given the contractor for a longer period than the time within which proceedings must be taken to enforce the lien, an action would be maintainable. *Haggarty* v. *Grant, defendant, and Duck, owner*, 2 B.C.R. 173.

B. No Sum Owing by Owner to Contractor.

1. Pleading and proof.] — The defence that nothing is payable by the owner to the contractor must be raised in the dispute note, and the onus is on the owner to show that nothing is due. *Brown* v. *Allan*, 18 B.C.R. 326.

2. Failure of contractor.] — B. contracted to build a house for T., and F. was a sub-contractor for the plastering. In each case the contracts included both labour and material and were for lump sums. B.'s contract was for $8,500, and after payment of $6,100, T., under a provision in the contract, took it over from B., who had assigned for the benefit of his creditors, and completed it at a cost of more than $2,400. At the time the contract was taken over, B. had almost completed his contract:—Held, that as there was no amount due by T. to B. when he took over the contract, the limitation in sec. 8 applied and the lien failed. *Fuller* v. *Turner and Beech*, 18 B.C.R. 69.

C. No Sum Payable to Claimant.

Appropriation.] — Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiffs to supply the lumber and building materials. Previous to this, Horrobin, who was indebted to the plaintiffs, gave them a 30 day note for $1,700, on which, about due date, he paid them $1,000 on account, in

doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "re Mrs. Henshaw." This cheque Horrobin indorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiffs' accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plaintiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to show, and dismissed the action as against defendants:—Held, on appeal, that there had been no appropriation by Horrobin, but held, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit, the claim had been brought for too much and there should be a reference. *The British Columbia Mills, Timber and Trading Company* v. *T. Horrobin, Julia W. Henshaw and John Harold Senkler*, 12 B.C.R. 426.

D. Conditions Precedent to Payment.

1. Certificate.] — Where the plaintiff agreed with the defendant to do certain work on terms embodied in correspondence, part of which read: "I'll pay you on the completion of each 80 feet of tunnelling: all you need to do is to have McLeod to certify that you have done the work," it was held that the plaintiff could not recover in the absence of a certificate from McLeod. *Leroy* v. *Smith*, 8 B.C.R. 293.

2. Certificate.]—Where there is a contract containing conditions precedent to payment, no action can be brought to enforce a lien alleged to arise out of labour performed and materials supplied under such contract until the conditions have been complied with. An action can no more be brought under the Mechanics' Lien Act than in any other case until a cause of action has arisen. *Champion and White* v. *The World Building, Limited*, 20 B.C.R. 156.

E. Proceedings Under Woodman's Lien for Wages Act.

Merger.]—Where a workman has recovered judgment jointly with others under the Woodman's Lien for Wages Act against his employer, he cannot afterwards proceed under the Mechanics' Lien Act against the owner of the land whereon the timber was cut. *Wake* v. *Canadian Pacific Lumber Co.*, 8 B.C.R. 358.

F. Taking Security.

1. Promissory note.]—Taking a promissory note for the amount of a mechanic's lien, and negotiating the same, discharges the lien, and the lien does not revive on non-payment of the note. *Edmonds* v. *Walter (owner) and Tiernan (contractor)*, 2 B.C.R. 82; 21 S.C.R. 406.

2. Promissory notes.]—Promissory notes having been received and discounted by the lien holder for the materials supplied:—Held, that the lien was not thereby waived. *Coughlan* v. *Nat. Cons. Co.*, 14 B.C.R. 339.

G. Extending Credit.

Quaere.] — Whether if credit has originally been given the contractor for a longer period than the time within which proceedings must be taken to enforce the lien, an action would be maintainable. *Haggerty* v. *Grant (defendant) and Duck (owner)*, 2 B.C.R. 173.

VII. ENFORCEMENT: PROCEDURE.

A. Jurisdiction.

1. Supreme Court.] — The Supreme Court has no original jurisdiction to enforce a mechanic's lien under the Act of 1891, whatever the amount. *Martin* v. *Russell and Jobson and the British Columbia Paper Manufacturing Company, Limited*, 2 B.C.R. 98.

2. Small Debts Court.]—An action to enforce a mechanic's lien is not one of debt within the meaning of sec. 2 of the Small Debts Act. *Dillon* v. *Sinclair*, 7 B.C.R. 328.

3. Claim for personal order as auxiliary.]—A claim for a personal order to pay an amount over $1,000 can be entertained in the County Court as auxiliary to relief by way of enforcement of a mechanic's lien. *Post* v. *Jones*, 2 B.C.R. 250.

4. Personal judgment.]—When the relationship of debtor and creditor is established on the hearing of a claim for a mechanic's lien, the jurisdiction of the County Court judge to give a judgment in personam arises under sec. 23 of the Mechanics' Lien Act Amendment Act, 1900. *Sayward* v. *Dunsmuir and Harrison*, 11 B.C.R. 375.

B. Affidavit.

1. Sufficiency of — Lien on mineral claim.]—A statement in the affidavit of lien that the work was finished or discontinued on or about a certain date is sufficient. *Holden* v. *Bright Prospects Gold Mining and Development Co.*, 6 B.C.R. 439; 1 M.M.C. 292.

2. Sufficiency of.]—In an affidavit for a mechanic's lien, the particulars of the claim as stated were "the putting in bath tubs, wash tubs, hot and cold water connection, all necessary pipes, boiler and hot water furnace, and waste pipes, $220":—Held, that the particulars of the claim were insufficiently stated, under sec. 8 of the Mechanics' Lien Act, 1891, and also that the claim could not be supported as including, indiscriminately with the claim for labour, a claim for materials, as to which there is no lien. *Weller* v. *Shupe*, 6 B.C.R. 58.

3. Sufficiency of.]—In an affidavit for a mechanic's lien the particulars of the work done were stated as follows: "Brick and stone work and setting tiles in the house situate upon the land hereinafter described, for which I claim the balance of $123":—Held, insufficient, and plaintiff nonsuited. *H. T. Knott, plaintiff* v. *W. J. Cline (contractor), and John Leander Beckwith (owner), defendants*, 5 B.C.R. 120.

4. Residence of contractors—Particulars of work and materials "owing."]—The filing of an affidavit fulfilling all the requirements of Stat. B.C. 1888, c. 74, sec. 9, is a pre-requisite to the validity of a mechanic's lien. The following defects in such affidavit held fatal: (1) Omission to state the residence of the owner of the property; (2) Omission to sufficiently state the residence of the contractors. Statement of residence as "Victoria" held insufficient; (3) Omission to state in detail the particulars and items of the work done and materials furnished in respect of which the lien is sought; (4) Omission to state that the amount claimed was "due," and when it became due. Statement that it was "owing" held insufficient. *Smith* v. *McIntosh, Carne & Ors*, 3 B.C.R. 26.

C. Amendment.

Description of land.]—Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien. *Rafuse* v. *Hunter*, 12 B.C.R. 126.

D. Pleading.

1. Special defence.]—Sec. 8 of the Mechanics' Lien Act, by which the amount of the lien is restricted to the sum payable by the owner to the contractor, is a special defence which should have been raised in the dispute note under Order XI., r. 18 of the County Court Rules, 1905. *Fitzgerald* v. *Williamson*, 18 B.C.R. 322.

2. Payment to contractor.]—By Order XI., r. 1a, County Court Rules, 1905, the dispute note shall state the several grounds of defence, and as r. 2 limits the defence to matters stated in the dispute note, the defendant should have pleaded the payment in full to the contractor, whether the plaintiff in his plaint alleged the matter or not. *Ibid.*

3. Payment to contractor.] — Held, that the defence that nothing is payable by the owner to the contractor must be raised in the dispute note, and the onus is on the owner to show that nothing is due. *Brown* v. *Allan*, 18 B.C.R. 326.

4. Non-posting of pay-roll.]—Held, that the defendant should have raised in the pleadings the objection that the architect had not posted upon the building or delivered to the owner a receipted pay roll pursuant to sec. 15 of the Mechanics' Lien Act, or led evidence upon that point. Therefore, that defence was not open. *Sickler* v. *Spencer*, 17 B.C.R. 41.

E. Appeal.

1. Appealable amount.]—Though several lienholders may bring suit on their respective and distinct claims in one action and judgment may be entered for the whole amount of said claims, yet for the purposes of appeal each claim is deemed to be sever-

able, and the adjudication thereon is a distinct one, and not appealable unless it amounts to $250. *Gabriele* v. *Jackson Mines, Limited,* 15 B.C.R. 373; 2 M.M.C. 399.

2. Appealable amount.]—In an action on a mechanic's lien, the amount adjudged to be owing was $172.05. Sec. 24 of the Mechanics' Lien Act enacts that there is no appeal where the amount claimed to be owing is adjudged to be less than $250. Therefore an appeal from the judgment was dismissed. *Gillies Supply Company* v. *Allan,* 15 B.C.R. 375.

3. Appealable amount.] — Upon appeal from a judgment dismissing the action in which claims of several lienholders under the Mechanics' Lien Act, some of which were less than $250, were consolidated in one action:—Held, that only each individual claim of $250 or more had a right of appeal. *Baker* v. *The Uplands, Ltd.,* 18 B.C.R. 197.

4. Conditions of finality.]—Sec. 24 of the Mechanics' Lien Act Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal:—Held, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is pre-supposed. *Coughlan* v. *Nat. Cons. Co.,* 14 B.C.R. 339.

5. Supreme Court of Canada.] — No appeal lies to the Supreme Court of Canada in an action to enforce a mechanic's lien. *Champion & White* v. *The World Building Co.,* 50 S.C.R. 382.

VIII. Cancellation.

Giving security.]—A judge has no jurisdiction upon a summary application under secs. 25 and 26 of the Mechanics' Lien Act to order the cancellation of a lien without the giving of security, because he thinks the lien is unsustainable. The giving of security is a condition precedent to the making of the order. *Walsh* v. *Mason; Stevens* v. *Mason,* 19 B.C.R. 48.

MEDICINE.

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I. Medical Practitioners.

A. Admission.

Medical practitioner—Imperial Medical Acts—Application of in British Columbia.] —A medical practitioner registered in England prior to June 1st, 1887, under the Imperial Medical Acts, is entitled to be registered and admitted to practice in British Columbia, pursuant to Imp. Stat. 31 Vict., c. 92, sec. 3, subject to such laws as the Provincial Legislature may have made for the purpose of enforcing the registration within its jurisdiction of persons registered under the Imperial Medical Acts. 2. General provisions in the British Columbia Medical Act (C.S.B.C. 1888, c. 81) relating to examination of candidates, payment of fees, and registration of medical practitioners, do not effect the right to be registered in the colony, acquired under the Imperial Statute by English registered practitioners. 3. The question of supremacy in relation to subjects of legislation, as distributed by the British North America Act, arises only as between the Dominion Parliament and the Provincial Legislatures. The Imperial Parliament is sovereign to both. 4. The British Columbia Medical Act (C.S.B.C. 1888, c. 81), sec. 31, authorizes the making by the British Columbia Medical Council of rules, pursuant to Imp. Stat. 31 Vict., c. 29, sec. 3, for admitting English registered practitioners upon the Provincial register. 5. The British Columbia Medical Council having made no such rules, plaintiff was entitled to be admitted upon the British Columbia register upon such proof of his English registration as would be admitted in a Court of law. *Metherell* v. *The Medical Council of British Columbia and G. L. Milne, M.D., the Registrar of the Council,* 2 B.C.R. 186.

B. Medical Council.

1. Inquiry under Medical Act—Whether mandamus lies to compel.]—Under sec. 36 of the Medical Act, 1898 (previous to its amendment in 1903), the council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—Held, that mandamus did not lie to compel the council to hold an inquiry. Charges of unprofessional conduct may be investigated by the council notwithstanding the acts complained of may be the subject-matter of an action at law.

In re The Medical Act; Ex parte Inverarity, 10 B.C.R. 268.

2. Unprofessional conduct.]—A young unmarried woman, being pregnant, having to the knowledge of T. endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. T., supposing that it might be necessary to expel the contents of her uterus owing to the patient's condition, arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition, by causing them to believe that she had been operated upon for appendicitis. This was done in a private sanitarium, under T.'s exclusive control, and without professional or other consultation. T. informed her father (whom she resided with and was dependent upon), in answer to inquiries as to his daughter's condition, that she was suffering from appendicitis. The incision made by T. could serve no purpose relating to the health of the patient. The woman died from the effects of attempts at abortion. T. was afterwards prosecuted on a charge of manslaughter, but was acquitted. The Medical Council, however, after a formal inquiry by a committee of council, resolved to erase his name from the register of medical practitioners. From this decision he appealed to a judge of the Supreme Court:—Held, that T. was guilty of unprofessional conduct, and that the order of the Medical Council, erasing his name from the register, should be restored:—Held, as to costs, that, the proceedings being in substance ad vindicatam publicam, in the absence of express enactment, the Legislature did not intend to confer the power to award costs. *In re Robert Telford*, 11 B.C.R. 355.

C. Registration.

Liability of unregistered practitioner—"Practising medicine."]—Defendant, with the object of making sales of medicines professed by him to be specifics for certain diseases, held public meetings, invited proposed purchasers to declare their symptoms, and publicly examined them and applied the remedy:—Held, that this was practising medicine for gain or hope of reward. *Regina* v. *Barnfield* (*alias Sequah*), 4 B.C.R. 305.

II. PHARMACY ACT.

"Exercising profession"—Meaning of.]—One who resided in the Province until the coming into force of the Pharmacy Act, 1891, and was a partner of a druggist practising within the Province, is not entitled to be registered, under sec. 12 of the Act, as having practised as a druggist. *Ex parte Henderson; In re The Pharmacy Act, 1891*, 2 B.C.R. 103.

METALLIFEROUS MINES ACT.

Rule 21a of sec. 25—Construction.]—Rule 21a of sec. 25 of the Inspection of Metalliferous Mines Act, as enacted by sec. 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 r. 21b refer to the preceding rule. *McGregor* v. *The Canadian Consolidated Mines, Limited* (*No. 2*), 12 B.C.R. 373; 2 M.M.C. 428.

See MASTER AND SERVANT.

MINES AND MINING.

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XXXII. INTERPRETATION, 641.

I. IN GENERAL.

1. Construction of Acts.]—In construing the mineral Act and its amendments the language of the particular enactment governing the question under consideration should be taken and read in connection with the other language of the same statute, in its natural significance, and effect should be given thereto, notwithstanding the way in which the subject-matter has been dealt with previously by the Legislature. *Spruce Creek Power Co.* v. *Muirhead*, 11 B.C.R. 68; 2 M.M.C. 158.

2. Attacking claim.]—A claimant of the land as distinct from the minerals has no locus standi to question the due performance by a free miner of the conditions precedent to his right to a valid mineral claim thereon. *Nelson, Etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396.

3. Locus standi in judicio.]—Where a placer miner has staked a claim on ground held under an existing hydraulic lease, but has not obtained the usual grant for such claim, he has no status to attack the lease. *Hartley* v. *Matson*, 2 M.M.C. 23; 32 S.C.R. 644.

4. Compliance with statutory requirements.] — Essential compliance with the directions of the Acts is necessary and sufficient; mathematical precision is not to be exacted. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

II. General Rights.

1. Right of entry on lands.]—A statutory grant of lands, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder," does not include the precious metals. The interpretation of general terms in a statute cannot be assisted by reference to the interpretation clause in another statute by which the same terms are in it given a special construction. Under sec. 95 of the Crown Lands Act, 1888, all lands in the Province, both public and private, are subject to the right of entry by free miners to search for the precious metals, subject to the conditions precedent contained in the Placer Mining Act, 1891, c. 26. *Bainbridge* v. *Esquimalt and Nanaimo Railway Co.*, 4 B.C.R. 181; 1 M.M.C. 98; 1896, A.C. 561.

2. Bond—Condition precedent to entry by free miner.] — The requirement of a bond by sec. 10 of the Act of 1891 is a directory provision for the protection of the land owner, and is not a pre-requisite to the acquisition by the miner of mineral rights from the Crown. *Nelson, etc., Ry. Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

III. Who May Locate.

1. Discovery.] — The Act does not restrict the location of a mineral claim to the first discoverer of rock in place, or to the discoverer of a new mine, but gives any free miner the right to locate claims, whether the land has never been located, or whether it has been located and abandoned, or whether it has been located but not duly recorded. *Richards* v. *Price*, 5 B.C.R. 362.

2. Rock in place.]—The discovery of a mineral vein or lode is not essential to a valid mineral claim: rock in place is sufficient. *Nelson, Etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396; I.M.M.C. 161.

3. Minerals in place.]—Before a prospector can locate a claim he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient. *Manley* v. *Collom*, 8 B.C.R. 153; 32 S.C.R. 371.

IV. Free Miner's Certificate.

1. Absence of.]—No valid title to a mineral claim can be acquired by anyone who does not hold a free miner's certificate. *Barinds* v. *Green*, 16 B.C.R. 433.

2. Expiry.]—No valid title to a mineral claim can be acquired from anyone whose free miner's certificate has expired. *Ibid.*

3. Lapse.] — Lack of a free miner's certificate does not prevent a partner in a claim from recovering his share of the proceeds of a sale thereof by his co-partner, though he held no certificate when he brought his action, having allowed the one he had up to the time of sale to lapse. *Archibald* v. *McNerhanie*, 6 B.C.R. 260; 1 M.M.C. 320; 29 S.C.R. 564.

4. Sheriff.] — The sheriff seized the interest in mineral claims held by an execution debtor in co-ownership with another free miner and prior to sale under the execution, the debtor allowed his free miner's certificate to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under sec. 4 of the Mineral Act Amendment Act, 1899:—Held, that upon the lapse of the free miner's certificate, the interest in question had become absolutely vested in the co-owner and could not be revived and revested in the judgment debtor by the issue of a special certificate. *McNaught* v. *The Harvey Van Norman Co.*, 9 B.C.R. 131; 1 M.M.C. 516; 32 S.C.R. 690.

5. Special certificate—Whether a revival of title.] — On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location. The obtaining of a special certificate under sec. 2 of the Mineral Act Amendment Act, 1901, does not revive the title if, in the meantime, the ground has been located as a mineral claim. *Woodbury Mines, Limited* v. *Poyntz*, 2 M.M.C. 76; 10 B.C.R. 181.

6. Expiration of certificate — Special certificate, R.S.B.C. 1897, c. 135, sec. 9, and B.C. Stats. 1901, c. 35, sec. 2.]—On the expiration of a free miner's certificate any mineral claim of which the holder thereof was the sole owner becomes open to location. The obtaining of a special certificate under sec. 2 of the Mineral Act Amendment Act, 1901, does not revive the title if in the meantime the ground has been located as a mineral claim. *Woodbury Mines, Limited* v. *Poyntz*, 10 B.C.R. 181.

7. Lapse.]—Where one of the co-owners of a mineral claim allows his free miner's

certificate to lapse, his interest at once vests pro rata in the remaining co-owners. *McNaught* v. *The Harvey Van Norman Co.*, 1 M.M.C. 516; 9 B.C.R. 131.

8 Mandamus.] — Mandamus will lie to compel the Chief Commissioner of Lands and Works as Gold Commissioner, to issue a free miner's certificate to a Chinese on payment of the usual fee. *Reg.* v. *Gold Commissioner of Victoria District*, 1 B.C.R., Pt. II., 260.

V. CLAIMS, INTEREST IN.

1. Shareholder in company.] — The owner of shares in a company is not an owner of any part of a mining claim owned by it. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71.

2. Interest in land.]—Interest of a free miner in his claim is an interest in land within the Statute of Frauds. *Stussi* v. *Brown*, 5 B.C.R. 195; 1 M.M.C. 195.

3. Parol agency—Evidence of, under Statute of Frauds.]—The interest of a free miner in his mineral claim is an interest in land, and an agreement not in writing respecting it cannot be enforced. Where one person on behalf of another locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal. *Fero* v. *Hall*, 6 B.C.R. 421; 1 M.M.C. 238.

4. Relief against forfeiture by Crown.] —Though the interest of a free miner in his claim expires, unless renewed, at the end of the year, his lessor, the Crown, may relieve against the forfeitures in cases where there is no one entitled to take advantage of such expiry. An interest in a claim which has not been renewed is an abandoned interest. *Williams Creek Bed Rock Flume & Ditch Co., Ltd.* v. *Synon*, 1 M.M.C. 1.

5. Interest in land.]—The interest of a free miner in a claim is an interest in land. *McMeekin* v. *Furry*, 2 M.M.C. 432.

VI. CLAIMS, ESSENTIALS OF VALID.

1. Conditions.]—(1) A duly recorded mineral claim may be abandoned before the expiration of the year from the date of its location by absence or other conduct of the holder, evincing an election to surrender it, and, on the facts, that the "Zenith" mineral claim in question was so abandoned. (2) An exception, expressed in a Crown grant to the railway company of subsidy lands, of all portions of such lands previously to a certain date, "held as mineral claims," imports only such claims as were then lawfully so held, and that it was open to the railway company to question the validity of mineral claims previously located thereon. (3) In the case of lands occupied for other than mining purposes, the giving by the free miner of a bond, under sec. 10 of the Mineral Act, as security for any damage which may be caused to such lands by mining operations, is an imperative prerequisite to his right to enter and locate a mineral claim thereon. (4) The finding upon the location of mineral bearing "rock in place," with a vein or ledge having defined walls, is essential to the validity of a mineral claim. (5) A certificate of improvements under sec. 46 of the Mineral Act, 1891, is a bar only to adverse claims to the location advanced by other claimants under the Mineral Act, and is not a bar to the rights of claimants of the land as land to whom the Mineral Act procedure does not apply. (1) The title to a duly located and recorded mineral claim is equivalent, under sec. 34 of the Mineral Act, 1891, to a lease for a year, vested in its owner, and the doctrine of implied surrender by conduct does not apply to it; and the only abandonment by which the owner can be concluded is that by notice of abandonment given by him to the Crown, as provided for by sec. 27 of the Act. (2) The exception from the railway company's Crown grant of "lands held as mineral claims," means de facto claims, and the word "lawfully" cannot be imported. (3) A claimant to the land as land has no status to question the due performance by the free miner of the conditions required by the Crown as prerequisite to his right to a valid mineral claim thereon. (4) The requirements of a bond by sec. 10 of the Act of 1891, is a directory provision for the protection of the land owner, and is not a pre-requisite to the acquisition by the miner of the mineral rights from the Crown. (5) The discovery of a mineral vein or lode is not essential to a valid mineral claim; "rock in place" is sufficient. (6) The words, "rock in place" are satisfied by rock in situ, bearing valuable deposits of mineral, although not lying between defined walls or in a vein or ledge. (7) A certificate of improvements is, under sec. 10 of the Mineral Act, 1891, a bar to adverse claimants in any right,

and on all grounds, except fraud. (8) Holders of mineral claims are not entitled to deal with any portion of the surface, except in accordance with the mining laws, and are not entitled to sell or dispose of the same. *The Nelson and Fort Sheppard Railway Company* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

2. Existence of deposit.]—The validity of a placer mining record primarily depends upon the mere belief of the locator based upon indications he has observed on the claim in the existence of a deposit of placer gold therein. *Tanghe* v. *Morgan*, 11 B.C.R. 76.

VII. Location.

A. In General.

1. Provisions imperative.]—The provisions of the Acts as to location are imperative. *Bleekir* v. *Chrisholm*, 8 B.C.R. 148; 1 M.M.C. 112; *Pellent* v. *Almoure*, 1 M.M.C. 134.

2. Provisions imperative.]—The provisions of the Act as to location are imperative and failure to observe them invalidates a location unless the defects are curable by the remedial sections. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487.

3. Location line—Title.]—The foundation or root of title to a mineral claim depends upon the proper location, i.e., a location made in accordance with the rules prescribed in the Mineral Act. Failure to mark the location line invalidates the location. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213; *Clark* v. *Haney*, 8 B.C.R. 130; 1 M.M.C. 281.

4. Bona fide attempt.] — A bona fide attempt to comply with the provisions of the Act does not mean merely an attempt to locate a claim of the size and form contemplated by the Act, but means an attempt to comply with the formalities prescribed by the Act, and therefore a locator who has staked his claim with four corner posts, without No. 1 and No. 2 posts, will not be deemed to have made such attempt. *Richards* v. *Price*, 5 B.C.R. 362; 1 M.M.C. 156.

5. Mineral claim—Changing location.]—Where the location of a claim has been fraudulently changed from its original position, it is void; sec. 28 of the Mineral Act has no application and cannot be invoked in support of a so-called location which never existed. *Wise* v. *Christopher*, 1 M.M.C. 413.

6. Re-location of existing location—"Jumping."]—An attempt to locate a claim on an existing valid location is merely an unauthorized trespass—a "jumping." *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

7. Intervening location.]—Two plots of ground separated by an intervening valid location, cannot, although within the statutory limit of 1,500 feet, be included in one location. *Dart* v. *St. Keverne Mining Co.*, 7 B.C.R. 56; 1 M.M.C. 331.

8. Agent.] — A mineral claim may be located by an agent. *Docksteader* v. *Clark*, 11 B.C.R. 37; 2 M.M.C. 192.

9. Of more than one claim.]—A second location in another's name on the same vein is against public policy and void. *Alexander* v. *Heath*, 8 B.C.R. 95; 1 M.M.C. 333.

10. Location on same vein on another's location—Public policy.]—When one free miner locates a mineral claim and locates another claim on the same vein in the name of another free miner, such a proceeding is contrary to public policy, and a violation of the Mineral Act and amendments, and the free miner requires no interest in the second location. *Alexander* v. *Heath*, 8 B.C.R. 95; 1 M.M.C. 333.

B. Unoccupied Land.

1. Occupied land.]—A location on land already lawfully occupied for mining purposes is invalid. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71; *Atkins* v. *Coy*, 5 B.C.R. 6; 1 M.M.C. 88.

2. Occupation and working.]—Mining ground actually occupied and actively worked as a mineral claim is not open to location. *Waterhouse* v. *Liftchild*, 6 B.C.R. 424; 1 M.M.C. 153.

3. Reversion of lapsed location.]—The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898 and 1899. In December, 1899, the ground covered by the original Parrot claim was relocated as the Defiance No. 1 Fraction, by the defendants' predecessor in title:—Held, in adverse proceedings, that so much of the Parrot claim as was overlapped by

the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location. *Rammelmeyer* v. *Curtis; Powers* v. *Curtis*, 8 B.C.R. 383; 1 M.M.C. 401.

4. Abandonment.] — The property in question had been located as the Bridge Creek mineral claim on the 28th of July, 1898, and all assessment work was done upon the ground up to July, 1903, when the holder was entitled to a certificate of improvement. He did nothing further until August, 1907, when he re-located this and adjoining ground as the Victoria group and the Victor group. On the 30th of October, 1901, the defendant railway Company obtained a Crown grant of certain lands by way of subsidy. In May and June, 1911, defendants Fitch and Hazlewood, contractors for the construction of the railway, entered the property in question and cut a number of railway ties:—Held, that the re-location was upon occupied land, not open to location as mineral claims. *Farrell and Farrell* v. *Fitch and Hazlewood and The British Columbia Southern Railway Company*, 17 B.C.R. 507.

5. Free miner's certificate, expiration of.]—On the expiration of his free miner's certificate any mineral claim of which the holder of the certificate was the sole owner becomes open to location and the obtaining of a special certificate does not revive the title if in the meantime the ground has been again located as a mineral claim. *Woodbury Mines, Ltd.*, v. *Poyntz*, 10 B.C.R. 181; 2 M.M.C. 76.

6. Failure to record transfer.]—In May, 1897, B. located and recorded the May Day claim, and six days after location conveyed a half-interest to the defendant by a bill of sale, which was not recorded till April, 1898: B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff purported to locate the May Day claim as a fresh claim:—Held, that the land had not become waste land of the Crown. *Grutchfield* v. *Harbottle*, 7 B.C.R. 186, 344.

C. Senior and Junior.

1. Extent of invalidity.]—Where a location purports to be made on ground already occupied by a valid and existing location, the junior location is invalid to at least the extent of the ground already covered by the senior location. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487; *Cranston* v. *English-Canadian Co.*, 7 B.C.R. 266; 1 M.M.C. 394; *Pellent* v. *Almoure*, 1 M.M.C. 134; *Bleekir* v. *Chrisholm*, 8 B.C.R. 148; 1 M.M.C. 112.

2. Validity.]—The validity of a junior location depends upon the validity of a senior location on the same ground. *Boie* v. *Saulter*, 1 M.M.C. 240.

3. Conflict.]—If the location line crosses other existing valid locations it does not invalidate the junior location unless in the circumstances it is calculated to mislead. If the initial post is placed on an existing valid location it does not invalidate the junior location unless in the circumstances it is calculated to mislead. *Docksteader* v. *Clark*, 11 B.C.R. 37; 2 M.M.C. 192.

4. Certificate of work.] — A location made upon an existing valid location becomes validated on the lapse by abandonment of the senior location and the recording of a certificate of work for the junior location. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

D. Size.

Excess in length.]—The location of a mineral claim is not invalid because, as staked, it exceeds 1,500 feet in length. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71.

E. Location Line.

1. Ledge or vein.] — A location line which is not run as nearly as possible on the line of the ledge or vein invalidates the location. *Bleekir* v. *Chrisholm*, 8 B.C.R. 148; 1 M.M.C. 112; *Pellent* v. *Almoure*, 1 M.M.C. 134.

2. Crossing.]—If the line crosses other existing valid locations it does not invalidate the junior location unless in the circumstances it is calculated to mislead. *Docksteader* v. *Clark*, 11 B.C.R. 37; 2 M.M.C. 192.

3. Length of line.]—A location is not invalid because the location line exceeds in length the statutory allowance. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71.

F. Direction.

Compass bearings.] — A prospector in locating and recording his location line between Nos. 1 and 2 posts as running in an easterly direction, whereas it was nearly due north does not comply with the

statute requiring him to state the approximate compass bearing and his location is void. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487; 32 S.C.R. 371.

G. Name.

Misnomer.]—A claim which is located under one name and recorded under another is invalid, and such a defect in location being necessarily calculated to mislead other locators in the vicinity, cannot be cured by sub-sec. (g) of sec. 16 of the Mineral Act Amendment Act, 1898. *British Lion Gold Mining Co.* v. *Creamer*, 2 M.M.C. 51.

H. Posts.

1. Mathematical accuracy not requisite.]—Although the No. 1 post must be squared or faced this does not imply squaring or facing of mathematical accuracy; but merely essential compliance with the statute; such compliance as can be secured by knife and axe. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

2. Legal first and second posts.] — A location staked by four corner posts, but without the legal first and second posts, is invalid. *Richards* v. *Price*, 5 B.C.R. 362.

3. Legal posts.]—Failure to put up legal posts as required by the Mineral Act, invalidates a location, unless remedied by the curative provisions of the Act. *Creelman* v. *Clark*, 1 M.M.C. 228; *Pellent* v. *Almoure*, 1 M.M.C. 134.

4. Misplaced.] —If the initial post is planted on an existing valid location it does not invalidate the junior location unless in the circumstances it is calculated to mislead. *Docksteader* v. *Clark*, 11 B.C.R. 37; 2 M.M.C. 192; 36 S.C.R. 622.

5. Foreign territory—Post.] — A location which has its No. 1 post on foreign territory is invalid. *Connell* v. *Madden*, 6 B.C.R. 76, 531; 1 M.M.C. 359.

6. Defective post.]—A location having a defective post is invalid: Ib. *Pellent* v. *Almoure*, 1 M.M.C. 134; *Clark* v. *Haney*, 8 B.C.R. 130; 1 M.M.C. 281.

7. Misleading location — Monuments—Posts—Curative provisions.]—The erection of rock monument instead of legal posts invalidates a location, and such an omission cannot be cured by sec. 16, sub-sec. (d). The provisions of that section are conjunctive. Any other mode of making a location than that specified by the Act is calculated to mislead other locators. *Callahan* v. *George*, 8 B.C.R. 146; 1 M.M.C. 242.

8. Glacier.]—The fact that a No. 2 post of a mineral claim is planted in a moving glacier will not invalidate the location provided the line is well marked, and the claim is otherwise properly marked out so as to be easily identified. *Sandberg* v. *Ferguson*, 10 B.C.R. 123; 2 M.M.C. 165; 35 S.C.R. 476.

9. Over the international boundary.]—Where the No. 1 post is planted on the United States side of the international boundary line, the location is invalid. *Connell* v. *Madden*, 6 B.C.R. 76, 531; 30 S.C.R. 109.

10. Party post.]—A post on the common and coterminous boundary line of two claims which has written on its opposite sides the names of the two claims facing the respective locations may perform a joint duty: it is not necessary to have two distinct sets of posts to mark the same boundary line. *Wheelden* v. *Cranston*, 12 B.C.R. 489; 2 M.M.C. 314.

11. Natural post.]—A tree or stump of a tree in place is the best location post there can be. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

I. Posts, Marking of.

1. Date and name.] — The failure to write on the No. 2 post the date of the location and the name of the locator is a non-observance of the formalities required by the Act. *Sandberg* v. *Ferguson*, 10 B.C.R. 123; 2 M.M.C. 165.

2. Date.]—Failure to write the true date upon the posts of a mineral claim as required by the Act invalidates the location unless cured by the validating provisions. *Boie* v. *Saulter*, 1 M M.C. 240.

3. Compass bearing.]—The failure to mark on the initial post the approximate compass bearing of the No. 2 post invalidates a location, unless curable by the remedial sections. *Callaghan* v. *Coplen*, 6 B.C.R. 523; 7 B.C.R. 422; 1 M.M.C. 348.

4. Compass bearing.]—An error in the statement on the initial post of the approximate compass bearing of No. 2 post, as N.E. and S.W. instead of N.W. and S.E. is fatal to the validity of the location, such a location is calculated to mislead and cannot be treated as a bona fide attempt to comply with the provisions of the Act.

Francoeur v. *English*, 6 B.C.R. 63; 1 M.M.C. 203.

5. Common post.]—Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims:—Held, that the object of the statute requiring due marking had been accomplished. *Wheelden* v. *Cranston*, 12 B.C.R. 489; 2 M.M.C. 314.

6. Old survey post.]—The location of a mineral claim is not invalid merely because an old survey post is used by the locator as the No. 1 post of his mineral claim, if the facts bring the locator within the benefit of sub-sec. (g) of sec. 16 of the Mineral Act as amended in 1898. *Crossley* v. *Scanlon*, 15 B.C.R. 223.

J. Blazing.

Statutory provisions.]—To constitute a valid location, the statutory provisions as to blazing must be complied with. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213.

K. Fractional Claims.

1. Accuracy.]—Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487; 32 S.C.R. 371.

2. Location line, marking of.] — The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. *Snyder* v. *Ransom; Ransom* v. *Snyder*, 10 B.C.R. 182; 2 M.M.C. 77.

3. Notices.] — Failure to put proper notices on a post will invalidate a fractional location, but that is a defect which in proper circumstances may be cured by sec. 16, sub-sec. (g) of the Mineral Act, 1898. *Sandberg* v. *Ferguson*, 10 B.C.R. 123; 2 M.M.C. 165; 35 S.C.R. 476.

4. Right to.]—Where W. sold certain claims to A., who in turn sold to the defendants, after which W. as agent for the plaintiff, located in the plaintiff's name a fraction between two of the claims sold to the defendant, the defendants had no right to the fraction in the absence of proof of fraud by W., and that the plaintiff was a party thereto. *Gibson* v. *McArthur*, 7 B.C.R. 59.

VIII. Recording.

1. Effect of.]—The act of recording a claim is the act of the party and not of the Crown, so cannot operate as a re-demise of ground already leased by the Crown. *Canadian Company* v. *Grouse Creek Flume Co., Ltd.*, 1 M.M.C. 3.

2. Right to record.]—Upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course he shall, under the remedial provisions of sec. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor. *Tanghe* v. *Morgan*, 11 B.C.R. 76.

3. Rectification.]—If a locator includes in his location ground then occupied by buildings, the record of such location will be rectified so as to exclude such ground. *Sunshine, Ltd.*, v. *Cunningham*, 1 M.M.C. 286.

4. Failure to record.]—If a claim is not properly taken up and recorded it never becomes a mineral claim. *Callahan* v. *Coplen*, 6 B.C.R. 523; 7 B.C.R. 422; 1 M.M.C. 348.

5. Abandonment.]—A location which is not recorded within the prescribed time is treated as abandoned and of no validity against a subsequent location properly recorded. *Francoeur* v. *English*, 6 B.C.R. 63.

6. Invalid location.]—A valid location is a pre-requisite to a valid record of a mineral claim, and where the subsequent location is void as not being made on unoccupied land, it does not acquire any validity by being recorded, and the priority of its record is immaterial as against the claim of the prior locator who had recorded his claim within the statutory period. *Atkins* v. *Coy*, 5 B.C.R. 6; 1 M.M.C. 88.

7. Excess in length.]—Where a claim, as staked, exceeds 1,500 feet in length, the lines may be corrected by the Provincial Surveyor who makes the survey, by removing for the correction of distance any post except the initial post, provided that the alteration does not affect the previously acquired rights of adjacent owners. *Granger* v. *Fotheringham*, 3 B.C.R. 590.

8. Compass bearing.] — Where in the affidavit of location it was stated that the direction of the location line was southeasterly, when in fact it was south 52 deg.

50′ west; this is a discrepancy calculated to mislead. *Docksteader* v. *Clark*, 11 B.C.R. 37; 2 M.M.C. 192.

9. Compass bearing.]—Failure to give the approximate compass bearing of the No. 2 post will invalidate a location. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487; 32 S.C.R. 371.

10. Omission to set out all words in full.]—Failure to set out in the declaration for record all the words upon the initial post will not necessarily invalidate a location: the words should be quoted with sufficient fullness and accuracy to enable the record to be identified as that of the particular location to which it refers. *Windsor* v. *Copp*, 12 B.C.R. 213; 2 M.M.C. 318.

11. Declaration.] — The declaration is evidence of recording. *Ibid.*

IX. Abandonment.

1. Implied.]—The title to a duly located and recorded mineral claim is equivalent to a lease for a year, and the doctrine of implied surrender by conduct does not apply to it; the only abandonment by which the owner can be concluded is that effected by notice of abandonment given by him to the Crown. *Nelson & Fort Sheppard Ry. Co.* v. *Jerry*, 5 B.C.R. 396.

2. Lapsed location — Reversal to Crown.]—On the lapse of a senior location, its ground reverts to the Crown. *Rammelmeyer* v. *Curtis*, 8 B.C.R. 383; 1 M.M.C. 401.

3. Failure to record.]—Where the prior location is not recorded within the prescribed time, it will be deemed to be abandoned and of no validity against a subsequent location duly recorded. *Francoeur* v. *English*, 6 B.C.R. 63; 1 M.M.C. 203.

4. Recording.] — It is necessary to record the abandonment of an invalid location and obtain the permission of the Gold Commissioner before relocation. *Pellent* v. *Almoure*, 1 M.M.C. 134.

5. Partial abandonment.]—Any portion of a mineral claim may be abandoned by specifying the portion and recording the abandonment. *Granger* v. *Fotheringham*, 1 M.M.C. 71; 3 B.C.R. 590.

6. Statutory notice of.]—The only abandonment by which the owner of a valid location can be concluded is by the statutory notice. *Nelson and Fort Sheppard Ry. Co.* v. *Jerry*, 5 B.C.R. 166, 396; 1 M.M.C. 161.

7. Statement in affidavit.]—A statement by a re-locator in his affidavit of re-location that the ground so re-located is "unoccupied by any person as a mineral claim," is a notice of abandonment in writing, under sec. 30 of the Mineral Act of the deponent's former rights in the original location. *Dunlop* v. *Haney*, 1 M.M.C. 369; 7 B.C.R. 1, 305.

8. Absence.]—Absence of 72 hours is not in all cases conclusive evidence of an intention to abandon. If a claim-holder does not properly represent his claim and so render it liable to re-location, he may, nevertheless, if he return to it and find it intact, resume possession, recommence working and be in "as of his old estate." *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

9. Reversion of lapsed location.]—In adverse proceedings the party locating over a claim alleged to have been abandoned, must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work. Semble, a locator cannot, after abandonment by a prior locator, rest on a location made before such abandonment, but must re-locate. *Cranston* v. *The English Canadian Co.*, 7 B.C.R. 266; 1 M.M.C. 394.

10. Cessation of operations.] — Where mining ground is held from the Crown under lease, which is subject to forfeiture for non-compliance with terms and conditions, the Crown alone can declare a forfeiture and re-enter for breach, or waive it. Free miners in general are strangers to such a lease and have no rights under or over it. Cessation of mining operations for want of funds is no proof of intention to abandon, even if that question could be raised by strangers to the lease. *Canadian Co.* v. *Grouse Creek Co.*, 1 M.M.C. 3.

11. Non-renewal.] — An interest in a claim which has not been renewed is an abandoned interest. *Williams Creek Bed Rock Flume & Ditch Co.* v. *Symon*, 1 M.M.C. 1.

12. Cessation for want of funds.]—The cessation of mining operations for want of funds is not proof of intention to abandon. *Canadian Company* v. *Grouse Creek Flume Co.*, 1 M.M.C. 3.

X. Abandonment and Relocation.

1. Re-location — Permission of Gold Commissioner.]—Before re-location, it is necessary to record the abandonment of an

invalid location and obtain the permission of the Gold Commissioner. *Pellent* v. *Almoure,* 1 M.M.C. 134.

2. Re-location in another name—Permission of Gold Commissioner.]—Where owners of a mineral claim, the title to which they consider defective, permitted a third person to re-locate it in his own name, who afterwards, without previous binding agreement to that effect, conveyed his title to them for a consideration:—Held, not a re-location by the owners of the original claim so as to render necessary the written permission of the Gold Commissioner. *Granger* v. *Fotheringham,* 3 B.C.R. 590; 1 M.M.C. 71.

3. Re-location by another at instance of first holder—Permission of Gold Commissioner.]—Where the holder of a mineral claim which is the subject of an adverse action causes the ground to be re-located by someone else, from whom he purchases it for a small consideration, the provisions of sec. 32 of the Mineral Act (R.S.B.C. 1897, c. 135), requiring permission to re-locate, do not apply. *Snyder* v. *Ransom; Ransom* v. *Snyder,* 10 B.C.R. 182; 2 M.M.C. 77.

4. Abandonment — Colourable representation.]—Absence of 72 hours is not in all cases conclusive evidence of intention to abandon. If a claim holder does not properly represent his claim and so render it liable to re-location, he may, nevertheless, if he return to it and find it intact, resume possession, recommence working, and be in "as of his old estate." Where one man pretends to represent two claim holders at the same time, it is strong evidence that his representation in both cases is colourable and so worthless. *Woodbury* v. *Hudnut,* 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

5. Notice of abandonment.]—A statement of a re-locator in his affidavit of re-location that the ground so re-located is "unoccupied by any person as a mineral claim," is a notice of abandonment in writing, under sec. 30 of the Mineral Act, of the deponent's former rights in the original location, and if the original location were valid, it could not lawfully be re-located without the written permission of the Gold Commissioner. *Dunlop* v. *Haney,* 1 M.M.C. 369; 7 B.C.R. 1, 305.

6. Recording abandonment.]—It is not necessary to record the abandonment of an invalid location before re-location. *Creelman* v. *Clarke,* 1 M.M.C. 228.

7. Abandonment—Representation work—Rights of different Crown grantees to same ground.] — In July, 1898, plaintiff located and obtained a Crown grant for placer mining in respect of a claim, and on 25th January, 1898, one Mensing located a claim, and recorded it the next day, and on the succeeding 27th of October, a few minutes after midnight of the 26th, the defendant re-located it as ground abandoned and open to occupation on the ground of non-representation. The two claims overlapped. On 10th November, 1898, the defendant obtained her Crown grant for placer mining covering the ground in dispute and being a re-location of Mensing's old claim. The Gold Commissioner had made a rule that three months' continuous work in the year was sufficient, and by the regulations a claim was deemed abandoned after it had remained unworked on working days for the space of seventy-two hours:—Held, dismissing an action of trespass, that the defendant's Crown grant must prevail over that of the plaintiff. *Victor* v. *Butler,* 8 B.C.R. 100; 1 M.M.C. 438.

8. Abandonment.]—It is not necessary to record the abandonment of an invalid location before re-location. *Creelman* v. *Clarke,* 1 M.M.C. 228.

9. Erroneous location of placer claim.]—Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to re-locate it in accordance with the existent statute, and no formal abandonment is necessary. *Wheelden* v. *Cranston,* 12 B.C.R. 489; 2 M.M.C. 314.

XI. IRREGULARITIES AND HOW CURED.

1. Scope of.]—The curative provisions of the Mineral Act are intended as a shield for the protection of locators, and to be invoked by them, and not used as a weapon of attack upon them. *Creelman* v. *Clarke,* 1 M.M.C. 228.

2. Calculated to mislead.]—No failure to observe the provisions of the Act, if of a character calculated to mislead, can be cured by the remedial sections. *Manley* v. *Collom,* 8 B.C.R. 153; 1 M.M.C. 487.

3. Bona fide attempt to locate — Misleading post.] — A bona fide attempt to comply with the provisions of the Mineral Act, 1896, sec. 16 (d), does not merely mean an attempt to locate a claim of size and form as provided in sec. 15, but means an

attempt to comply with the formalities provided by sec. 16 as to staking, and a locator who has staked his location by four corner posts, without No. 1 and 2 posts, has not made such an attempt. *Richards* v. *Price*, 5 B.C.R. 362; 1 M.M.C. 156.

4. Fraudulent change.]—Where the location of a claim has been fraudulently changed it is void, and cannot be cured by the validating provisions of the Act. *Wise* v. *Christopher*, 1 M.M.C. 413.

5. Use of old survey post.]—The location of a claim is not invalid merely because an old survey post is used by the locator as the No. 1 post of his claim, in the absence of evidence that such staking was calculated to deceive. *Crossley* v. *Scanlan*, 15 B.C.R. 223.

6. Interest of third person.] — Where, before the issue of a certificate of work a third interest intervenes to the area in question, sec. 28 of the Mineral Act does not apply. *Windsor* v. *Copp*, 12 B.C.R. 213.

7. Staking—Non-observance of formalities—No. 2 post planted in glacier.]—The failure to write on the No. 2 post of a mineral claim the date of the location and the name of the locator is a non-observance of the formalities within the meaning of sec. 16 (g) of the Mineral Act, and is cured by the Act. *Sandberg* v. *Ferguson*, 10 B.C.R 123; 2 M.M.C. 165; 35 S.C.R. 476.

8. Question of fact.]—The question as to whether a deviation from any of the formalities prescribed by the Act is calculated to mislead is one of fact depending on the nature of the locus in quo. The learned trial judge having found that an error in an approximate compass bearing of 77° 50″ was, in the circumstances, calculated to mislead, his finding would not be disturbed unless shown to be clearly wrong. *Docksteader* v. *Clark*, 2 M.M.C. 192; 11 B.C.R. 37.

9. No. 1 post misplaced.]—The location is not invalid merely because the No. 1 post is planted on the ground of an existing valid claim if there was a bona fide attempt by the locator to comply with the provisions of the Act, and the blunder is not of a character to mislead. *Docksteader* v. *Clark*, 11 B.C.R. 37; 36 S.C.R. 622.

10. Defective affidavit.]—In his declaration, the locatior did not set forth all the words which were put upon the initial post at the time of location:—Held, upon the evidence, applying the curative force of sub-sec. (g) of sec. 16 (as enacted by sec. 4 of c. 33, 1898), that the defect complained of was not a substantial non-compliance with the provisions of sec. 16; and that the rule to be followed in such cases is that the words on the initial post shall be quoted in the affidavit with sufficient accuracy to enable the identification of the record as the record of the particular location to which it refers, and to prevent fraudulent substitution of other language for the language placed upon the posts at the time of location. *Windsor* v. *Copp*, 12 B.C.R. 213.

11. Legal posts—Failure to erect.]—Failure to put up legal posts, as required by the Mineral Act, invalidates a location, unless cured by sec. 16, sub-sec. (d). *Creelman* v. *Clarke*, 1 M.M.C. 228.

12. Date—Failure to write on post.]—Failure to write the true date upon the posts of a mineral claim, as required by the Mineral Act, invalidates the location, unless cured by sec. 16, sub-sec. (d). *Boie* v. *Saulter*, 1 M.M.C. 240.

13. Certificate of work.]—Defects in location made bona fide in endeavouring to avoid encroaching upon other locations, and which do not mislead, are cured by a certificate of work. *Waterhouse* v. *Liftchild*, 6 B.C.R. 424; 1 M.M.C. 153.

14. Record — Compass bearing — Misleading—Failure to duly record a location invalidated it.] — An error of the initial post of the approximate compass bearing of No. 2 post of N.E. and S.W., instead of N.W. and S.E., is calculated to mislead, and cannot be cured by sec. 16 (d). *Francœur* v. *English*, 6 B.C.R. 63; 1 M.M.C. 203.

15. Re-location — Lapsed location — Reversion—Certificate of work—Curative provisions.]—Even if the senior location were valid at the time of the location by the junior locator, if it subsequently lapsed, the junior would become entitled to the overlapped area as against the third location, if the junior locator had recorded a certificate of work before the making of the third location; the junior location in the life of the senior was "a mere irregularity" cured by sec. 28. *Pavier* v. *Snow*, 7 B.C.R. 80; 1 M.M.C. 384.

16. Certificate of work, delay in recording.]—The word "irregularity," in sec. 28, extends to the certificate of work itself. Delay in recording such a certificate of work is an irregularity which is cured by said sec. 28. Decision of McColl, J., reversed. *Peters* v. *Sampson*, 1 M.M.C. 247; 6 B.C.R. 405.

17. Located and recorded under different names.] — A claim which is located under one name and recorded under another is invalid, and such a defect in location, being necessarily calculated to mislead other locators in the vicinity, cannot be cured by sub-sec. (g) of sec. 16 of the Mineral Act Amendment Act, 1898. *British Lion Gold Mining Co.* v. *Creamer*, 2 M.M.C. 51.

18. What defects curable.]—The provisions of the Mineral Act as to location are imperative, and failure to observe them invalidates a location unless cured by the remedial sub-sec. 16 (g) and 28. Sec. 28 does not include within its purview any area not duly located; and the irregularities cured by that section are only such as occur in the interval between location and record, and the recording of the last certificate of work. In November, 1897, Cooper, having already located a claim on the same lode, located the Native Silver claim in the name of Halpin, who transferred in December, 1897, one-half to Cooper and the other half to Haller, who sold to plaintiff in July, 1900, the usual certificates of work having been obtained in the interim. Defendant, who knew of the error in the description of the compass bearing, and of the issue of such certificates, on failing to effect a purchase of the claim from Cooper and Haller, located the same ground as the Arlington Fraction, and on obtaining the usual certificates of work, applied for Crown grant:—Held, in adverse proceedings, that the irregularities in the plaintiff's title were not curable by sec. 28 of the Mineral Act. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487; 32 S.C.R. 371.

19. Mistake in compass bearing.]—The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded, and certificates of work were issued in respect of it regularly since. The plaintiff, in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground, and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. The compass bearing was east by north, and required south-easterly as stated on No. 1 post:—Held, that the irregularity in locating was not cured by a certificate of work. *Callahan* v. *Coplen*, 7 B.C.R. 422; 1 M.M.C. 348.

20. Omission to file notice.] — The plaintiff, owner of the Rebecca mineral claim, and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality, as shown by subsequent survey, a few feet outside the claim, but did not file the notice required by sec. 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received, in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca:—Held, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by sec. 53 of the Act. The omission to file the notice required by sec. 24 of the Act, and the incorrect filling up of the affidavit, were irregularities which were cured by the certificate of work. *Lawr* v. *Parker*, 7 B.C.R. 418; 8 B.C.R. 223; 1 M.M.C. 456.

21. Rock monuments instead of posts.] —The erection of rock monuments instead of legal posts, as required by the Mineral Act, invalidates a location, and such an omission cannot be cured by sec. 16, sub-sec. (d). The provisions of that section are conjunctive. Any other mode of making a location than that specified by the Act is calculated to mislead other locators. *Callanan* v. *George*, 1 M.M.C. 242; 8 B.C.R. 146.

22. Certificate of work.]—The Trilby mineral claim lapsed by abandonment in July, 1896. Before lapse the same ground was located as the Old Jim by the defendant's predecessor in title, and certificates of work were recorded in respect of it in 1897, 1898 and 1899. In February, 1899, the plaintiffs located the same ground as the Herald Fraction claim:—Held, that the defects in defendant's title were cured by the recording of the certificate of work. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

XII. Mineral in Place, Discovery of.

1. Failure to discover.]—Failure to discover "mineral in place" invalidates a location, and such discovery must be established as a fact when the onus of proving it is upon the locator; belief is insufficient. *Manley* v. *Collom*, 1 M.M.C. 487; 8 B.C.R. 153; 32 S.C.R. 371.

2. Certificate of work — Mineral in place.]—The recording of a certificate of work is an answer to the objection that mineral in place was not discovered. *Cranston*

v. *English Canadian Co.*, 7 B.C.R. 266; 1 M.M.C. 394.

XIII. ASSESSMENT WORK.

1. What constitutes.]—Work done by a miner making a cut through an adjoining claim, with the consent of the owners, for the better working of his own claim, must be held to be a representation of his own claim. *Wheeldon* v. *Cranston*, 12 B.C.R. 489; 2 M.M.C. 314.

2. Close season—Residence—Leave of absence—Representing two claims—Exoneration.]—During the close season there is no obligation to represent a claim, the whole of that season being for the purposes expunged from the calendar, and an attempt to locate another claim on the same ground during that season is merely an unauthorized trespass—a "jumping." Unless actual damage be shown, nominal damages ($1) only will be awarded for the trespass. Building a residence on or at a place manifestly convenient for the purpose of working a claim is doing miner-like work on such claim within the meaning of the Mineral Act, 1882, secs. 48 and 50, though in old and highly organized countries it would not be. The decision of the Gold Commissioner in granting leave of absence will not be interfered with unless for fraud. Where a free miner finds another in possession of his claim so that to insist upon working it might lead to a breach of the peace, he is exonerated from the performance of assessment work until the title is determined. If a claimholder does not properly represent his claim and so render it liable to re-location, he may, nevertheless, if he return to it and find it intact, resume possession, recommence working, and be in "as of his old estate." Where one man pretends to represent two claimholders at the same time, it is strong evidence that his representation in both cases is colourable, and so, worthless. *Woodbury* v. *Hudnut; Woodbury* v. *Meyers; Blasdel* v. *Hunley; Hammil* v. *Sproule*, 1 M.M.C. 31; 1 B.C.R., Pt. II., 39.

3. Effect of.] — The performance of assessment work is equivalent to the payment of an annual rent to the Crown. *Manley* v. *Collom*, 8 B.C.R. 153; 1 M.M.C. 487.

4. Proof of.] — The performance of assessment work as between subjects is conclusively established by recording certificates of work. *Cleary* v. *Boscowitz*, 8 B.C.R. 225; 1 M.M.C. 506.

5. Close season—Lay over—Gold Commissioner.]—The Gold Commissioner cannot, by declaring a close season or laying over, supersede statutory requirements as to assessment work. *Wilson* v. *Whitten*, 1 M.M.C. 38.

6. Miner doing assessment outside of boundary of claim.]—The plaintiff, owner of the Rebecca mineral claim and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as he believed, but in reality, as shown by subsequent survey, a few feet outside the claim, but did not file the notice required by sec. 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. Plaintiff received, in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca:—Held, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by sec. 53 of the Act. The omission to file the notice required by sec. 24 of the Act, and the incorrect filling up of the affidavit, were irregularities which were cured by the certificate of work. *Law* v. *Parker*, 7 B.C.R. 418; 8 B.C.R. 223; 1 M.M.C. 456.

7. Extension of time—Recorded pursuant to permission of Gold Commissioner.]—An order-in-council, under sec. 161 of the Mineral Act, 1896, extending the time for the doing and recording of assessment work on a mineral claim is intra vires. A certificate of work recorded pursuant to permission granted by a Gold Commissioner acting under such an order-in-council is a good certificate within sec. 28 of the said Act. *Peters* v. *Sampson*, 6 B.C.R. 405; 1 M.M.C. 247.

8. Peace, breach of.]—A free miner is not required to commit a breach of the peace to preserve his rights or perform assessment work. *Victor* v. *Butler*, 8 B.C.R. 100; 1 M.M.C. 438.

9. Official administrator failing to perform.]—The official administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown. The Official Administrator not having maintained the assessment work on a mineral claim, the ground was re-located and

recorded by another person, under the name of the Parkside mineral claim, and assessment work done on it. The original claim, known as the June, was, subsequently to such relocation, sold by the Official Administrator to plaintiff, who performed and recorded the annual assessment work:—Held, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had lapsed, and that the ground was open to location under the Mineral Act. *Windsor* v. *Copp*, 12 B.C.R. 213; 2 M.M.C. 318.

XIV. Leave of Absence.

Gold Commissioner, by.]—The decision of the Gold Commissioner, granting leave of absence, will not be interfered with except in case of fraud. *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

XV. Close Season.

1. Close season—Gold Commissioner.]—A close season may be fixed by the Gold Commissioner, by verbal direction, requiring three months' work on each claim, instead of by specifying a certain portion of the year as applicable to all claims. *Victor* v. *Butler*, 8 B.C.R. 100; 1 M.M.C. 438.

2. Power of Gold Commissioner to declare.] — Under the Mineral Act, 1884, and amendments of 1886-7, a Gold Commissioner has no power to declare a close season or lay over mineral claims so as to supersede the necessity of compliance with the statutory requirements relating to the representation of such claims by annual assessment work or expenditure of $100. *Wilson* v. *Whitten*, 1 M.M.C. 38.

3. Representation during.]—During the close season there is no obligation to represent a claim, the whole of that season being for the purposes expunged from the calendar, and an attempt to locate another claim on the same ground during that season is merely an unauthorized trespass. *Woodbury* v. *Hudnut; Woodbury* v. *Meyers; Blasdel* v. *Hunley; Hammil* v. *Sproule*, 1 M.M.C. 31; 1 B.C.R., Pt. II., 39.

XVI. Certificate of Work.

1. Conclusiveness.] — A certificate of work done on a mining claim is conclusive evidence that the holder has paid his rent, and can only be impugned by the Crown. *Cleary* v. *Boscowitz*, 8 B.C.R. 225; 32 S.C.R. 417.

2. Evidence to impugn.] — Where the plaintiff, believing that the statutory work had not been done, and that the claims were therefore vacant, located and recorded them under new names, and brought an action claiming an adverse right thereto, it was held that evidence to impugn a certificate of work was rightly rejected at the trial. *Ibid.*

3. Impeachment.]—A certificate of work cannot be impeached in any proceedings to which the Attorney-General is not a party. *Cleary* v. *Boscowitz*, 8 B.C.R. 225.

4. Issued during course of action.]—On the trial of an action attacking the validity of the defendant's location, a certificate of work obtained by the defendant the day before was not permitted to be put in evidence. *Rammelmeyer* v. *Curtis*, 8 B.C.R. 383; 1 M.M.C. 401.

5. Performance of assessment work outside of location.] — Performance of assessment work by mistake outside of boundaries of claim is an irregularity which is cured by the recording of a certificate of work. *Lawr* v. *Parker*, 7 B.C.R. 417; 8 B.C.R. 223; 1 M.M.C. 456.

6. Failure to record—Effect of recording.]—Failure to record a certificate of work is presumptive evidence of abandonment. The recording of a certificate of work is an answer to the objection that mineral in place was not discovered. *Cranston* v. *The English Canadian Co.*, 1 M.M.C. 394; 7 B.C.R. 266.

7. Extension of time for recording—Delay in recording.] — An order-in-council, under sec. 161 of the Mineral Act, 1896, extending the time for the doing and recording of assessment work on a mineral claim, is intra vires. A certificate of work recorded pursuant to permission granted by a Gold Commissioner acting under such an order-in-council is a good certificate within sec. 28 of the said Act. The word "irregularity" in sec. 28 extends to the certificate of work itself. Delay in recording such a certificate of work is an irregularity which is cured by said sec. 28. *Peters* v. *Sampson*, 6 B.C.R. 405; 1 M.M.C. 247.

8. Fraud.]—A certificate of work cannot be invoked in support of a so-called location which has been fraudulently changed. *Wise* v. *Christholm*, 1 M.M.C. 413.

9. Form of.]—A certificate of work is not irregular because it contains more than the Act requires, nor because it does not show on its face a statutory extension of time. *Payne Consolidated Mining Co., Ltd. Lby.* v. *Wilson,* 1 M.M.C. 485.

10. Lease—Rent—Assessment work—Certificate of work—Fraud.]—Performance of the annual assessment work (or the equivalent money payment), is the annual rental payable to the Crown, and therefore, in the case of a valid location, whenever a dispute arises in which payment of a rent is concerned, the production of the certificate of work is conclusive against all the world, except the Crown itself, in a suit to set it aside for fraud. *Manley* v. *Collom,* 8 B.C.R. 153; 1 M.M.C. 487; 32 S.C.R. 371.

11. Impeachment — Fraud.]—A certificate of work is conclusive evidence of performance of assessment work as between subjects till impeached by the Crown for fraud. *Manley* v. *Collom,* 8 B.C.R. 153; 1 M.M.C. 487. *Cleary* v. *Boscowitz,* 8 B.C.R. 225; 1 M.M.C. 506.

12. Conflicting certificates of work.]—Where both sides have recorded certificates of work, title will be determined according to prior location and record. *Fero* v. *Hall,* 6 B.C.R. 421; 1 M.M.C. 238.

13. Irregularity — Assessment work—Mistake of official—Curative provisions—Time.]—If a free miner by mistake perform his assessment work outside the boundaries of his claim that is an irregularity which is cured by recording a certificate of work. The Attorney-General is the only party who could attack such certificate. If a free miner is misled by the statement of the Gold Commissioner, and consequently neglects to give the notice required by sec. 24, and makes any incorrect affidavit, he is protected by sec. 53. The effect of sec. 53 of the Mineral Act, 1898, is to provide for an extension of time within which the certificate can be obtained. *Lawr* v. *Parker,* 7 B.C.R. 418; 8 B.C.R. 223; 1 M.M.C. 456.

14. Occupation of.]—Defects in a location made bona fide in endeavouring to avoid encroaching upon other locations, and which do not mislead, are cured by a certificate of work. *Waterhouse* v. *Liftchild,* 1 M.M.C. 153; 6 B.C.R. 424.

15. Title—Defects in, cured by certificate of work.]—In November, 1897, Cooper, having already located a claim on the same lode, located the Native Silver claim in the name of Halpin, who transferred in December, 1897, one-half to Cooper and the other half to Haller, who sold to plaintiff in July, 1900, the usual certificates of work having been obtained in the interim. Defendant, who knew of the error in the description of the compass bearing, and of the issue of such certificates, on failing to effect a purchase of the claim from Cooper and Haller, located the same ground as the Arlington Fraction, and on obtaining the usual certificates of work, applied for Crown grant:—Held, in adverse proceedings, that the defendant not being misled, the irregularities in the plaintiff's title were cured by sec. 28 of the Mineral Act. *Manley* v. *Collom,* 8 B.C.R. 153; 1 M.M.C. 487.

16. Curative effect.] — If the description of a mining claim, as recorded, is so erroneous as to mislead parties locating other claims in the vicinity, the error is not cured by a certificate of work done by the first locator on land not included in such description and covered by the subsequent claims. *Callahan* v. *Coplen,* 6 B.C.R. 523; 7 B.C.R. 422; 1 M.M.C. 348; 30 S.C.R. 555.

17. Calculated to mislead.]—No failure to observe the provisions of the Act, if of a character calculated to mislead, can be cured by the recording of a certificate of work. *Manley* v. *Collom,* 8 B.C.R. 153; 1 M.M.C. 487.

18. Curative effect.] — Sec. 28 of the Mineral Act (R.S.B.C. 1897, c. 135) does not apply where a stranger acquires an interest in the claim before the issue of a certificate of work. *Windsor* v. *Copp,* 12 B.C.R. 213; 2 M.M.C. 318.

19. Reversion of lapsed location.]—The Trilby mineral claim lapsed by abandonment in July, 1896. Before lapse the same ground was located as the Old Jim by the defendant's predecessor in title, and certificates of work were recorded in respect of it in 1897, 1898 and 1899. In February, 1899, the plaintiffs located the same ground as the Herald Fraction claim:—Held, that the defects in defendant's title were cured by the recording of the certificate of work. *Gelinas* v. *Clark,* 8 B.C.R. 42; 1 M.M.C. 428.

20. Interest of third party intervening.]—The recording of a certificate of work issued after a new location by another free miner does not revive the original location, for a third interest has intervened between the Crown and the subject. *Windsor* v. *Copp,* 12 B.C.R. 213; 2 M.M.C. 318.

XVII. CERTIFICATE OF IMPROVEMENTS.

A. In General.

1. Effect of.]—A certificate of improvements is a bar to adverse claimants in any right, and on all grounds except fraud. *Nelson, etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

2. Bar—Laches—Crown.]—An adverse claimant who neglects to bring an adverse action under sec. 37 cannot sue to set aside a certificate of improvements on the ground of fraud. Semble, that under such circumstances the Crown alone is entitled to sue. *Hand* v. *Warren*, 7 B.C.R. 42; 1 M.M.C. 376.

3. Second adverse action — Fraud.]—Where a claim owner has received a certificate of improvements for his claim his position is assured and he is not called upon to adverse a subsequent application of another for a certificate of improvements for a claim which would include a portion of his claim. Sec. 37 requires any claimant of an adverse nature to the ground applied for to substantiate his claim within the prescribed time or be forever barred except for fraud. *Re American Boy Mineral Claim*, 7 B.C.R. 268; 1 M.M.C. 304.

4. Co-owner applying.]—The co-owner of part of claim may apply for a certificate of improvements. *Bentley* v. *Botsford*, 8 B.C.R. 128; 1 M.M.C. 454.

5. Necessity for commencement of action before issuance of certificate.]—Plaintiffs held a Crown grant dated 8th March, 1895, of certain lands, from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." Defendant held certificate of improvements dated 14th August, 1899, and plaintiffs, being apprehensive as to form of Crown grant to be issued to defendant, applied for injunction restraining him from applying for and receiving Crown grant:—Held, dismissing the motion, that the policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained. *Nelson and Fort Sheppard Railway Co.* v. *Dunlop*, 7 B.C.R. 411; 1 M.M.C. 414.

6. Injunction preserving property pending appeal.]—In a case of very special and exceptional circumstances, and to preserve the property in dispute, a party in an adverse action, who had obtained judgment at the trial, may, after appeal has been brought, be enjoined from persisting in his application for, or from obtaining a certificate of improvements pending such appeal. *Dunloy* v. *Haney*, 1 M.M.C. 344; 7 B.C.R. 300.

B. Fraud in Obtaining.

1. Setting aside for.] — An adverse claimant who neglects to take the remedy provided by sec. 37 of the Mineral Act, cannot sue to set aside a certificate of improvements on the ground of fraud. Semble, that under such circumstances the Crown alone is entitled to sue. *Hand* v. *Warren*, 7 B.C.R. 42; 1 M.M.C. 376.

2. Statement in affidavit.]—A statement in an affidavit (as to the question of undisputed possession) untrue at the time of the taking of the oath, but true at the time the affidavit reached the Gold Commissioner for action thereon, was not a misleading of that official, the affidavit having been made at his suggestion as a formal compliance with the Act, and he having full knowledge of the circumstances, and so, not a fraud within the meaning of the said sections. Parties strenuously yet bona fide pursuing what they deemed, however erroneously, to be their rights, do not come within the meaning of the word fraud in said sections. Semble, when fraud is shown under sec. 37, the curative properties of sec. 28 vanish as against the Crown. *Attorney-General* v. *Dunlop*, 7 B.C.R. 312; 1 M.M.C. 408.

XVIII. CROWN GRANT.

A. Application for.

1. Coal license.] — Petitioners held a prospecting license for coal over 2,500 acres of land under the Mineral Ordinance, 1869, and applied for a Crown grant. In support of their claim they relied on a certificate of the Assistant Commissioner of Lands and Works that they had duly posted notices of their application, and "that no objection to the issue of such grant had been substantiated":—Held, (1) That the certificate was not in acordance with the Act. (2) That the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted. (3) That the department could not dispense with the performance of preliminary conditions imposed by the Legislature. (4) That in a proceeding to enforce

specific performance by the Crown unreasonable delay on the part of the petitioners is fatal to the application. (5) On the facts, that the claim had been abandoned. Quære, whether to entitle prospecting licensees to a Crown grant of coal lands under the Mineral Act it is not essential that they should have found coal on the land selected by them for purchase. *Peck* v. *Regina*, 1 M.M.C. 13; 1 B.C.R., Pt. II., 11.

2. Injunction—To restrain application for Crown grant.]—Plaintiffs held a Crown grant dated 8th March, 1895, of certain lands from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." Defendant held certificate of improvements dated 11th August, 1899, and plaintiffs, being apprehensive as to form of Crown grant to be issued to defendant, applied for injunction restraining him from applying for and receiving Crown grant:—Held, dismissing the motion, that the policy of the Mineral Act is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained. *Nelson and Fort Sheppard Railway Co.* v. *Dunlop*, 7 B.C.R. 411; 1 M.M.C. 414.

3. In writing.]—The application for a Crown grant need not be in writing. *Attorney-General* v. *Dunlop*, 7 B.C.R. 312; 1 M.M.C. 408.

4. Procedure to obtain.]—Sec. 16 of the Mineral Act Amendment Act, 1897, saving the rights under repealed statutes of applying for Crown grants, applies to Crown grants issued as well before as after the enactment of the statute. *Spencer* v. *Harris*, 6 B.C.R. 466; 1 M.M.C. 294.

B. Rectification.

Overlapping claims.]—The holder of a Crown grant is entitled to have it rectified where a certificate of improvements has been improvidently issued covering land properly included within the Crown grant. *In re The American Boy Mineral Claim*, 7 B.C.R. 268; 1 M.M.C. 304.

XIX. Forfeiture.

A. Who Can Declare.

The Crown.]—Where mining ground is held from the Crown under a lease which is subject to forfeiture for non-compliance with terms and conditions, the Crown alone can declare a forfeiture and re-enter for breach, or waive it. Free miners in general are strangers to such a lease, and have no rights under or over it. Cessation of mining operations for want of funds is not proof of intention to abandon, even if that question could be raised by strangers to the lease. The act of recording a claim is the act of the party and not of the Crown, so cannot operate as a re-demise of ground already leased by the Crown. *Canadian Company* v. *Grouse Creek Flume Co., Ltd.*, 1 M.M.C. 3.

B. Relief Against.

Unrenewed interest.]—Though the interest of a free miner in his claim expires, unless renewed, at the end of a year, his lessor, the Crown, may relieve against forfeiture in cases where there is no one entitled to take advantage of such expiry. *Williams Creek Co.* v. *Synon*, 1 M.M.C. 1.

XX. Transfer.

1. Writing.]—A transfer of a mineral claim is not enforceable unless in writing. *Alexander* v. *Heath*, 8 B.C.R. 95; 1 M.M.C. 333.

2. Notice — Land registry — Conveyance.]—Secs. 50 and 51 Mineral Act, 1891, introduce into the law relating to transfers the policy of the land registry laws, namely, that a prior unregistered conveyance must be postponed to that which is subsequent but duly registered. Quære, whether mining records constitute notice, and to what extent? *Atkins* v. *Coy*, 5 B.C.R. 6; 1 M.M.C. 88.

3. Notice—Record.]—Though documents duly recorded are notice to subsequent purchasers, the mere fact of a notice of claim being filed with the Recorder is not notice. *Stussi* v. *Brown*, 5 B.C.R. 380; 1 M.M.C. 195.

4. Record—Failure to enter.]—Failure to record a conveyance under sec. 49 of the Mineral Act does not result in the claim becoming waste lands of the Crown open to location. There is an apparent conflict between secs. 49 and 50, which can be reconciled by construing sec. 50 as meaning merely that a Court should not afford relief, before record of conveyance. *Grutchfield* v. *Harbottle*, 1 M.M.C. 396; 7 B.C.R. 186, 344.

5. Bill of sale.]—The interest of a principal in a mineral claim may be transferred by his agent by a bill of sale, though executed by the agent in his own name. *Wilson* v. *Whitten*, 1 M.M.C. 38.

6. Joint transferees.] — If one of two joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other. *Cook* v. *Denholm*, 8 B.C.R. 39; 1 M.M.C. 447.

7. Time allowed for recording.]—The claimant of an interest in a mineral claim seized under an execution on 18th May, 1903, relied on a bill of sale obtained by him on 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the Mining Recorder's office. The bill of sale was not recorded until 22nd May, 1903:—Held, that as the time for recording mineral claims fixed by sec. 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the Recorder's office, therefore, by sec. 49 of the Act, the bill of sale was of no effect as against the intervening execution, as it was not recorded within the time limited by said sec. 19. *Dumas Gold Mines, Limited* v. *Boultbee*, 10 B.C.R. 511; 2 M.M.C. 137.

8. Partnership — Notice.] — Under sec. 34 of the Mineral Act, 1891, the interest of a free miner in his mineral claim is an interest in land within the Statute of Frauds. An agreement between the defendant and plaintiff, not stated to be in writing, in regard to the mineral claim in question being alleged in the statement of claim and admitted in the statement of defence:—Held, that the defence of the Statute of Frauds was waived and the defendant concluded by the admission. Upon appeal to the Full Court:—Held, to maintain the defence of the Statute of Frauds to an agreement for sale or transfer of a mineral claim, both that statute and sec. 34 of the Mineral Act, supra, must be pleaded. Quære: Whether the bar provided by sec. 51 of the Mineral Act, 1891, that "no transfer of any mineral claim, etc., shall be enforceable unless the same shall be in writing," etc., is not confined to a plaintiff seeking to enforce the transfer, and inapplicable to a defendant. *Stussi* v. *Brown*, 5 B.C.R. 380; 1 M.M.C. 195.

9. Assignee in bankrupt.]—A transfer by an assignee in bankruptcy is invalid unless all the orders and proceedings constituting his title to dispose of the bankrupt's property have been recorded. *Barinds* v. *Green*, 16 B.C.R. 433.

10. Conflict of laws.]—Defendants were co-owners of certain mineral claims. S., in July, 1909, filed a petition in bankruptcy in a New York Court, which adjudged him a bankrupt and directed a reference. The petition, without in terms assigning any specific property, recited that S. was willing to surrender all his property for the benefit of his creditors, and included in a schedule of his personal property were his interests in the two mineral claims in question. On the 26th of July G. was appointed trustee of S.'s estate. The point was not disputed that the bankruptcy proceedings were sufficient to transfer the claims to G. if the claims had been in New York State. On the 4th of September, 1909, S., being in default in his share of assessment work, defendant duly advertised, under sec. 25b, forfeiture of S.'s interest if the amount due was not paid within 90 days. On the 18th of October, G. sold the claims to plaintiff and executed a transfer of them. This transfer, with a certificate of G.'s appointment, were recorded in the mining recorder's office on the 4th of November, but the sale was not confirmed by the referee in bankruptcy until the 8th of October, 1910. Before the expiration of the 90 days under the advertisement, the amount due under S.'s default was tendered by plaintiff to defendant, who refused to accept it, and completed his forfeiture proceedings. S.'s mining license expired on the 31st of May, 1908, was not renewed until the 14th of June, 1908; it expired again on the 31st of May, 1910, and was not renewed. At the time of the transfer of S.'s interest to plaintiff, neither the latter nor G. held a free miner's certificate. Plaintiff took one out on the 26th of October, 1909, and G. on the 16th of November, 1909. It was submitted for plaintiff that a mineral claim is a chose in action, and governed by the law of the place where the owner is; therefore S., being in New York, and having been adjudged a bankrupt by a Court of that State, the sufficiency of the transfer from him should be governed by the law there:—Held, in the absence of direct proof of domicile, and of authority for the latter proposition, it was quite consistent with the bankruptcy proceedings that S.'s domicile was elsewhere; that as the mineral claims were immovables within British Columbia, they were subject to British Columbia law

(Mineral Act, R.S.B.C. 1897, c. 135, sec. 2); that the absence of a free miner's certificate at the time of the transfer was fatal in the case of S. and G. (sec. 9); that as all the proceedings alleged to constitute the transfer had not been recorded, sec. 50 was not complied with; and that the transfer to the plaintiff was not recorded within the time fixed by secs. 19 and 49. Accordingly it had not been shown that the plaintiff was the owner of an undivided one-third interest in the two mineral claims. *Barinds* v. *Green and Silverman,* 16 B.C.R. 433.

XXI. Extra-Lateral Rights.

1. Apex location.] — To justify an encroachment in the exercise of the right of following and exploiting a mineral vein extra-laterally beyond the vertical plane of the side-line of the location within which it has its apex, the owner of the apex must prove the identity and continuity of the vein from such apex to his extra-lateral workings. *The Star Mining and Milling Co.* v. *Byron N. White Co.*, 13 B.C.R. 234; 41 S.C.R. 377.

2. Continuous or faulted vein.]—In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the Court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting, were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. *Star Mining and Milling Company* v. *Byron N. White Company*, 12 B.C.R. 162.

3. Burden of proof.]—In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the trial judge, after inspection of the mine, in the presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. On inspection of this work the trial judge found that the facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut-off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. Plaintiffs applied for an order directing further work to be done on the ground that enough had not been done to establish their theory. This was refused, and plaintiffs appealed. The appeal was allowed, and further work directed to be done:—Held, on appeal, on the evidence furnished by the further work done under direction of the Full Court, that the defendant Company had failed to discharge the onus cast upon it to establish the identity and continuity of the vein in question. *Star Mining and Milling Company, Limited Liability* v. *Byron N. White Company* (*Foreign*), 13 B.C.R. 234.

XXII. Surface Rights.

1. Sale of.]—The holders of mineral claims are not entitled to deal with any por-

tion of the surface, except in acordance with the mining laws, nor to sell or dispose of the same. *Nelson, etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396.

2. Lease from grantee—Squatter.]—A Crown grant of a mineral claim vests such a title at least in the grantee that a squatter upon such lands must show a better title or move off. Where such a squatter takes a lease from the Crown grantee he cannot maintain an action to set aside the lease if the lessor has observed its covenants. *Spencer* v. *Harris*, 6 B.C.R. 466; 1 M.M.C. 294.

A. Tunnels.

Consent of other owners.]—If a miner has obtained the consent of other owners to construct a tunnel through their property, it is not necessary for him to obtain the consent of the Gold Commissioner. *Wheeldon* v. *Cranston*, 12 B.C.R. 489; 2 M.M.C. 314.

XXIII. WATER RIGHTS.

1. Rights of lessees of timber berths from Crown in right of the Dominion.]—Plaintiffs were entitled, as riparian proprietors, to the use of the natural flow of the water of a stream, Quartz Creek, running through timber lands leased by them from the Dominion Government. The lands so leased were part of the lands in the railway belt granted to the Dominion by the Province of British Columbia, by 43 Vict., British Columbia, c. 2, in aid of the construction of the Canadian Pacific Railway. Defendants, as free miners, licensed by the Provincial Government, obtained from it a grant of the right to use, for mining purposes, the water of a stream running into Quartz Creek above the plaintiff's sawmill, by record under the Placer Mining (British Columbia) Act, 1891, secs. 56 and 57. Defendants so used this water as to foul Quartz Creek and stop the plaintiff's mill:—Held, (1) No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him. (2) A right granted by a statute, which does not, in express terms, derogate from the rights of others, cannot be held to have done so by implication. (3) A grant of water privileges under the Provincial Mining Acts does not sanction the user of the water to the detriment of the rights of others, however acquired, to the same water at another part of the stream. (4) The Dominion Government, under 43 Vict. (British Columbia), c. 2, were in possession of the lands, as trustees to administer the same, and it was competent to them to grant a lease to the plaintiffs, carrying the ordinary rights to the water of a riparian proprietor. *The Columbia River Lumber Co.* v. *Yuill and others*, 2 B.C.R. 237; 1 M.M.C. 64.

2. Hill claims.]—Under the Gold Mining Ordinance, 1867, unless the owner of a hill claim has obtained a grant of water under Part X, he has no right to intercept water higher up a stream that flows through or past his claim, and so interfere with another owner of a lower hill claim in the exercise of the latter's rights under a water grant obtained under the said Part. Water so intercepted is not water "naturally flowing through or past his claim" within the meaning of sec. 36 of the ordinance. A grant of such water need not be in writing. *Jenny Lind Co.* v. *Bradley-Nicholson Co.*, 1 B.C.R., Pt. II., 185; 1 M.M.C. 9.

3. Placer mining.]—A free miner who is a leaseholder of a placer claim is an "owner of a placer mine" within the meaning of the Water Clauses Consolidation Act, 1897, Amendment Act, 1904, and has the same water rights as an individual placer miner. *Ginaca* v. *McKee Consolidated Hydraulic, Ltd.*, 11 B.C.R. 481; 2 M.M.C. 288.

4. Additional rights.]—If a free miner has water rights on one creek, he is not deprived of them merely because he obtains additional water rights on another. *Ibid.*

5. Rights in general.]—The Act shows a clear intention to increase the benefits accruing to the free miner and to cut down the rights of holders of water records; and also to secure to the occupants, being free miners, of placer ground that continuous flow of water which sec. 2 specifies. *Ibid.*

XXIV. OFFICIALS, POWERS AND MISTAKES OF.

1. Mistake of—Effect on miner.]—If a free miner is misled by Gold Commissioner and consequently neglects to give notice required by sec. 24 and makes an incorrect affidavit, he is protected by sec. 53. *Lawr* v. *Parker*, 7 B.C.R. 418; 8 B.C.R. 223; 1 M.M.C. 456.

2. Sub-recording office.]—If a sub-recording office is opened by the Minister of

Mines without the authority of the executive, that is an "act of omission or commission of a Government official," the consequences of which a free miner may be relieved against under sec. 53. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

3. Omission of.]—When renewal of the mining lease was applied for by one of the plaintiff's predecessors in title in 1900, he asked the Gold Commissioner to renew the water record, to which the Gold Commissioner replied that it was not necessary. Sec. 14 of the Placer Mining Act (R.S.B.C. 1897, c. 135) declares that "a free miner shall have all the rights and privileges granted to free miners by the Mineral Act, 1896," and sec. 53 of that Act provides that "no free miner shall suffer from any acts of omission or commission or delays on the part of any Government official":—Held, that the failure of the Gold Commissioner to direct them how to proceed could not be regarded as an act of omission within the meaning of sec. 53 of the Mineral Act. *Lightning Creek Mining Co.* v. *Hopp*, 19 B.C.R. 586.

4. Proper action.]—If the action taken by the Gold Commissioner was the proper one, it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action. *Brown* v. *Spruce Creek Power Co.*, 11 B.C.R. 243.

5. Change of location.]—A Gold Commissioner has no authority to change the entire location of a placer claim, and an order to that effect made by him is null and void. *Tanghe* v. *Morgan*, 11 B.C.R. 76.

6. Powers of Gold Commissioner over closed season.]—Under the Mineral Act, 1884, and amendments of 1886-7, a Gold Commissioner has no power to declare a close season or lay over mineral claims so as to supersede the necessity of compliance with the statutory requirements relating to the representation of such claims by annual assessment work or expenditure of $100. Powers of Gold Commissioner to declare a close season and lay over mineral claims considered. *Wilson* v. *Whitten*, 1 M.M.C. 38.

7. Powers of, over closed season.]—A close season may be fixed by the Gold Commissioner by verbal direction, requiring three months' work on each claim, instead of by specifying a certain portion of the year as applicable to all claims. *Victor* v. *Butler*, 1 M.M.C. 438; 8 B.C.R. 100.

8. Official administrator.] — Assuming that the official administrator of a deceased free miner is a Government official whose mistakes may be relief against, the act or omission relied on must be a failure to do something which a Government official ought to do or a doing something which he ought not to do. *Windsor* v. *Copp*, 12 B.C.R. 213; 2 M.M.C. 318.

9. Discretion.] — The decision of the Gold Commissioner in granting leave of absence will not be interfered with unless for fraud. *Woodbury* v. *Hudnut*, 1 B.C.R. Pt. II., 39; 1 M.M.C. 31.

XXV. Conflicting Claims: Contests.

A. Rules for Ascertainment of Rights.

1. Priority of record.] — Where both parties have recorded certificates of work, the title will be determined according to prior location and record. *Fero* v. *Hall*, 6 B.C.R. 421; 1 M.M.C. 238.

2. Title — Proof of.]—Sec. 11 of the Mineral Act Amendment Act, 1898, applies to all adverse proceedings, including those commenced before the Act. By proving (1) his free miner's certificate; (2) prior location and due record; and (3) the overlapping of the claims in dispute, a senior locator who is plaintiff in adverse proceedings makes out a prima facie case. *Schomberg* v. *Holden*, 6 B.C.R. 419; 1 M.M.C. 290.

3. Title—Overlapping — Measurements —Re-location—Affidavit.]—In an adverse action, if the plaintiff wish to attack the defendant's title he must do so at the time of making out a prima facie case for his own title. Where boundaries of conflicting claims are in question the overlapping must be proved by measurements taken on the ground. The expression "adverse proceedings" in sec. 11 of the Mineral Act Amendment Act, 1898, is used in a broad sense. Observations upon the scope and object of sec. 11. *Dunlop* v. *Haney*, 7 B.C.R. 1, 305; 1 M.M.C. 369.

4. Title—Not established.]—Where both parties fail to establish title, the judge will so find, and direct judgment to be so entered without costs. *Ryan* v. *McQuillan*, 6 B.C.R. 431; 1 M.M.C. 289.

5. Onus of proof—Objection—Trial.]—In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title, and if he is the junior locator, establish his case in detail. Counsel for adverse claimant,

in deference to a remark of the trial judge, did not complete the proof of his own title:—Held, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial. *Caldwell* v. *Davys*, 7 B.C.R. 156; 1 M.M.C. 387.

6. Overlapping.] — Locations which do not overlap do not conflict, at least in so far as boundaries are concerned. *Dunlop* v. *Haney*, 7 B.C.R. 300; 1 M.M.C. 344.

7. Failure to record.]—In adverse proceedings, the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work. Semble, a locator cannot, after abandonment by a prior locator, rest on a location made before such abandonment, but must re-locate. *Cranston* v. *The English Canadian Co.*, 7 B.C.R. 266 ; 1 M.M.C. 394.

8. Conflicting Crown grants—Title.]—Where there are two Crown grants to different parties for the same claim, or overlapping portions of two claims, the earlier must prevail. *Victor* v. *Butler*, 8 B.C.R. 100; 1 M.M.C. 438.

9. Impeachment of certificate of work.]—A certificate of work cannot be impeached in any proceeding to which the Attorney-General is not a party. Plaintiffs, in making their case, admitted that defendant held certificates of work:—Held, that in itself was affirmative evidence of defendant's title within the meaning of sec. 2 of the Mineral Act Amendment Act of 1898. *Cleary* v. *Boscowitz*, 8 B.C.R. 225; 1 M.M.C. 506.

10. Sale—Fraud—Agent—Estoppel.]—W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants, after which W., as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name:—Held, that the defendants had no right to the fraction in the absence of proof of fraud by W., and that the plaintiff was a party thereto; and held, also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the end of the two claims, between which the fraction in question was located, adjoined each other. *Gibson* v. *McArthur*, 7 B.C.R. 59; 1 M.M.C. 382.

11. Reversion of lapsed location.]—In adverse proceedings where it is not established with reasonable certainty (1) that the ground was properly staked, (2) that assuming the ground had been properly staked, it was identical with the ground mentioned in the record, and the defendant shows title and produces certificates of work for several years, judgment will be given in favour of defendant. *Pavier* v. *Snow*, 7 B.C.R. 80; 1 M.M.C. 384.

12. Right to third claim.]—In proving a title, one party cannot set up against another a right to a third claim which he himself contends he has destroyed. *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

13. Curative provisions.]—In an adverse action, when the validity of a junior location depends upon the location of the senior location on the same ground, the curative provisions of sec. 16, sub-sec. (d), of the Mineral Act can only be invoked in support of such senior location by some one claiming to be entitled thereto, and not by a party to such adverse action who has no interest therein. *Boie* v. *Saulter*, 1 M.M.C. 240.

14. Equitable principles.] — The Court should deal with mining disputes upon the principles of a Court of Equity, and should discountenance a plaintiff whose action is based upon defects in title, knowledge of which was acquired by him while a Government employee in a mining record office, it being contrary to his duty to the public for him to use such information. Practice of "jumping" claims should be discouraged. *Granger* v. *Fotheringham*, 1 M.M.C. 71; 3 B.C.R. 590.

15. Onus of proof—In adverse action.]—In adverse actions which are ejectment, not trespass actions, plaintiff must succeed by strength of his own title. *Clark* v. *Haney*, 8 B.C.R. 130; 1 M.M.C. 281.

16. Onus of proof.]—Where a location is alleged to be invalid on the ground that it was made upon an existing valid location, that fact must be established, particularly where the location attacked was otherwise valid, and certificates of work recorded thereon. *Pavier* v. *Snow*, 7 B.C.R. 80; 1 M.M.C. 384.

17. Onus of proof.]—The onus of proof is on the adverse claimant, and if he is the junior locator he must establish his case in detail. *Caldwell* v. *Davys*, 7 B.C.R. 156; 1 M.M.C. 387.

18. Onus of proof.]—Where the onus is on the defendant to prove valid location, he cannot do so simply by the production of a certificate of work issued the day before

the trial. Neither party having established his claim, judgment was so entered, without costs, under sec. 11 of the Mineral Act, 1898. *Rammelmeyer* v. *Curtis*, 8 B.C.R. 383; 1 M.M.C. 401.

19. Root of title.]—Location according to the Act is the root of title. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213.

20. Speed and finality.]—It is the policy of the Mineral Acts to provide for a speedy determination of disputes and finality of title. *Kinney* v. *Harris*, 5 B.C.R. 229; 1 M.M.C. 137. *Kilbourne* v. *McGuigan*, 5 B.C.R. 233; 1 M.M.C. 142; *Nelson and Fort Sheppard Railway Co.* v. *Jerry*, *ib.*, 161; *Dunlop* v. *Haney*, *ib.*, 236; *In re The American Boy Mineral Claim*, 7 B.C.R. 268; 1 M.M.C. 304.

21. Equitable principles.] — Disputes over mineral claims should be decided on equitable principles and jumping be discouraged. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71; *Atkins* v. *Coy*, 5 B.C.R. 6; 1 M.M.C. 88; *Victor* v. *Butter*, 8 B.C.R., 100; 1 M.M.C. 438.

22. Encroachments.]—It is the duty of a mine owner, when his workings approach his boundaries, to proceed with caution, and make surveys to prevent encroachments on adjoining properties, and the least evidence of bad faith on his part will make every intendment in favour of the injured party. *Last Chance Mining Co.* v. *American Boy Mining Co.*, 2 M.M.C. 150.

B. Remedies.

1. Courts, Jurisdiction of.

1. County Court.] — It is doubtful whether under the Acts of 1891 and 1892 an action of trespass to enforce an adverse claim could be brought in the County Court. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213.

2. County Courts.] — Sec. 34 of the County Courts Act, which provides, inter alia, that if in any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives security for trial in the Supreme Court, the proceedings in the County Court shall be stayed, applied to procedings in the Courty Court under its mining jurisdiction. *Muirhead* v. *Spruce Creek Mining Co., Ltd.*, 2 M.M.C. 155; 11 B.C.R. 1.

3. Transfer to Supreme Court.] — An action pending in the County Court will not be transferred to the Supreme Court unless some peculiar questions of expediency arise. *Richards* v. *Price*, 5 B.C.R. 362; 1 M.M.C. 140.

4. Objections to jurisdiction.]—If jurisdiction is objected to, the point must be taken below or it will not be entertained on appeal. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

5. Water rights.]—The County Courts in their mining jurisdiction have power to deal with actions respecting the disturbance of water rights appurtenant to mining property. *Spruce Creek Power Co.* v. *Muirhead and others*, 11 B.C.R. 68; 2 M.M.C. 158.

2. Adverse Proceedings, when Applicable.

1. All mining cases.] — The words "adverse proceedings," in sec. 11 of the Mineral Act, 1898, apply to all mining cases wherein there are mineral claims in conflict under the Mineral Acts. By the combined effect of sec. 117 of the Mineral Act, and sec. 25 of the County Courts Act, said sec. 11 has the same effect in the County Court as in the Supreme Court. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

2. Holder of certificate of improvements.]—Under sec. 86 of the Land Act, a defective Crown grant may be cancelled and a new one issued at any time irrespective of existing certificates of improvements for mineral claims contained in the area of the grant. Where a claim owner has received a certificate of improvements for his claim, his position is assured, and he is not called upon to adverse a subsequent application of another for a certificate of improvements for a claim which would include a portion of his claim. Sec. 37 of the Mineral Act requires any claimant of an adverse nature to the ground applied for to substantiate his claim within the prescribed time or be forever barred, except for fraud. The fact that a claimant began adverse proceedings and abandoned them does not deprive him of whatever rights he otherwise had under the section. *In re The American Boy Mineral Claim*, 1 M.M.C. 304.

3. Attack on defendant's title.]—In an adverse action, if the plaintiff wish to attack the defendant's title, he must do so at the time of making out a prima facie case for his own title. *Dunlop* v. *Haney*, 1 M.M.C. 369; 7 B.C.R. 1, 305.

4. Injunction to restrain issue of Crown grant.] — A Crown grantee of land, qua land, cannot obtain an injunction to prevent the owner of a mineral claim who has obtained a certificate of improvements from obtaining a Crown grant thereunder, even though the objection is only to the form of the Crown grant. The policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to begin action before the certificate of improvements is obtained. *Nelson and Fort Sheppard Railway Co.* v. *Dunlop*, 1 M.M.C. 414; 7 B.C.R. 411.

5. Meaning of.] — The phrase "adverse proceedings" means only those mentioned in sub-sec. 2 of sec. 37 of the Mineral Act. *Voigt* v. *Groves*, 2 M.M.C. 357.

6. Certificate of improvements—Fraud.]—The Crown alone can sue to set aside a certificate of improvements on the ground of fraud. *Hand* v. *Warren*, 7 B.C.R. 42; 1 M.M.C. 376.

3. Attacking Certificate of Improvements.

Adverse claimant.]—An adverse claimant who neglects to take the remedy provided by sec. 37 of the Mineral Act cannot sue to set aside a certificate of improvements on the ground of fraud. None but the Crown can take such action. *Hand* v. *Warren*, 7 B.C.R. 42; 1 M.M.C. 376.

4. Setting Aside Adverse Claim.

1. Non-service of writ.]—Plaintiff having commenced an action to enforce an adverse claim did not serve the writ within a year, as provided by r. 31. The defendant moved in the action to set aside the writ and to vacate the adverse claim:—Held, that the action was out of Court, and no order could be made therein. Semble, that an application to set aside an adverse claim is not properly made in an action brought to enforce it. *Troup* v. *Kilbourne*, 5 B.C.R. 547; 1 M.M.C. 219.

2. Renewal of writ.]—The plaintiff in an adverse action issued a writ on 5th August, 1897, and not having served it, obtained, on 2nd August, 1898, upon an ex parte application, an order for renewal; the order was, on the application of the defendant, set aside:—Held, on appeal, that no reasonable explanation of the delay being given, the order for renewal was properly set aside; but that sec. 37 of the Mineral Act does not enable a defendant to get rid of an action by applying in a summary way when not authorized by the ordinary practice of the Court. *Haney* v. *Dunlop*, 6 B.C.R. 520; 1 M.M.C. 311.

5. Judgment in Adverse Action, Effect of.

1. Judgment in rem—Co-owner.]—A judgment in an application in an adverse action under sec. 37 of the Mineral Act is not a judgment in rem. One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. *Fry* v. *Botsford*, 9 B.C.R. 234; 1 M.M.C. 520.

2. Res judicata.] — Where the Court abstains from making any declaration as to title there is no estoppel created. *Dunlop* v. *Haney*, 7 B.C.R. 307; 1 M.M.C. 390.

3. Res judicata.] — When the title to conflicting claims have been investigated and determined in the County Court mining jurisdiction, the same question cannot be raised between the same parties or their successors in title in the Supreme Court. *Pellent* v. *Almoure*, 1 M.M.C. 134.

C. Practice.

1. In General.

1. County Court.] — Secs. 144 to 150, inclusive, of the Mineral Act, 1896, refer only to procedure in the County Courts. *Corbin* v. *Lookout Mining, etc., Co.*, 5 B.C.R. 281.

2. Partnership.]—Sec. 63 of the Placer Mining Act does not require an action on behalf of a mining partnership to be brought in the name of the foreman; and it may be brought in the name of the unincorporated company under which the partnership is worked. *First of May Mining Co.* v. *Cariboo Goldfields, Ltd.*, 2 M.M.C. 292.

3. Authority.]—Though in the Supreme Court an incorporated company can only be represented by its solicitor, and not by its chairman or managing director, yet in the County Courts it may be so represented, and will be bound by the defence filed by, and conduct at the trial of such officer. *Ibid.*

2. Filing an Adverse Claim.

(*a*) *In General.*

Condition precedent.]—The filing of a plan and affidavit required in an adverse action under sec. 9 of the Mineral Act Amendment Act, 1898, is not a condition precedent to the right of the adverse claimant to proceed with his action. *Paulson* v. *Beaman*, 9 B.C.R. 184; 1 M.M.C. 471; 32 S.C.R. 655.

(*b*) *Extension of Time for.*

1. Order cannot be made in chambers.]—An order extending the time for filing the affidavit and plan required by the Act must be made by the Court and cannot be made by a judge in chambers. *Murphy* v. *Star, etc., Co.*, 8 B.C.R. 421; 1 M.M.C. 450.

2. Further extension.]—The time for filing the affidavit and plan in an adverse action may be further extended on an application made after the lapse of the time fixed by a previous order. *Noble* v. *Blanchard*, 7 B.C.R. 62; 1 M.M.C. 373.

3. Jurisdiction.]—The Court has no jurisdiction to extend the time for filing an adverse claim. *Kilbourne* v. *McGuigan*, 5 B.C.R. 233; 1 M.M.C. 142.

(*c*) *Affidavit and Plan.*

1. Affidavit—Husband and wife.]—An affidavit in support of an adverse claim under sec. 37 and amendments may, if bona fide, be made by the husband of the claimant. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213.

2. Form of plan and affidavit.]—The plan required to be filed in an adverse action under sec. 37 of the Mineral Act (R.S.B.C. 1897, c. 135), as amended by sec. 9 of the Mineral Act Amendment Act, 1898, need not be based on an actual survey of the location made by the Provincial land surveyor who signs the plan. *Paulson* v. *Beaman*, 9 B.C.R. 184; 1 M.M.C. 471; 2 M.M.C. 1; 32 S.C.R. 655.

3. Condition precedent.]—The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with the action. *Ibid.*

4. Signature of plan.]—Leave will be granted to amend the plan attached to an affidavit of adverse claim by adding the signature of the surveyor. *Crossley* v. *Scanlon*, 15 B.C.R. 223.

3. Extension of time for bringing Adverse Action.

1. After lapse of time.]—The Court has jurisdiction to extend the time for commencing an adverse action as well after as before the time has elapsed. *Re Good Friday Mineral Claim*, 4 B.C.R. 496; 1 M.M.C. 84.

2. Grounds for.]—The Mineral Act, 1891, secs. 21 and 126 (a), provides that adverse claims should be filed in the office of the Mining Recorder, while the Act of 1894, sec. 6, gives a form of notice of application for certificate of improvements which sets forth that adverse claims must be sent to the Gold Commissioner. The proposed defendants made an application for a certificate of improvements for the mining ground in question, and published the notice prescribed by sec. 6, supra, whereupon the proposed plaintiffs, in accordance with the terms of the notice, filed their adverse claim with the Gold Commissioner. Within the prescribed time they gave instructions to their agent to commence action, but he, by mistake omitted to do so, the omission not being discovered until some time afterwards, when negotiations for settlement were pending. Prior to and during these negotiations the proposed defendants knew that no action had been instituted. Finally, one of the proposed defendants refused his assent to a settlement which had been agreed to by all the other parties. The proposed plaintiffs moved to extend the time to commence action:—Held, by the Mineral Act, 1892, sec. 14 (b), the filing of an adverse claim in the office of the Mining Recorder is a condition precedent to the right of action, and that there is no jurisdiction to extend the time. Quære, whether, if there were such a jurisdiction, the grounds shown were sufficient. Upon appeal:—Held, (1) That the adverse claim was not properly filed; (2) That, owing to the nature of the subject matter, the Court requires stronger ground for extending time in mining cases than in other matters. *Kilbourne* v. *McGuigan*, 5 B.C.R. 233; 1 M.M.C. 142.

3. Mistake of law.]—The boundaries of the Countess and Golden Butterfly mineral claims overlapped. The Countess having applied for a certificate of improvements was adversed on the ground of defective

location by the Golden Butterfly, with a view to secure the ground common to the two claims. The secretary of the Golden Butterfly Company had re-located the remainder of the Countess ground in his own name as a fraction. He, upon the assumption that, if the adverse of the Golden Butterfly were sustained, the whole of the Countess location would be invalidated, did not bring an action attacking it on his own behalf until after the expiration of the statutory sixty days from the publication of the notice of application for the certificate of improvements to the Countess. He then applied to the Court for leave to bring an action:—Held, the circumstances were sufficient ground for an order extending the time. *Re Golden Butterfly Mineral Claim*, 5 B.C.R. 445; 1 M.M.C. 125.

4. Divisional Court — Appeal to, from order extending time.]—The order of a judge extending the 30 days provided by the Mineral Act (1891) Amendment Act, 1892, within which to commence proceedings in a Court of competent jurisdiction to enforce an adverse claim is appealable to the Divisional Court under sec. 67, Supreme Court Act, although not made in any pending cause. It appeared that a writ, endorsed to prosecute the adverse claim in the Supreme Court, had been issued before the application for the order appealed from was made, but that fact was not disclosed to the judge upon the application:—Held, allowing the appeal, that the fact of the issue of the Supreme Court writ was material to the original application and should have been disclosed. Such a circumstance can be taken advantage of upon an appeal from, as well as upon a motion to, rescind the order. *Re The Maple Leaf and Lanark Mineral Claims*, 2 B.C.R. 323; 1 M.M.C. 68.

4. Writ.

(*a*) *Expiration of.*

Not served in time.]—If the writ in an adverse action is not served within a year the action is out of Court and no order can be made therein. *Troup* v. *Kilbourne*, 5 B.C.R. 547; 1 M.M.C. 219.

(*b*) *Renewal of.*

No explanation of delay.]—The plaintiff in an adverse action issued a writ in August, 1897, and not having served it before the end of the year, obtained, upon an ex parte application, an order for renewal:—Held, on motion to set aside the order for renewal, that the plaintiff had not prosecuted his action with reasonable diligence, as required by sec. 37 of the Mineral Act, and that the order must be set aside:—Held, on appeal, that no reasonable explanation of the delay being given, the order for renewal was properly set aside, but that sec. 37 of the Mineral Act does not enable a defendant to get rid of an action by applying in a summary way when not authorized by the ordinary practice of the Court. *Haney* v. *Dunlop*, 6 B.C.R. 520.

5. Parties.

Joinder of defendants.]—All claimants to any part of the ground covered by the mineral claim of the plaintiff may be made parties to an action by him to assert an adverse claim against any one of such claimants. *Dunlop* v. *Haney*, 6 B.C.R. 169; 1 M.M.C. 232.

6. Pleadings.

1. General denial.]—A general denial is bad, and not only will it be disregarded, but the allegations must be taken as admitted. If it is intended to rely on non-compliance with the requirements of the Mineral Act as to location, or otherwise, this must be specially pleaded, and the material facts set up on which reliance is placed. Defences of such a nature cannot be raised on appeal for the first time. *Hogg* v. *Farrell*, 6 B.C.R. 387; 1 M.M.C. 79; *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213.

2. Special defences.] — In the County Court, though there are no pleadings, special defences must be raised by notice before trial. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

3. Special defence.]—Defences setting up failure to comply with the provisions of the Placer Mining Act must be specifically pleaded, e.g., lack of a free miner's certificate and failure to record interest. Unless exception is taken at the trial to the jurisdiction of the County Court, it will not be entertained on appeal. *Stephenson* v. *Stephenson and Stephenson*, 13 B.C.R. 115.

4. Non-compliance with the Acts.]—Pleadings in mining cases should be certain and unambiguous, and if it is intended to attack a location on the ground of non-

compliance with the Mineral Acts, it must be specifically pleaded. *Hanna* v. *Morgan*, 2 M.M.C. 142.

5. Fraud—Pleading.]—A certificate of improvements is a bar to those claiming adversely to the location in any right and on all grounds except fraud. If it is proposed to attack it, that issue must be raised on the pleadings. *Nelson, etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

6. Statute of Frauds and Mineral Act must be pleaded.] — If the title to a mineral claim is an interest in land within the Statute of Frauds, it is so by reason of the Mineral Act, and that in order to take advantage of the defence of the Statute of Frauds the Mineral Act should also be pleaded. *Wells* v. *Petty*, 1 M.M.C. 147; 5 B.C.R. 353. *Stussi* v. *Brown*, 5 B.C.R. 380; 1 M.M.C. 195.

7. Particulars of title.]—In an action by plaintiffs, who have never been in possession, to recover certain coal seams, the statement should set out particulars of the title under which the claim is advanced. *Esquimalt and Nanaimo Railway Company* v. *New Vancouver Coal Co.*, 6 B.C.R. 188; 1 M.M.C. 237.

8. Particulars of title—General allegations — Embarrassing.]—If the defendant not only traverse the plaintiff's title to certain coal seams, but set up a title to the same in himself, he must plead it with particularity; a general allegation will be struck out as embarrassing. *Esquimalt and Nanaimo Railway Co.* v. *New Vancouver Coal Co.*, 6 B.C.R. 306; 9 B.C.R. 162; 1 M.M.C. 284.

7. Amendment.

Terms on which granted.] — It is especially desirable in mining cases to prevent a party being taken by surprise. When an amendment is necessary it will be allowed, but, if the opposite party is surprised, only on the terms of the postponement of the trial and the payment forthwith of the costs of the day, while the costs of, and occasioned by, the amendment will be costs in any event to the opposite party. *Hanna* v. *Morgan*, 2 M.M.C. 142.

8. Examination for Discovery.

Scope of.]—In the examination for discovery of a mine superintendent, the party examining is entitled to answers as full, direct and explicit as it is in the power of the witness to give. He who occupies a responsible position in the management of a mine will be presumed to be a person of experience and competence in mining matters, and must testify accordingly in regard to the workings under his superintendence. It is specially desirable in actions respecting extra-lateral rights that there should be the fullest possible disclosure. *Star Mining and Milling Co., Limited Liability* v. *Byron N. White Co.*, 2 M.M.C. 96.

9. Order for Development Work and Inspection.

1. Grounds for inspection—By whom to be made.]—Plaintiffs claiming title to certain coal fields which were being worked by the defendants, applied, before pleading, for an order for inspection of the defendants' workings. Defendants admitted working within the area claimed by the plaintiffs:—Held, that the plaintiffs were entitled to have inspection, and by their own agents:—Held, on appeal, (1) The chief ground on which such an order is made is to enable the plaintiff to get on with his case; (2) Under special circumstances, as when there is danger of flood, the order may be made to preserve the evidence; (3) That the inspection should be by indifferent persons, who should not reveal any information without the sanction of the Court. *Esquimalt and Nanaimo Railway Company* v. *New Vancouver Coal Company*, 6 B.C.R. 194; 1 M.M.C. 223.

2. Privilege—Enforcement of order.]—Proceedings for inspection of a mine, under r. 514, are distinct from ordinary proceedings in discovery, and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive. It is a proper and convenient practice to apply to the Court to enforce an order for inspection. *Star Mining Co.* v. *Byron N. White Co.*, 1 M.M.C. 513.

3. Inspection and survey of mine—Undertaking and security.]—An order for inspection and survey of a mine for making copies of plans thereof in an action concerning extra-lateral rights should contain an undertaking for damages, but not a direction that security be given. *Star Mining Co.* v. *Byron N. White Co.*, 9 B.C.R. 9; 1 M.M.C. 468.

4. Copies of plans.] — The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings. *Star*

Mining and Milling Co., Limited Liability v. *Byron N. White Co.*, 2 M.M.C. 40; 9 B.C.R. 422.

5. Discretion of judge.] — The Centre Star Mining Company had been enjoined from mining in the Iron Mask claim, in which it was alleged was a continuation of a vein whose apex was in its own claim, and was also refused leave to do experimental or development work on the Iron Mask Claim in order to determine the character or identity of the said vein:—Held, that it ought to be left to the trial judge to decide whether it was necessary to have any work done to elucidate any of the issues raised. *Centre Star* v. *Iron Mask; Iron Mask* v. *Centre Star*, 6 B.C.R. 355.

6. Development work.]—In an action between the owners of adjoining mineral claims respecting extra-lateral rights, the parties claiming the extra-lateral rights will not be forced on to trial without being given a fair opportunity of doing such development work as may be necessary to determine the position of the apex of the vein in question. *Noble Five Consolidated Mining and Milling Company, Limited* v. *Last Chance Mining Company, Limited*, 9 B.C.R. 514; 2 M.M.C. 35.

7. Adjournment for purpose of inspection.]—Defendants got an order at the trial for the inspection of a vein in the plaintiffs' claim, which they alleged was a continuation of a vein, the apex of which was within the limits of their own claim; whereupon plaintiffs alleging that such order necessitated inspection by them of other similar places on their property, with a view to furnish evidence to rebut that which might be adduced by reason of the plaintiffs' inspection, and on adjournment for that purpose, obtained the adjournment, but 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 Mining Co.* v. *Centre Star Mining Co.*, 1 M.M.C. 362; 7 B.C.R. 66.

8. Vein continuous or faulted.]—In an action to determine whether a vein were continuous or faulted by another, the trial judge, after inspection of the mine, in the presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertain which theory was correct, and afterwards found against the plaintiff, refusing its application to have further work done to prove its contention, but on appeal it was held that the application should have been granted. *Star Mining, etc., Co.* v. *Byron N. White Co.*, 2 M.M.C. 401.

9. Form of order.]—Settlement of form of order in such cases. *Ibid.*

10. Right to Jury and Direction to Jury.

1. Adverse action.]—Generally in adverse actions the issues cannot be tried by a jury, though it is possible cases might arise wherein it could be done. The right to a jury under sec. 150 of the Mineral Act, 1896, is restricted to the County Courts. *Corbin* v. *Lookout Mining and Milling Co.*, 5 B.C.R. 281; 1 M.M.C. 126.

2. Adverse claim.] — In an action to enforce an adverse claim, and for a declaration that the plaintiff was entitled to the right of possession to that portion of the "Paul Boy" mineral claim in conflict with the "Lookout" mineral claim, and that the "Lookout" be declared invalid, the defendants asked for a jury:—Held, (1) That as the relief prayed was such as could not have been obtained in a common law action prior to the Judicature Acts, the issues were not proper for trial by a jury. (2) That the character of the action will be determined from the issues raised on the pleadings. *Corbin* v. *Lookout Mining and Milling Company (Foreign)*, 5 B.C.R. 281; 1 M.M.C. 126.

3. General right to, with particular exceptions.]—In a mining action either party has the right to a trial by jury under r. 331, subject to r. 332, which applied to the present case (one of extra-lateral rights) because it required scientific or local investigation which could not be conveniently made by a jury. *Iron Mask Co.* v. *Centre Star Co.*, 6 B.C.R. 474; 1 M.M.C. 300.

4. Form of direction.]—Full charge to the first jury which has ever sat in a mining case. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

D. Burden of Proof.

1. Affirmative proof of title.] — In adverse proceedings the onus of proof is on the adverse claimant, who has to give affirmative evidence of his own title, and if he is the junior locator establish his case in detail. *Caldwell* v. *Davys*, 1 M.M.C. 387; 7 B.C.R. 156.

2. Affirmative proof of title.]—Adverse proceedings are essentially ejectment, not trespass action, and the plaintiff must succeed by the strength of his own title, and it is part of the plaintiff's case to affirmatively show due location of his claim. *Clark* v. *Haney*, 8 B.C.R. 130; 1 M.M.C. 281.

3. Each party must prove his own title.]—Sec. 11 was designed, where there is a real controversy within the meaning of sec. 37 of the Mineral Act, to get rid of the rule theretofore acted upon that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title, thereby putting both parties on an equality as regards the onus of proof. The section presupposes a real controversy, a genuine lis, and not a challenge by a party who comes into court and admits no title in himself. *Voight* v. *Groves*, 12 B.C.R. 170; 2 M.M.C. 357.

4. Proof of staking and identity.]—In adverse proceedings where it is not established with reasonable certainty, (1) that the ground was properly staked; (2) that assuming the ground had been properly staked, it was identical with the ground mentioned in the record, and the defendant shows title and produces certificates of work for several years, judgment will be given in favour of defendant. *Pavier* v. *Snow*, 7 B.C.R. 80; 1 M.M.C. 384.

5. Attacking defendant's title.] — In adverse proceedings, if the plaintiff wishes to attack the defendant's title he must attack it while proving his own title, and not wait for rebuttal. *Dunlop* v. *Haney et al.*, 7 B.C.R. 1; 1 M.M.C. 369.

6. Admission of lack of title by plaintiff.]—At the commencement of the trial of an action brought to enforce an adverse claim under the provisions of sec. 37 of the Mineral Act, the plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversed, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim. The trial judge proceeded to hear evidence as to defendants' right to the ground, under the provisions of sec. 11 of the Mineral Act Amendment Act, 1898, c. 33, and dismissed the action, but found that defendants had not affirmatively proved their title to the adverse claim. Counsel for defendants did not on this admission, move for dismissal:—Held, that as soon as this admission was made by the plaintiff, it was open to the defendants to move for dismissal for the reason that there was no ground in controversy within the meaning of sec. 11, and that they were not bound in the circumstances to bring forward their title for investigation. *Voight* v. *Groves*, 12 B.C.R. 170; 2 M.M.C. 357.

7. Suspicious circumstances.] — The defendant cannot satisfy the onus by production of a certificate of work issued the day before the trial. *Rammelmeyer* v. *Curtis*, 8 B.C.R. 383; 1 M.M.C. 401.

8. Affirmative evidence.]—Where both parties in an adverse proceeding fail to establish their titles to the satisfaction of the judge, judgment will be entered to that effect without costs to either party. *Ryan* v. *McQuillan*, 6 B.C.R. 431.

9. Affirmative evidence.]—Sec. 11 of the Mineral Act Amendment Act, 1898, providing that each party shall give affirmative evidence of his title applies to proceedings commenced before the passing of the Act. *Schomberg* v. *Holden*, 6 B.C.R. 419.

10. Measurements.] — The plaintiff, in adverse proceedings, must show the measurements of the ground in dispute in order to prove overlapping of claims. *Dunlop* v. *Haney*, 7 B.C.R. 1, 305; 1 M.M.C. 369.

E. Evidence.

1. Prima facie case.]—A prior locator who is plaintiff in adverse proceedings makes out a prima facie case by proving (1) his free miner's certificate, (2) prior location and due record, (3) the overlapping of the claims in dispute. *Schomberg* v. *Holden*, 6 B.C.R. 419.

2. Measurements.] — Where the boundaries of conflicting locations are in dispute accurate measurements thereof should be taken and a plan prepared for use at the trial. *Tanghe* v. *Morgan*, 11 B.C.R. 76; 2 M.M.C. 178.

3. Measurements.]—Where the area of mineral claim is in dispute the evidence of one who has made no measurements is of little if any value. *Bleekir* v. *Christholm*, 8 B.C.R. 148; 1 M.M.C. 112; *Waterhouse* v. *Liftchild*, 6 B.C.R. 424; 1 M.M.C. 153;

Dunlop v. *Haney*, 7 B.C.R. 305; 1 M.M.C. 369.

4. Certificates — As evidence.]—Under s. 119 of the Mineral Act a certificate of a mining recorder may, under certain conditions, be admitted in evidence without notice as proof of the issuance of a free miner's certificate. A similar certificate of the recording of a certificate of work may be similarly admitted. Copies of instruments recorded under s. 115, may be likewise admitted without proof of loss of original and without notice. *Pavier* v. *Snow*, 1 M.M.C. 384; 7 B.C.R. 80.

5. Certificate — Conclusiveness — Dispensing with statutory conditions—Specific performance against Crown.] — The Mineral Ordinance, 1860, provides that holders of a prospecting license for coal may select for purchase a portion of the lands included in their license. Upon compliance with the terms and conditions of the Act, the licensees are entitled to claim a Crown grant of the selected lands. The petitioners held a prospecting license for coal, over 2,500 acres of land, and applied for a Crown grant. In support of their claim, they relied on a certificate of the Assistant Commissioner of Lands and Works, that they had posted notices of their application, and that no objection to the issue of a grant had been substantiated:—Held, (1) That the certificate was not in accordance with the Act. (2) That the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted by evidence to the contrary. It was contended that the Lands and Works Department, having received the certificate without objection, and not having cancelled the license under the provisions of the Mineral Ordinance Amendment Act, 1873, had waived the performance of the terms and conditions of the Act:—Held, that the Department could not waive the performance of conditions imposed by the Legislature. The petitioners' application for a Crown grant was made in 1874, but they did not prospect or work the land, or take further steps in support of their claim till 1882, and in the meantime the lands had increased in value:—Held, that, in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application. *Peck and others, petitioners* v. *The Queen, respondent*, 1 B.C.R., Pt. II., 11; 1 M.M.C. 13.

6. Certificate of work—Conclusiveness —Admission of record of.]—A certificate of work can only be impeached by the Crown, and for fraud; so, in action between subjects, it is conclusive evidence of the performance of assessment work. Where the defendant is the senior locator, an admission by the plaintiff, the junior locator, that the defendant has duly recorded certificates of work is of itself affirmative evidence of the defendant's title under the Mineral Act, 1898. *Cleary* v. *Boscowitz*, 1 M.M.C. 506; 8 B.C.R. 225; 32 S.C.R. 417.

7. Affirmative evidence of title.]—Affirmative evidence of title may be given by means of the record of the claim and other documents. *Cook* v. *Denholm*, 8 B.C.R. 39; 1 M.M.C. 447.

8. Real evidence.] — Posts may be brought into Court in case of disputes as to notices thereon or the size thereof. *Rutherford* v. *Morgan*, 2 M.M.C. 214.

9. Title.]—In proving title, one party cannot set up as against another a right to a third claim which he himself contends he has destroyed. *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

F. Stay of Proceedings.

Not to proceed till trial.] — An undertaking not to proceed further until the trial of the action is observed, although proceedings are taken before the formal order or decree is drawn up, but after judgment delivered. *Dunlop* v. *Haney*, 7 B.C.R. 300; 1 M.M.C. 344.

G. Appeal.

1. Jurisdiction.] — Unless an exception to the jurisdiction of the County Court is taken at the trial it will not be entertained on appeal. *Stephenson* v. *Stephenson*, 13 B.C.R. 115.

2. Jurisdiction.] — Unless objection is taken to the jurisdiction of the County Court at the trial it will not be considered on appeal. *Gelinas* v. *Clark*, 8 B.C.R. 42; 1 M.M.C. 428.

3. Case on appeal.]—The provisions of the Mineral Act (C.S.B.C. 1888, c. 82, sec. 29) that appeals from the judgments of mining Courts may be in the form of a case settled and signed by the parties is not imperative, and such appeals may be

brought in the same form as in other cases. *Kinney* v. *Harris*, 5 B.C.R. 229; 1 M.M.C. 137.

4. Notice of appeal—Service on solicitor's agent.]—A notice of appeal may be served on the agent of the solicitor for the proposed defendants. *Kilbourne* v. *McGuigan*, 5 B.C.R. 233; 1 M.M.C. 142.

5. Time—Extension of—Appeal.]—An appeal lies to the Divisional Court from the order of a judge extending the time for bringing an adverse action under sec. 37 of the Mineral Act, 1891, and amendments. The fact that a writ has already been issued is material to the application and should be disclosed. Such a circumstance can be taken advantage of upon appeal from, as well as a motion to rescind the order. *In re Maple Leaf Claim*, 2 B.C.R. 323; 1 M.M.C. 68.

6. Time—Extension of.]—The appellant was advised by counsel, up to a period considerably beyond the time for appealing from the judgment of an inferior Court, to acquiesce in it, but he had since been advised by other counsel to appeal, and that special hardship would probably result to him if the judgment were allowed to stand:—Held, insufficient ground for extending the time for appealing. *Trask* v. *Pellent*, 5 B.C.R. 1; 1 M.M.C. 86.

7. Extension of time—Abandonment.]—Owing to the nature of the subject-matter, the Court requires stronger grounds for extending the time for appealing from judgment in mining cases than in other matters. Defendants gave notice of appeal from a judgment of a County Court in a mining cause rendered 11th March, 1896, within the time provided by sec. 29 of c. 82, C.S.B.C. 1888, for the next Court, but being unable to procure the notes of the trial judge, did not set it down for that Court. In December, 1896, they obtained the notes, and in January, 1897, gave notice of moving the Full Court to extend the time for setting down the appeal, showing that the registrar refused to enter the appeal without appeal books containing the judge's notes being filed:—Held, that the appellants were bound to set the appeal down for argument at the next Full Court, or to move that Court for an extension of time for setting it down, and that the neglect to take either course constituted an abandonment. *Kinney* v. *Harris*, 5 B.C.R. 229; 1 M.M.C. 137.

8. Cross-motion — Withdrawal.] — A cross-motion to the appeal for a new trial having been served by respondent and adjournments obtained by her to obtain affidavits in support of it, which were subsequently filed, the Court, on objection by defendants, refused to permit the plaintiff to withdraw such application. *Atkins* v. *Coy*, 5 B.C.R. 6; 1 M.M.C. 88.

9. New defence on appeal.]—A defence setting up defective location cannot be raised for the first time on appeal. *Hogg* v. *Farrell*, 6 B.C.R. 387; 1 M.M.C. 79.

10. Gold Commissioner — Reviewing decision of.]—A decision of the Gold Commissioner in granting leave of absence will not, on appeal, be interfered with except for fraud. *Woodbury* v. *Hudnut*, 1 B.C.R., Pt. II., 39; 1 M.M.C. 31.

H. Costs.

1. Costs — Interlocutory order.]—The costs of an appeal from an interlocutory order are payable forthwith. *Star Mining Co.* v. *Byron N. White Co.*, 9 B.C.R. 9; 1 M.M.C. 468.

2. Amendment.] — The costs of and occasioned by an amendment are payable to the opposite party in any event of the cause; the costs of the day on a postponement granted in consequence of such an amendment are payable to the opposite party forthwith. *Hanna* v. *Morgan*, 2 M.M.C. 142.

3. Inspection.] — 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 plaintiffs alleging that such order necessitated inspection by them of other similar places on their property, with a view to furnishing evidence to rebut that which might be adduced by reason of the plaintiffs' inspection, and therefore 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 B.C.R. 66; 1 M.M.C. 362.

4. Of appeal.]—Where the appellant succeeds on a point not taken below, no costs will be allowed. *Aldous* v. *Hall Mines*, 6 B.C.R. 394; 1 M.M.C. 213.

XXVI. CONSTRUCTION OF AGREEMENTS RELATING TO.

1. Contract to win ore—Timber and ore bins.] — Defendant, by an agreement under seal, purported to lease to plaintiff a portion of a quartz mine, the plaintiff covenanting, inter alia, to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant, and to insure, by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. Defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to plaintiff:—Held, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns, and was not a lease. Plaintiff claimed damages for being prevented by defendant from using the timber on the claim in his operations under the agreement, for tearing up and removing the ore-track and trestle which were alleged to be the only means for working the ore, and also for preventing plaintiff from using certain ore-bins and a track in connection with same at the mouth of the level:—Held, that as the agreement was silent concerning the use of the timber, track, trestle and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was. *Halpin* v. *Fowler (No. 2)*, 12 B.C.R. 447; 2 M.M.C. 422.

2. Alteration of terms.] — Defendant Warner and his associates had an option on the Mother Lode and Kootenay Belle mineral claims, upon which they had paid certain sums of money. He went to New York, where he formed the acquaintance of the three plaintiffs, whom he told he was trying to put these two claims on the market at a lump sum of $300,000. They secured for him an introduction to Mr. McMartin, who was disposed to take a sixteenth interest in the two claims for $180,000. Part of this sum was to be expended in the construction of a smelter; a portion was to go in satisfaction of the payment of the option, and the remaining portion, $84,000, was to go to Warner and his associates. Just before the agreement was drawn up, and in contemplation of the agreement, Warner and the three defendants entered into an agreement that they should accept in full satisfaction of their charges $18,000. This sum was to be payable as and when McMartin met his payments of the options at a ratio of ten per cent. The defendants were also to receive an interest in the shares retained by Warner and his associates. McMartin shortly afterwards came to British Columbia, examined the properties and refused to go on with the agreement that he had entered into, but he made two separate agreements. He agreed to buy the whole of the Mother Lode for $75,000 and to undertake the payment of the bond. So that as to the Mother Lode he was to become the sole owner. Warner would not retain the six-tenths and therefore the defendants could not obtain their one-tenth interest in respect of that. McMartin entered into the other agreement with reference to the Mother Lode, under which he agreed to pay $60,000 and to satisfy the bond. The result of these two agreements would be that the defendants would receive only $135,000 in cash. Clement, J., at the trial was of opinion that the effect of the agreement was that they should be paid 10 per cent., $13,500, and not the $18,000 mentioned in the document, because, as he said, it was only to be ten per cent. of the amount to be paid as arranged in any subsequent agreement:—Held, on appeal, that the trial judge was right. *Ruthrauff* v. *Black and Warner*, 16 B.C.R. 359.

3. Sale — Payment by instalments— Time — Extension of — Consideration.] —An agreement for the sale of mineral claims provided for payments by instalments, and contained a proviso that "failure to make any of the above payments to render this agreement void as to all parties thereto, and the said (vendees) can quit at any time without being liable for any further payments thereunder from such time on." At the request of the vendees the vendors, without consideration, extended the time for payment of one of the instalments. After the original, but before the extended period for making the payment, the vendees notified the vendors that they had quit. In an action to recover the amount of the instalment:—Held, that the liability of the defendants, the vendees, to pay the instalment in question was absolute upon the day named in

the original agreement, and remained unaffected by the voluntary concession of further time to pay. *Webb* v. *Montgomery*, 5 B.C.R. 323; 1 M.M.C. 129.

4. Smelting contract.] — A contract between mine owners and smelter owners provided, inter alia, that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence showed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling, and had been in vogue for about twenty years:—Held, a mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores, so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract. Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, show a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. *Le Roi Co., No. 2, Ltd.* v. *Northport Smeltling & Refining Co., Ltd., and The Le Roi Mining Co., Ltd.*, 2 M.M.C. 59; 10 B.C.R. 138.

5. Net proceeds.]—Under an option to purchase a mineral claim and develop the same during the term of the option, one of the conditions was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . . . and to be applied in part payment to the vendors." Defendant contended that the words "net proceeds," as used in the option, meant a sum to be arrived at after deducting from the gross proceeds the cost of mining, delivery at the smelter, and of smelting:—Held, on the facts, that the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purpose of conversion and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms of the agreement above mentioned. Pending the payment of the purchase price provided for in the option, the defendant acquired no right of property in the ore in situ, and none after extraction from the mine. The operation of developing the property was, pending the payment of the purchase price, to be done by defendant for the owners of the property, and in shipping or dealing with the ore, he was to deal with it as a trustee for the plaintiffs, and the proceeds would be in his hands as such trustee. *Grobe* v. *Doylle*, 12 B.C.R. 191; 2 M.M.C. 327.

XXVII. Co-owners.

1. Co-owner — Certificate of improvements.]—A co-owner may apply for a certicate of improvements. *Bentley* v. *Botsford*, 8 B.C.R. 128; 1 M.M.C. 454.

2. Co-owners and adverse action.]—One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. Sec. 37 does not apply to co-owners of the same claim, but owners of conflicting claims. *Fry* v. *Botsford*, 9 B.C.R. 234; 1 M.M.C. 520. *Callahan* v. *Coplen*, 30 S.C.R. 555.

3. Lapsed certificate.]—The interest of one co-owner who has failed to renew his certificate immediately vests in his co-owners pro rata. *McNaught* v. *Van Norman*, 9 B.C.R. 131; 1 M.M.C. 516.

4. Partner or co-owner.]—A co-owner of an interest in a mineral claim is not in the position of a partner but of a co-owner. *Alexander* v. *Heath*, 8 B.C.R. 95; 1 M.M.C. 333.

5. Shares in company.]—An owner of shares in an incorporated mining company is not the owner of any part of a mineral claim owned by it. *Granger* v. *Fotheringham*, 3 B.C.R. 590; 1 M.M.C. 71.

XXVIII. Partnership.

1. Free miner's certificate.]—Lack of a free miner's certificate does not prevent a partner in a claim from recovering his share of the proceeds of a sale thereof by his co-partner though he held no certificate when the action was brought, having allowed the one he held up to the time of the sale to lapse. *McNerhanie* v. *Archibald*, 6 B.C.R. 260; 1 M.M.C. 320; 29 S.C.R. 564.

2. Co-owners.] — Where parties are working placer claims together it takes very little evidence to show that they have become co-partners as well as co-owners. *Sabin* v. *Pine Creek Power Co., Ltd.*, 2 M.M.C. 141.

3. Parol establishment of agency.]—The interest of a free miner in his mineral claim is an interest in land, and an agree-

ment not in writing respecting it cannot be enforced. Where one person, on behalf of another, locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal. *Fero* v. *Hall*, 6 B.C.R. 421; 1 M.M.C. 238.

4. Parol agreement for partnership.]—Plaintiff having discovered "mineral float" communicated its situation to the defendant upon a verbal agreement by the latter that in the event of his thereby discovering the ledge and locating a mineral claim, the plaintiff should be "in on it":—Held, that the words "in on it" imported an agreement to give the plaintiff an interest in the nature of a partnership or co-ownership; that, in the absence of anything in a partnership contract to the contrary, the presumption of law is that the partnership shares are equal, and that the contract was not void for uncertainty. *Wells* v. *Petty*, 5 B.C.R. 353; 1 M.M.C. 147.

5. Account — Development work, expense of—Co-owners and partners—Repayment — Ore.] — Partners and co-owners in a mineral claim entered into an agreement by which one of the partners and co-owners was to advance to his co-partner in cash the amount of their respective shares of the expenses of certain development work, and to be repaid the loan with interest out of the proceeds of ore shipped from the claim, the principal and interest not to stand as a charge against the interests of the partners in the claim:—Held, that taken as a whole the agreement could not, in the absence of express stipulation, be construed to exclude the lender from his ordinary right to compel the borrowing partners to ultimately account to him for his advances of their share of the expenses. *Marino* v. *Sproat*, 1 M.M.C. 481.

6. Partnership.]—M. was a member of and held a controlling interest in a mining partnership. He was not formally appointed foreman, but appears to have been permitted to manage its affairs in the matters in question, and appointed one G. superintendent, who ordered certain goods from M. for the partnership. He also supplied other goods to the partnership, accounts for which were passed at a meeting of the partnership:—Held, affirming the registrar's certificate made upon taking the accounts under the decree allowing the items to M., that sec. 126 of the Act does not preclude a mining partnership from contracting liabilities otherwise than upon the order of a duly appointed foreman. That as to the items passed at meetings of the partnership, it was estoped from disputing its liability. *Gray* v. *McCallum*, 5 B.C.R. 462; 1 M.M.C. 206.

7. Proof of.]—The plaintiff alleged that the defendant, being his partner, bought land for the use of the partnership:—Held, that there was not sufficient proof of the partnership to enable the Court to declare the defendant a trustee for the partnership. *Brown* v. *Grady*, 6 B.C.R. 190.

XXIX. Statute of Frauds.

1. Partnership.]—A partnership may be formed by a parol agreement notwithstanding that it is to deal in land, the Statute of Frauds not applying to such a case. *McNerhanie* v. *Archibald*, 6 B.C.R. 260; 1 M.M.C. 320; 29 S.C.R. 564.

2. Pleading.]—To maintain the defence of the Statute of Frauds in an action to enforce an agreement for the sale of a mineral claim, both the appropriate section of that statute and of the Mineral Act must be pleaded. Where such an agreement is alleged in the statement of claim and admitted in the defence, the objection resting on the statute is waived. *Stussi* v. *Brown*, 5 B.C.R. 380; 1 M.M.C. 195.

3. Interest in land—Agent—Trustee.]—The interest of a free miner in his mineral claim is an interest in land, and a parol agreement respecting it cannot be enforced. An agent who, pursuant to a parol agreement, locates in his own name a mineral claim for his principal, will, if he repudiate the trust, be declared a trustee for such principal. *Fero* v. *Hall*, 6 B.C.R. 421; 1 M.M.C. 238.

4. Interest in land — Trustee — Pleading.]—Whether or not an interest in a mineral claim is an interest in land within the meaning of the Statute of Frauds is doubtful, but under the circumstances the defendant was a trustee for the plaintiff, and could not set up said statute as a defence against him. If the title to a mineral claim is an interest in land within the Statute of Frauds, it is so only by reason of the Mineral Act, and in order to take advantage of the defence of the Statute of Frauds, the Mineral Act should also be pleaded. *Wells* v. *Petty*, 5 B.C.R. 353; 1 M.M.C. 147.

5. Trust—Location—Agent.]—An agent who locates in his own name a mineral claim for his principal cannot, if he repudi-

ate the trust, in the absence of any writing to satisfy the Statute of Frauds, be declared a trustee for such principal. *Sunshine, Ltd.* v. *Cunningham*, 1 M.M.C. 286.

6. Description — Signature.] — Oliver Furry located certain mineral claims under an arrangement made in 1898 with one L. J. Boscowitz on a basis of Furry having a non-assessable half-interest. Certain claims known as the "Queen," "Empress" and "Victoria" were located by Furry pursuant to this understanding. When the memorandum of the arrangement of 1898, and a further memorandum conveying a half interest in the claims was being drawn up, Boscowitz, at the request of Furry, signed the firm name of "J. Boscowitz & Sons." The latter memorandum, made in May, 1899, was recorded with the Mining Recorder in April, 1901. Sec. 50 of the Mineral Act provides that transfers of mineral claims, or interests therein shall be in writing, signed by the transferor, or his agent authorized in writing, and recorded with the Mining Recorder, and if signed by an agent, the authority of such agent shall be recorded before the record of such transfer. In June, 1900, Boscowitz and Furry, after a consultation relative to handling and controlling the property generally, went together to a solicitor who drew up a document allotting to Furry a one-fifth interest in the claims already mentioned along with certain other claims, in lieu of the half interest previously arranged upon. This document was signed by L. J. Boscowitz but not by Furry:—Held, on appeal, per Irving, J., that the document of May, 1899, was a conveyance of a one-half interest in the claims mentioned therein to Furry. Per Martin, J.: That in signing the name "J. Boscowitz & Sons," there was no element of mistake on the part of L. J. Boscowitz, who thereby gave a deliberately incorrect signature which had no legal effect as regards those it purported to bind, and consequently no interest in the mineral claims was conveyed to Furry. Per Clement, J.: The Statute of Frauds and sec. 50 of the Mineral Act were a fatal bar to the enforcement of the document of June, 1900, reducing Furry's interest to a one-fifth; while, on the other hand neither of them stood in the way of the enforcement of the document of May, 1899, conveying to Furry a one-half interest in the three claims therein mentioned. *McMeekin* v. *Furry*, 13 B.C.R. 20.

7. Subsequent parol agreement.] — Where there is a valid written agreement for the sale of a proportionate interest in a mineral claim, a subsequent unsigned agreement reducing the amount of the interest is ineffectual to vary the original agreement. *McMeekin* v. *Furry*, 13 B.C.R. 20; 39 S.C.R. 378.

8. Signature.]—A signature deliberately made in another's name, and not as agent for such other, is sufficient to bind the signer as a party to be charged, if he intended to be bound thereby as far as possible. *McMeekin* v. *Furry*, 2 M.M.C. 432.

XXX. Placer Claims.

1. Representation work.] — In July, 1898, the plaintiff located and obtained a Crown grant for placer mining in respect of a claim, and on the 25th January, 1898, one Mensing located a claim and recorded it the next day, and on the succeeding 27th October, a few minutes after midnight of the 26th, the defendant re-located it as ground abandoned and open to occupation on the ground of non-representation. The two claims overlapped. On the 10th November, 1898, the defendant obtained her Crown grant for placer mining covering the ground in dispute and being a re-location of Mensing's old claim. The Gold Commissioner had made a rule that three months' work in the year was sufficient, and by the regulations a claim was deemed abandoned after it had remained unworked on working days for the space of 72 hours:—Held, that the defendant's Crown grant must prevail over that of the plaintiff. *Victor* v. *Butler*, 8 B.C.R. 100; 1 M.M.C. 438.

2. Forfeiture.] — Where mining ground is held from the Crown under a lease which is subject to forfeiture for non-compliance with its terms and conditions, the Crown alone can declare a forfeiture and re-enter for breach, or waive the forfeiture. Free miners in general are strangers to such a lease and have no rights under or over it. Cessation of mining operations for want of funds is not proof of intention to abandon, even if that question could be raised by strangers to the lease. The act of recording a claim is the act of the party and not of the Crown, so cannot operate as a re-demise of ground already leased by the Crown. *Canadian Company* v. *Grouse Creek Flume Co., Ltd.*, 1 M.M.C. 3.

3. Location — Record — Power of Gold Commissioner.]—A placer claim may be

located on a lode claim. Upon a locator of a placer claim tendering to the proper officer the proper documents in due form, accompanied by the proper fee, he is entitled to obtain a record for the claim, and such officer has no discretion in the issuance thereof. Where a record is not granted to a locator in due course he shall, under the remedial provisions of sec. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor. The validity of a placer mining record primarily depends upon the mere belief of the locator, based upon indications he has observed on the claim, in the existence of a deposit of placer gold therein. Where the holder of a placer claim is prevented from properly representing it by the wrongful act of the Gold Commissioner, he will be excused from the consequences of such failure to represent. The Gold Commissioner has no authority, either under sec. 128, sub-sec. (g), of the Placer Mining Act, or otherwise, to change the entire location of a placer claim, and an order to that effect is one made wholly without jurisdiction and absolutely null and void. *Tanghe* v. *Morgan*, 2 M.M.C. 178; 11 B.C.R. 76.

4. Conviction.] — A conviction under sec. 144 of the Placer Mining Act for refusing to obey a lawful order of the Gold Commissioner cannot stand if the order be in excess of his jurisdiction. *R.* v. *Tanghe*, 2 M.M.C. 139.

For Leave of Absence, *see* XIV.

For Close Season, *see* XV.

XXXI. Coal Licenses.

1. Prospecting license—Lease—Powers of Chief Commissioner and Minister—Jurisdiction.]—The Legislature has not, by sec. 12 of the Coal Mines Act, authorized the establishment of any regulations, conditions or restrictions depriving a license granted pursuant to secs. 2 and 3 of its characteristic of exclusiveness over the area to which such license applies. The Chief Commissioner cannot modify the conditions precedent prescribed by secs. 2 and 3. In performing their functions under the statute, the Chief Commissioner and the Assistant Commissioner do not act as agents of the Crown but as mandataries of the statute. Sec. 12 does not contemplate the granting of licenses by the Lieutenant-Governor-in-Council; it contemplates the application to and the granting of a license by the Chief Commissioner under secs. 2 and 3. The powers of the Lieutenant-Governor-in-Council do not extend to the prohibition of the grant of licenses over reserved lands. A grant of the power to regulate, or to impose conditions or restrictions does not import a grant of the power to prohibit. Sec. 9 of the Coal Mines Act is limited to disputes between adverse claimants in respect of (1) the right or title to a license acquired or sought to be acquired; or (2) in respect of right or title to any claim acquired or sought to be acquired under the Act. Semble, the word "claim" stands for "area of land," and is equally applicable to the area of land included in a license as it is to that included in a lease. *Baker* v. *Smart; Leckie* v. *Watt*, 12 B.C.R. 129; 2 M.M.C. 373.

2. Prospecting license—Crown grant—Application for —Waiver — Laches—Evidence—Certificate — Statutory preliminaries—Abandonment.]—Petitioners held a prospecting license for coal over 2,500 acres of land under the Mineral Ordinance, 1869, and applied for a Crown grant. In support of their claim they relied on a certificate of the Assistant Commissioner of Lands and Works that they had duly posted notice of their application, and "that no objection to the issue of such grant had been substantiated":—Held, (1) That the certificate was not in accordance with the Act; (2) That the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted; (3) That the department could not dispense with the performance of preliminary conditions imposed by the Legislature; (4) That in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application; (5) On the facts, that the claim has been abandoned. Quære, whether to entitle prospecting licensees to a Crown grant of coal lands under the Mineral Act, it is not essential that they should have found coal on the land selected by them for purchase. *Peck* v. *Reginam*, 1 B.C.R., Pt. II., 11; 1 M.M.C. 13.

3. Prospecting licenses — Abandonment.]—Where applicants for a prospecting license take no steps to enforce their alleged rights thereto for a period of nine

years after the refusal of the proper officer to entertain their application they will be deemed to have abandoned it, and the obtaining of a special license issued under the Order-in-Council of the 4th of June, 1904, does not assist them. *In re Baker*, 2 M.M.C. 530.

4. Location lines.]—Location lines must run true north and south and true east and west. *Ibid.*

5. Stake or post.] — A tree stump properly squared may be used as a stake or post in making location. *Ibid.*

XXXII. INTERPRETATION.

1. Crown grant—De facto minerals—Rock in place.] — (1) The doctrine of implied surrender by conduct does not apply to a valid location, and the only abandonment by which the owner can be concluded is that by notice of abandonment given by him to the Crown under sec. 27 of the Mineral Act Amendment Act, 1892; (2) The exception from the plaintiff's Crown grant of "lands held as mineral claims," means de facto claims, and the word "lawfully" cannot be imported; (3) A claimant to the land as land has no status to question the due performance by the free miner of the conditions required by the Crown as pre-requisite to his right to a valid location thereon; (4) The requirement of a bond by sec. 10 of the Act of 1891 is a directory provision for the protection of the land owner, and is not a pre-requisite to the acquisition by the miner of mineral rights from the Crown; (5) The discovery of a mineral vein or lode is not essential to a valid location—"rock in place" is sufficient; (6) The words "rock in place" are satisfied by rock in situ, bearing valuable deposits of mineral, although not lying between defined walls, or in a vein or ledge; (7) A certificate of improvements is a bar to those claiming adversely to the validity of the location in any right and on all grounds except fraud; (8) The expression "valuable deposits of mineral" means "capable of being valued," not "costly"; (9) If it is proposed to attack a certificate of improvements obtained since issue of writ, that issue must be raised on the pleadings. *Nelson and Fort Sheppard Railway Co.* v. *Jerry*, 1 M.M.C. 161; 5 B.C.R. 396.

2. Minerals—"Rock in place"—"Valuable deposit" — Certificate of improvements—Bar—Fraud.]—The discovery of a mineral vein or lode is not essential to a valid location; "rock in place" is sufficient. The words "rock in place" are satisfied by rock in situ bearing valuable deposits of mineral, although not lying between defined walls or in a vein or ledge. A certificate of improvements is a bar to those claiming adversely to the validity of the location in any right, and on all grounds except fraud. The expression "valuable deposits of mineral" means "capable of being valued," not "costly." *Nelson, etc., Railway Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

3. "Adverse proceedings."]—*Dunlop* v. *Haney*, 7 B.C.R. 1, 305; 1 M.M.C. 369.

4. "At the instance"—"At the request."]—*Anderson* v. *Godsal*, 7 B.C.R. 404; 1 M.M.C. 416.

5. "Costly."]—*Nelson and Fort Sheppard Railway Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

6. "Discovery."]—*Richards* v. *Price*, 5 B.C.R. 362; 1 M.M.C. 156.

7. "Falling material."]—*McKelvey* v. *Le Roi Mining Co.*, 9 B.C.R. 62; 1 M.M.C. 477.

8. "In on it."] — *Wells* v. *Petty*, 5 B.C.R. 353; 1 M.M.C. 147.

9. "In the office."]—Re Water Clauses Consol. Act, 8 B.C.R. 374; 1 M.M.C. 422.

10. "Lands."] — *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 A.C. 295; 14 S.C.R. 345; 1 M.M.C. 52; *Bainbridge* v. *Esquimalt and Nanaimo Railway Company*, 1896, A.C. 561; 4 B.C.R. 181; 1 M.M.C. 98.

11. "Rock in place."]—*Nelson and Fort Sheppard Railway Co.* v. *Jerry*, 5 B.C.R. 396; 1 M.M.C. 161.

12. "Trial."]—See *Dunlop* v. *Haney*, 7 B.C.R. 300; 1 M.M.C. 344.

13. "Claim."]—The word "claim" means an area of land, and is equally applicable to the area included in a license as to that included in a lease. *Baker* v. *Smart*, 12 B.C.R. 129.

14. "Mine"—"Placer mine."]—"Mine," "placer mine," and "diggings" are synonymous terms under the Placer Act. *Ginaca* v. *McKee Consolidated Hydraulic, Ltd.*, 11 B.C.R. 481.

15. "Mineral in place."] — *Manley* v. *Collom*, 32 S.C.R. 371; 8 B.C.R. 153; 1 M.M.C. 487.

See TRESPASS.

See WATERS AND WATERCOURSES.

MISREPRESENTATION AND FRAUD.

I. Innocent Misrepresentation, 643.
II. How Made: In Writing, 643.
III. Duty of Disclosure, 643.
IV. Fraud of Third Person, 644.
V. Collusion, 644.
VI. Frauds of Agents, 645.
VII. Estoppel, 646.

I. Innocent Misrepresentation.

1. Executed contract.] — An executed contract for the sale of an interest in land will not be rescinded for an innocent misrepresentation. *Pope* v. *Cole*, 6 B.C.R. 205; 29 S.C.R. 291.

2. Material misrepresentation.] — An action by a vendor to enforce a contract for the sale of a business fails where it appears that the purchasers were induced to enter into the contract by the material misrepresentations of the vendor, though innocently made. *Kidd* v. *Nelson*, 18 B.C.R. 217.

II. How Made: In Writing.

Lord Tenterden's Act.]—An agent in recommending a loan upon mortgage security upon lands represented to plaintiff that the borrower "was a hard working, industrious farmer, who would be sure to pay his interest money as it fell due," and also made certain representations concerning the value of the lands. The defendants pleaded Lord Tenterden's Act, and maintained that the representations were incapable of being separated, and that not being in writing, the action did not lie. Lord Tenterden's Act applies to representations affecting the financial standing and credit of a person, and not to such statements as were made here that H. was a thrifty, hard working man. Those statements may be absolutely true, without affecting his pecuniary position. The loan was not advanced on his thrift, but on the value of the security offered. *Wolley* v. *Lowenberg, Harris & Co.*, 3 B.C.R. 416; 25 S.C.R. 51.

III. Duty of Disclosure.

Freight rates.] — Plaintiff Company, a British Columbia concern, sought from the defendant Company's agent at Seattle, Wash., U.S.A., information as to the rate on plaster from a point in Kansas, and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant Company's contention) or to Vancouver, B.C. (according to plaintiff Company's contention), but a letter from an official of defendant Company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shown in giving the information:—Held, that an action of deceit did not lie in the circumstances:—Held, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates. *The Gillis Supply Company, Limited*, v. *The Chicago, Milwaukee and Puget Sound Railway Company (No. 2)*, 16 B.C.R. 254.

IV. Fraud of Third Person.

Location of mineral claim.]—W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants, after which W., as agent for the plaintiff, located a fraction between two of the claims in the plaintiff's name:—Held, that defendants had no right to the fraction in the absence of proof of fraud by W., and that the plaintiff was a party thereto; and held also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W., that the ends of the two claims between which the fraction in question was located adjoined each other. *Gibson* v. *McArthur*, 1 M.M.C. 382; 7 B.C.R. 59.

V. Collusion.

Company—Fraudulent sale by directors of assets of.]—In an action to set aside a sale of a mineral claim on the ground that the sale was a sham sale for the benefit of the purchaser and the directors, and that the stated consideration was not paid and the trial judge found that the sale was made at a price so inadequate as to show an intention to benefit the purchaser at the expense of the shareholders:—Held, on appeal, that on the finding of the trial judge, the sale should be set aside. Per Irving and Martin, JJ.: The provisions of sec. 2 of the Companies Act Amendment Act, 1893, respecting the mode of sale of a company's assets are enabling and not

restrictive. *Daniel* v. *Gold Hill Mining Company (Foreign)*, 6 B.C.R. 495.

VI. Frauds of Agents.

1. Transfer of shares.]—V. entered into a contract to purchase for re-sale the unissued shares of a foreign joint stock company on the term, amongst other, that subscriptions were to be made from time to time as sales were made. It was further provided that the company should accept all offers for shares received through V. at the price of $15 per share; that V. should sell the shares for $20 each; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency; and that the contract should continue in force so long as the company had any unissued shares. The company also gave V. authority to establish agencies in Canada in connection with its accident insurance business and to appoint medical examiners there. At the time the company had no license to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed the plaintiff the sole medical examiner of the company for Vancouver, assuring him that the company would commence to carry on its accident insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's unissued capital, which were paid for partly by the plaintiff's cheques, payable to the company, and as to the balance by a series of promissory notes falling due from month to month following the date of the subscription and payable to V. a number of shares equal to those so subscribed for by the plaintiff were then transferred to him by V. out of the allotment made to him under his contract, the certificates being obtained from the company by V. in the name of the plaintiff, but the company did not formally accept the plaintiff's subscription nor issued any shares to him thereunder. The company did not commence business in Vancouver within the time specified by V., nor did it obtain a license to carry on the business of insurance in Canada until many months later. In an action by the plaintiff to recover back the money he had paid and for the cancellation and return of the notes, it was held that in the transaction which had taken place V. was the company's agent; that the company, consequently, was responsible for the deceit practised in procuring the subscription; that there had been no contract for the purchase of shares concluded between the company and the plaintiff, that the object of the plaintiff's subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation. *Thompson* v. *The International Casualty Co.*, 48 S.C.R. 167.

2. Conspiracy.]—C., a policy-holder of a fire insurance company, conspired with H., their local agent, to defraud the company. C. handed in to H., for transmission to the company, an unfounded claim for pretended losses by fire, supported by his (C.'s) statutory declaration, the whole being false to the knowledge of H. Upon this C. obtained the money through H. from W. & Co., the general agents of the company:—Held, (1) The knowledge of their agent H. of the falsity of the pretence could not be imputed, as the knowledge of W. & Co., or the company, so as to effect the criminality of C. (2) The fact that C. and H. might have been indicted for conspiracy to defraud was immaterial. *Regina* v. *Clark*, 2 B.C.R. 191.

3. Purchase of land.]—In an action for the return of money paid on a contract for the purchase of land, on the ground, inter alia, of misrepresentation by the agent of the vendor:—Held, in the circumstances, that plaintiff was entitled to be refunded his money. *Dunn* v. *Alexander*, 17 B.C.R. 347.

4. Failure of proof.]—In an agreement respecting certain timber licenses, defendant S. was empowered to dispose of the licenses, pursuant to the terms of the agreement, without reference to his associates and cestui qui trustent. Morrison, J., at the trial, dismissed plaintiffs' action for cancellation of the agreement on the ground that the fraud and misrepresentation alleged had not been proved:—Held, that the action was rightly dismissed. *Bingham* v. *Shumate*, 17 B.C.R. 359.

VII. Estoppel.

Non est factum.]—In intending to apply for shares in the plaintiff company, pursuant to the proposal, made through her

husband, of the agent of the company for obtaining such applications, M. was induced through the fraud of the agent to sign, without reading it, a document which she believed to be an application for shares but which, in fact, was a mortgage for securing a supposed loan to her and contained a covenant to repay the amount of the loan. M. was an intelligent woman, capable of reading and understanding the document:—Held, that as M. was under no duty to exercise care to protect the company against the possible frauds of its own agent, she was not guilty of negligence preventing her from setting up the plea of non est factum, which was a good defence to the company's action on the covenant. *The Dominion Permanent Loan Co.* v. *Morgan*, 17 B.C.R. 366; 50 S.C.R. 485.

MISTAKE.

See CONTRACT.

MORTGAGE.

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V. ACCOUNTS, 656.

I. NATURE, VALIDITY AND EFFECT.

A. Mortgage or Absolute Conveyance

1. Proof of true nature of transaction.]—A. assigned to B. by instrument in writing under seal, absolute in form, all his interest in certain mineral claims. By contemporaneous memorandum they further agreed that B. might dispose of the property if $500 due him from A. was not paid within 30 days. In an action by A.'s heirs for a declaration that the instruments were given as security by way of mortgage:—Held, that the assignment and the contemporaneous agreement must be read together, from which it is clear that the transaction was one of mortgage and not of sale. *Cleary* v. *Aitken*, 19 B.C.R. 369.

2. Right to redeem.]—When once it is established that the original relation of the parties was that of mortgagor and mortgagee, the mortgagor cannot waive or abandon his right to redeem except by acts equivalent to a subsequent bargain to do so. *Whitlow* v. *Stimson*, 14 B.C.R. 321.

3. Purchaser for value affected by notice.]—The husband and children of N., deceased, brought action for the redemption of certain land, alleging that an absolute conveyance of the same made by N. in her lifetime, in 1902, to the defendant C. was merely security for a loan, in addition to a mortgage that she had previously given him on the land, and that the defendant B. purchased the land from C., in 1903, with actual knowledge of the plaintiffs' rights, N. having died in the interval. On the trial, C. admitted that he held the land as security only, and that B. knew this both from himself and from N.'s husband. He stated at the same time that the sale was made to B. at the husband's request, who was administrator of N.'s estate, and received a portion of the purchase money, equal to his share as one of the heirs-at-law of N.:—Held, that the onus was on the plaintiff to show that B. purchased the property with express or actual notice that C. was holding the land only as security, that upon the evidence they had satisfied that onus, and B. obtained by his purchase from C. only such rights as C. had:—Held, further, that the actions of N.'s husband barred his own rights as an heir-at-law of N. by estoppel, but would not defeat the claims of the other heirs-at-law, who were entitled as against B. to a decree for redemption. *Nelson* v. *Charleson and Ballinger*, 19 B.C.R. 100.

B. Equitable Mortgage.

By deposit of title deeds.]—The Statute of Frauds does not apply to an equitable mortgage by deposit of title deeds. *Hudson's Bay Co.* v. *Kearns*, 3 B.C.R. 330.

C. Validity.

1. Security given by company—Necessity to inquire as to regularity of.]—A person who bona fide takes a security in the ordinary course of business from an incorporated company is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. *Jackson* v. *Cannon*, 10 B.C.R. 73.

2. Infant.]—A mortgage executed by an infant before the passing of the Infants' Contracts Acts is not void, but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age. *Saunders* v. *Russell*, 9 B.C.R. 321.

D. What Property Covered: Description.

1. Fixtures.]—By two separate instruments at different dates, plaintiff obtained mortgages on certain "land and premises, including all buildings, fixtures," etc., such land and premises comprising a saw-mill, built on mud sills, spiked to piles. The mill having been seized for debt, the plaintiff claimed the plant and machinery under his mortgage as part of the freehold. The plant was in general affixed to the structure by heavy bolts going through the beams or sills, and apparently could have been removed by unscrewing without injury to the building:—Held, that the method of attachment of the machinery adopted showed that it was the intention that the machinery was to be, and in fact did become a part of the mill building, which was itself part of the land; and, further, that the form of the mortgages showed that it was the intention that the mortgagee should take under them certain rights in the fixed plant in addition to his rights as grantee of the land. *Kilpatrick* v. *Stone*, 15 B.C.R. 158.

2. Book debts.]—V. and C sold a grocery business including all the stock-in-trade and book debts to H. and B., who shortly afterwards gave a mortgage to E. on the stock-in-trade and "all book debts. . . . now due or which may hereafter become due to the mortgagors in the business carried on by them as grocers":—Held, that the book debts originally due to V. and C. and assigned by them to H. and B. were covered by the mortgage. *Robinson* v. *Empey*, 10 B.C.R. 466.

E. Continuing Security.

Indemnity.]—A deed conveyed land to a party as security to indemnify him from loss in respect of his indorsement of a promissory note:—Held, that it secured him and his estate in respect of every subsequent indorsement of any other note, whether by way of renewal or as collateral security in respect of the same debt. *Westfall* v. *Stewart and Griffith*, 13 B.C.R. 111.

II. Rights and Liabilities of Parties.

A. Interest.

After maturity.]—A mortgage contained no proviso for payment of interest at the rate therein specified after maturity, but merely a covenant to pay same "at the day and time and in manner above mentioned":—Held, that the interest after maturity was outside the covenant, and was recoverable only as damages for detention of the principal, at the statutory rate of six per cent. *Cunningham* v. *Hamilton*, 5 B.C.R. 539.

B. Priorities.

1. Notice of agreement binding subject-matter.]—Where a miner takes out ore on a percentage basis, i.e., for a fixed percentage of the smelter returns on the ore extracted, one taking a mortgage with notice of the agreement between the owner and the miner, cannot claim in priority to the latter. *Forrest* v. *Smith and Traves*, 14 B.C.R. 183; 42 S.C.R. 514.

2. Ship—Mortgagee of—Rights of, as against execution creditor.]—Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action in rem in the Exchequer Court to enforce a mortgage of the ship, such property cannot be seized by a sheriff under a writ of fieri facias issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

3. Ship—Unregistered mortgage.]—Ships being specially exempted from the operation of the Bills of Sale Acts, and

there being no provision in the Merchant Shipping Act penalizing neglect to register a mortgage on a ship, an execution creditor cannot seize and sell in priority to an unregistered mortgage. *Imperial Timber and Trading Company, Limited* v. *Henderson*, 14 B.C.R. 216.

4. Judgment — Whether unregistered mortgage affected by.]—A registered judgment binds only the interest of the debtor existing at the time of registration and therefore cannot affect a mortgage already given by the debtor although such mortgage is not registered before the judgment. *Yorkshire Guarantee and Securities Corporation* v. *Edmonds*, 7 B.C.R. 348.

III. Enforcement.

A. On Default in Payment of Interest.

No express proviso.]—Upon default in payment by a mortgagor of any instalment of interest the mortgagee has a right, independently of any express proviso in the mortgage to that effect, to call in the whole principal and interest, and foreclosure. *Canada Settlers' Loan Company* v. *Nicholles*, 5 B.C.R. 41.

B. Sale.

1. Duty of mortgagee.]—The Court of Appeal found that a sale by the assignees of a mortgage in the exercise of a power of sale contained therein was invalid as against the mortgagor and decreed redemption, on the ground that there had been reckless disregard of the interests of the mortgagor in the conduct of the sale. It appeared that the pleadings contained no charge of fraud or collusion or bad faith against the defendant purchasers, that there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof, and that the purchaser had accordingly given no counter-evidence of its sufficiency:—Held, that the finding of the first Court to the effect that the sale was valid and regular ought not to have been reversed and that the failure in the circumstances of the purchasers to produce counter-evidence did not justify a finding in effect that the sale was fraudulent. *Huson* v. *Haddington Island Quarry Co.*, 16 B.C.R. 98; 1911 A.C. 722.

2. Exercise of power of sale.]—In the exercise of a power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in a sacrifice of the chattels. *Ishitaka* v. *The B. C. L. & I. Agency*, 16 B.C.R. 299; 45 S.C.R. 302.

3. Offer to redeem.] — In order to impeach the exercise of the power of sale in a mortgage of chattels on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to show that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due, and being thus informed of the intention to redeem, refused to accept payment. *Ishitaka* v. *The B. C. L. & I. Agency*, 16 B.C.R. 299; 45 S.C.R. 302.

4. Notice.]—In an action by the purchaser of the equity of redemption in mortgaged premises to redeem the same upon the ground, inter alia, that no proper or sufficient notice of exercising power of sale had been served upon him:—Held, per Irving and Clement, JJ. (Martin, J., dissenting), no objection to the validity of such notice that it was expressed to be a notice by the agent of the mortgagee; or that it was unsigned, it having been mailed to the plaintiff accompanied by a letter signed by the agent in his own name; nor was such notice conditional by reason of a statement in such letter that if the plaintiff refused to sign a certain document "the only course open to me is to serve you with the enclosed notice of my intention to sell"; nor was it a valid objection to the sufficiency of such notice that the unsigned document stated such sale would be after the expiration of one calendar month while the signed letter accompanying it informed the plaintiff "I purpose to sell as soon as possible"; nor was such notice waived or abandoned by the mortgagee having served a fresh notice of exercising power of sale some two years subsequently. The above notice was served on the plaintiff in October, 1897, and by articles of agreement dated the 8th of December, 1899, and expressed to be made between the defendant Corporation as vendors and the defendant Lemon as purchaser, the defendant Corporation agreed to sell the mortgaged premises for $1,200:—Held, not a valid objection to such sale that it did not purport to be in pursuance of the

power contained in the mortgage; nor that the mortgagee agreed to sell as absolute owner; nor that such sale was on credit:—Held, also that neither the non-disclosure by the mortgagee of said sale of the 8th of December, 1899, nor the service in January, 1902, of a fresh notice of exercising power of sale, entitled the plaintiff to redeem. *Lockhart* v. *Yorkshire Guarantee and Securities Corporation, Limited,* 14 B.C.R. 28.

5. After order nisi.]—A mortgagee having obtained a foreclosure order nisi, shortly afterwards, and before the period allowed for making absolute the order nisi had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem:—Held, that the mortgagee could not, after the order nisi for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the court. *DeBeck* v. *Canada Permanent Loan and Savings Company,* 12 B.C.R. 409.

6. After order nisi—Estoppel.]—Where a mortgagee after an order nisi for foreclosure, but before order absolute sold the land in 1906 to the knowledge of the mortgagor, who took no action till 1911, when he brought an action to redeem, it was held that the mortgagor had abandoned his rights and was not entitled to redeem. *Williams* v. *Sun Life Assurance Co.,* 16 B.C.R. 370.

7. Purchase by mortgagee.] — Where mortgagees put up for sale the stock-in-trade of a butcher over which they held a mortgage, and themselves bid it in; and thereupon entered into possession with the assent of the mortgagor, and paid arrears of wages and rent, and carried on the business with the mortgagor in their employ for some months, the transaction was held to be void, the mortgagor was permitted to redeem. *Van Volkenburg* v. *West. Can. Ranching Co.,* 6 B.C.R. 284.

8. Company in liquidation.]—The Court has no power to confirm a sale by a mortgagee of property mortgaged by a company in liquidation. *In re Thunder Hill Mining Co.,* 3 B.C.R. 351.

C. Foreclosure.

Affidavit of non-payment.]—The certificate of the Registrar upon taking the accounts under the mortgage in a foreclosure action directed that the balance found due should be paid by the mortgagor at the office of the agent of the plaintiff (foreign) company in Victoria. Upon motion for final decree upon the affidavit of non-payment as directed, made by the agent:—Held, that the affidavit of both principal and agent was necessary. *Canada Settlers' Loan Co.* v. *Renouf,* 5 B.C.R. 243.

IV. Redemption.

A. In General.

1. Clog on equity of redemption.]—Defendant held a mortgage, payable in three months, on a sawmill plant, to secure an advance of $30,000. He allowed the mortgage to run for nearly a year, when, owing to further advances, the indebtedness had increased to some $51,000. The mortgagee then served notice on the mortgagor that unless the indebtedness were paid in ten days he would enter into possession and sell, etc., under the provisions in the mortgage. This notice was accompanied by a letter, in which the mortgagee proposed that the parties should come to an arrangement whereby he (the mortgagee) should enter into possession forthwith and operate the mill on his own account for nine months, during which time the mortgagor should have the right to redeem, subject to the further agreement that the mortgagor should forthwith execute a conveyance of the property to the mortgagee, to be placed in escrow and to be taken therefrom only on certain conditions, one of which was that in case any suits were brought against the mortgagor, the mortgagee would be at liberty to register the conveyance. The mortgagor agreed to the terms of this letter. The mortgagor was sued before the expiration of the nine months, whereupon the mortgagee registered the conveyance and held himself out as the absolute owner of the property. Upon entering into possession the mortgagee expended $30,000 in improvements dur-

ing the first nine months and $65,000 subsequently:—Held, in an action for redemption, that the parties could not, in the instrument of mortgage itself or by a contemporaneous agreement, limit the mortgagor's right of redemption. *Manitoba Lumber Company, Limited* v. *Emerson*, 18 B.C.R. 96.

2. Abandonment of right to redeem.]—S. advanced to W. the amount required to pay off a mortgage upon his land, taking as security a deed of property absolute in form. Further advances were subsequently made. S. having died, W. brought action for redemption against his widow, executrix and sole devisee under S.'s will:—Held, that, when once it was established that the original position of S. and W. was that of mortgagee and mortgagor (as to which the onus was on W.), W. could not waive or abandon his vested right to redeem except by acts equivalent to a subsequent bargain so to do; and that the evidence failed to show any such acts. *Whitlow* v. *Stimson*, 14 B.C.R. 321.

3. Estoppel.]—A mortgagor will not be allowed to redeem when he has lain by for five years with knowledge that the mortgagee has sold the land after an order nisi for foreclosure though before the order absolute. *Williams* v. *Sun Life Assurance Co.*, 16 B.C.R. 370.

B. Terms of.

1. Terms of redemption by purchaser of equity of redemption — Statute of Limitations.]—Under sec. 44 of the Execution Act, providing that any purchaser may remove or satisfy any mortgage in like manner as the execution debtor might have done, an execution purchaser of an equity of redemption is entitled to redeem only upon payment of the whole arrears of principal and interest legally recoverable from the mortgagor, and 20 years are recoverable under the usual covenant to pay. *Keary* v. *Mason*, 2 B.C.R. 48.

2. Costs subsequent to date of decree.]—A judge has no jurisdiction to add to an order made by another judge for redemption of a mortgage on payment of the debt and costs to date of decree, a further term adding subsequent costs and requiring their payment as a further condition of redemption and charge upon the lands. *Lehman* v. *Wilkinson*, 3 B.C.R. 19.

V. ACCOUNTS.

1. Wages, arrears of.]—A mortgagee who goes into possession of a stock-in-trade mortgaged to him and carries on the business, and pays arrears of wages, cannot charge such payments in the accounts, in the absence of an express assent to the payment on the part of the mortgagor. *Van Volkenburg* v. *West. Can. Ranching Co.*, 6 B.C.R. 284.

2. Goodwill.]—Where a mortgagee has gone into possession of a business it cannot be charged with a sum stated by it as the value of the goodwill for the purposes of a scheme of amalgamation with another company. *Van Volkenburg* v. *West. Can. Ranching Co.*, 6 B.C.R. 284.

See BILLS OF SALE.

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I. BOUNDARIES.

Itala or Eagle Island.]—Itala or Eagle Island is within the boundaries of the municipality of North Vancouver. *Mowat* v. *North Vancouver,* 9 B.C.R. 205.

II. GOVERNMENT AND PROCEDURE.

A. Governing Body.

1. Qualification.

1. Qualification for municipal councillor —Payment of taxes.]—By the Municipal Act, 1881, it was provided as an essential qualification for the position of municipal councillor that the candidate should have paid all taxes due to the municipality. By the same Act, such taxes were provided to be paid to the "collector" of the municipality. C. having paid all his taxes to the municipal treasurer in due time, and being in all other respects qualified, W., the returning officer, refused him nomination and a poll for non-payment of taxes to the collector. B., the only other candidate, was declared elected by acclamation:—Held, that the taxes were duly paid, and that C. was duly qualified. *Cawley* v. *Branchflower and Webb,* 1 B.C.R., Pt. II., 35.

2. Alderman — Qualification for.]—A person to be qualified for alderman for Victoria city must be the owner, in his own right, of property of the clear unencumbered value of at least $500 during the whole period of the six months preceding nomination. The period prescribed by sec. 86 of the Municipal Elections Act for taking proceedings by way of election petition or quo warranto does not apply to a qui tam action brought under sec. 20 of the Municipal Clauses Act. *Falconer* v. *Langley,* 6 B.C.R. 444.

3. Property.]—A candidate for alderman who, prior to nomination, has conveyed the lands which professedly constitute his qualification, is not disqualified, if the conveyance is not registered. *Levy* v. *Gleason,* 13 B.C.R. 357.

2. Disqualifications.

1. Interest in contract.]—R. being reeve of plaintiff municipality, did certain work repairing a stone crusher, for which work the municipal council voted him $75, such sum being shown in the accounts as expenses. Subsequently he spent considerable time, at the request of the council, in advocating the passage through the Legislature of a loan bill, in respect of which time he was voted $100. An action was brought for the recovery of these two sums of money as illegal payments in contravention of sec. 21 the Municipal Clauses Act, and also for penalties under sec. 22 for sit-

ting and voting as reeve after the receipt of these respective sums. The claim for penalties was abandoned at the trial, and the action resolved itself into a question of law, as to whether the statement of claim disclosed a cause of action in the circumstances:—Held, that the statement of claim did not disclose a cause of action, so the contract was not made void by the statute, and there were no grounds alleged on which it might be declared void in equity. The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto. *The Municipality of the District of South Vancouver* v. *Rae* (*No. 2*), 12 B.C.R. 184.

2. Interest in contract by alderman.]—An alderman who has contracted to supply a person, who has a contract with his municipality, materials to carry it out, has "an interest in a contract with or for the municipality, either directly or indirectly," within the meaning of the Municipal Act, 1892, British Columbia, sec. 30, sub-sec. 10. *Coughlan & Mayo* v. *The Corporation of the City of Victoria, Antoine Henderson, James Munro Miller and James Baker*, 3 B.C.R. 57.

3. Compromise of debt due to corporation.]—Defendant, having a judgment against him by the City for taxes in a test case, entered into an understanding with the City whereby in consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected an alderman:—Held, that this agreement came within the disqualification clause of the Municipal Clauses Act:—Held, further, that as in this case the defendant had acted bona fide, the Court would exercise its discretion under the Supreme Court Act to relieve against the penalty. *Mason* v. *Meston*, 14 B.C.R. 22.

B. Officers.

1. Election to office.]—A person duly elected, at a meeting of the municipal council, to municipal office, pursuant to a statute giving the municipal corporation power so to appoint its officers, becomes thereby the servant of the corporation without further evidence or ratification of the contract of hiring, either by writing under the corporate seal or otherwise, and can maintain an action for damages if not received into the employment in pursuance of the contract of hiring implied by such appointment. *Tuck* v. *The Corporation of the City of Victoria*, 2 B.C.R. 179.

2. Legal advisers—Appointment of.]—Plaintiffs, by their statement of claim, alleged that they were solicitors in partnership and that they were duly appointed to be the "legal advisers" to the corporation, the defendants. This allegation was not denied or put in issue by the defendants' pleadings. Plaintiffs were afterwards continuously and exclusively employed as the solicitors of the corporation:—Held, that the defendants were debarred from denying the appointment, viz., an appointment under seal. In conformity with a resolution of the mayor and council, their clerk, by a letter under the corporate seal, addressed to the plaintiffs, informed them that they had been appointed to be the "legal advisers" of the corporation. Semble, this might be insisted on as an appointment under seal. The designation "legal advisers" being ambiguous, may be interpreted to mean "solicitors" or "attorneys" by reference to the circumstances of the parties at the time of the appointment, and the acts of the parties subsequently; and was so interpreted in this case. An appointment to be solicitor to a corporation operates as a general retainer. *Drake & Jackson* v. *Corporation of Victoria*, 1 B.C.R., Pt. II., 165.

3. Tenure of office.]—Under sec. 45 of the Municipal Clauses Act, a municipal officer holds office "during the pleasure of the mayor or council," and so may be removed at any time without notice or cause shown therefor. A tax sale bye-law provided that the collector should be entitled to a commission on all arrears of taxes collected:—Held, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in. *The Municipality of the District of North Vancouver* v. *Keene*, 10 B.C.R. 276.

4. Salary.]—Sub-sec. 13 of sec. 150 of the Act, requiring a two-thirds vote of the members present for rescinding previous actions of the council, does not apply to a resolution of the council altering the amount of salary payable to an officer whose engagement might, under sec. 154, have been terminated by one month's notice on either side. *Tetley* v. *City of Vancouver*, 5 B.C.R. 276.

5. Magistrate—Interest in prosecution by reason of salary drawn from Consolidated Revenue Fund.]—The fact that the fines imposed by a police magistrate appointed by a municipal corporation are paid into the Consolidated Municipal Fund, and that he holds another office under the corporation, the salary of which is drawn from such fund, does not incapacitate him as magistrate by reason of interest in the prosecution. A Provincial statute authorized an appointment to be made by a municipal corporation, subject to the consent of the Lieutenant-Governor-in-Council:—Held, 1. Such appointment was well made by resolution under the corporate seal, and a bye-law was unnecessary. 2. It is immaterial whether the assent of the Lieutenant-Governor-in-Council is obtained before or after the resolution. *Regina* v. *Hart*, 2 B.C.R. 264.

III. Powers, Duties and Liabilities.

A. Exercise of Powers.

1. In General.

1. Control of Courts.]—Acts within the discretionary powers of a municipal council are not subject to judicial control, except where fraud is imputed and shown, or there is a manifest invasion of private rights. Injunction to restrain the corporation from proceeding with a contract awarded to other than the lowest tenderer refused, and action dismissed. *Haggerty* v. *The City of Victoria*, 4 B.C.R. 163.

2. Public interest.]—The Hudson's Bay Company, the owner of lots on each side of a lane, which, with the lane, made a block facing on three streets, desiring to erect a large business block covering the lots and the lane between, petitioned the Council to close such portion of the lane and to lease it to the Company for 25 years, the Company agreeing to convey to the City a lot and two important easements to be used as an outlet from the lane in substitution for the portion closed. In pursuance of this petition the Council passed a bye-law closing the portion of the lane in question and providing for its lease to the Company. Certain owners of the lots adjoining that portion of the lane that was closed applied to Clement, J., to quash the bye-law. The application was dismissed: — Held, on appeal, per Irving and Martin, JJ.A., that the appeal should be dismissed. Per Macdonald, C.J.A., and Galliher, J.A., that the appeal should be allowed and that the bye-law should be quashed. Per Irving, J.A.: Where bodies of a public representative character, entrusted by Parliament with delegated authority, are acting bona fide and within the limits of the powers conferred upon them by Parliament, they are not to be interfered with by the Courts. Per Martin, J.A.: The question of public interest is one of degree, dependent upon the particular circumstances of each case, and where present in any appreciable degree, the Court should not interfere with the bona-fide exercise of municipal powers. Per Macdonald, C.J.A., and Galliher, J.A.: The erection of a costly private building in a city is not a matter of public interest in the legal sense of the term. The Court being evenly divided, the appeal was dismissed. *In re United Buildings Corporation, Limited, and The Corporation of the City of Vancouver*, 18 B.C.R. 274; 1915, A.C. 345.

3. Confiscation.] — In exercising its legislative powers dealing with public utilities, wherein considerable money has been invested over a long period of years, a municipal council cannot ignore the equities which have thus arisen. Where, therefore, powers were exercised for over 25 years under a bye-law granting privileges to a gas company, and on a dispute arising over an alleged irregularity, the municipal council repealed the bye-law:—Held, that, in the circumstances, it could not be considered that the Legislature contemplated conferring upon municipal councils the power to pass confiscatory legislation such as that complained of. *Cunningham* v. *The Corporation of the City of New Westminster*, 18 B.C.R. 188.

4. Disregard of contract.]—A saloon license under the Municipality Act, 1881, the fee for which is paid in advance under the provisions of the Act, is a statutory contract with the municipality, and during the statutory term for which it is granted cannot be so altered or varied by a bye-law passed by the municipality granting the license as to destroy the object for which it was granted, or materially reduce its value. *In re Clay*, 1 B.C.R., Pt. II., 300.

5. Public wharves.]—Where a corporation is given power to provide public wharves, it cannot license any interference with the free access thereto. *Lee* v. *The Olympian*, 2 B.C.R. 84.

6. Highways.]—The power conferred of establishing, opening, making . . . . or

stopping up roads is not confined to such roads only as have both their termini within the boundaries of the municipality. *Styles* v. *City of Victoria*, 8 B.C.R. 406.

7. Imposition of penalties for obstructing highways.] — Under a power to pass bye-laws "for preventing and abating public nuisances" a municipal council may impose penalties for obstructing public thoroughfares by congregating thereon in crowds and for refusing to disperse when so requested by the police, for such an obstruction is a public nuisance at common law. *Rex* v. *Taylor*, 14 B.C.R. 235.

8. Excess of powers under bye-law.]— Where a municipal corporation passes a bye-law for the construction of a particular kind of road it is a contravention of that bye-law to construct a different kind of road, and the owners of property assessed for the cost of construction have a right to restrain such a contravention. *Arbuthnot* v. *City of Victoria*, 15 B.C.R. 209.

2. Mode of Exercise.

1. Exercise de facto.]—A municipal corporation having, under the Municipal Act, 1892 (55 Vict., c. 33), de facto taken over the care and control of a certain bridge, their acts with regard to it are prima facie competent corporate acts, and it would lie on the corporation to show clearly that any acts done by its officers under its direction were ultra vires and illegal, and that conclusion could not be reached merely by reason of its not having passed a bye-law under the Act actually vested the bridge in it. *Patterson* v. *Victoria Corporation*, 5 B.C.R. 628; 1899, A.C. 615.

2. Deviations from authorized works.] —Deviations from the general plan of any public work authorized by bye-law are justified when they are incidental to the carrying out of the authorized works and are made with a view to diminish unnecessary inconvenience and resulting claims to compensation. *Wilson* v. *Delta Corporation*, 1913, A.C. 181.

3. Authority to appoint.] — Where a corporation is authorized by statute to make appointments of officials, subject to the consent of the Lieutenant-Governor-in-Council, it may exercise such power by resolution, and a bye-law is unnecessary. It is also immaterial whether the prescribed assent is obtained before or after the date of the resolution. *R.* v. *Hart*, 2 B.C.R. 264.

4. Salary of officer.]—Sub-sec. 13 of sec. 150 of the Vancouver Incorporation Act, 1886, requiring a majority of two-thirds of the members present at a meeting for rescinding previous actions of the council does not apply to a resolution of the council altering the amount of the salary payable to an officer whose engagement might, under sec. 154, have been terminated by one month's notice on either side. *Tetley* v. *City of Vancouver*, 5 B.C.R. 276.

3. Place Where Exercised.

Area of jurisdiction.] — Prior to the amendment of the Municipal Act by the Municipal Act Amendment Act, 1894 (57 Vict., c. 34), sec. 15, municipal councils subject to that statute had no power to hold meetings for the transaction of any business of the corporation, administrative, legislative or judicial, outside of the territorial boundaries of the municipality. *Anderson* v. *The Municipality of South Vancouver*, 16 B.C.R. 401; 45 S.C.R. 425.

B. Contracts.

1. Seal.] — The provision that, "Each municipal corporation shall have a corporate seal, and the council shall enter into contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the council" is imperative, and applies to all contracts by municipal corporations subject to the Act. *Paisley* v. *Corporation of Chilliwack*, 5 B.C.R. 132.

2. Seal.]—Sec. 82 of the Municipal Act, 1892, providing: "Each municipal corporation shall have a corporate seal, and the council shall enter into all contracts under the same seal, which shall be affixed to all contracts by virtue of an order of the council," is imperative, and applies to all contracts of the corporation. That the contract was in fact wholly executed, and the work completed and accepted by the corporation, and part payment therefor made, and that the clerk of the corporation had acknowledged an order by the contractor in favour of the plaintiffs:—Held, not to operate to cure the objection that the contract was not under seal. *United Trust Company* v. *Chilliwack*, 5 B.C.R. 128.

3. Tax sale—Subsequent sale by corporation—Redemption—Specific performance.]—At a tax sale in November, 1899, as the price offered for a lot owned by one

Beatty was less than the arrears of taxes, it was bid in by the corporation. In September, 1902, plaintiff wrote the corporation asking if they would accept "the taxes and costs" for the property, and the next day the council passed a resolution reciting plaintiff's offer and resolving to accept for the property the amount of "taxes, costs and interest," amounting to $88, and the reeve and clerk were authorized to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to plaintiff, who then demanded the deed and tendered his cheque for $88. Subsequently the clerk received from the agent of Beatty $88, and returned plaintiff his cheque, informing him that Beatty had redeemed his property. Plaintiff sued for specific performance:—Held, that a contract had been made out and that plaintiff had a good cause of action against the corporation, but that as the land had been redeemed by the original owner specific performance could not be granted, and it was therefore referred to the registrar to assess the damages. *Tracy* v. *The Corporation of the District of North Vancouver,* 10 B.C.R. 235; reversed, 34 S.C.R. 132.

C. Liabilities.

1. For Acts of Servants, Agents and Contractors.

1. Highway authority — Negligence — Respondeat superior—Contractor or servant—Misfeasance or nonfeasance—Trial —Cross-examining questions to jury—Right of jury to find general verdict.]—A municipal corporation which had statutory power to enter land and take, without payment, gravel for its roads, let a contract for grading and gravelling a road within its limits, which contained no provision as to where the gravel was to be obtained. The contractor entered adjacent private property and took gravel from a pit thereon in such a manner as to undermine a large tree standing close to the road allowance, which, by reason thereof, afterwards fell upon and killed plaintiff's husband, who was driving on the road. To be assured of its quality, the taking of the gravel was superintended by the municipal road inspector. The jury found that the excavation was done by the order or permission of the corporation, and that irrespective of who caused the excavation, the subsequent condition of the tree was a dangerous nuisance to the highway, of which the corporation had notice:—Held, (1) The corporation was responsible for the act of the contractor in undermining the tree, to the same extent as if he was a labourer acting under the orders of the road inspector or the board of works. (2) If one employs a contractor to do a work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, and the employer accepts the work in that condition, he becomes at once responsible for the nuisance. (3) He who knowingly maintains a nuisance is as liable for its consequences as he who created it. The corporation was under an obligation to the public so to exercise its powers of repairing the highway as not to render its use dangerous to the lives of passengers thereon by the absence of reasonable precautions against obvious risks from falling trees, and the circumstance that the corporation exercised its powers through the instrumentality of their contractor did not absolve it. *Steves* v. *The Corporation of the District of South Vancouver,* 6 B.C.R. 17.

2. Trespass.]—A corporation is liable for a trespass committed by its servants while conducting its business, although committed in the doing of an act ultra vires of the corporation itself. Where the servant of a corporation forms an erroneous judgment, and, in the supposed discharge of the duty delegated to him, commits a trespass, the corporation is liable for it. *Adams* v. *Nat. Elec., etc., Co.,* 3 B.C.R. 199.

3. Town constable.]—A municipal corporation appointing a person to act as constable pursuant to the provisions of sec. 232 of the Municipal Clauses Act, is not responsible for the negligent acts of such person in his capacity of constable. Such person discharges public duties imposed by the Legislature, and from which the corporation derives no benefit in its corporate capacity. Where, therefore, a municipal constable and gaoler having arrested a person, and after searching him and taking matches and other articles from him and another prisoner, locked him up, and he was suffocated from a fire which broke out in the cell during the temporary absence of the constable-gaoler:—Held, that the trial judge was right in dismissing the action for damages brought by the deceased's widow, and setting aside the verdict of the jury in her favour. *McKen-*

zie v. *Corporation of Chilliwack,* 15 B.C.R. 256; 1912, A.C. 888.

2. As to Municipal Buildings and Apparatus.

1. No proof of negligence.]—A small rural township is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners in which there is no fire and matches are not allowed. *McKenzie* v. *Chilliwack Corporation,* 15 B.C.R. 256; 1912, A.C. 888.

2. Duty of, to maintain its electric wires in a safe condition.]—A fire alarm wire belonging to a municipality broke and fell upon an electric wire belonging to a private corporation, and thereby sent a fatal current into the plaintiff's horse:—Held, that the municipality was liable. *Earle* v. *The City of Victoria,* 2 B.C.R. 156.

3. As to Drains and Sewers.

1. Defective condition.] — In a drain constructed by the defendant municipality some 17 years before the cause of action, there had been placed a man-hole, which reduced the capacity of the drain. In addition to this the drainage area had been greatly increased. Plaintiff's basement drain was connected with this drain with the knowledge and consent of the Corporation. The woodwork in the municipal drain having become decayed, some of it broke away and caused an obstruction which, in a heavy rainfall, flooded plaintiff's basement, causing damage:—Held, that the Corporation was liable, notwithstanding that the drain might have been sufficient for the purpose when first built; but that here there was the further element that the drain had been allowed to remain in a defective condition. *Woodward* v. *The Corporation of the City of Vancouver,* 14 B.C.R. 403.

2. Permissive use.]—There is no statutory liability cast upon municipal corporations to keep drains in repair, and where the plaintiffs were not compelled or requested to drain the basement of their house by connecting with the city's drain, and were merely permitted to do so for their own convenience, without making any payment, and water flowed into the basement through faulty construction of the main drain, the corporation was held not to be liable. *Woodward* v. *City of Vancouver,* 16 B.C.R. 457.

3. Omission to repair.]—Held, that the Corporation of the City of Vancouver were under no statutory or common law liability to provide means of drainage to plaintiff's basement, and that the latter voluntarily assumed the risk, which resulted in the damage complained of, by connecting with the drain in the manner he did. *Woodward* v. *Corporation of the City of Vancouver,* 16 B.C.R. 457.

4. As to Streets and Highways.

1. Nonfeasance.] — Where a municipal corporation is guilty of negligent default by nonfeasance of the statutory duty imposed upon it to keep its highways in good repair, and adequate means have been provided by statute for the purpose of enabling it to perform its obligations in that respect, persons suffering injuries in consequence of such omission may maintain civil actions against the corporation to recover compensation in damages, although no such right of action has been expressly given by the statute, unless something in the statute itself, or in the circumstances in which it was enacted, justifies the inference that no such right of action was intended to be conferred. *McPhalen* v. *City of Vancouver,* 15 B.C.R. 367; 45 S.C.R. 194.

2. Knowledge or means of knowledge.]—Plaintiff was injured by stepping into a hole in a sidewalk within the municipal limits, there being no evidence of how the hole came to be there, or whether the municipal authorities had actual knowledge of its existence. Under their Act of incorporation, the control of the thoroughfares is vested in the Corporation, and there is also imposed upon them the duty of keeping them in repair, and it is also made unlawful for a third person to interfere with the streets or sidewalks without permission:—Held, that the breach of the duty to repair gave a right of action to a person injured; that in the circumstances the jury might infer that the sidewalk was broken by defendant Corporation, or with their permission; and that where by reasonable care and diligence they could and ought to know that streets require repairing, the Corporation are liable if they neglect to do so. The existence of the defect here might be strong evidence of neglect to discover it. *Cummings*

v. *The Corporation of the City of Vancouver*, 16 B.C.R. 494; 46 S.C.R. 457.

3. Defective construction by owner with permission of corporation.]—Plaintiff was injured by stepping on the wooden grating in a sidewalk, which grating, when put in was found, on the evidence, to be structurally defective. The grating was put in by the owners of the abutting property under a permit from the Corporation:—Held, that notwithstanding the statutory provision as to notice to the Corporation of accidents so happening, the Corporation must be taken to have had knowledge of the originally defective construction of the grating, and were therefore liable. *Macpherson* v. *The Corporation of the City of Vancouver*, 14 B.C.R. 326.

4. Non-repair.]—Plaintiff's horse stumbled through a rotten culvert on a public road within the municipal limits, and plaintiff and his wife were thrown from the vehicle and injured. The culvert, constructed of cedar, covered with a few inches of earth, had been placed there some 16 years previously, and it had never been inspected, repaired or renewed during that time:—Held, that the municipality had been guilty of misfeasance in allowing the culvert to become a nuisance, and was therefore liable. *Cooksley* v. *The Corporation of New Westminster*, 14 B.C.R. 330.

5. Faulty method of construction.]—The defendant corporation constructed a sidewalk and street crossing in such a manner that the defendant, walking upon the sidewalk at night with reasonable care, failed to step on to the crossing, which was of less width than the sidewalk, but stepped over its outer edge on to the ground, which at that point was at a considerably lower level, thereby sustaining injury:—Held, that the method of construction constituted a misfeasance by the corporation, and that it was liable in an action for damages. *Smith* v. *City of Vancouver*, 5 B.C.R. 491.

6. Corporation not an insurer of latent defects in highways.]—Corporations undertaking to manage highways are not insurers against latent defects; they are only bound to take reasonable care. No action could be maintained at common law for an injury arising from the non-repair of a highway, but a duty may be cast by statute upon a corporation to repair, and if that is clearly done it will be answerable in an action of negligence. The Municipal Act, 1892, British Columbia, sec. 104, sub-sec. 90, gave the defendant corporation power to raise money by way of road tax, and to pass bye-laws dealing with roads, streets and bridges:—Held, that no duty to keep the streets in repair was thereby laid on defendants. *Lindell* v. *Corporation of the City of Victoria*, 3 B.C.R. 400.

7. Grade of street—Action for damages for lowering.]—The Act incorporating the City of New Westminster, 51 Vict., c. 42 (British Columbia), by sec. 190, empowers the council of the city to order by bye-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract, or by complying with the formalities prescribed in sub-secs. 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land; sub-sec. 13 provides for the confirmation of the appointment and for the deposit in Court of said price by the council, which deposit should vest in them the title to said land. Sub-sec. 17 of sec. 190 enacts that sub-secs. 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality. The council was authorized by bye-law to raise money for improving certain streets, but no bye-law was passed expressly ordering such improvements. In one of the streets named in said bye-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult, and no retaining wall having been built, the soil of said lot caved and sunk, thereby weakening the supports of the buildings thereon:—Held, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the street, and was not obliged to seek redress under the statute; that sub-sec. 17 of sec. 190, which dispenses with the formalities required by prior sub-sections, only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets the corporation must comply with the formalities prescribed by sub-secs. 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land, the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the

statute; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they were liable for damage thereby caused:—Held, further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained. In the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person. *The Corporation of the City of New Westminster* v. *Manuella Brighouse*, 20 S.C.R. 520.

8. Right of corporation to indemnity.]—A municipal corporation, charged with the maintenance and repair of streets and sidewalks, took up a wooden sidewalk and replaced it with a permanent one. In doing so, they replaced a wooden grating in an area opening, which had been made in the old sidewalk by a former owner of the abutting private property without permission from the corporation. The private owner at the time of replacing the old sidewalk was not consulted by the corporation. The trial judge, in an action for personal injuries sustained by plaintiff in falling through the wooden grating, gave damages, $3,000, against the corporation, with a remedy over against the third party. An appeal was taken by the municipality, and the third party also appealed against the main judgment and against the order that she indemnify the City, but on the argument she confined her appeal to the latter:—Held, on appeal, that the corporation was liable, and that the appeal of the third party should be allowed. *Macpherson* v. *The Corporation of the City of Vancouver (Stirling, third party)*, 17 B.C.R. 264.

5. As to Bridges.

1. Accident to bridge.]—In an action to recover damages from a municipal corporation for a fatal accident caused by the breaking down of a bridge of which the corporation had taken over the care and control, it was held that the finding of the jury that an act done by an officer of the corporation had materially weakened the beam which afterwards broke amply justified a verdict against it. *Patterson* v. *Victoria Corporation*, 5 B.C.R. 628; 1899, A.C. 615.

2. Nonfeasance.]—In an action for negligence it is not sufficient to show general negligence on the part of the defendant, but the plaintiff must show a negligent act "whereby" the injury was caused. There is, at law, no cause of action for damages for negligence in not performing a statutory duty, or for not exercising a statutory power, but only for negligent acts in the performance of the duty, or in the exercise of the power. The jury found, inter alia, that the injury, which resulted from the collapse of a bridge built by the Provincial Government, but afterwards brought within the city limits, was caused by the breaking of a hanger supporting one of the floor beams. The city had substituted stirrup hangers with welds, made by their orders, on some of the beams in place of unwelded straight hangers. When asked whether it was one of the substituted hangers which broke, the jury said there was no evidence, but in their opinion a missing stirrup hanger must have broken at the welds, otherwise it would have been attached to the floor beam. To the question whether the corporation was blamable for the cause of the action, and how, the jury answered: "A. Yes, because having been made aware of the condition of the bridge, through the report of the engineer and otherwise, they attempted repairs, but the work was not done sufficiently well to strengthen the structure. In our opinion it was their duty to first ascertain the carrying capacity of the bridge before allowing such heavy cars to pass over it." Upon motion for judgment:—Held, 1. That there was no finding of actionable negligence "whereby" the disaster was caused; 2. That the acts of negligence to which the jury attributed the disaster were mere nonfeasance. *Gordon* v. *The City of Victoria*, 5 B.C.R. 553.

3. Use by railway company.]—The company had a right under its statutory charter (sec. 12 of 57 Vict., c. 63) to construct, maintain and operate a street railway along certain highways and bridges. One of the bridges over which the company had lawfully run its cars under the Act was destroyed, and the City commenced the construction of another in its place which was of insufficient strength to carry the cars. Upon motion for a mandatory injunction to compel the City to construct the bridge of sufficient strength to maintain the car traffic of the company:—Held, that the company were merely grantees of the right of

way, and as such had no right to compel their grantors to repair the bridge, and that in the absence of a special agreement to do so the right did not exist. The City were not liable for non-repair even if it amounted to a nuisance. *The Consolidated Railway Company* v. *The City of Victoria*, 5 B.C.R. 266.

IV. Franchise, Grant of.

Point Grey Bye-law.] —The company had powers under the Consolidated Railway Company's Act, 1896, to construct and operate a street railway or tramway in certain districts in the Province along such streets or roads as might be specified by the council of any municipality through which the same might be constructed, who might fix the location and terms of user over such streets or roads. By an agreement between the company and the Corporation of Point Grey, which was in the districts referred to, the corporation consented to the company constructing a tramway along specified roads, and, upon certain conditions, operating the same for forty years. The agreement also provided that if the corporation or other persons should desire thereafter to construct a tramway along other roads, the company should have, upon certain conditions, a prior right to construct and operate it. A bye-law of the corporation authorized the affixing of the corporate seal to this agreement:—Held, that the agreement and bye-law did not amount to a charter bestowing a right, franchise, or privilege, and that they were not invalid in the absence of the assent of the electors. *Stewart* v. *British Columbia Electric Railway Company*, 16 B.C.R. 374; 1913, A.C. 816.

V. Bye-Laws.

A. In General.

1. Money loaned on — Assumption of risk as to regularity of proceedings.]—The lender of money to a municipality on its debentures is bound, at his own risk, to see that the proceedings leading up to their creation and issue are legal and regular. *Wiltshire* v. *The Township of Surrey*, 2 B.C.R. 79.

2. Action to set aside.]—The provisions of sec. 91 of the Municipal Clauses Act, R.S.B.C. 1897, c. 144, do not prevent an action being brought to restrain a corporation from proceeding under a bye-law which has not been quashed, but only prevent an action for damages till the bye-law has been quashed. *In re Traves*, 7 B.C.R. 48.

3. Good in part.]—A bye-law may be good in part and bad in part, but the part that is good must be clearly distinguishable from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete bye-law capable of enforcement. *R.* v. *Jim Sing*, 4 B.C.R. 338.

4. Question of validity.]—A magistrate is bound to decide all questions raised before him as to the validity of bye-laws. *R.* v. *Russell*, 1 B.C.R., Pt. I., 256.

5. Unnecessary.] — Where a statute creates offences and provides the necessary machinery for carrying out its provisions, a bye-law to put it in force is unnecessary and bad. *Hayes* v. *Thompson*, 9 B.C.R. 249.

6. Certiorari.]—The validity of a bye-law may be tested in proceedings by certiorari. *In re Traves*, 7 B.C.R. 48.

B. Authentication.

Seal.] — Where the copy of a bye-law deposited for registration has impressed upon it the seal of the municipality, that is sufficient, and it is not necessary to affix the seal to the certificate of the municipal clerk authenticating the bye-law. *City of Fernie* v. *Crow's Nest, etc., Co.*, 13 B.C.R. 12.

C. Nature and Effect.

Alteration by resolution.]—A bye-law is not an agreement, but a law binding on all persons to whom it applies, whether they care to be bound by it or not. A resolution can no more alter a bye-law than it can alter a statute. *The Corporation of the City of Victoria* v. *Meston*, 11 B.C.R. 341.

D. Construction.

1. Absurdity.]—In a bye-law passed by the corporation of the City of Victoria, having for its object the closing of a portion of the Craigflower Road, the word "by" was omitted inadvertently, with the result that by the strict grammatical construction of the bye-law a former bye-law dealing with the same road was declared closed, instead of the road itself:—Held, that certain words in the enacting clause should be regarded as a parenthetical expression, and as

descriptive of the portion of the road referred to, thus giving the bye-law a sensible meaning and the one intended. The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable. *Esquimalt Water Works Company* v. *The Corporation of the City of Victoria*, 10 B.C.R. 193.

2. Insensible construction.]—The effect of reprinting a municipal bye-law was to alter the position of the last word in the first line of a section. The same word occurred five times in the section. An amendment was subsequently passed, intending the insertion of another word before the word so changed in position:—Held, that the amendment should be placed and read in the position only to which it could sensibly relate. *The Corporation of the City of Victoria* v. *Belyea*, 13 B.C.R. 5.

3. Lodging-house.]—Where a bye-law, requiring lodging house keepers to take out a license, does not define the words "lodging house," it does not apply to a person not engaged in such occupation for profit. *In re Gun Long*, 7 B.C.R. 457.

4. Sunday trading.] — A bye-law prohibiting the keeping open of barber shops on Sunday is not necessarily infringed by shaving customers on Sunday. *In re Lambert*, 7 B.C.R. 396.

E. Amendment.

Consent of Lieutenant-Governor.]—By the (special) Vancouver Incorporation Act, 1886, sec. 129, bye-laws for raising money not for ordinary expenses must receive the assent of the electors, "and when such assent is received no such bye-law shall be altered, amended or repealed by the council except as hereinafter provided." The (general) Municipal Act, 1892, sec. 113, dealing with the same class of bye-laws, provides, "No such bye-law shall be altered or repealed except with the consent of the Lieutenant-Governor-in-Council." The city of Vancouver passed a bye-law, No. 159, aiding a railway by gift of municipal debentures. A question having been raised as to whether this bye-law should have been voted upon by the electors upon the roll of 1891, instead of, as was the case, upon that of 1892, two new bye-laws, Nos. 166 and 167, for the same purpose, were introduced and submitted to, and respectively received the assent of, each group of electors. These bye-laws were similar to each other, but varied in substantial particulars from bye-law 159. After they were passed, an order of the Lieutenant-Governor-in-Council was obtained assenting to the alterations which they made in bye-law 159. Upon motion to quash bye-laws 166 and 167, as altering bye-law 159, contrary to sec. 129, supra:—Held, quashing the bye-laws: That sec. 129 of the special Act, supra, exclusively governed. That sec. 113 of the subsequent general Act, supra, did not apply, and that, in any event, the language of that section was not enabling but necessitated the consent of the Lieutenant-Governor-in-Council as an additional restriction upon the power to amend by subsequent bye-law. *In re Bell-Irving and City of Vancouver: In the matter of the Vancouver Incorporation Act,* 1886, *and the Municipal Act,* 1892, *and Bye-laws* 166 *and* 167 *of the Corporation of the said City*, 4 B.C.R. 228.

F. Consolidating and Revising.

Failure to identify.]—Where a revising bye-law purports to bring into effect a number of bye-laws contained in a printed roll alleged to be attested by the mayor and city clerk, but such roll was not, in fact, so attested until after the final passage of the revising bye-law, such bye-law has failed to bring into force any bye-law contained in such roll. *Traves* v. *City of Nelson, In re Traves—Certiorari*, 7 B.C.R. 48.

G. Voting on.

1. Right of voting.]—Sec. 127 of the Vancouver Incorporation Act, 1886, providing that the right of voting on bye-laws requiring the assent of the electors shall belong to persons rated on the revised assessment roll on which voters' lists of the city are based, confers the right to vote only upon persons on the revised assessment roll upon which the existing voters' lists are based, and the description is not satisfied by persons upon the last revised assessment roll upon the basis of which the voters' lists for the current year have not yet been made up. *In re Bell-Irving*, 4 B.C.R. 219, 300.

2. Necessary majority.]—An amendment to the special Act of the city of Vancouver required a three-fifths majority of votes to pass a certain class of bye-laws requiring

submission to the electors. An amendment to the general Municipal Act passed on the same day authorized such bye-laws to be passed by a majority only of the electors, and gave the same power to the cities of Vancouver and New Westminster, notwithstanding anything in the special Acts relating to said cities inconsistent with or repugnant thereto. Upon a rule nisi to quash such a bye-law, upon the ground that it received the assent of a majority only of the electors:—Held, wherever there is a particular enactment, and also a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative to the exclusion of the other. *Bailey* v. *The Corporation of the City of Vancouver*, 4 B.C.R. 433.

H. Irregularities, Validation of.

1. Not reconsidered and finally adopted.]—By sec. 278, Municipal Act, 1892, B.C., "Before any bye-law . . . . shall be valid or come into effect, the council shall cause it to be published once in every week for four weeks in, etc. . . . after which the bye-law may be reconsidered by the council; and, if reconsidered and finally adopted by the council within thirty days from the termination of the four weeks of publication aforesaid, it shall come into effect after seven days from its final adoption by the council, unless the date of its coming into effect is otherwise postponed by such bye-law." By sec. 279, unless quashed, "the bye-law shall, notwithstanding any want of substance or form, either in the bye-law itself or in the time or manner of passing the same, be a valid bye-law." The bye-law in question was not reconsidered and finally adopted by the council within the thirty days above limited. No motion to quash the bye-law within the time limited for that purpose had been made. The action was for a declaration that the bye-law was invalid, and plaintiffs had obtained an interim injunction restraining actions against them in the County Court, to recover a rate assessed against them thereunder:—Held, dissolving the injunction, that the bye-law was validated by sec. 279. Semble, that the objection was not fatal to the bye-law. *Belrose* v. *The Municipality of Chilliwack*, 3 B.C.R. 115.

2. Coram non concilio.]—The provision in the Municipal Act [R.S.B.C. 1897, c. 144, sec. 86 (2)] validating bye-laws, to quash which no motion has been within a defined period, has no application to invalid bye-laws enacted by municipal councils on occasions when they could not perform legislative functions. *Anderson* v. *The Municipality of South Vancouver*, 16 B.C.R. 401; 45 S.C.R. 425.

3. Debentures.]—A municipal bye-law, under which debentures have been issued and the interest thereon paid by the municipality for a year or more, cannot be invalidated or set aside on any ground whatever. *Wilson* v. *Delta Corporation*, 1913, A.C. 181.

I. Enforcement.

1. Penalty.]—It is not necessary that a bye-law imposing a tax should fix a penalty for its infraction; the statute itself does that and provides the manner in which it may be recovered. *City of Victoria* v. *Belyea*, 12 B.C.R. 112.

2. Information.]—Any person may lay an information in respect of the infraction of a municipal bye-law. *R.* v. *Chipman*, 5 B.C.R. 349.

3. Mens rea.]—In order to support a conviction under the clause in the Victoria Consolidated Health Bye-law, 1886, providing "17. No person shall let, occupy, or suffer to be occupied, as a dwelling or lodging, any room which (a) does not contain at least 384 cubic feet of space for each person occupying the same," it is necessary that there should be some evidence of guilty knowledge, actual or constructive, on the part of the person charged. *Re Wing Kee*, 2 B.C.R. 321.

J. Quashing.

1. In General.

Relief.] — Apart from any statutory authority the Court has power in any case to afford relief where it is shown that the council has not properly exercised its powers. *In re Arthur*, 6 B.C.R. 323.

2. Practice.

1. Grounds not specified.]—A bye-law may be quashed on grounds not specified in the rule. *In re Arthur*, 6 B.C.R. 323.

2. Locus standi in curia.] — Only the applicant and the corporation have any

locus standi on proceedings to quash. *MacLean* v. *City of Fernie*, 12 B.C.R. 61.

3. Time for application to quash.]—Held, that the application to quash a bye-law made within one month from the date of its publication in the British Columbia Gazette, though more than one month from the date of its passing the council, was "within one month of the passing of the bye-law," according to the true interpretation of the language of sec. 128 of the Municipal Act, 1892, coupled with secs. 122, 125 and 126. *Kane* v. *The Corporation of the City of Kaslo*, 4 B.C.R. 486.

4. Time for application to quash.]—An application to quash a bye-law made on the day next following the time limited by R.S.B.C. c. 144, sec. 89, which time expired upon a holiday, is in time. R.S.B.C. c. 1, sec. 10, sub-sec. 20, is not confined to matters of procedure only *In re Nelson City Bye-law, No. 11*, 6. B.C.R. 163.

5. Proof of bye-law.]—It is sufficient that the copy of the bye-law, deposited for registration, be impressed with the seal of the municipality: it is not necessary that the seal be affixed to the certificate of the municipal clerk, authenticating the bye-law. *City of Fernie* v. *Crow's Nest Pass E. L. & P. Co.*, 13 B.C.R. 12.

6. Framed under particular section not to be supported under different section.]—A bye-law manifestly passed in pursuance of a particular section of the Municipal Clauses Act, and aimed at regulating or governing a specific matter, cannot be supported as applying to other matters. Thus, where a bye-law was framed under sub-sec. 27 of sec. 50 for regulating the keeping of wild animals in captivity, such bye-law could not be supported under other provisions of the same section dealing with public health and sanitation. *French* v. *Corporation of Saanich*, 16 B.C.R. 106.

K. Causes of Invalidity.

1. In General.

1. Bye-law regulating.]—A bye-law that is not just and equal in its operation, or which is unreasonable, or permits favouritism, is void. *Reg.* v. *Russell*, 1 B.C.R., Pt. 1, 256.

2. Delivery of debentures in specie.]—It is no good objection to a bye-law for raising moneys on debentures that it provides for the delivery of the debentures themselves to the company to be aided, instead of the proceeds of the debentures. *In re Bell-Irving*, 4 B.C.R. 228.

2. Defects of Form.

1. Recitals.]—By the (general) Municipal Act, 1892, sec. 113, sub-sec. 4, bye-laws for contracting debts not required for ordinary expenditure, and not payable within the same municipal year, "shall recite: (2) The total amount required by this Act to be raised annually by special rate for paying the new debt and interest, and (4) The annual special rate in the dollar for paying the interest and creating an equal yearly sinking fund for paying the principal of the new debt." By sec. 4 of the same Act, "This Act shall be construed as applying to the cities of New Westminster and Vancouver only, so far as it is not repugnant to or inconsistent with their Acts of Incorporation." By the Vancouver Incorporation Act (private) 1886, c. 32, sec. 128, as amended by c. 62 of 1892, sec. 5, each of such bye-laws "(1) shall name a day in the financial year in which the same is passed, when the bye-law shall take effect, and (3) the amount of the debt which such new bye-law is intended to create, and, in some brief and general terms, the object for which it is to be created":—Held, that the provisions of sec. 113 of the (general) Municipal Act, supra, are not repugnant to or inconsistent with the provisions of sec. 128 of the Vancouver Incorporation Act, supra, and that bye-law 159 of Vancouver is invalid for non-compliance with sec. 113. *Bell-Irving and City of Vancouver: In the matter of the Vancouver Incorporation Act*, 1886, *and the Municipal Act*, 1892, *and the bye-law* 159 *of the Corporation of the said City*. 4 B.C.R. 300.

2. Non-publication and non-reconsideration.]—A bye-law which has not been advertised nor reconsidered and adopted as the statute directs is bad. *Wiltshire* v. *Surrey Corporation*, 2 B.C.R. 79.

3. Statutory requirements.]—A bye-law for borrowing money is bad if it fails to specify the total amount required to be raised annually to pay the debt and interest. *In re Bell-Irving*, 4 B.C.R. 228.

3. Excess of Powers.

1. Benefit to individual.]—The respondents passed a bye-law stopping up part of

a lane upon the petition of a company which owned land on either side of it, and upon that company conveying to the respondents land over which the lane could be diverted, they leased the portion so stopped to the petitioning company for twenty-five years at a nominal rent. The respondents had powers under the Vancouver Incorporation Act, 1900, sec. 125, sub-sec. 52, to pass bye-laws for stopping up lanes, that sub-sec. being one of a group under the head, "Public Health"; they also had power to lease the stopped portion for twenty-five years. Under the Municipal Act, 1906, sec. 194, a bye-law "giving a bonus" requires the assent of the electors of the municipality, which was not obtained by the respondents:—Held, that, having regard to the other matters included under the head "Public Health" in sec. 125, above referred to, the bye-law was within the powers of the respondents under sub-sec. 52; that the bye-law was not outside those powers, nor within the Municipal Act, 1906, sec. 194, merely because a benefit specifically accrued to particular persons, and that, no bad faith or improper conduct being shown, it was validly passed. *United Buildings Corporation, Ltd.* v. *Corporation of the City of Vancouver,* 18 B.C.R. 274; 1915, A.C. 345.

2. Prohibition and regulation.] — A municipal corporation passed a bye-law providing that "no building or structure of any kind shall be constructed and used for a laundry or wash-house" within a specific district. The bye-law was passed under R.S.B.C. 1897, c. 144, sec. 50, (91), as amended by B.C. Stats. 1900, c. 23, sec. 4, by which power was given to municipalities to make bye-laws "for licensing and regulating wash-houses and laundries, and for naming and defining the streets or limits (as in the case of fire limits) on or within which laundries or wash-houses may be established, maintained or operated, and for preventing and regulating the erection or continuance of any laundries or wash-houses which may be found to be nuisances." The defendant was convicted of a breach of the bye-law for having constructed and used a building for a laundry or wash-house within the restricted area:—Held, that the conviction should be quashed, as the bye-law exceeded the power conferred upon the municipality and was unauthorized. *In re Glover and Sam Kee,* 20 B.C.R. 219.

3. Public nuisance.]—Under a power to pass bye-laws "for preventing and abating public nuisances," a municipal council may impose penalties for obstructing public thoroughfares by congregating thereon in crowds and for refusing to disperse when so requested by the police. *R.* v. *Taylor,* 14 B.C.R. 235.

4. Sunday trading.] — Under the Vancouver Incorporation Act, 1900, the council has no power to pass a bye-law prohibiting a barber from exercising his trade on a Sunday. *In re Lambert,* 7 B.C.R. 396.

5. Fire limits.] — The city of Victoria corporation, under the Municipal Act, 1881, passed a bye-law which defined fire limits, within which limits no wooden building was to be altered without the permission of the inspector and a majority of the fire wardens. The defendant was convicted of a breach of this bye-law for having altered his building (a wooden building existing in 1881), without permission:—Held, that the corporation under the Municipal Act, 1881, c. 16, sec. 104, sub-secs. 78 and 58, had no power to regulate mere alterations in existing houses, and therefore the bye-law was ultra vires. *Regina* v. *On Hing,* 1 B.C.R., Pt. II., 148.

4. Unreasonableness.

1. Intra vires.] — A bye-law cannot be successfully attacked upon the ground of unreasonableness, where its provisions are in the terms of the enabling statute, for the objection is then to the unreasonableness of the statute. *Reg.* v. *Petersky,* 4 B.C.R. 385.

2. Bye-law affecting public morals—Exercising calling.]—The Municipal Clauses Act, 1896, sec. 50, sub-sec. 90, gave to the council of every municipality the power to pass bye-laws in relation to "Public morals, including the observance of the Lord's Day, commonly called Sunday." The municipal council of Richmond passed a bye-law thereunder, "that no person shall do or exercise any worldly labour, business, or work of his ordinary calling upon the Lord's Day, or any part thereof, works of necessity or charity only excepted," etc.:—Held, that the bye-law was bad for unreasonableness. *Regina* v. *Petersky,* 5 B.C.R. 549.

5. Discrimination.

Distinction between vehicles drawn by animate and inanimate power.]—Pursuant

to sub-secs. 130 and 131 of sec. 125 of the Vancouver Incorporation Act, 1900, empowering the council to regulate and license owners and drivers of stage coaches, livery, feed and sale stables and of horses, drays, express wagons, carts, cabs, carriages, omnibuses, automobiles and other vehicles used for hire, the council passed a bye-law imposing a license for each vehicle drawn by one or two horses, $5 per annum; by more than two horses $10; and for each automobile or taxi-cab carrying up to seven passengers, $25; over seven passengers, $50 per annum. On an application for a writ of certiorari to bring up a conviction under the bye-law on the ground that it made a discrimination between vehicles drawn by horses used for hire and other vehicles used for hire:—Held, that the conviction was valid. *Rex* v. *Forshaw*, 15 B.C.R. 322.

6. Uncertainty.

Fee to be fixed.]—Where power is given to fix the sum to be paid for a license, a bye-law imposing a fee "to be fixed" is bad for uncertainty. *R.* v. *Jim Sing*, 4 B.C.R. 338.

7. Delegation of Power.

Fee to be fixed.]—The power to fix a license fee by bye-law does not authorize a bye-law delegating it to the council to fix the fee by resolution. *R.* v. *Jim Sing*, 4 B.C.R. 338.

8. Interest of Corporate Officer.

Director of contracting company.]—A bye-law to borrow money for the purchase of an electric lighting plant belonging to a company is not invalid merely because the mayor was president of the company at the time of the passing of the bye-law, and of the completion of the contract to purchase. *In re Arthur*, 6 B.C.R. 323.

9. Regulation and Prohibition.

1. Prohibition.]—A power to regulate a trade does not authorize the prohibition of such trade. *R.* v. *Sung Chong*, 14 B.C.R. 275.

2. Menagerie.] — A menagerie kept within the municipal area is not a nuisance per se. Where, therefore, a municipal council passed a bye-law purporting to regulate the maintenance of a menagerie within the municipal bounds, but imposed such conditions as to make such maintenance virtually prohibitive, the bye-law was held bad. *French* v. *Municipality of North Saanich*, 16 B.C.R. 106.

3. Hawkers and peddlers.] — Where a municipal bye-law was passed prohibiting hawkers and peddlers of vegetables and similar products from pursuing their calling throughout the municipality during certain hours on market days:—Held, that the bye-law in question was not authorized by the statute. A statutory power to pass bye-laws regulating a trade does not authorize the prohibition of such trade or the making it unlawful to carry on a lawful trade in a lawful manner. *Rex* v. *Sung Chong*, 14 B.C.R. 275.

10. Date of Coming Into Force.

On or after.]—A clause in a bye-law providing that it shall come into force on or after a stated date is a sufficient compliance with the statutory requirement. *In re Arthur*, 6 B.C.R. 323.

11. Unqualified Voters.

Invalidity.]—Certain persons not qualified, and others, not authorized, having voted on a city bye-law granting electric lighting and water franchises:—Held, that the bye-law was defective and must be quashed. *MacLean* v. *The Corporation of the City of Fernie*, 12 B.C.R. 61.

12. Misrepresentation of Fact.

Quashing — Mis-statement of fact on face of.]—An agreement relating to the railway enterprise to be assisted by the bye-law was referred to as "made and concluded" between the contracting railway companies, but the agreement was set forth in the bye-law, and appeared without signatures; in fact, at the date of the publication of the bye-law, it had only been executed by one of the railway companies:—Held, that there was no misrepresentation of fact such as to avoid the bye-law on that ground. *Re Bell-Irving and Vancouver Corporation*, 4 B.C.R. 219.

VI. Trade Licenses.

A. In General.

1. Discrimination against particular nationalities.]—It is not competent to the

Provincial Legislature, or to a municipality, to deprive, generally, particular nationalities or individuals of the capacity to take out municipal trade licenses; e.g., a Chinaman has a right to apply for a pawnbroker's license. *Regina* v. *Corporation of Victoria, at the prosecution of Mock Fee and another*, 1 B.C.R., Pt. II., 331.

2. Goods sold on commission.]—Where goods are consigned by the owner to be sold on commission and they are sold by the consignee by auction in premises rented by him, the owner is not an occupant of such premises nor a transient trader within the Municipal Clauses Act (R.S.C.B. 1897, c. 144, sec. 171, sub-sec. 23), amended in 1898 (c. 35, sec. 19). To support a conviction it is essential that the person charged occupy premises in the municipality. *Regina* v. *Wilson*, 7 B.C.R. 112.

3. Wholesale trade.]—A sale to a person in British Columbia by an agent of a firm doing business outside the province of 1,100 business cards, to be supplied by them, is a sale by wholesale and not a sale by retail within the Municipal Act, 1891, 54 Vic. c. 29, B.C. sec. 166, and a conviction for making such sale, without the license required by the statute for making such sales by retail, quashed. *Heath* v. *The City of Victoria*, 2 B.C.R. 276.

4. Wholesale trader.]—By Statute B.C. 55 Vic. c. 33, sec. 204, sub-sec. (10): "Every municipality shall in addition to the powers of taxation by law conferred thereon have the power to issue licenses for the purposes following, and to levy and collect by means of such licenses the amounts following (10) From any person carrying on the business of a wholesale or of a wholesale and retail merchant or trader not exceeding $50 for every six months:—Held, that a person who imported materials, and manufactured articles of clothing therefrom, and sold same in quantities to wholesale and retail dealers, was a person carrying on a wholesale business within the meaning of the Act. A trader, wholesale or retail, is one who sells to gain his living by such buying or selling, not to gain a profit on one isolated transaction. If a manufacturer sells the product of his labour and skill in wholesale quantities, he is a wholesale trader. *Regina* v. *Pearson*, 3 B.C.R. 325.

5. Six months' license.]—A municipal bye-law, providing for the imposition of a license "for every six months" was passed and registered on the 18th of September, and the time limited for the expiration of the first license thereunder was fixed for the 15th of the ensuing January. There was no provision made for the period of time between the passage of the bye-law and the 15th of January:—Held, that a conviction of defendant Company for carrying on business on or about the 4th of December intervening, without having taken out a license under the bye-law, was bad, in that sec. 1 of the bye-law could apply only to a six months' license for which a six months' fee had been paid. *City of Fernie* v. *Crow's Nest Pass Electric Light and Power Company, Limited*, 13 B.C.R. 12.

6. Barrister and solicitor.]—A bye-law provided for the taking out of a license by every person using or following "any of the professions particularly described and mentioned in Schedule A." The profession of barrister or solicitor was not mentioned, but clause 27 of the bye-law contained an omnibus provision that "every person following within the municipality any profession . . . . not hereinbefore enumerated" should take out a license:—Held, that this provision took in the professions of barrister and solicitor without any more definite description. *Corporation of Victoria* v. *Belyea*, 13 B.C.R. 5.

7. Barrister and solicitor.]—The profession of a barrister is included in the term "profession" in clause 26 of sec. 171 of the Municipal Clauses Act, as amended in 1902, c. 52, and sec. 173 as amended in 1903, c. 42:—Semble, one appearance in the town where the barrister has his office, in court as counsel for a client, is sufficient to constitute an offence under the statute, although acting in several instances would constitute only one offence in respect of which only one penalty could be imposed. *The Corporation of the City of Victoria* v. *Belyea*, 12 B.C.R. 112.

8. Invalid condition.]—Where a municipal corporation is empowered to collect a license fee "from any retail trader, not exceeding twenty dollars, for every six months," the license to be granted "so as to terminate on the 15th day of July or the 15th day of January," the corporation may not stipulate that the applicant shall confine his trading to week days only of the period of the license, and may not withhold the license if he refuses to subscribe to such a condition. *Vasilatos* v. *The Corporation of the City of Victoria*, 15 B.C.R. 153.

9. Refusal on ground of bad character.]—The provisions of sub-sec. (3) of sec. 3 of c. 46 (B.C. statutes, 1907), regulating inter alia, the licensing of drivers of vehicles for hire, does not confer upon a municipal council the power to vest in the Chief of Police authority to refuse a license to an applicant properly applying, because such applicant is not considered to be of good character. *Rex* v. *Sparks*, 18 B.C.R. 116.

10. Club—What is.]—By the Municipal Act, B.C. 1889, sec. 173: "Every club in a municipality shall pay to the corporation of the municipality an annual tax of one hundred dollars on the 31st day of December in every year." "A 'club' for the purposes of this Act shall mean and include an association of persons consisting of not less than forty in number, whose objects of association are mutual recreation or improvement, and the keeping for the members a place of resort wherein intoxicating, spirituous and malt liquors are consumed by members, either at a tariff fixed by the rules of the association or pursuant to any agreement or understanding between the members of the association." The defendants admitted that they were such an association:—Held, that the club was not liable to pay the license because it did not sell liquor. *The City of Victoria* v. *The Union Club*, 3 B.C.R. 363.

B. Occupation Not for Gain.

Lodging-house keeper — Bye-law — No definition of—How construed.]—Where a bye-law requiring lodging-house keepers to take out a license did not define what was meant by keeping a lodging-house:—Held, that it did not apply to a person not engaged in such occupation for profit. *Re Gun Long*, 7 B.C.R. 457.

C. Vancouver Incorporation Act.

Bye-law regulating, in Vancouver City.]—The Vancouver Incorporation Act, 1886, sec. 142, sub-sec. 71, as amended by the Vancouver Incorporation Amendment Act, 1889, sec. 33, empowered the council to pass bye-laws: (a) "For licensing, regulating, and governing hawkers, etc., of any goods for sale, etc., and for fixing the sum to be paid for a license for exercising such calling within the city, and the time the license shall be in force." "(b) Provided always that no such license shall be required for hawking or peddling any goods, etc., the growth, produce or manufacture of this Province." Bye-law 202 of the City of Vancouver, purporting to have been passed under the powers conferred by sub-sec. 71 supra, provided: "No sale of vegetables, etc., shall be made in the city by any dealer, huckster, etc., unless at a permanent place of business for the sale of said articles, before the hour of nine o'clock in the forenoon of each day of the week, excepting Saturdays, and then not before four o'clock in the afternoon, except at the market place; and no such dealer, huckster, etc., shall sell or offer for sale any of the before-mentioned goods at any place other than the market or from a recognized store, without first having paid the market fees payable by him or her, the amount of which fees and where payable may from time to time be fixed and regulated by resolution of the council." The defendant was convicted of offering vegetables, which appeared to have been grown in the province, for sale between the hours of seven and eight o'clock a.m.:—Held, on appeal, quashing the conviction: (1) That the power to fix the license fee by bye-law did not authorize a bye-law relegating it to the council to fix the fees by resolution. (2) That the imposition of a fee, in effect a license fee "to be fixed," etc., was bad for uncertainty. (3) That the partial prohibition and regulation by the bye-law as to sales by hawkers in effect involved the imposition of a license tax upon them in the exercise of the calling, and that the case of the defendant as hawker of vegetables grown in the province was within the exception provided by sub-sec. (b). (4) A bye-law may be good in part and bad in part, but the part that is good must be clearly distinguished from the part that is bad, so that if the invalid portion is eliminated there will still remain a perfect and complete bye-law capable of being enforced. *Regina* v. *Jim Sing*, 4 B.C.R. 338.

VII. Ferries.

Ferries Act.]—Sec. 275 of the Municipal Clauses Act, R.S.B.C. 1897, provides that, notwithstanding anything contained in the Ferries Act, where a ferry is required over any stream or other water within the province, and the two shores of such stream or other water are in different municipalities, the Lieutenant-Governor-in-Council

may grant a license to ferry, without submitting the same to public competition, to either of such municipalities exclusively, or both conjointly, as may be most conducive to the public interest. Sec. 8 of the Ferries Act provides that "ferry licences issued after such public competition may be granted for any period not exceeding five years." The Provincial Government granted to the rural municipality of North Vancouver a license for a ferry between the municipality and the City of Vancouver for 15 years under the provisions of sec. 275. The municipality sublet the license to the plaintiff company pursuant to sec. 277 of the Municipal Clauses Act. Subsequently the municipality obtained an Act of incorporation as a city municipality and in the Act provision was made, inter alia, for giving effect to such sub-lease. In an action to restrain a rival company from infringing on the rights of the plaintiff company (the sub-lessees) an injunction was granted by Clement, J. and it was:—Held, on appeal, that the provisions of the Ferries Act as to duration of a franchise do not control the granting of a license for a ferry to be established between municipalities. *North Vancouver Ferry and Power Company, Limited* v. *Bunbury*, 16 B.C.R. 170.

VIII. Municipal Property.

A. Shares in Companies.

Appointment of trustees.]—A municipal corporation owning shares in the capital stock of an incorporated company may appoint trustees to whom they have the power to transfer the shares. *Lucas* v. *Municipality of North Vancouver*, 18 B.C.R. 239.

B. Highways, Streets and Parks.

1. Vesting of freehold in streets.]—Sec. 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . . in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved). In an action for an injunction to restrain the corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted that a proper construction of the word "vest" as used in sec. 218, did not authorize the Corporation to dig to an excessive depth:—Held, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well. *Cotton* v. *The Corporation of the City of Vancouver*, 12 B.C.R. 497.

2. Trust estate—Conveyance of lands embraced in.]—The corporation of Victoria was, under an Act of Parliament, seised of 120 acres, upon trust, to lay out and maintain the same as a public park or pleasure ground for the enjoyment and recreation of the inhabitants:—Held, that the corporation could not convey any of such land free from that trust:—Held, that cattle lairs, an agricultural hall for the exhibition of farming implements and products, and an emigrant's home, were not within the objects of the trust. *Anderson* v. *Corporation of City of Victoria and others, and The Attorney-General* (on the information of Anderson) v. *Corporation of City of Victoria and others*, 1 B.C.R., Pt. II., 107.

IX. Taxation.

A. Power of.

Trade licenses.]—P. was convicted before a justice of the peace for soliciting in Victoria orders for the sale by retail of goods to be supplied by a firm doing business outside the Province of British Columbia. By the Municipal Act, 1891, British Columbia, 54 Vict., c. 29, sec. 166, "Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect by means of such licenses the amounts following: '(12) From every person who, either on his own behalf or as agent for another or others, sells, solicits, or takes orders for the sale by retail of goods, wares or merchandise to be supplied or furnished by any person or firm doing business outside the Province and not having a permanent and licensed place of business within the Province, of a sum not exceeding $50 for every six months.'" By bye-law, following the language of sub-sec. (12), supra, except that the words "permanent or licensed place of business" are substituted for "permanent and licensed place of business," the license fee was fixed at $50:—Held, 1. The statute, bye-law, and license tax thereunder are not, as contended, ultra vires, (a) for interference with trade and commerce, or (b) for

unlawful discrimination against traders outside the Province. 2. The imposition of the license tax in question is within the powers relegated to Provincial control by the British North America Act, sec. 92, sub-sec. 16. *Poole* v. *The City of Victoria*, 2 B.C.R. 271.

B. Principles of Liability.

1. Assessment — Name on roll.] — The mere fact that a person is named in the assessment roll of a municipality as the owner of certain real estate does not make him personally liable for the amount of the assessment. Quære, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed. *Coquitlam Corporation* v. *Hoy*, 6 B.C.R. 458.

2. Fire insurance company.] — In an action against defendant company under the Fire Companies' Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a company issuing policies within city limits, it was held at the trial, dismissing the action, that the plaintiff had failed to establish agency:—Held, by the Full Court, dismissing plaintiff's appeal, that the action was misconceived; that the tax sought to be recovered was not on the company directly, but in respect of a special form of agency described in the statute, and the evidence negatived the existence of such an agency. *Dowler* v. *Union Assurance Society of London*, 9 B.C.R. 196.

3. Interest of homesteader.] — Where the fee still remains in the Crown the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is. *King* v. *The Municipality of Matsqui*, 8 B.C.R. 289.

4. License — "Sale" of liquor — Club selling to its members, whether.]—By the Municipal Act, British Columbia, 1889, sec. 173, "Every club in a municipality shall pay to the corporation of the municipality an annual tax of one hundred dollars on the 31st day of December in every year. A club for the purposes of this Act shall mean and include an association of persons consisting of not less than forty in number, whose objects of association are mutual recreation or improvement, and the keeping for the members of a place of resort wherein intoxicating, spirituous or malt liuqors are consumed by members either at a tariff fixed by the rules of the association or pursuant to any agreement or understanding between the members of the association." The defendants admitted that they were such an association:—Held, that the club was not liable to pay the license, because it did not sell liquor. *The City of Victoria* v. *The Union Club*, 3 B.C.R. 363.

C. Assessment, Principles of.

1. Assessment of private streets.]—A street, the fee in which is in a private owner, who, however, cannot close it by reason of lots abutting thereon having been sold according to a plan showing said street, should be assessed at a nominal figure only. *In re Smith Assessment Appeal*, 6 B.C.R. 154.

2. Actual cost.]—Under sec. 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor:—Held, that in estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive. *In re B. T. Rogers*, 9 B.C.R. 373.

3. Insufficient description.]—Defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion Government, and was assessed, under sec. 168, sub-sec. 4, of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1,605 and 1,607, block 1; measurement, 23 x 66; Government Street; land, $12,650; improvements, $920; total, $13,570":—Held, dismissing the action to recover taxes: (1) That defendant was an occupant of part of the improvements only, and not of the land. (2) The assessment was invalid because the lands and improvements were insufficiently described. (3) The Act provides no procedure for such an assessment. (4) Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *Victoria Corporation* v. *Bowes*, 8 B.C.R. 363.

4. Measure of value.]—The measure of value for purposes of taxation, prescribed by sec. 113 of the Municipal Clauses Act, is

the actual cash selling value, and not the cost. *In re Municipal Clauses Act and J. O. Dunsmuir,* 8 B.C.R. 361.

5. Measure of value for assessment.]—The measure of value of improvements for purposes of taxation, prescribed by sec. 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value, and not the cost. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers,* 9 B.C.R. 495.

D. Remedies for Improper Assessment.

1. Appeal to Supreme Court.] — An appeal lies from a decision of the Court of Revision in relation to the assessment of such property to a judge of the Supreme Court. *In re Smith Assessment Appeal,* 6 B.C.R. 154.

2. Excess of jurisdiction.]—Where an assessor exceeds his jurisdiction, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *Coquitlam Corporation* v. *Hoy,* 6 B.C.R. 546.

3. Vancouver Incorporation Act.]—No appeal lies from the decision of a judge on an appeal from the Court of Revision under sec. 56 of the Vancouver Incorporation Act. *In re B. T. Rogers,* 9 B.C.R. 373.

4. Persona designata.] — The judge to whom an appeal from the Court of Revision is given by sec. 137 of the Municipal Clauses Act (B.C. Stats. 1906, c. 32) is a persona designata, and the authority conferred upon him cannot be exercised by the judge of another Court acting in his absence and on his request. *City of Slocan* v. *Canadian Pacific Railway Company,* 14 B.C.R. 112.

E. Court of Revision.

Place of session.]—Courts of Revision organized under the Municipal Act have no power to exercise their functions as such except at meetings held within the territorial limits of the municipality where the property, as described in the assessment rolls to be revised by them, is situate. *Anderson* v. *The Municipality of South Vancouver,* 16 B.C.R. 401; 45 S.C.R. 425.

F. Exemption.

1. Onus of proof.]—The whole of the lands appurtenant to St. Paul's Hospital, owned by the Sisters of Charity, and within the municipal limits of Vancouver, were assessed. By sub-sec. 3 of sec. 46 of the Vancouver Incorporation Act, 1900, the buildings and grounds of any incorporated charitable institution are exempt from taxation so long as such buildings and grounds are actually used and occupied by the institution, provided the grounds shall not exceed in extent the amount actually necessary for the requirements of the institution, the extent to be decided by the Court of Revision, whose decision shall be final. The Sisters complained of the assessment to the Court of Revision, but did not produce any evidence, and the Court, without dealing with the complaint laid by the Sisters, passed a resolution exempting in general terms from taxation all charitable institutions to the extent of the buildings occupied by them, and a further area of land equal to 25 per cent. of the area occupied by the buildings. The effect of this resolution was to reduce the assessment from $38,250 to $28,585. Morrison, J., on the application of the Sisters, granted a writ of certiorari removing up the assessment for review by a judge. The municipality appealed: — Held, on appeal, that if the Sisters were dissatisfied with the exemption thus voluntarily and generally made, they should have produced evidence at the time to show that the exemption was not sufficient in the circumstances, as the onus is on persons claiming the benefit of an exemption to produce evidence in support of it, and that the rule for a writ of certiorari should not have issued in this case. *In re Sisters of Charity Assessment,* 15 B.C.R. 344; 44 S.C.R. 29.

2. Functions of the Court of Revision.]—The functions in respect of the limitation of exemptions from taxation so vested in the Court of Revision are quasi-judicial and must be exercised in each case with respect to that case alone. It is not vested with power to lay down a general rule based upon general considerations. But the minute embodying the resolution, in the absence of further evidence, was not incompatible with the view that the Court of Revision had examined each particular case before deciding to act in the sense of the minute. *Ibid.*

G. Tax Sale.

1. Proceedings in.

Tax sale — Order confirming.] — An order, under sec. 151 of the Municipal

Clauses Act Amendment Act of 1898 and amendments of 1899 and 1900, confirming a tax sale will not be made without notice of the petition for the order being given to the persons whose property is being sold. *Re South Vancouver Tax Sale,* 9 B.C.R. 572.

2. Effect of.

Sale of land for taxes—Exhausts lien.]—A sale of land for taxes under a bye-law passed pursuant to the Municipal Act, 1892, sec. 104, sub-sec. 115, exhausts the lien of the municipality upon the lands, for taxes, given by sec. 202 of the Act; and the purchaser at the tax sale takes the lands discharged of any lien in respect of taxes actually due at the time of the sale over and above the taxes for which the land was sold. *Jamieson* v. *City of Victoria,* 6 B.C.R. 109.

3. Action to Set Aside.

(*a*) *Parties.*

Municipality.]—A municipal corporation may be joined in an action to set aside a tax sale. *Lasher* v. *Tretheway,* 10 B.C.R. 438.

(*b*) *Pleadings.*

1. Form of claim—Particulars.]—Where it appears that one who holds a certificate of title to land has obtained it upon a sale and conveyance for taxes, the burden is upon the certificate holder to establish the regularity of the tax sale. The plaintiff, in his statement of claim, instead of setting up the tax sale and alleging that it was made without authority, should have simply set out his title and alleged that the purchaser at the tax sale (a defendant) had wrongfully taken possession of his property:—Held, however, that the plaintiff, having alleged the tax sale and its invalidity and asked for a declaration accordingly, was not bound to furnish particulars of the defects in the authority of the municipality to sell. *Beavis* v. *Township of Langley and Jenny Stewart,* 18 B.C.R. 30.

2. Particulars.]—In an action by plaintiff, claiming that the tax sale proceedings on which her property had been sold were invalid, it was alleged in the statement of claim (par. 7) that the plaintiff had made various demands for statements of the taxes due, and (par. 8) that the provisions of the Municipal Clauses Act had not been followed in carrying out the tax sale proceedings. On a summons for particulars of these two paragraphs, plaintiff was ordered to deliver an amended statement of claim giving such particulars:—Held, that particulars should not have been ordered, but, in any event, the form of the order, directing the delivery of a new statement of claim, instead of particulars simply, was objectionable. *Turner* v. *Municipality of Surrey,* 16 B.C.R. 79.

(*c*) *Discovery.*

Interrogatories.]—A defendant in an action to set aside a sale for arrears of taxes will not be given leave to interrogate as to alleged invalidity of the proceedings leading up to the sale. *Turner* v. *Municipality of Surrey* (*No. 2*), 16 B.C.R. 349.

(*d*) *Burden of Proof of Regularity of Proceedings.*

1. Title of former owner.]—In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed is not called upon to prove the regularity of the tax sale proceedings until the defendant shows some title to the land in question. *Carroll* v. *The Corporation of the City of Vancouver,* 10 B.C.R. 179.

2. Tax sale deed.]—A certificate of title based on, does not, ipso facto, oust a prior certificate of title outstanding in the hands of former owner, and holder of it must affirmatively show regularity of all tax sale proceedings. *Kirk* v. *Kirkland,* 7 B.C.R. 12; 30 S.C.R. 344.

4. Invalidity of.

Municipal Council and Courts of Revision held outside territorial limits.]—The council of a municipal corporation, without any formal resolution, held its meetings during several years at a place outside the limits of the municipality, and organized Courts of Revision there. These courts held all their meetings at the same place as the council and assumed to revise the municipal assessment roll at these meetings. The council approved the rolls so revised and enacted bye-laws, from year to year, levying rates and authorizing the collection of taxes on the lands mentioned in the rolls, and

after notice as provided by the statute, sold lands so assessed and alleged to be in arrear in payment of the taxes so imposed:—Held, that the assessment rolls were invalid, that the bye-laws levying the rates and authorizing the collection of taxes on lands mentioned therein were null and void, and that the sale of the lands so made for alleged arrears of taxes were illegal and of no effect. *Anderson* v. *The Municipality of South Vancouver,* 16 B.C.R. 401; 45 S.C.R. 425.

5. Validation of.

1. Land Registry Act.]—The plaintiff's land was sold for taxes by the Municipality of North Vancouver in 1897, for arrears 1894 to 1897. The defendant Municipality bought in the property at the sale, and in 1903 sold to the defendant Ross. On Ross applying for registration of the tax-sale deed from the Municipality to itself and the further deed from the Municipality to himself, the registrar, after serving the plaintiff with notice of the application, as required by the Land Registry Act, and he not appearing, issued a certificate of title to Ross. The plaintiff brought action in 1911 to set aside the sale, on the grounds that the meetings of the Council and of the Court of Revision, without the required authority of a resolution of the Council, were held outside the limits of the municipality (i.e., in the City of Vancouver); that no resolutions were passed by the Court of Revision passing and confirming the assessments, and no assessment bye-law was passed for the year 1897. The main defences were, first, that the plaintiff not having taken action when served with notice by the registrar on the defendant Ross's application for a certificate of title, he was barred from asserting any claim by sec. 3, c. 31, British Columbia Statutes, 1901; second, that he not having brought action within one year from the time the cause of action arose, he was barred by secs. 243 and 244 of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, c. 144:—Held, that the appellant was estopped and debarred from asserting any claim whatever to the land in question by sec. 3, c. 31 of the statutes of 1901. *Temple* v. *Municipality of North Vancouver,* 18 B.C.R. 546. (Leave to appeal to the Privy Council refused.)

2. Fairly and openly conducted.]—An auctioner in charge of a tax sale acting as agent for the purchaser is not, independent of other grounds, a sufficient reason for setting aside the sale as not being "fairly and openly conducted" within the meaning of sec. 3 of the Land Registry Act Amendment Act, 1901. *Beavis* v. *Stewart,* 20 B.C.R. 450.

6. Lien for Taxes.

Recovery of taxes paid by purchaser.]—The purchaser of certain land at a tax sale sold in 1907 to the plaintiffs, who paid the taxes for four years. The original owner, the defendant, brought action and obtained judgment in 1911, setting aside the tax sale and declaring him the owner. The plaintiffs sought to recover from him the amount of the taxes paid, relying on sec. 14 of c. 71 of the statutes of 1913:—Held, that the section is not retroactive, and the provisions thereof do not entitle the plaintiff to recover. *Smith* v. *Anderson,* 18 B.C.R. 453.

7. Commission.

Collector's commission.]—Where a bye-law for the sale of lands for taxes provided that the collector shall be entitled to a commission on all arrears of tax collected, and lands are bought in by the municipality because the amount offered is less than the arrears of taxes and costs owing in respect of the lands, the collector is not entitled to a commission on the price of the lands so bought in. *District of North Vancouver* v. *Keen,* 10 B.C.R. 276.

X. Actions By and Against.

A. Authority to Commence.

Resolution.]—A municipal council having resolved to join in an action already launched against 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 shown an intention to sue defendant, the action of the reeve was a substantial, if not a strict compliance with that intention. *Municipality of South Vancouver* v. *Rae,* 12 B.C.R. 64.

B. By Ratepayers.

1. Application of municipal funds.]—The municipal corporation of the City of

Victoria, having by special resolution appropriated $5,200 to defray the cost of constructing a bridge over navigable water, part of a public harbour within the city limits, did not obtain the sanction of the Dominion Government to do the work, and proceeded to execute it in such a way as to interfere with navigation. Upon information by the Attorney-General of Canada an injunction was granted restraining the continuation of the work. This action was then brought by the plaintiff individually as a ratepayer to restrain the corporation from expending any part of the $5,200 in payment for the work:—Held, that an injunction should be granted restraining the application of the money to any further construction of the bridge, but refused as to payment for work bona fide done upon that part of it already completed. As to the frame of the action: (1) That the Provincial Attorney-General was not a necessary party. (2) That the plaintiff should sue on behalf of himself and all other ratepayers, except the aldermen. (3) That both the corporation and the members thereof responsible for the illegal action should be parties defendants. *Elworthy* v. *The Corporation of the City of Victoria*, 5 B.C.R. 123.

2. To enforce performance of bye-laws.]—The corporation having, with the consent of the property owners interested, passed a bye-law for the improvement of a thoroughfare by certain specified methods, departed from those methods and proceeded to construct the thoroughfare in another manner. The property owners to be assessed objected that this was not the class of work to which they had given their consent, and further, that it would not be as beneficial or permanent as the work originally proposed, and brought action to compel the Corporation to carry on the work in accordance with the bye-law, or in the alternative to be relieved from the payment of any special rates which might be levied in respect of the work. Irving, J., at the trial, dismissed the action on the ground that the pleadings showed no cause of action:—Held, on appeal, that, the Corporation having passed a bye-law for the construction of a certain class of road, they were contravening the provisions of that bye-law by constructing a different kind of road, that the property owners to be assessed had a right to object, and that their objection should be adjudicated upon. *Arbuthnot* v. *The Corporation of the City of Victoria*, 15 B.C.R. 209.

3. Municipal property.] — A ratepayer cannot sue to restrain a misuse of municipal property unless specially injured thereby. *Anderson* v. *City of Victoria*, 1 B.C.R., Pt. II., 107.

C. Limitation of Actions.

1. Deviations from authorized works.] —Secs. 243 and 244 of the Municipal Clauses Act, 1897, bar any cause of action within one year from the date thereof in respect of deviations by the municipality from the general plan of any public works authorized by its bye-laws. *Wilson* v. *Delto Corporation*, 1913, A.C. 181.

2. Qui tam.]—The period prescribed by sec. 86 of the Municipal Elections Act (R.S.B.C. 1897, c. 68) for taking proceedings by way of election petition or quo warranto does not apply to a qui tam action brought under sec. 20 of the Municipal Clauses Act (R.S.B.C. 1897, c. 144). *Falconer* v. *Langley*, 6 B.C.R. 444.

3. Injunction to restrain proceedings under bye-law.]—Secs. 91 and 92 of the Municipal Clauses Act (R.S.B.C. 1897, c. 144) do not prevent an action being brought to restrain a municipality from proceeding under a bye-law which has not been quashed, but merely prohibit an action for damages, already suffered, until the bye-law is quashed. *Traves* v. *City of Nelson*, 7 B.C.R. 48.

4. Mandamus.]—The limitation of one year prescribed by sec. 244 of the Municipal Clauses Act for commencing actions against a municipality applies to mandamus proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes. *The Queen* v. *The Municipal Council of the Corporation of the District of Mission*, 7 B.C.R. 513.

5. Local improvement assessment.]—Where a local improvement bye-law is passed, making a general assessment for the cost of the work, but the payment of which is spread over a number of years, any action by a ratepayer contesting the work, or complaining of its non-completion, must be brought within six months after the cause of action arose. *Arbuthnot* v. *The Corporation of the City of Victoria*, 18 B.C.R. 35.

6. Admiralty action.] — The statutory provision limiting to one year the bringing

of actions against a municipality does not apply to actions in rem in the Admiralty Court. *Kennedy* v. *The "Surrey,"* 11 B.C.R. 499.

See CERTIORARI.

See CRIMINAL LAW.

See HEALTH.

MURDER.

See CRIMINAL LAW.

NATURALIZATION.

See ALIEN.

See CONSTITUTIONAL LAW.

NEGLIGENCE.

I. NATURE OF ACT, 701.
A. In general, 701.
B. In management of railway, 702.
C. Mining, 705.
D. Use of machinery, 706.
E. Works of construction, 708.
F. Explosives, 709.
G. Navigation, 710.
II. RELATIONSHIP OF PARTIES, 710.
A. Identification, 710.
B. Trespasser, 710.
III. CONTRIBUTORY NEGLIGENCE, 711.

I. NATURE OF ACT.

A. In General.

1. Proof of negligence.]—Where the evidence is equally consistent with the existence or non-existence of negligence it is not competent for the judge to leave the case to the jury. *Loffmark* v. *The Adams River Lumber Company, Limited,* 17 B.C.R. 440.

2. General negligence.]—In an action for negligence it is not sufficient to show general negligence on the part of the defendant, but the plaintiff must prove a particular negligent act on the part of the defendant whereby the injury was caused. *Gordon* v. *City of Victoria,* 5 B.C.R. 553.

3. Breach of statutory duty.]—Where a guest in a hotel is injured by fire in consequence of the failure of the proprietor to provide a fire escape, as required by the Act, an action for damages will lie notwithstanding that a penalty is imposed for breach of the statutory duty. *Love* v. *The New Fairview Co.,* 10 B.C.R. 330.

4. Statutory power or duty.]—There is no cause of action for damages for negligence in not performing a statutory duty, or not exercising a statutory power, but only for negligent acts in the performance of the duty, or the exercise of the power. *Gordon* v. *City of Victoria,* 5 B.C.R. 553.

B. In Management of Railway.

1. Growth of grass and weeds.]—For a railway company to permit grass and weeds to grow on a side track is not such negligence as will make it liable to compensate a servant who is injured in consequence of such growth while on the side track in the course of his employment. *Wood* v. *Canadian Pacific Railway Company,* 6 B.C.R. 561; 30 S.C.R. 110.

2. Jumping from engine.] — Plaintiffs sued defendant Company for damages for the death of their son, a locomotive engineer in the defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found $6,000 damages:—Held, on appeal, per Hunter, C.J., that the only verdict reasonably open to the jury was that the deceased lost his life by his own negligence. Per Irving, J.: That the damages were excessive. Per Morrison, J.: That the verdict should stand. New trial ordered. *White and White* v. *Victoria Lumber and Manufacturing Company,* 14 B.C.R. 367.

3. Collision between cars.] — Deceased, while travelling on his employers' car, was injured, and subsequently died from his injuries, in a collision between a car which broke away or became detached from the motor which was pulling it and ran back down grade, crashing into the car occupied by deceased. Defendants, in their pleadings, admitted that the accident occurred through the negligence of fellow servants in the employment of defendant Company, but there was no other evidence of negligence:—Held, on appeal, that it was for the plaintiff to show that the accident was due to some specific act of negligence for which the defendants were responsible. *Farmer* v. *The British Columbia Electric Railway Company, Limited,* 16 B.C.R. 423.

4. Crossing track.] — At about eight o'clock on the evening of the 8th of January, 1912, during a slight fall of snow, the plaintiff started across Main Street (on

which was a double track street-car line running north and south) from the southwest corner of Main and Dufferin Streets in Vancouver. A team of horses, with waggon, coming out of Dufferin Street, East, was to his left, crossing the tracks and turning north on the west side of Main Street. Plaintiff crossed the west track and, on reaching the west rail of the east track, looked to his left, past the rear of the waggon as it cleared the track, and saw a car coming south on the east track, about 30 feet away. He stopped and turned, and on taking two or three steps back, was struck by a car going north on the west track and was knocked about 13 feet across the east track, sustaining a broken leg and other injuries. There was a conflict of evidence as to the speed at which the car that struck the plaintiff was going, ranging from six to 30 miles an hour, and the witnesses who saw the accident testified that they saw no car going south on the east track, as stated by the plaintiff. On the trial the jury disagreed, and the motion for judgment by way of nonsuit was dismissed:—Held, affirming the trial judge, that there was evidence upon which the jury must pass, and there must be a retrial. *MacKenzie* v. *British Columbia Electric Railway Company, Limited*, 19 B.C.R. 1.

5. Crossing track.]—The plaintiff, going north in his motor-car on Seymour Street in Vancouver, when approaching Robson Street, on which there is a double track street-car line, heard the noise of a street-car and slowed down to about four miles an hour. On reaching the north side of Robson Street he loked to the right and saw a car coming on the near track. This car was coming at a moderate speed and there appeared no difficulty in crossing in front. He continued on and when the front of his motor-car was within about a foot of the near track he looked to the left and saw a car approaching at about 20 miles an hour on the far track. He put on all possible speed, at the same time veering to the right in an attempt to cross in front, but was caught on the fender and carried about 40 feet, the motor-car being considerably damaged. The motorman on the street car did not reverse or put on brakes until within a few feet of Seymour Street. The trial judge held in favour of the plaintiff and assessed the damages at $300:—Held, on appeal, per Macdonald, C.J.A., and Galliher, J.A., that the defendants running their car at an unlawful rate of speed when the accident happened, were guilty of negligence, and the plaintiff was not guilty of contributory negligence. Per Irving and Martin, JJ.A.: That the defendants were guilty of negligence, but the plaintiff was guilty of contributory negligence. The Court being evenly divided, the appeal was dismissed. *Berry* v. *British Columbia Electric Railway Company, Limited*, 18 B.C.R. 175.

6. Crossing track.]—The plaintiff, running from the northwest corner towards the southwest corner of Granville and Davie Streets in Vancouver (Granville Street running north and south, and Davie Street east and west), to catch a Granville Street car on the south side of Davie Street, reached a point just beyond the track that curved into Davie Street from the north on Granville Street, when, on turning sharply to the left towards his car, he was struck by the fender of a car rounding the curve into Davie Street and was injured. There was evidence that the motorman did not sound his gong while making the turn. The jury returned a verdict for the plaintiff:—Held, on appeal, that the case was one in which the jury could properly find a verdict for the plaintiff. *Ogle* v. *British Columbia Electric Railway Company, Limited*, 18 B.C.R. 692.

7. Invitation to alight.]—The plaintiff was riding as a passenger on one of the defendant Company's cars. Upon the conductor collecting her fare she asked him to let her off at a certain place, to which he answered "all right." He then went into the motor vestibule in front and stayed there until after the accident. After turning a corner at plaintiff's destination the car stopped, and as the plaintiff was about to alight it started up again, throwing her to the ground, and from the fall she sustained injuries. At the time of the accident there were but three passengers in the car. The jury gave a verdict for $1,000 for the plaintiff and $500 for her husband:—Held, on appeal, that there was evidence upon which the jury might reasonably come to the conclusion that the Company was negligent. *Armishaw* v. *British Columbia Electric Railway Company, Limited*, 18 B.C.R. 152.

8. Motor car on the rails.]—Plaintiff's motor car proceeding along the highway, got partly between the rails of the defendant Company, but owing to the condition of the road, was unable to get out of the way

of an approaching tramcar. On seeing his difficulty, the driver signalled to the motorman of the tramcar to stop, which he endeavoured to do, but was unable to avoid a collision in which the motor car was damaged. The trial judge gave judgment for plaintiff on the ground of negligence on the part of the defendant company in not having a car of the size which caused the collision equipped with air brakes, which would, he held, have enabled the motorman to have stopped in time to prevent the collision:—Held, on appeal, that there was no negligence on the part of the motorman. *Winter* v. *The British Columbia Electric Railway Company, Limited,* 15 B.C.R. 81.

9. Car on parallel track.] — Where plaintiff alighted from one of the defendant's cars at night time, at a point where the street was torn up for purposes of repair, and the bell on a car immediately behind that from which he alighted, was clanging; and going between the two cars, and looking up and down a parallel track before crossing, but seeing no car approaching, was nevertheless struck and injured by an approaching car, running at an excessive speed on such parallel track:—Held, that he was entitled to recover, as it was the duty of the driver to have his car under control. *Morton* v. *The British Columbia Electric Railway Company, Limited,* 15 B.C.R. 187.

10. Riding on front car.] — Plaintiff's husband was a passenger on one of defendant company's cars, riding on the front platform, where it was customary for passengers to ride. The doors were open and there was no protecting bar across the opening, or other measures of safety taken. On the car approaching a switch, at a speed of three or four miles an hour, he was jolted off the car and, falling under the wheels, was killed. A jury gave a verdict of $3,500, but the trial judge entered judgment for the defendant company on the ground that there was no evidence of negligence on their part:—Held, on appeal, that there was evidence of negligence and that the verdict should stand. *Dynes* v. *British Columbia Electric Railway Company, Limited,* 15 B.C.R. 429; 47 S.C.R. 395.

C. Mining.

1. Protection of winze.]—The plaintiff in an action under the Employers' Liability Act, for damages caused by a defect in his employer's "works and ways," cannot succeed if on the facts proved the jury can only conjecture how the injury occurred. Rule 18, of sec. 25, c. 134, R.S.B.C. 1897, does not require that a winze extending through several levels of a metalliferous mine shall be protected at each level; the rule is sufficiently complied with if the winze is protected at the top level only. *Stamer* v. *Hall Mines,* 6 B.C.R. 579.

2. Operating colliery without statutory man holes—Negligence—Excessive damages.]—In defendants' coal mine the haulage slope, which, necessarily used as a travelling road by the workmen, was not provided with man holes at intervals of more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient man holes, it was the custom of the company not to run the trip during the time the workmen were going to and coming from work. The plaintiff, while coming from work, was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by defendant's negligence in letting the trip down, and on the verdict judgment was entered for plaintiff for $1,424 and costs. An appeal to the Full Court was dismissed, the Court refusing to reverse the findings of fact or to interfere with the damages as excessive. *Booker* v. *Wellington Colliery Company, Limited,* 9 B.C.R. 265.

D. Use of Machinery.

1. Injury from running chain.] — Plaintiff was employed as a brakeman at defendant company's smelter. Part of his duty was to indicate to the engineer to stop at the required spot where the slag-pots brought out from the smelter were to be emptied, and the engineer was not to move again until signalled to do so. Certain points existed where there were chains which were used to anchor the frame of the car to the track in order to prevent the locomotive being capsized when the pot, weighing about 12 tons, was being emptied. On the occasion in question, the engineer reached the chain point, when, considering he had gone too far, reversed, going back about two feet. Plaintiff, meanwhile, had dismounted and thinking the engineer was not going to back up, put his hand under

to draw the chain through and anchor the car. In doing so his hand was run over and seriously injured. There were hooks supplied for this purpose, but plaintiff did not use one:—Held, that the accident was due to a natural misunderstanding in the circumstances and that there was neither negligence nor contributory negligence. *Harrigan* v. *Granby Consolidated Mining, Smelting and Power Company, Limited*, 14 B.C.R. 89.

2. Injury from shingle saw.]—Plaintiff was injured whilst working as a shingle sawyer on a Perkins machine, the saw of which revolves in a horizontal position. His sole duty was to saw the shingles and attend to the saw. After the shingles passed from under the saw, they went down a chute to the floor. Plaintiff set up negligence on the part of defendants in not having the frame of the machine sufficiently high to provide such space below the chute as would lessen or do away with the possibility of the shingles becoming congested, and the congestion extending up under the saw. There was a conflict of evidence as to the height of the machine from the floor, but only as to a few inches. On the occasion of the accident, during the first hour in the morning, when his saw was sharp, plaintiff cut above the average of the day, and in that way the shingles became backed up under the saw. He, as sawyers usually do, leaned over the edge of the machine, put his hand under the saw, near the teeth, and took hold of a shingle to pull it out, when the friction upon the shingle drew his hand against the saw and cut off a portion of three fingers. Defendants denied negligence as to the construction of the machine; that if there was any negligence, it was not the cause of the accident, and that the sole cause was the plaintiff's unnecessarily using his hand to pull out the congested shingles whilst the machine was in motion, when he could, by a rope close within his reach, easily have stopped the machine; also, the machine being open at the top, the accumulation was readily observable and removable with a stick before the shingles became wedged:—Held, that the defendants had not been guilty of any negligence, and that therefore the plaintiff could not recover. *Guthrie* v. *W. F. Huntting Lumber Company, Limited*, 15 B.C.R. 471.

3. Electrical wires.]—The plaintiff M., the owner of a sawmill in which was installed a complete electrical system, properly insulated, was supplied with electric power by the defendants. The power was supplied over a low potential wire carrying a maximum of 2,300 volts, which was strung below a high potential wire, carrying 40,000 volts, on the same line of poles from the power house to within a short distance of the sawmill. There was no fuse for protection at the point where the wire ran from the service line into the mill. About 4 o'clock in the afternoon of the 22nd of August, 1911, lightning struck and shattered one of the defendants' poles, causing the upper wire to fall on the lower. The damage was repaired and the current again turned on about 7:30 in the evening; at 9 o'clock the mill took fire. Shortly before 9 o'clock the wires above the switchboard in the mill were observed to become incandescent, and immediately afterwards there was an explosion in the oil-switch in the mill, from which the fire resulted. In an action for damages for destruction of the mill by the defendants' negligence, the jury returned a verdict for the plaintiff, upon which judgment was entered:—Held, on appeal, that there was evidence which could not properly have been withdrawn from the jury, and that the jury's verdict for the plaintiff should not be disturbed. *McElmon* v. *British Columbia Electric Railway Company, Limited*, 18 B.C.R. 522.

4. Missing nut.]—F., a conductor and brakeman in the employ of the defendant company, while turning the brake wheel fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—Held, in an action by F.'s personal representatives, to recover damages in respect of his death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury. *Fawcett* v. *Canadian Pacific Railway Company*, 8 B.C.R. 393; 32 S.C.R. 721.

E. Works of construction.

1. At work on rocky ledge.]—Plaintiff was sent, with some fellow workmen, to clear an incline of stones and other natural

debris preparatory to the commencement of certain operations in connection with the defendant company's undertaking. A considerable quantity of such debris had been cleared when plaintiff proceeded to operate a drilling machine upon a rocky ledge. He was struck and injured by a stone which rolled from the incline. A jury found that if the incline had not been sufficiently cleared, it was due to the negligence of plaintiff and his fellow workmen, but that defendant company was also negligent in not protecting the incline with barriers to stop loose material from coming down. It was admitted by plaintiff that it was customary to clear off such inclines, or to use barriers, but not to do both; and there was some evidence that in this case barriers were unnecessary and dangerous:—Held, that there was no evidence justifying the jury in finding defendant company guilty of negligence, and that any negligence shown was that of the plaintiff's fellow servants. *Bergklint* v. *Canada Western Power Company, Limited,* 17 B.C.R. 443; 50 S.C.R. 39.

2. Raising material in elevator.]—The plaintiff, under the direction of a foreman of the defendant company, took a wheelbarrow of cement on an open elevator platform at the basement of a building under construction for use on the upper storeys. The platform was six feet one inch in length, four feet eight inches wide at one end and three feet at the other. After the elevator had gone from the basement to the ground floor other workmen got on, and when it had again started up there were two wheelbarrows, two boxes, two feet by 18 inches, and seven men on the elevator. The plaintiff was crowded over to one side, the heel of one of his feet protruding beyond the edge of the floor. Upon the elevator continuing up his heel was caught on a bolt that was projecting from the side of the elevator shaft and his foot was crushed between the bolt and the floor of the elevator:—Held, reversing the finding of the trial judge, who took the case from the jury and dismissed the action, that a prima facie case was made out by which a jury might find negligence and absence of contributory negligence. *Charles* v. *Norton Griffiths Company, Limited,* 18 B.C.R. 179.

F. Explosives.

Driving pick into dynamite.]—Plaintiff was injured by striking his pick in some dynamite in a tunnel of the defendant company. There was no evidence of how the dynamite happened to be there beyond the inference that it was from a previous blast, and plaintiff did not show that there had been no inspection after the blast. The jury gave a verdict for plaintiff on the ground that as the defendant company had not proved that such inspection was made, they were therefore guilty of negligence. The trial judge set aside the verdict as a finding tantamount to negativing negligence, and as wrong in that it was an attempt to throw upon the defendant company the burden of disproving negligence in the first place:—Held, on appeal, that the trial judge's view should be sustained. *Root* v. *Vancouver Power Company, Limited,* 17 B.C.R. 203.

G. Navigation.

Passing under bridge.]—A tug attached to a scow loaded with coal approached a bridge, the piers of which were being repaired by a railroad 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 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. Plaintiff was crushed against a pile by the scow and severely injured:—Held, that the master of the tug was negligent in not stopping and then making certain that it was safe to proceed. *Padularoga* v. *The Canadian Canning Company, Limited,* 12 B.C.R. 468.

II. Relationship of Parties.

A. Identification.

Passenger and driver.]—A person receiving a lift from a driver on a vehicle and sitting beside him is not so identified with the driver as to make the driver's negligence his negligence. *Loach* v. *British Columbia Electric Railway Company, Limited,* 19 B.C.R. 177.

B. Trespasser.

Right to recover.] — Notwithstanding that the injured party was trespassing on a railway company's line and thereby com-

mitting a breach of sec. 408 of the Railway Act (R.S.C. 1906, c. 37), the company is liable where the engine driver fails to apply the emergency brake at the time he becomes aware of the danger of accident by noticing the injured party attempting to cross the line. *Hinrich* v. *Canadian Pacific Railway Company*, 18 B.C.R. 518; 48 S.C.R. 557.

III. CONTRIBUTORY NEGLIGENCE.

1. Withdrawing case from jury.] — A judge is not justified in withdrawing a case from the jury on the ground that the evidence establishes contributory negligence on the part of the plaintiff unless no other conclusion can be drawn from it. *Daynes* v. *British Columbia Electric Railway Company*, 17 B.C.R. 498; 49 S.C.R. 518.

2. Ways — Defect — Volenti non fit injuria.]—Plaintiff, in the course of his duties as defendants' employee, in their mill, walked upon a roller way constructed for the purpose of carrying lumber from the saws out of the mill, consisting of a platform through which rollers, moved by connecting uncovered cog wheels at the sides, slightly projected. The jury found that there were other passage ways for the plaintiff, but none of them sufficient. That the non-covering of the cogs was a defect. That the plaintiff was cognizant of the danger of using the roller platform, but was not unduly negligent, and found damages:—Held, that, to support the defence of contributory negligence, it was necessary that there should be a direct and positive finding that the plaintiff voluntarily incurred the risk, and that there was no such finding. *Scott* v. *British Columbia Milling Co.*, 3 B.C.R. 221; 24 S.C.R. 702.

3. Ultimate negligence.]—Where, in an action under Lord Campbell's Act, a jury finds that the defendant was guilty of negligence and the deceased guilty of contributory negligence, but also finds that the defendant's motorman could have avoided the accident, notwithstanding the deceased's negligence, if the brake on the car had been in an effective condition, failure to provide a proper brake is "ultimate negligence" as distinguished from "original negligence," and the plaintiff was entitled to recover. *Loach* v. *British Columbia Electric Railway Company, Limited*, 19 B.C.R. 177; (1916) 1 A.C. 719.

4. Ultimate negligence.]—The deceased, while crossing the tracks of the defendant company, was struck by a train travelling at an excessive speed, and instantly killed. The railway at this point ran due east and west, and deceased was walking across in a north-westerly direction, with his back half turned to the approaching train. The engineer first saw the deceased when about 500 feet away. He whistled continuously until about 100 feet from deceased, when he reversed and put on the brakes, but not in time to avoid the accident. The deceased was 31 years old, his hearing and eyesight being good. The accident took place about 10 o'clock in the morning, the weather being bright and fair:—Held, on appeal, that although the plaintiff was guilty of negligence in not ascertaining that the train was coming, the engineer saw the danger in time to have slowed up and avoided the accident, and the defendant company was, therefore, responsible for his negligence. *Hinrich* v. *The Canadian Pacific Railway Company*, 18 B.C.R. 518; 48 S.C.R. 557.

5. Knowledge of danger spot.] — The plaintiff, an employee of a milk vendor, in the course of his duties, carried milk up and down an unguarded freight elevator in the defendant company's quarters, used for the storing and pasteurizing of milk. The floor of the elevator, when down, was used in conjunction with the other floor space where it stood, in going from one side to the other, there being a pit below the elevator floor about 15 feet deep, of which the plaintiff claimed to have no knowledge. The plaintiff had been at the building, in the usual course of his business, about ten times previous to the evening of the accident. When he entered the building about 8 o'clock, there were no lights. In crossing the floor space where the elevator shaft was (the elevator being at an upper storey), he fell in the pit and was injured:—Held, affirming the judgment of the trial judge taking the case from the jury and dismissing the action, that the plaintiff had knowledge of the locus in quo, and he was guilty of contributory negligence in attempting to cross the elevator floor without knowing whether the elevator was down or not. *Despointes* v. *Almond*, 18 B.C.R. 578.

6. Ultimate negligence.]—The plaintiff boarded a car of the defendant company, while in motion, about 40 feet from its starting point on a siding. The car being crowded, he and two other passengers were forced to stand on the lower steps of the

back entrance, he being forward of the other two and holding on to the railing at the doorway, where he remained up to the time of the accident. The car over-ran a switch it should have made, and while backing up, was met by another car on a parallel track. The plaintiff and the other two men were overhanging the devil-strip, and the cars, in passing, forced the two men into the vestibule, which had the effect of shoving the plaintiff out and between the cars, where he was thrown to the ground, sustaining injury. When the car first started, the conductor had cleared the lower step of passengers and then went ahead to flag the car, not seeing the plaintiff getting on board. At the trial the jury found that the defendants were guilty of negligence and the plaintiff of contributory negligence, but that the defendants' negligence was the proximate cause of the accident, and they entered a verdict for the plaintiff:—Held, that the defendants were liable; that the plaintiff was negligent in standing on the step, but the ultimate negligence was that of the defendants' servants in not exercising reasonable care in backing the car. *Williams* v. *British Columbia Electric Railway Company, Limited,* 18 B.C.R. 295.

7. Collision between tram and motor car.]—Plaintiff was injured in a collision between a motor car, driven by himself, and a tramcar operated by defendant company:—Held, that the plaintiff's own negligence was such as to disentitle him from recovering; that the verdict of the jury absolving him from negligence was an unreasonable finding, and that the action should be dismissed. *Monrufet* v. *British Columbia Electric Railway Company, Limited,* 18 B.C.R. 91.

8. Attempt to rescue.]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor notwithstanding that a penalty is imposed for breach of the statutory duty. The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting safely out, is not as a matter of law "contributory negligence"; whether the plaintiff did anything which a person of ordinary care and skill would not have done under the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contribute to the accident, was for the jury to decide. *Love* v. *The New Fairview Corporation Limited,* 10 B.C.R. 330.

9. Disregard of rules.]—Where printed rules were posted near the mouth of a mine providing among other things, that signals should be given, by any miner wishing to go down the mine or be brought up by means of bells, the number telling the engineer and pitman what was required, and the jury found that it was not usual in descending to signal with the bells and that the injured miner knew of, but had not complied with the rules, it was held that there was no contributory negligence by non-use of the signals, the rules having, with the consent of the employees and the persons in charge of the men, been disregarded, which indicated their abrogation. *Warmington* v. *Palmer,* 8 B.C.R. 344; 32 S.C.R. 126.

10. Order of foreman.]—Plaintiff sustained injuries while in defendant company's employment as an engineer, owing, as alleged by him, to his having obeyed a peremptory but negligent order of the foreman. The jury awarded him $3,000 damages:—Held, on appeal (per Irving, J.A.), that the plaintiff not having made out a case sufficient to go to the jury, he should have been nonsuited. Per Galliher, J.A.: That there was evidence of contributory negligence on the part of the plaintiff, and the jury ought to have found contributory negligence. Per Macdonald, C.J.A. (dissenting): That as there was evidence of negligence on the part of defendant company, and an absence of contributory negligence on the part of the plaintiff, as found by the jury, the verdict should stand. In the result the verdict was set aside and the action dismissed. *Latham* v. *Heaps Timber Company, Limited,* 17 B.C.R. 211.

See COLLISION.

See MASTER AND SERVANT.

See TORT.

NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE.

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NEW TRIAL.

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I. In General.

1. Alternative—Motion for new trial.]—It is not competent to an appellant uno flatu, to move alternately for reversal of the judgment as entered on the findings of a jury or for a new trial. *Foley* v. *Webster*, 2 B.C.R. 137.

2. Jury — Disregarding material evidence.]—The Court has power to order a new trial where the findings show that the jury have disregarded material undisputed facts in evidence. *Robson* v. *Suter*, 1 B.C.R., Pt. II., 375.

3. Divisional Court — Referring back motion for fresh evidence.] — The Divisional Court, upon a motion for a new trial, being of opinion that there was no evidence upon which the damages assessed could be calculated, directed a further inquiry as to such damages, and adjourned the motion in the meantime. *Parks* v. *Blackwood*, 2 B.C.R. 346.

4. Whether or not expedient in view of result of other decisions by Privy Council arising out of same accident—Municipal corporation — Negligence by allowing a bridge to get rotten.]—In an action for negligence against a municipality (reported 5 B.C.R. 553), the judge gave judgment for the defendants, holding that the findings of the jury amounted to a verdict of nonfeasance only. Other actions by other plaintiffs arising out of the same occurrence had been decided against the defendants by the Privy Council:—Held, by the Full Court, 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. *The Corporation of the City of Victoria*, 7 B.C.R. 342.

5. Lack of evidence.]—A new trial will not be granted to enable the plaintiff to obtain evidence which either was in his possession at the time of the trial or by proper diligence might have been obtained. *Brown* v. *British Columbia Electric Railway Company*, 15 B.C.R. 350.

6. New cause of action, raising.]—Where the plaintiff had misconceived his cause of action, a new trial was granted with leave to the plaintiff to amend his pleadings. *Wilson* v. *Canadian Development Co.*, 9 B.C.R. 82.

7. Consideration — Illegality of.] — Where the assignment in question was void for illegality, it appearing that it was made in consideration of the assignee refraining from taking criminal proceedings against the assignor, as the question of illegality was not raised on the pleadings, a new trial was granted on payment of costs, to give the assignee an opportunity of adducing evidence to contradict the illegality of the consideration. *The Meriden Britannia Co.* v. *Bowell*, 4 B.C.R. 520.

II. Conduct of Trial.

1. Litigant bound by conduct of trial.]—In an action for damages for personal injuries sustained by a workman engaged in decking logs caused by the alleged negligence of defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness, and that plaintiff did not have a full knowledge and appreciation of the danger:—Held, by the Full Court, affirming a judgment in plaintiff's favour that although the findings read alone did not establish any legal liability on the part of defendants, yet as the issues for the jury were limited to the questions submitted to them, and as defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence. The provisions of sec. 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted. The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case. The proviso of said section giving a party the privilege of having his right to have the issues for trial submitted to the jury enforced by appeal without any

exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass. *Scott* v. *The Fernie Lumber Company, Limited,* 11 B.C.R. 91.

2. Exclusion of witnesses—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 show that he was substantially prejudiced thereby in order to get a new trial. Quaere, in case of harmless exclusion. *Bird* v. *Vieth,* 7 B.C.R. 31.

3. Proof of title — Deference to trial judge in refraining from completing.]— Counsel for adverse claimant in deference to a remark of the trial judge, did not complete the proof of his own title:—Held, that he should have pressed to be allowed to complete it, but under the circumstances there should be a new trial. *Caldwell* v. *Davys,* 7 B.C.R. 156.

4. Non-submission of question of fact to jury.]—On 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 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.

5. Jury — Discharge of — Subsequent proceedings.]—In an action for damages caused by water being backed up on to plaintiff's premises, the jury did not answer the question put, but found that certain grading of a street caused the damage, but did not state that the grading was done by the defendants, and judgment was entered for plaintiff on the verdict:—Held, on appeal, that from the circumstances of the case, it was evident that the jury found that the grading was done by the defendant. After judgment was pronounced and the jury was discharged, at the direction of the Court, the jury was re-called 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. 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. *Waterland* v. *City of Greenwood,* 8 B.C.R. 396.

6. Cross-examining questions to jury—Right of jury to find general verdict.]— The jury may believe part and reject part of a witness' evidence. Cross-examining questions to a jury are not to be encouraged, as they are calculated to induce the jury to stand on their undoubted right to return a general verdict. *Steves* v. *The Corporation of the District of South Vancouver,* 6 B.C.R. 17.

7. Questions to jury—Findings—Entering judgment against.] — The trial judge submitted certain questions to the jury with the following stated reservation: "Subject to the law governing the contract and its construction"; but judgment was given, for reasons stated by the Court, at variance with the findings of the jury therein:—Held, that the trial judge should have explained the law governing the contract and its construction to the jury, and then taken their opinion on the questions submitted; and that so long as the findings of a jury stand unreversed, judgment must be entered in accordance therewith. *McDonald* v. *Methodist Church,* 5 B.C.R. 521.

8. Failure to ask for specific instruction.] — Owing to fog disarranging the schedule time of defendant company's cars, they were not running on time. That which the plaintiff was riding in stopped on a bridge. There was another car immediately ahead which, in due course, would take plaintiff to her destination before that in which plaintiff was. The conductor asked or told her and another passenger to transfer to that car, and in doing so, she was injured by falling on the bridge in the darkness:—Held, that in the absence of evidence to the contrary, it must be assumed that the conductor had authority to use his judgment in the circumstances to forward the passengers to their destination. The question of the scope of the conductor's authority having been twice brought to the notice of the judge during the trial, yet he did not direct the jury on that point, and

the case having been allowed to go to them without direction, and no objection taken to the charge on that account:—Held, that the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass. *Schnell* v. *British Columbia Electric Railway Company, Limited*, 15 B.C.R. 378.

9. Payment into Court mentioned to jury.]—In an action for damages arising out of a newspaper libel, the defendants pleaded a mistake of their reporter, published an apology, and paid into Court $5, as sufficient to satisfy the plaintiff's claim. A special jury awarded the plaintiff $5,000 damages:—Held (Irving, J.A. dissenting), that there should be a new trial, because the plaintiff's counsel, in addressing the jury, had referred to the fact that money had been paid into Court and mentioned the amount, contrary to Order XXII., r. 22, and might thereby have influenced the jury:—Held, further, that the rule is applicable in an action for libel. Per Irving, J.A.: The rule was applicable and was violated; but a new trial should not be ordered, because the defendants' counsel did not ask to have the jury discharged, which he should have done if he thought the defendants were prejudiced. Per Martin, J.A.: The objection to the violation of the rule should have been given effect to by the trial judge, who should have discharged the jury of his own motion, and given directions for a rehearing. The alleged libel purported to be a report of a police court trial, in which it was stated that the magistrate had reserved sentence, whereas, in fact, he had reserved judgment. He afterwards dismissed the charge. The plaintiff, in his statement of claim, limited his complaint to the libellous statement that he had been convicted; he made no complaint concerning the report of the evidence given at the trial:—Held, per Macdonald, C.J.A. and Irving, J.A., that the trial judge properly refused to permit the defendants' counsel to cross-examine the plaintiff to elicit what had been said about the plaintiff by witnesses in the police court. The proper mode of proving the police court proceedings, where admissible, is by putting in the depositions: *Rex* v. *Prasiloski* (1910), 15 B.C.R. 29; and the rejected evidence was irrelevant, having regard to the frame of the pleadings. Per Irving, J.A.: The ruling of the trial judge was acquiesced in by counsel for the defendants, and he did not press the questions. Also, the amount of the damages was not so excessive as to justify interference by the Court of Appeal. *Dickinson* v. *The World Printing & Publishing Company, Limited, and L. D. Taylor*, 17 B.C.R. 401.

10. Judge's communication with jury.]—While it is inexpedient for a judge to communicate with the jury otherwise than in open Court, yet his doing so is not necessarily a ground for a new trial. *Greer* v. *Reg.*, 2 B.C.R. 112.

11. Refusal to allow question in cross-examination.]—An Appellate Court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which had not, at the time it was put to the witness, relevancy to the issues. *Brownell* v. *Brownell*, 42 S.C.R. 368.

12. Behaviour of counsel.]—The plaintiff, before the action, had been divorced by her husband (the defendant) on the ground of adultery with H., who subsequently married her. After the divorce H. wrote scandalous and obscene letters respecting the defendant to defendant's children, and a warrant was issued for his arrest. He was arrested by detectives in the plaintiff's rooms in an apartment house about half past eight in the evening. A newspaper published an account of the trial, when the defendant complained over the telephone to the editor that the affair was not properly reported, saying: "Detective Champion said that he arrested Hallren (H.) last November in the bedroom occupied by Nettie, the divorced wife of Holden." The words were subsequently published in the newspaper. On this statement the plaintiff sued for libel. The jury awarded $25,000 damages, for which judgment was entered. The evidence showed that throughout the trial plaintiff's counsel continually made suggestions of evidence that he knew he could not produce or that, if submitted in evidence, would be ruled out:—Held, on appeal, that there should be a new trial on the ground of excessive damages:—Held, further, that the plaintiff pay the costs thrown away by reason of the abortive trial because of the course adopted by plaintiff's counsel throughout the trial. Per Macdonald, C.J.A.: That the tactics pursued at the trial might have had a great deal

to do with the excessive damages arrived at by the jury, who were evidently awarding alimony, and not damages for slander. Per Irving, J.A.: That although the failure of counsel for defendant to object to going on with the trial is as a rule necessary for the allowance of a new trial on the ground of inflammatory speeches by counsel, yet justice would be done in this particular case by ordering a new trial, notwithstanding such failure. *Hallren* v. *Holden*, 18 B.C.R. 210.

III. Wrongful Admission or Rejection of Evidence.

1. Formal tender of evidence.]—Where a party asks for a new trial on the ground of the wrongful rejection of evidence, he must show that the evidence sought to be given was distinctly tendered so that the attention of the judge was directed to the question of admission or rejection. *Hopkins* v. *Gooderham*, 10 B.C.R. 250.

2. Refreshing memory.] — One of the witnesses at the trial endeavoured to refresh his memory from an extended note of the accident made at the time. The trial judge refused to permit this:—Held, that there had been an improper rejection of evidence, and that the defendants were in any event entitled to a new trial. *Daynes* v. *British Columbia Electric Railway Company, Ltd.*, 17 B.C.R. 498.

3. Reply.]—Where the defendant gives evidence which casts the burden of proof on the plaintiff, the latter is entitled to give evidence in reply, and the rejection of such evidence entitles the plaintiff to a new trial. *McAdam* v. *Kickbush*, 11 B.C.R. 488.

4. Evidence of authority.]—The defendant's steamer which previously had been employed in carrying cargo and passengers between White Horse and Dawson, had gone out of commission on 23rd September, 1898, and on that day, and while on her way down Lake Lebarge to winter quarters, she took in tow the plaintiff's scow laden with goods. After proceeding some way the weather became bad and in endeavouring to get into shelter the scow foundered. In an action for damages, evidence was tendered by the owners of the steamer that those in charge of the steamer had been particularly warned not to tow, but this evidence was objected to and excluded:—Held, that the judgment entered for the plaintiffs should be set aside with liberty to them to have a new trial upon paying the costs of the abortive trial. *Courtnay* v. *Canadian Development Co.*, 8 B.C.R. 53.

5. Evidence taken after close of trial.]—It is undesirable that further evidence should be heard after the close of the trial. *Andrews* v. *Pacific Coast Coal Mines, Ltd.*, 15 B.C.R. 56.

IV. Misdirection.

1. Objection not taken at trial.]—Notwithstanding the rule that objections going to misdirection not taken at the trial are not open, on appeal, the Court may mero motu suo consider the question of whether there was miscarriage of justice arising from misdirection and direct a new trial. *British Columbia Iron Works Co.* v. *Buse*, 4 B.C.R. 419.

2. Whole charge to be regarded.]—It is no misdirection sufficient to require a new trial, that the judge has used inaccurate language in the course of a long summing up, if the charge as a whole afforded a fair guide to the jury. *Gray* v. *McCallum*, 2 B.C.R. 104.

3. Jury—Power of Full Court to order new trial without.]—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 sec. 66 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 as to an application by counsel for further direction by the judge. (3) Mere complexity of fact is not a ground for depriving parties of their inherent right to a jury. *Alaska Packers' Association* v. *Spencer*, 10 B.C.R. 473.

4. Corporation—Trespass—Master and servant — Respondeat superior — Agency —New trial—Misdirection—Rule 446.]—A servant of the defendant corporation employed to cut timber on its lands, knowingly trespassed and cut timber off plaintiff's land which adjoined, and the defendants' manager, general foreman and other servants, knowingly took and included it in defendants' boom and hauled it away. It was afterwards cut up and sold along with defendants' lumber. Evidence was given for plaintiff and denied by defendants that the trespass was committed by instructions of the manager. The jury found a verdict for the plaintiff:—Held, per Drake, J., on motion for judgment: If a servant of a company commits a tort in the course of his employment and for the benefit of his employer, whether by his direct orders or not, the employer is liable, even if the act was unknown to or actually forbidden by him. On appeal and motion for a new trial:—Held, per Crease, J., following *Clark* v. *Molyneux*, 3 Q.B.D. 237: The whole of the summing up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions:—Held, per Walkem, J.: That it was misdirection by the trial judge to tell the jury that they had only to consider the question of damages, as the question of agency of the servant for the master by ratification or otherwise had to be left to them. That the defendants were liable for the tortious acts of their manager and foreman on the ground that they had the entire control of their business. That under r. 446, the Court of Appeal, notwithstanding an apparent misdirection of the jury, can draw such inferences of fact as are not inconsistent with the verdict. *Harris* v. *Brunette Saw Mill Co.*, 3 B.C.R. 172

5. Non-direction.]—Non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case, the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being no evidence on which the jury could find that such point was within the right of way, the learned judge would not have been justified in charging to that effect. *Blue* v. *Red Mountain Ry. Co.*, 12 B.C.R. 460.

6. Two causes of action.]—Where the plaintiff frames his claim as for deceit, and also for negligence of an agent, the fact that the judge charges the jury on the cause of action for deceit, and findings are taken thereon, does not invalidate a verdict for the plaintiff on the ground of negligence. *Wolley* v. *Lowenberg*, 3 B.C.R. 416.

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

8. Failure to submit question.]—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 misdirection. *Waterland* v. *City of Greenwood*, 8 B.C.R. 396.

9. Practice.]—It is too late to rely on misdirection before the Judicial Committee of the Privy Council which has not been excepted to at the trial or in the notice of the appeal to or in oral argument before the Court of Appeal. *White* v. *Victoria Lumber & Manufacturing Co.*, 1910, A.C. 606.

10. Direction not explicit.]—The question for the jury was, whether or not the place of origin of fire which caused the harm

was within the limits of the "right of way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible materials, and their finding was that it did, but the charge of the judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by sec. 118 (j) of that Act, might be treated as included within the "right of way"; and, in effect, the judge made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section:—Held, that in consequence of the want of more explicit directions to the jury on the question of law, and the misdirection as to the issues, the defendants were entitled to a new trial. *Blue* v. *Red Mountain Railway Co.*, 12 B.C.R. 460; 39 S.C.R. 390.

11. Judge's opinion on 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 defendants, but he also told them that the matter was entirely for them to decide:—Held, not misdirection. *Harry* v. *The Packers' Steamship Company*, 10 B.C.R. 258.

12. Examination for discovery.] — The judge, in charging the jury, may read to them parts of an examination for discovery, additional to the parts put in evidence by counsel. *Adams* v. *The National Electric Tramway & Lighting Co.*, 3 B.C.R. 199.

13. As to ultimate negilgence.] — In submitting the case to the jury in an action for damages arising out of injury to a child by one of the defendant Company's cars, five questions were submitted by the judge, who also instructed the jury that they might, if they chose, bring in a general verdict. The jury returned a verdict for the plaintiff in $300 damages. On the judge asking whether they had answered the questions, the foreman replied that they had answered three: "(1) Was the Company guilty of negligence? Yes. (2) If so, in what did such negligence consist? Overspeed. (3) Was the plaintiff guilty of contributory negligence? Yes." The trial judge, on this, dismissed the action:—Held, that while it is probable that the jury intended to return a general verdict, yet the matter was not free from doubt, and should have been cleared up before the jury was discharged. There should, therefore, be a new trial. One of the questions not answered was "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?" The judge said, in submitting this question: "I want you to consider that last element, because it is not: 'Could he have prevented the accident if running at an unreasonable rate of speed?' ":—Held, that this question was improperly framed, and the jury were not properly directed; that the original rate of speed was the original negligence, and after finding such negligence the jury had to consider whether, notwithstanding the unreasonable rate of speed, the motorman, after seeing the boy commit or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it. New trial ordered, costs of appeal to appellant and costs of trial below to abide the event of the new trial. *Rayfield* v. *British Columbia Electric Railway Company*, 15 B.C.R. 361.

14. Forest fires.] — In an action for damages caused by forest fires alleged to have been started by the defendant's servants there was evidence that other fires, which had been previously burning, had united through a change of wind. The judge was requested by the defendant to ask the jury to find if any of the other fires had caused the loss complained of, and if so, which, but the judge refused to do so and charged the jury to find which fire was the preponderating cause of the damage:—Held, no misdirection. *King Lumber Co.* v. *Canadian Pacific Railway Company*, 17 B.C.R. 502.

15. Charge in action of contract.]—In an action on a written contract the judge should explain to the jury the law governing the contract and its construction, and then take their opinion on the questions submitted. *Macdonald* v. *Methodist Church (Trustees of)*, 5 B.C.R. 521.

16. Specifying objections.] — On a motion for a new trial for misdirection, the objections must be specified. *Croasdaile* v. *Hall*, 3 B.C.R. 384.

17. Bearing of law on the facts.]—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 is defective in this respect there should be a new trial. *Alaska Packers Association* v. *Spencer*, 10 B.C.R. 473; 35 S.C.R. 362.

18. Refusal to put questions.]—In an action for damages caused by forest fires, alleged to have been caused by the negligence of defendant Company's servants, there was some evidence of other fires which had been burning previously having united through a change in the wind. Counsel for defendant Company requested that the jury be asked to find if any such fires caused the damage complained of, and if so, which. The trial judge declined, and instructed the jury to find which fire was the preponderating cause of the damage. The jury returned a verdict against defendant Company:—Held, that the refusal of the trial judge to put the questions suggested did not, viewing the whole of the judge's charge, prejudice the defendant Company, and that there was therefore no misdirection. *King Lumber Company, Limited* v. *Canadian Pacific Railway Company*, 17 B.C.R. 502.

V. Erroneous Verdict.

A. In General.

1. Juror acting on subsequent trial.]—If a juror on the trial of an action 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. *Lowenberg, Harris & Co.* v. *Dunsmuir*, 9 B.C.R. 303; 34 S.C.R. 228.

2. Crediting witnesses.]—A jury may accept part and reject part of a witness' evidence. *Steves* v. *District of South Vancouver*, 6 B.C.R. 17.

3. Questions.]—If the judge does not submit questions to the jury, it is no ground for a new trial if he has properly instructed the jury. *Snow* v. *Crow's Nest Pass Coal Co.*, 13 B.C.R. 145.

4. Bias.]—On the morning of the second day of the trial of an accused person on a charge of procuration, the foreman of the jury informed the judge that one of the jurymen had stated that he was prejudiced, and asked the advice of the judge on the point. The judge refused to take any action further than directing that the trial proceed:—Held, that the course adopted was right; that a juryman ought not to volunteer a statement of that kind. Jurors, after they are sworn, are expected to live up to their oaths. *R.* v. *Mah Hung*, 17 B.C.R. 56.

B. Lack of Evidence to Sustain.

1. Findings of jury.]—Where a case has been properly allowed to go to the jury and there is evidence before them from which they could reasonably reach the conclusion at which they arrived, the verdict should not be disturbed on appeal. *Longman* v. *Cottingham*, 18 B.C.R. 184; 48 S.C.R. 542.

2. Perversity.]—The Court will not set aside the verdict of a jury unless it is wholly unsupported by the evidence, or is contrary to such a body of evidence or rests on such slight foundations as to make it obvious that the jury were perverse or invincibly prejudiced. *Gray* v. *McCallum*, 2 B.C.R. 104.

3. Setting aside.]—The verdict of a jury should not be disturbed as being against evidence unless it is one which the jury, on the evidence, could not reasonably have formed. *Harper* v. *Cameron*, 2 B.C.R. 365.

4. Sufficiency of evidence.]—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 first trial with special jury plaintiff got a verdict in his favour, and on appeal a new trial was ordered. At the second trial a non-suit 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 third trial. James Muirhead 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 trial:—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 sub-sec. 5 of sec. 59 of the Jurors' Act. D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned, and agreeing to pay a commission of five per cent. on the

selling price, such commission to include all expenses. H. failed to effect a sale. In an action to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, the jury returned a verdict as follows: "Mr. Foreman: In reply to the questions, we have found a general verdict. We find that the plaintiff is entitled to compensation of $9,667.62. The Court: So that disposes of the questions? Mr. Foreman: Yes. Mr. Foreman handed in a written verdict as follows: (1) Did the defendant, Mrs. Dunsmuir, verbally authorize the plaintiff, say, in the middle of 1890, 'to do his best' to sell her mine; and if so, was any compensation mentioned at the time? A. In view of concessions made subsequently we believe there was. (b) A promise of fair treatment in case of no sale. (2) Were the documents, which were dated later, viz., on the 18th of September, 1890, and 18th of January, 1892, which provided that the plaintiff was to be paid a commission of five per cent., which was 'to include all expenses' in the event of his effecting a sale, intended to represent all the terms agreed upon between the parties with respect to a sale and to compensation to the plaintiff? A. Yes, had sale been effected. (3) If you should be of opinion that the above documents were not intended to represent the whole agreement between the parties, what agreement was come to? Answer to question number one expresses our view on this point. (4) Is the plaintiff entitled to any damages, and, if so, how much—stating amount of disbursements, including sums for which he was liable and also amount of compensation separately? The plaintiff is entitled to compensation. We have no means of proving the accuracy of his statement of disbursements, but accept it as correct, with the exception of one item of $525, which we have deducted. We find the plaintiff is entitled to compensation for expenses to the amount of $9,667.62":—Held, by the Full Court, affirming the judgment entered at the trial in the plaintiff's favour: (1) The agreement found by the jury was not illusory. (2) The verdict supported the judgment. (3) The verdict was not one which the jury could not reasonably find. *Harris* v. *Dunsmuir,* 9 B.C.R. 303; 34 S.C.R. 228.

5. No evidence.] — A clerk from one bank presented at another bank a cheque of a customer of such last mentioned bank, but at the wrong ledgerkeeper's wicket, and was directed to present it at another wicket. There was no evidence that this was done, and a telegram was sent out by the first mentioned bank that the drawer of the cheque had no account:—Held, that the trial judge was right in taking the case from the jury and dismissing the action for want of sufficient evidence. *Rear* v. *The Imperial Bank of Canda,* 13 B.C.R. 345; 42 S.C.R. 222.

6. Weight of evidence.]—In an action for malicious prosecution in which the verdict of the jury was in favour of the plaintiff, the case centred on what took place at a certain interview between the plaintiff and the defendant, at which the defendant promised to give the plaintiff a certain sum of money, namely, whether the money was promised voluntarily or in consequence of the plaintiff's threats. The defendant's evidence was corroborated by a witness, who overheard what took place at the interview, and by the plaintiff's admissions at the time of his arrest. The surrounding circumstances also appear to favour the truth of the defendant's story:—Held, on appeal, that the verdict of the jury should be set aside and a new trial ordered. *Dickinson* v. *Harvey,* 18 B.C.R. 461.

7. Weight of evidence.]—Deceased was employed in the defendants' workshops, and travelled to and from his work on a pass. The condition on the back of the pass, exempting the Company from liability for damages to person or property of holder of pass, was not signed by the workman. Deceased was a man skilled in his particular trade, and refused to work for the Company unless given transportation. The jury found as a fact that deceased was travelling on a pass, but that there was not sufficient evidence to show that he was made acquainted with the conditions thereon, and gave a verdict for $9,000, which, on motion for judgment, was sustained by the trial judge:—Held, per Macdonald, C.J.A., and Galliher, J.A.: That the finding as to want of knowledge of the condition on the pass should not be interfered with. Per Irving, J.A.: That the finding was against the weight of evidence. *Farmer* v. *The British Columbia Electric Railway Company, Limited,* 16 B.C.R. 423.

8. Sufficiency of evidence.]—Deceased, a motorman, met his death in a collision between two cars of the defendant Company, on the 7th of November, 1908, but the writ in the action was not issued until the 2nd

of August, 1909, the action being brought under Lord Campbell's Act. The questions at issue were: (1) Was the accident caused by the negligence of a fellow servant? On this point the facts were that the cars leaving Vancouver had a double line of track as far as a place called Cedar Cottage, after which there was only a single track. On foggy nights there was a watchman at Cedar Cottage to advise conductors and motormen as to the condition of traffic. The men in charge of the colliding cars were killed, so it was not possible to ascertain whether the watchman had advised the conductor or motorman whether the line was clear. The jury, on the evidence, found a defective system:—Held, that the appeal from the verdict based on the findings should be dismissed, Martin, J.A. expressing the opinion as to there being no evidence to support such a finding. *McDonald* v. *British Columbia Electric Railway Company, Limited*, 16 B.C.R. 386.

9. Sufficiency of evidence.] — In an action for damages resulting from the death of a passenger on a car of the defendant Company, it appeared that deceased alighted from a car about 7.40 o'clock in the evening. There was another car immediately behind that from which he alighted. He passed between the cars, and while doing so, the motorman on the rear car called to him to "look out." He continued on, however, and when he reached about the centre of the parallel track, was struck and killed by a car coming in the opposite direction at an excessive speed. At the trial the jury brought in a verdict for the plaintiff:—Held, on appeal, that there was sufficient evidence to support the finding of the jury. *Gentile* v. *British Columbia Electric Railway Company, Limited*, 18 B.C.R. 307.

10. Sufficiency of evidence.]—Deceased, an employee of the Corporation of Vancouver, was run down and killed by a motor-car while working on a bridge clearing snow shortly after midnight. On the question of the identity of the motor-car that struck deceased there was the evidence of the driver of a sleigh who was close by and saw the accident, he swearing that from the time he came on the south end of the bridge and reached the scene of the accident, the only car to pass him (which was going south, as he was) was the car that struck deceased, and the defendant admitted that after coming onto the south end of the bridge, and before he reached the spot where the accident occurred, he passed a sleigh. This evidence was corroborated by one of deceased's fellow workmen, who swore that the only motor-car that passed between three minutes to twelve and the time of the accident was the car that killed deceased. The jury found in favour of the plaintiffs:—Held, on appeal, that there was evidence upon which the jury might reasonably return the verdict which they did. *Longman* v. *Cottingham*, 18 B.C.R. 184; 48 S.C.R. 542.

11. Issue of fraud.]—The Court will not as a rule grant a new trial on the ground that the verdict is against the weight of evidence upon an issue of fraud, particularly where the charge involves a criminal offence, and the verdict is in favour of the party charged. *Cope and Taylor* v. *Scottish Union Co.*, 5 B.C.R. 329.

12. Against undisputed evidence.]—Where a jury answered one of seven questions put to them at the trial against undisputed evidence a new trial was ordered. In dealing with the verdict of a jury, the Court is bound to see whether the scales of justice are held in an apparently even manner. Where several questions were left to the jury, one of which, though not absolutely decisive in the matter, was answered contrary to uncontradicted evidence, a new trial was granted. *Robson* v. *Suter*, 1 B.C.R., Pt. II., 375.

13. Case improperly left to jury—Excessive damages—Libel.]—W., a judge of the Supreme Court of British Columbia, brought an action against H., editor, for a libel contained in the following article published in his paper: "The McNamee-Mitchell Suit. In the sworn evidence of Mr. McNamee, defendant in the suit of McKenna v. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership (in the drydock contract) out in British Columbia, one of whom was the Premier of the Province.' The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure that McNamee must be labouring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly nor

allowed to pass unheeded." The innuendoes alleged by the declaration to be contained in this article were: 1. That W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money. 2. That he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the Government. 3. That he committed criminal offences punishable by law. 4. That he continued to hold his interest in the contract after his elevation to the bench:—Held, that the article was susceptible of the first of the above innuendoes, but not of the others, which should have been, but were not, distinctly withdrawn from the consideration of the jury at the trial. On the trial the jury found a verdict for the plaintiff, with $2,500 damages:—Held, that the case was improperly left to the jury, but the only prejudice sustained by the defendant thereby was that of excessive damages, and the verdict might stand on the plaintiff consenting to the damages being reduced to $500. *David W. Higgins* v. *The Honourable George Anthony Walkem*, 17 S.C.R. 225.

14. Libel.]—Where two allegations of wrong-doing on the part of the plaintiff as an officer of the Crown were proved, and there was no proof of their truth, and the judge charged in favour of the plaintiff but the jury returned a verdict for the defendant, the plaintiff was held to be entitled to a new trial. *Green* v. *The World Printing & Publishing Co.*, 13 B.C.R. 467.

C. Incomplete Verdict.

1. Inconclusive findings.]—The plaintiff's intestate had a contract with the defendant company to repair a bridge, and the jury found that he went thither on such business on a coal train without any ticket, but with the consent of the official in charge, and that the latter had no authority, unless by usage, to allow the deceased to travel on the train:—Held, that the findings were inconclusive and that there must be a new trial. *Nightingale* v. *Union Colliery Co.*, 8 B.C.R. 134.

2. Failure to return direct finding.]—Defendant is not entitled to a new trial upon the ground that the jury have failed to return a direct finding upon a question put to them upon the issue of contributory negligence where the other findings support judgment for the plaintiff. From the moment the plaintiff makes out a prima facie case that the injury was caused by the negligence of the defendant, the onus is cast on the defendant, if he sets it up, to show contributory negligence. *McMillan* v. *Western Dredging Co.*, 4 B.C.R. 122.

3. Verdict for damages.]—A verdict as to damages is equivalent to a general verdict supplementing any special findings and importing such findings as are necessary to a general verdict. *Scott* v. *British Columbia Milling Co.*, 3 B.C.R. 221.

4. Indefinite—May be construed from the circumstances of the case.]—In an action for damages caused by water being backed up on to plaintiff's premises, the jury did not answer the questions put, but found that certain grading of a street caused the damage, but did not state that the grading was done by the defendants, and judgment was entered for plaintiff on the verdict:—Held, that from the circumstances of the case, it was evident that the jury found that the grading was done by the defendant. *Waterland* v. *City of Greenwood*, 8 B.C.R. 396.

5. Jury finding answers to questions and also returning general verdict—Effect of.]—Where a jury, besides returning answers to the questions put to them, of their own accord, stated that they were all for a verdict for the plaintiff:—Held, that a general verdict, in addition to special findings, imports a finding in favour of the party for whom it is given of every fact in issue necessary to sustain it, besides the facts specially found. *Harper* v. *Cameron*, 2 B.C.R. 365.

6. Jury unable to agree.]—In an action for work and materials done upon and provided for certain ships, where the jury did not answer all the questions submitted, the trial judge was right in giving judgment for the plaintiffs for the amount claimed and covered by the certificate of the agent of the defendant, and in discharging the jury as being unable to agree in respect of the other matters litigated, and in reserving further consideration thereof. *Galbraith* v. *Hudson's Bay Co.*, 7 B.C.R. 431; C.S.C., 7th December, 1900.

VI. EXCESSIVE DAMAGES.

1. Perversity.]—A verdict will not be considered perverse merely where the damages are considered excessive. *Hopkins* v. *Gooderham*, 10 B.C.R. 250.

2. Award of $11,500 for injury in collision.]—Plaintiff was injured in a collision between two cars of the defendant Company, the collision having occurred admittedly through the Company's negligence. No evidence was offered by the Company at the trial. Plaintiff's hip was dislocated and permanently injured, rendering him unable to follow certain branches of his trade, that of tinsmith. There was some medical evidence that an operation might improve his condition so as to reduce the disability. He was, at the time of the accident, 24 years of age, and earned $4 per day when working. His medical and other expenses in connection with the accident amounted, roughly, to $500. Added to this should be loss of work on account of the accident. In an action for damages, the jury awarded him $11,500:—Held, that the damages were excessive, and there should be a new trial. *Farquharson* v. *The British Columbia Electric Railway Company, Limited,* 15 B.C.R. 280.

3. Award of $15,000 for injury in railway accident.]—In an action for damages for injuries sustained in a railway accident, the negligence was admitted and the case tried only on the question of amount of damages. The sum of $15,000, the amount sued for, was awarded, and defendants appealed. A new trial was ordered, but it was directed that, in the circumstances, the plaintiff should pay the costs of the first trial. *Carty* v. *British Columbia Electric Railway Company, Limited,* 16 B.C.R. 3.

4. After new trial.]—Where a plaintiff had recovered damages which in the opinion of the Court of Appeal were excessive, the Court ordered a new trial. On the second trial a jury increased the damages from $15,000 to $17,500, and the Court of Appeal, under marginal r. 869a, reduced the damages to $12,000. *Taylor* v. *British Columbia Electric Railway Company, Limited,* 16 B.C.R. 420.

5. Directions as to measure of damages.]—The defendant Company, instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and for the faulty manner in which the work was carried out plaintiff sued for the amount of the damage caused by the fire, and also for damages in respect of loss occasioned by reason of being unable to carry on her business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal, the Full Court, being of opinion that the amount of the damages was excessive, with plaintiff's consent, reduced it to $1,000. Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and as the case had been allowed to go to the jury without such directions without objection by defendants' counsel, and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed. *Murray* v. *Royal Insurance Co.,* 11 B.C.R. 212.

VII. Actions for Negligence and Under Employers' Liability Act.

1. Assumption of risk.]—Where a jury under the judge's charge do not consider whether the plaintiff voluntarily assumed the risk, no damages can be given under the Employers' Liability Act and a new trial must be ordered. *Everett* v. *Schaake Machine Works,* 17 B.C.R. 271.

2. Verdict at common law.]—Where the jury return a verdict at common law, and the Court finds that there is no case at common law but that there may be a case under the Act, there must be a new trial. *Crevelling* v. *Canadian Bridge Co.,* 20 B.C.R. 137.

3. General verdict.] — Plaintiff, a fireboss in a mine, was directed by the mine foreman to start a pumping engine, in doing which he was injured. In an action claiming damages, at common law or under the Employers' Liability Act, the jury brought in a general verdict for $7,500:—Held, that the plaintiff having failed to make out a case at common law, the appeal from the verdict should be allowed and a new trial ordered. *Shearer* v. *Canadian Collieries (Dunsmuir), Limited,* 19 B.C.R. 277.

4. Defect in pleading.] — In an action for damages under the common law and under the Employers' Liability Act, in which the question of the statutory liability was not properly raised on the pleadings, but was brought up during the proceedings, and the trial judge, without the formal allowance of an amendment, gave the case to the jury on both branches of the case, upon which he gave them specific directions, and subsequently set aside the verdict given under the statute on the ground that the verdict rested on an issue which had not been

pleaded:—Held, on appeal, that there was a mistrial, and that the case be sent back for a new trial under the Act. *Airey* v. *Empire Stevedoring Company, Limited*, 20 B.C.R. 130.

5. Action for negligence and under the Employers' Liability Act.] — Where an action is brought for negligence and also under the Employers' Liability Act, and the jury return a verdict for a sum in excess of that allowed under the Act, and the Court decided that the plaintiff has failed in his action for negligence, a new trial will be ordered. *Shearer* v. *Canadian Collieries, Ltd.*, 19 B.C.R. 277.

6. Action under Employers' Liability Act and at common law.]—Where the plaintiff brings an action for negligence at common law and under the Employers' Liability Act, and at the trial tries to make a case at common law, but does not abandon the alternative case, and the trial judge leaves it open to the jury to find for the plaintiff under the Act, and the jury's answers do not establish liability at common law but might do so under the Act, and the damages assessed exceed the limit allowed by the Act, the plaintiff is entitled to a new trial. *Hosking* v. *Le Roi No. 2, Limited*, 9 B.C.R. 551; 34 S.C.R. 244.

VIII. Composition of Jury on.

Juror at former 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. *Harris* v. *Dunsmuir*, 9 B.C.R. 303.

IX. Evidence on.

New trial.]—Where an accused submits himself to give evidence and be cross-examined, the evidence so given is admissible on a new trial. *R.* v. *Deakin*, 17 B.C.R. 13.

See Appeal.

NOTICE.

I. Constructive, 738.
A. By failure to make inquiry, 738.
B. By knowledge of agent, 739.

I. Constructive.

A. By Failure to Make Inquiry.

1. Land Registry Act.]—Action to foreclose an equitable mortgage by deposit of title deeds, brought by the plaintiffs against the mortgagor K. and a person, R., who appeared on the title as the grantee of the lands under a deed made to him by K. subsequent to, and, as the plaintiffs' claim alleged, in fraud of the mortgage, which deed he had registered not as a fee, but as a charge against the lands; K. had suffered judgment by default. Neither notice of the mortgage, nor want of valuable consideration for the deed were charged against R. in the statement of claim, or negatived by him in his defence, in which he claimed, that, under sec. 31 of the Land Registry Act, his registered charge, and also set up the Statute of Frauds. At the trial R. called no evidence, and maintained that the onus probandi to displace his prima facie statutory priority was on the plaintiffs, and that he was entitled to judgment:—Held, per Walkem, J., on motion for judgment, dismissing the action as against R., that his registered charge had a prima facie validity and priority, under sec. 31, and that the onus of proof of want of consideration, fraud, or notice to him of the mortgage, was on plaintiffs. The Statute of Frauds is not a defence to an equitable mortgage:—Held, by the Full Court on appeal: Per Crease, J.: That in the state of the pleadings and evidence, fraud on R.'s part could not be assumed by the Court, but that there should be a new trial to determine the question of the bona fides of the deed. Per McCreight, J.: That before the statute the burden of proof would have been upon R. to show that he made enquiries for the title deeds and gave valuable consideration for his deed from K., as being facts peculiarly within his knowledge and not of the plaintiffs, and not having done so he was, by their absence, affected with constructive notice of the mortgage. That by sec. 35 he was only relieved from the effect of such notice by proving himself a purchaser for value, and that the onus of doing so was therefore on him, and that as to the effect of notice, sec. 31 must be read as subject to sec. 35, which alone deals with that question. Quære, whether the non-compliance with secs. 13, 19, 54 and 55 of the Act, as to production of the title deeds, vitiated the registration. Per Drake, J.: That, on the facts, the presumption was that R. had actual, or there

was constructive notice to him of the equitable mortgage, and the onus was on him to allege and prove valuable consideration for his deed. That the deed in fee was improperly registered as a charge, and that the plaintiffs should not be prejudiced by the mistake of the Registrar. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 3 B.C.R. 330.

2. Prior unregistered charge.] — The Registrar registered a conveyance from K. to R. as a charge, without either the title deeds or certificate of title being produced or accounted for by R. They were, in fact, outstanding in the hands of plaintiffs, as prior equitable mortgagees of the lands. Express notice to R. of the equitable mortgage was not proved, but he enquired of K. for the title deeds and certificate, and they were not accounted for. The action was for foreclosure of the equitable mortgage:—Held, 1. The purchaser of a registered title is within the protection of sec. 35 whether he registered his own conveyance or not. 2. The principle of *Lee* v. *Clutton*, 45 L.J., Ch. 43; 46 L.J., Ch. 484, is applicable to the British Columbia Land Registry Act. The policy of the Act is to free the purchaser of a registered title from the imputation of constructive notice, and in the absence of express notice such a purchaser of lands for valuable consideration will, under sec. 35, have priority over a prior unregistered charge, notwithstanding that he knew that the title deeds were in the possession of persons other than the vendor and abstained from enquiry. To take such a purchaser out of the protection of sec. 35, he must be guilty of conduct equivalent to fraud, and, as fraud is never presumed, it will not be imputed by inference, or in the absence of proof of express notice of the facts, the knowledge of which constitutes the fraud. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 4 B.C.R. 536.

B. By Knowledge of Agent.

Through solicitor.]—K. by deed assigned to plaintiff a proportion of certain sums to be earned and received by him from the City of Vancouver, under a certain contract. He afterwards, to secure advances made to him by defendant, assigned to her all sums due or to become due to him under the same contract. The plaintiff gave verbal notice of the deed to her to the chairman of the Board of Works and to the City Solicitor of Vancouver. The defendant subsequently gave formal written notice of her assignment to the city clerk, and plaintiff afterwards gave a similar notice of her deed:—Held, that by his deed to plaintiff K. made himself a trustee for the plaintiff of the proportions of earnings to be received by him from the city, which he thereby assigned to her, and that the plaintiff had therefore an equity thereto which over-rode the subsequent assignment thereof to the defendant, and that the priority of notice of the latter assignment was immaterial. Per McCreight, J.: That, upon the evidence, the defendant having had actual notice of the existence of the deed to the plaintiff, had constructive notice of its terms. 2. That the fact that the solicitor whom she employed to draw the assignment to her also drew the deed to the plaintiff fixed the defendant with constructive notice of such deed through the knowledge of the solicitor, though acquired in a different and previous transaction. *Clark* v. *Kendall*, 4 B.C.R. 503.

See ASSIGNMENT.

See EQUITY.

See INSURANCE.

See MISREPRESENTATION AND FRAUD.

See PRINCIPAL AND AGENT.

See REGISTRATION OF LAND.

NUISANCE.

I. WHO LIABLE, 740.
II. WHO MAY SUE, 741.
III. NATURE OF ACT, 741.
IV. ABATEMENT, 743.

I. WHO LIABLE.

1. Independent contractor.] — If one employs a contractor to do a work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, and the employer accepts the work in that condition, he becomes at once responsible for the nuisance. *Steves* v. *District of South Vancouver*, 6 B.C.R. 17.

2. Maintaining.] — One who knowingly maintains a nuisance is as liable for the consequences as he who created it. *Ibid.*

II. Who May Sue.

1. Enforcement of municipal bye-law.]—A municipal corporation applied for a mandatory injunction requiring the defendant to pull down a wooden building he had erected on his land within the municipality without a certificate from the corporation's engineer and contrary to the provisions of the building bye-law. The defendant had previously applied for and been refused a certificate on the ground that a wooden building would be a nuisance and increase the danger of fire:—Held, that although a municipal corporation may bring an action for an injunction respecting its own property or where a statute gives it a special protection and breaches thereof are being committed, all actions in respect of public nuisances must be brought in the name of the Attorney-General. *Corporation of the District of Oak Bay* v. *Gardner*, 19 B.C.R. 391.

2. Obstruction of highway.]—A municipal corporation cannot maintain an action against a railway company to restrain the latter from interfering with a highway. *Delta Corporation* v. *Vancouver, Victoria and Eastern Railway & Navigation Co.*, 14 B.C.R. 83.

3. Attorney-General.] — An application to add the Attorney-General made at the trial, without proof of his consent and without its being shown that the public interest is affected, will be refused. *British Canadian Securities, Ltd.* v. *Victoria Corporation*, 16 B.C.R. 441.

III. Nature of Act.

1. Access to highway.]—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 Company*, 14 B.C.R. 121.

2. Right of access to tidal waters.]—The riparian owner of land, bounded by high-water mark of tidal waters, is entitled to access to such waters from all parts of his frontage thereon. The Court will, at his suit, enjoin any obstruction of the foreshore. The same principle applies to the owner of land abutting on a highway. He is entitled to an injunction to restrain any obstruction of the highway in front of his land. *Rorison* v. *Kolosoff*, 15 B.C.R. 26.

3. Anticipated injury.] — In an action to restrain the municipality from constructing a public convenience on municipal property, brought by the owners of an adjoining lot, the evidence was that they contemplated building, and alleged that substantial and special injury would be suffered by them (apart from that suffered by the general public by such an institution), in that the odours from the convenience would be offensive, and that the building, being on an alleged public highway, would obstruct the approach to the plaintiff's proposed building:—Held, that a public convenience such as that proposed to be constructed by the Corporation is not per se a nuisance, and in any event it could not be considered so to the occupants of a building not yet erected, and that, therefore, the action was premature. *British Canadian Securities, Limited* v. *Corporation of the City of Victoria*, 16 B.C.R. 441.

4. Act within jurisdiction of Railway Commissioners.]—In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion:—Held, that, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief, as they had complete control over their order. *The Corporation of the Municipality of Delta* v. *The Vancouver, Victoria and Eastern Railway and Navigation Company*, 14 B.C.R. 83.

5. Railway obstructing navigable waters.]—Upon an application by the plaintiff Company for a mandatory injunction to compel the defendant Company to cease obstructing certain navigable rivers, and to remove a temporary bridge built across one of them, also to make openings in two permanent steel bridges constructed pursuant to statutory authority:—Held, upon the evidence, that the injunction be refused, as the requirements of the Railway Act of Canada had been complied with, and the public works department of Canada had sanctioned the temporary obstruction

of these streams:—Held, further, that the plaintiff was not obstructed in its navigation of the streams, nor was its business jeopardized thereby. *British Columbia Express Company* v. *Grand Trunk Pacific Railway Company,* 20 B.C.R. 215.

6. Flow of water in mine.]—Defendants' predecessors in title ran trespass workings from their mineral claim the Nickel Plate through the Ore-or-no-Go mineral claim, in which they had a right to mine, but of which the plaintiffs were the owners in fee, into plaintiffs' mineral claim the Centre Star, which adjoined the Ore-or-no-Go claim; to stop the flow of water from the Nickel Plate through the trespass workings to the Centre Star claim defendants built bulkheads on the boundary between the Centre Star and Ore-or-no-Go claims and at this point a large body of water accumulated:—Held, that the accumulation of water was a menace to plaintiffs and amounted to a nuisance and that the bulkheads should have been built at the Nickel Plate boundary so as to keep the water from flowing from the Nickel Plate into the trespass workings. *Centre Star, etc., Co.* v. *Rossland, etc., Co.,* 2 M.M.C. 232.

IV. ABATEMENT.

1. Public nuisance.] — A private individual has no right to abate a public nuisance. *Waddell* v. *Richardson,* 17 B.C.R. 19.

2. Municipality.]—A municipal corporation cannot undertake to abate a public nuisance by tearing down a fence obstructing a highway. *Hope* v. *Surrey Corporation,* 20 B.C.R. 434.

ORDERS.

See PRACTICE.

PARENT AND CHILD.

See INFANT.

PARTICULARS.

See PLEADING.

PARTIES.

See PLEADING.

PARTITION.

1. Interests in lands.]—There can be no judgment for partition where the defendant's interest in the land is only by way of contract and no conveyance has yet been executed. *Angus* v. *Heinze,* 14 B.C.R. 157.

2. Contract for the sale of land.]—A. and S., being the holders of the entire capital stock in a railway company, agreed that they would cause a moiety of the company's lands to be vested in H. by a valid instrument to be executed by the company at the request of H., and in such form as he might require. During some years the lands were administered by A. and S., but H. never requested nor received any conveyance of his moiety, and the title to the lands, insofar as they had not been disposed of, remained in the company. A. and S. and the company brought an action against H. for partition:—Held, that as, at the time of action, the title to the lands was still vested in the company, which was not a party to the agreement, the order for partition could not be granted. *Angus* v. *Heinze,* 14 B.C.R. 157; 42 S.C.R. 416.

PARTNERSHIP.

I. CREATION AND DURATION, 744.
A. *In general,* 744.
B. *Evidence of formation,* 745.
II. LIABILITY OF PARTNERS TO THIRD PERSONS, 748.
A. *Joint and several creditors,* 748.
B. *Power of one partner to bind the firm,* 748.
C. *Ratification,* 750.
III. RELATIONS OF PARTNERS INTER SE, 751.
A. *Partnership property and separate property,* 751.
B. *Rights after dissolution,* 752.
IV. LEGAL PROCEEDINGS, 753.
V. REGISTRATION, 753.

I. CREATION AND DURATION.

A. In General.

Land.]—A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. *Archibald* v. *McNerhanie,* 6 B.C.R. 260; 29 S.C.R. 564.

B. Evidence of Formation.

1. Onus of proof.] — The defendant engaged the plaintiff in 1907 as a salesman at a salary and a percentage of the profits of his business. The basis of remuneration was adjusted from time to time. The business took the defendant away on long trips yearly and the plaintiff managed the business during his absence. From 1910 on the plaintiff urged for an interest in the business, with a view to a partnership, to which he contended the defendant agreed but would not come to a definite settlement, the defendant, on the other hand, asserting that the discussions were always on a basis of what percentage of the profits the plaintiff should receive, claiming that a partnership was never contemplated. In January, 1912, the defendant left on a trip to the Orient, via England. On reaching Montreal he received a letter from the plaintiff asserting a partnership and insisting that it be evidenced in writing at once. The defendant's letter in reply was evasive, not openly affirming the partnership, but not in any way denying the assertions in the plaintiff's letter. In June, 1912, the defendant served the plaintiff with a notice of dissolution of partnership in which he referred to their relations as that of a partnership:—Held, that the onus was upon the plaintiff to show that he had been admitted as a partner in the strict legal sense, and that the indefinite use of the term "partnership" in the correspondence and notice did not, in the circumstances, amount to evidence of an agreement that there should be a partnership. *Disher* v. *Donkin*, 18 B.C.R. 230.

2. Co-owners.]—Plaintiff and the two defendants Holland were real estate agents in partnership, but entered into certain investments on their own account (aside from the agency business) in the purchase of three lots, on account of which they paid down $294. Being unable to meet the succeeding calls when due, they invited the defendant Horne into the transaction, he to pay 85 per cent. of the purchase money and the remaining three to contribute 15 per cent., the profits to be divided. Horne took over the agreements to purchase and eventually received a conveyance of the lots. There was a verbal agreement that if a sale could be effected before the second instalment of the purchase money became due, and if that sale netted a profit of over 15 per cent. the old partnership should share with Horne equally in the profits. This sale was not made, but four months after the due date of the instalment, Horne sold a half interest:—Held, that no partnership had been proved. *Gordon* v. *Horne, Holland and Holland*, 14 B.C.R. 138; 42 S.C.R. 240.

3. Borrower and lender.]—The defendant S., desiring to buy out his partner B. in the stationery business in North Vancouver, received an advance from the defendant D. of $2,150 for that purpose, and the sale went through. A year later, the $2,150 being still owing, S. and D. signed a partnership agreement in duplicate, each retaining one. S. showed his (according to his own evidence) to his banker, who was not called as a witness. Later D. indorsed notes from time to time to assist in carrying on the business. Eventually the business failed and D. claimed the $2,150 he had advanced as a creditor, although this amount had been treated in the partnership agreement as his contribution to the capital. Both defendants testified that the agreement was never made operative, but was made solely for the purpose of protecting D. for his advance:—Held, that notwithstanding a partnership agreement having been drawn up and signed, the evidence showed there was no intention that there should be a partnership. D., therefore, was not liable as a partner, and was entitled to claim as a creditor. *Kelly, Douglas & Company, Limited* v. *Sayle*, 19 B.C.R. 93.

4. Mining partnership—Whether agreement for equal shares.]—Plaintiff having discovered "mineral float," communicated its situation to the defendant upon a verbal agreement by the latter that in the event of his thereby discovering the ledge and locating a mineral claim, the plaintiff should be "in on it":—Held, that the words "in on it" imported an agreement to give the plaintiff an interest in the nature of a partnership or co-ownership; that in the absence of anything in a partnership contract to the contrary, the presumption of law is that the partnership shares are equal, and that the contract was not void for uncertainty. *Wells* v. *Petty*, 5 B.C.R. 353.

5. Division of profits.]—Tenders were invited for certain municipal public works. Defendant, having already put in a tender, met the plaintiff, who also proposed to tender for the work. It was agreed between them that the defendant should withdraw his tender and put in another at the higher figure, and that the plaintiff should tender at a still higher price; that in the event of

the defendant's tender being accepted, the profits of the contract should be equally divided between them. The defendant's tender was accepted. In an action to declare a partnership:—Held, that the agreement constituted a partnership, and was not void as against public policy. *Stevenson* v. *Boyd*, 5 B.C.R. 626.

6. Sufficiency of evidence.] — Plaintiff alleged that the defendant, being his partner, bought land for the use of the partnership:—Held, on the evidence, that there was not sufficient proof of such partnership to enable the Court to declare the defendant a trustee for the partnership. *Brown* v. *Grady*, 6 B.C.R. 190.

7. Admissions.]—To establish a partnership, the statements of one of the alleged partners is not admissible against the other. *British Columbia Iron Works Co.* v. *Buse*, 4 B.C.R. 419.

8. Whether company has power to contract with an individual.]—The defendant company, having power by its memorandum of association, *inter alia*, to carry on and enter into contracts for the purposes of the business of bookbinders, entered into an agreement with the plaintiff whereby it purchased and amalgamated his book-bindery business with its own, the joint concern to be carried on and profits and losses to be divided between the plaintiff and the company in certain proportions, the plaintiff to be manager and foreman at a salary. The company not having paid plaintiff the purchase money, as agreed, refused to furnish proper accounts or otherwise perform the stipulations of the agreement. In an action for a rescission of the agreement, an account, payment and a receiver:—Held, that the order for accounts and a receiver should be affirmed, but the contract rescinded instead of ordering a dissolution. Quære, whether the agreement constituted a partnership or not. *Roedde* v. *The News-Advertiser Publishing Company*, 4 B.C.R. 7.

9. Pre-emption.] — Mother and son applied for a pre-emption of certain land which had been occupied by the father previous to his death, but to which he had acquired no rights from the Crown, the land having then been reserved from settlement. The land subsequently was declared open to settlers, and after consultation with the Government agent, it was agreed that the mother should apply for the land as legal representative of the father. Mother and son occupied and operated the land together, until the son's death. On the issue of the Crown grant, all the children, including the son referred to, executed a surrender in favour of the mother. The son took and held the Crown grant as security for what he considered his rights under an alleged understanding that the land was to descend to him on the decease of the mother. The mother denied this understanding. In an action by the mother against the widow of the son for the recovery of the Crown grant the widow set up a partnership between the mother and son in the possession and operation of the land:—Held, that there had been no such partnership established, and that the land belonged to the mother free from any trust in favour of the son. *Campbell* v. *Campbell*, 14 B.C.R. 354.

II. Liability of Partners to Third Persons.

A. Joint and Several Creditors.

1. Separate bank accounts—Power of banker to draw on, to cover overdraft of firm.]—Where the members of a firm have separate private accounts with the bankers of the firm, and a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts. *Richards* v. *Bank of British North America*, 8 B.C.R. 143, 209.

2. Joint creditor, rights of.]—A joint creditor may maintain an action against the representative of a deceased partner and the surviving partners, or their assignees for the benefit of creditors, and may in such action obtain an order for accounts, an injunction, and a receiver. *Hudson's Bay Co.* v. *Green*, 1 B.C.R., Pt. I., 247.

B. Power of One Partner to Bind the Firm.

1. Power to execute bill of sale.]—Where the goods comprised in a bill of sale are, within twenty-one days after execution of the bill of sale, bona fide taken possession of by the grantee, the Bills of Sale Act does not apply, and it is immaterial even though the bill of sale was given subject to a defeasance not contained in it. D. B., A. O. and T. G. W. carried on business in partnership as hardware merchants under the name of the Greenwood Hardware Company, the money being supplied by D. B. and A. O. B., and the business being managed by W. The firm became indebted to

both the McClary Company and the Howland Company, and the latter, under threat of commencing an action, obtained, on the 27th of June, 1900, a bill of sale by way of mortgage of all the firm's assets and immediately took possession. The bill of sale was executed on behalf of the firm by W., and also by W. personally, D. B. and A. O. B. both being absent. When A. O. B. returned he protested against the execution of the bill of sale, but subsequently withdrew his protest and consented to a sale of the goods on the understanding that plaintiffs and defendants should share pro rata in the proceeds. The arrangement that plaintiffs and defendants should share in the proceeds was not carried out. On the 27th July, 1900, the McClary Company recovered a judgment in respect of their claim against the firm and obtained judgment under Order XIV., the judgment being entered up against D. B. and A. O. B., and also against the Greenwood Hardware Company, although not a party to the action, and an execution issued was returned nulla bona. The McClary Company thereupon sued to have the bill of sale set aside on the ground that it was fraudulent and void as being given with the intent to defeat and delay creditors, and that W. had no authority to give it on behalf of the firm. Under an order of Court the goods were sold and the proceeds paid into Court to abide the result of the action. The Howland Company recovered a judgment in January, 1901, against the firm for the amount of its indebtedness to them, and an execution issued thereunder was returned nulla bona. At the trial in July, 1902, Martin, J., dismissed the plaintiffs' action, holding that the bill of sale was not a fraudulent preference, but was given bona fide under pressure:—Held, on appeal, affirming decision of Martin, J., that the bill of sale was not a fraudulent preference, but was given bona fide under pressure. Per Hunter, C.J., and Drake, J.: W. had implied authority to execute the bill of sale. Per Irving, J.: W. was not the agent of his partners to execute the bill of sale, but they had either ratified his act or become estopped from denying his authority. Per Hunter, C.J.: The plaintiffs had no locus standi to attack the bill of sale on the ground that it was executed without proper authority. Per Drake, J.: The McClary Company's judgment against the firm was invalid, and hence the company had no locus standi to attack the bill of sale. *The McClary Man. Co.* v. *H. S. Howland, Sons & Co., and the Greenwood Hardware Co.*, 9 B.C.R. 479.

2. Mining partnership — Foreman — Estoppel.]—M. was a member of and held a controlling interest in a mining partnership. He was not formally appointed foreman, but appeared to have been permitted to manage its affairs in the matters in question, and appointed one G. superintendent, who ordered certain goods from M. for the partnership. He also supplied other goods to the partnership, accounts for which were passed at a regular meeting of the partnership:—Held, affirming the registrar's certificate made upon taking the accounts under the decree allowing the items to M., that sec. 126 of the Act does not preclude a mining partnership from contracting liabilities otherwise than upon the order of a duly appointed foreman. That as to the items passed at meetings of the partnership, it was estopped from disputing its liability. *Gray* v. *McCallum*, 5 B.C.R. 462.

C. Ratification.

Authority of partner to execute bill of sale.]—Where the goods comprised in a bill of sale are within twenty-one days after execution of the bill of sale bona fide taken possession of by the grantee, the Bills of Sale Act does not apply, and it is immaterial even though the bill of sale was given subject to a defeasance not contained in it. D. B., A. O. B. and T. G. B. carried on business in partnership as hardware merchants under the name of Greenwood Hardware Company, the money being supplied by D. B. and A. O. B., and the business being managed by W. The firm became indebted to both the McClary Company and the Howland Company, and the latter, under threat of commencing action, obtained on the 27th of June, 1900, a bill of sale by way of mortgage of all the firm's assets, and immediately took possession. The bill of sale was executed on behalf of the firm by W., and also by W. personally, D. B. and A. O. B. both being absent. When A. O. B. returned he protested against the execution of the bill of sale, but subsequently withdrew his protest and consented to a sale of the goods on the understanding that plaintiffs and defendants should share pro rata in the proceeds. The arrangement that plaintiffs and defendants should share in the proceeds was not carried out. On the 27th of July, 1900,

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III. Relations of Partners inter se.

A. Partnership Property and Separate Property.

1. Right of partner who has allowed his license to expire to share in proceeds of sale of mineral claim.]—If a partner in a mineral claim makes an agreement for sale thereof with a third party, another partner does not forfeit his share in the proceeds of such sale merely because his free miner's certificate was allowed to lapse after the making of the agreement. *McNerhanie* v. *Archibald*, 6 B.C.R. 260.

2. Government salary.]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution:—Held, that even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect. *Cane* v. *MacDonald*, 10 B.C.R. 444.

3. Attempted exclusion of partner.]—An agreement was entered into between two creditors of a partnership concern and the executors of a deceased partner that on the recovery of a certain sum of money due the partner it should be divided: two-thirds to the said creditors and one-third to the daughter of the partner. In an action by another partner:—Held, that the plaintiff was entitled to the one-third retained by the executors for the benefit of the daughter. *Oppenheimer* v. *Sweeny*, 13 B.C.R. 117.

B. Rights After Dissolution.

1. Dominion official—Salary—Receiver—Appointment — Partnership in — Right to share in salary ceases on dissolution.]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected at Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half of the salary since the dissolution and asked that a receiver be appointed of it, and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—Held, that even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the

salary after the dissolution of the firm unless there was a special agreement to that effect. *Cane* v. *MacDonald*, 9 B.C.R. 297; 10 B.C.R. 444.

2. Continuance after expiry of term.]—A deed providing for a partnership during seven years from its date provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner should die, the value of his share should be subject to a discount of 20 per centum. After the seven years had expired, the partners continued the business by verbal agreement for an indefinite period, and while it so continued K. died:—Held, that even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K. and to be allowed the deduction of 20 per centum therefrom; and that in the absence of any stipulation in the deed to the contrary, the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Collister* v. *Hibben*, 30 S.C.R. 459.

IV. LEGAL PROCEEDINGS.

New firm suing in old firm name.]—K. in 1895 gave two promissory notes to the firm of Lenz & Leiser, and in 1896 one member of the firm died, and the partnership business was continued under the same firm name by the surviving partner and the dead partner's widow. In 1898 the firm sued K. on the notes, and he was arrested on a writ of ca. re., the affidavit leading to the order being made by the surviving partner, who swore that he was a member of the firm of Lenz & Leiser, and that K. was indebted to the firm on the notes, but no mention was made of the notes having been given to the old firm:—Held, on a summons to discharge the defendant from custody, that the affidavit was insufficient, as it did not disclose that the firm of Lenz & Leiser is a new and different firm from that in existence when the cause of action occurred. *Lenz & Leiser* v. *Kirschberg*, 6 B.C.R. 533.

V. REGISTRATION.

Effect of failure to register.]—Plaintiff sued the defendant for a balance due on a printing contract. Plaintiff carried on business under the name of the Victoria Printing and Publishing Company, during the term of the said contract, until after his action was launched, and in excess of a period of three months, without having complied with the provisions of secs. 74 and 75 of the Partnership Act, which requires (sec. 74) every person trading alone under a firm or company name implying a plurality of partners to file a declaration to that effect with the Registrar of the County Court of the county in which the business is being conducted, and (sec. 75) that such declaration shall contain certain particulars and be filed within three months of the adoption of such firm or company name. Defendant contended that plaintiff's action was barred by his non-compliance with secs. 74, 75 and 76, and that he therefore could not enforce the contract:—Held, that while the plaintiff came within the wording of the statute, and became liable for the penalty provided for not registering, yet the penalty is imposed for something not contemplated by the contract in this case, and he was therefore entitled to recover. *Smith* v. *Finch*, 12 B.C.R. 186.

See CONTRACT.

See MINES AND MINERALS.

See PRACTICE.

PATENT.

I. INFRINGEMENT, 754.
A. In general, 754.
B. Actions for, practice in, 755.

I. INFRINGEMENT.

A. In General.

1. Essence and substance.]—A patent for a mechanical combination, which produces a new result, is infringed if the combination is taken in essence and in substance. *Short* v. *Federation Brand Salmon Canning Company*, 7 B.C.R. 197; 31 S.C.R. 378.

2. Essence and substance.]—A patent for a mechanical combination is not infringed unless the combination is taken in essence and in substance. *Jones* v. *Galbraith and Sons*, 9 B.C.R. 521.

B. Actions For, Practice in.

1. Issue of writ.] — In an action for damages for infringement of a patent, the writ need not be issued out of the registry nearest the place of residence or business of the defendants, but sec. 30 of the Patent Act is complied with if the venue is laid at the place of such registry. *Short* v. *Federation Brand Salmon Canning Company,* 6 B.C.R. 385.

2. Venue.]—In an action against a company for infringement of a patent the venue should be laid at the place of the registry which is nearest the head office of the company. *Short* v. *Federation Brand Salmon Canning Co.,* 6 B.C.R. 436.

PAYMENT.

See CONTRACT.

PERJURY.

See CRIMINAL LAW.

PERSONA DESIGNATA.

1. Deputy registrar.]—An order directed the examination of a witness de bene esse before "the registrar of this Court." The registrar not being able to take the examination, the witness was examined before the deputy registrar of the Court. By the Supreme Court Act, C.S.B.C. 1888, c. 31, sec. 2, "The district registrar shall include any deputy of such registrar":—Held, that the nomination of the registrar by the order to take the examination was not as "persona designata," but as registrar, and that the deputy registrar was competent to act for him thereon. *Richards* v. *Ancient Order of Foresters,* 5 B.C.R. 59.

2. Appeal from Court of Revision.]—The judge to whom jurisdiction to entertain an appeal from the Court of Revision is given by sec. 137 of the Municipal Clauses Act (S.B.C. 1906, c. 32) is persona designata. *City of Slocan* v. *Canadian Pacific Railway Company,* 14 B.C.R. 112.

PERSONAL REPRESENTATIVE.

See EXECUTOR AND ADMINISTRATOR.

PETITION OF RIGHT.

I. IN GENERAL, 756.
II. NATURE AND SUBJECT MATTER, 756.
III. PROCEDURE AND CONDITIONS OF RELIEF, 757.

I. IN GENERAL.

1. Statutory duty to submit.]—Under the Crown Procedure Act, sec. 4, it is the duty of the Provincial Secretary to submit to the Lieutenant-Governor a petition left with him as therein directed for that purpose. His definite refusal to do so gives the petitioner a cause of action involving damages. *Norton* v. *Fulton,* 12 B.C.R. 476; 39 S.C.R. 202; 1908, A.C. 451.

2. Refusal.]—After a decisive refusal to submit the petition has been made, the right of action vests at once, and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim. *Ibid.*

II. NATURE AND SUBJECT MATTER.

1. Crown grant — Proper remedy to obtain.]—Mandamus does not lie to compel the Chief Commissioner of Lands and Works to issue a Crown grant; the remedy is by petition of right. *Clarke* v. *The Chief Commissioner of Lands and Works,* 1 B.C.R., Pt. II., 328.

2. Locus standi of suppliant.] — Suppliant applied to be allowed to purchase certain land under sec. 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to the railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a petition of right to be brought:—Held, dismissing the petition, that the suppliant had no locus standi to obtain any relief. *Hall* v. *The Queen and the Kaslo and Slocan Ry. Co.,* 7 B.C.R. 89, 480.

3. Agent for government — Special delegate — Remuneration.] — Suppliant, a member of Dominion Parliament, was appointed by order-in-council (14th October, 1880) as special agent for the Province at Ottawa. Another order, of same date, provided for "payment of expenses necessarily incurred." On 30th March, 1881, suppliant went, at the request of Provincial Government, as delegate to London, to support

prayer of petition from British Columbia Legislative Assembly to the Queen. All expenses of suppliant were allowed and paid. On a petition for payment for services:—Held, that as the positions were honorary, and as contracts were silent as to remuneration for services, he could not recover. *DeCosmos* v. *The Queen*, 1 B.C.R., Pt. II., 26.

III. PROCEDURE AND CONDITIONS OF RELIEF.

1. Counterclaim.]—There cannot be a counterclaim to a petition of right. *Spiers* v. *Queen and Corbould*, 4 B.C.R. 388.

2. Mineral claim—Petition of right to obtain Crown grant—Laches.]—The Mineral Ordinance, 1869, provides that holders of a prospecting license for coal may select for purchase a portion of the lands included in their license. Upon compliance with the terms and conditions of the Act, the licensees are entitled to claim a Crown grant of the selected lands. The petitioners held a prospecting license for coal over 2,500 acres of land, and applied for a Crown grant. In support of their claim they relied on a certificate of the Assistant Commissioner of Lands and Works that they had posted notices of their application, and that no objection to the issue of a grant had been substantiated:—Held, (1) that the certificate was not in acordance with the Act; Held, (2) that the certificate of an Assistant Commissioner was not conclusive evidence of compliance with the statutory conditions, and the presumption arising from the certificate could be rebutted by evidence to the contrary. It was contended that the Lands and Works Department having received the certificate without objections, and not having cancelled the license under the provisions of the Mineral Ordinance Amendment Act, 1873, had waived the performance of the terms and conditions of the Act:—Held, that the department could not waive the performance of conditions imposed by the Legislature. The petitioners' application for a Crown grant was made in 1874, but they did not prospect or work the land, or take further steps in support of their claim till 1882, and in the meantime the lands had increased in value:—Held, that, in a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application. *Peck and others, petitioners* v. *The Queen, respondent*, 1 B.C.R., Pt. II., 11.

PHARMACY ACT.

See MEDICINE.

PLEADING.

I. IN GENERAL, 758.
II. PARTIES, 760.
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B. Substituting right plaintiff, 760.
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XI. ADMISSIONS, 778.

I. IN GENERAL.

1. Point of law not raised in pleadings.]—The objection that upon the evidence the act complained of was not done by the servant in the course and within the scope of his employment by defendants, and was unauthorized by them, is not open to defendants upon motion for a nonsuit, unless they pleaded it as a defence. *Adams* v. *National Electric Tramway and Lighting Co.*, 3 B.C.R. 199.

2. Issue not raised in pleading.]—Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed. *Tanghe* v. *Morgan*, 11 B.C.R. 76; 2 M.M.C. 178.

3. Judgment not supported by pleadings.]—Plaintiff brought an action alleging

in the statement of claim that defendant had agreed "to refrain from practising as a physician," and that he had not ceased to practice "as he had agreed to." The relief sought was an injunction "to restrain defendant from practising." Defendant admitted that he had agreed "not to open an office nor have one for the practice of medicine." At the trial plaintiff's evidence was directed to proving that defendant in breach of the agreement did "open and have an office," and the defendant relying on the pleadings, which had not been amended, offered no evidence. Judgment was given restraining defendant from opening or having an office:—Held, on appeal, that the judgment was not supported by the pleadings, and must be set aside. *King* v. *Wilson*, 11 B.C.R. 109.

4. Denial of allegation not pleaded.]—A specific denial in the defence of an allegation that the plaintiff should have, but neglected to plead in an action for damages under the Employers' Liability Act, cures the defect, if the issues are thereby defined in the pleadings with sufficient clearness for the trial. *Cook* v. *Newport Timber Company*, 18 B.C.R. 624.

5. Mining cases — Particularity.]—In mining cases if the defendant wishes to rely on defects in the plaintiff's location he must set them forth specifically in his pleading. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394.

6. Ratification.] — Where a contract is attacked, the ratification must be pleaded before evidence of it can be admitted. *Harper* v. *Cameron*, 2 B.C.R. 365.

7. Pleading fraud.]—Where a judgment has been obtained by fraud, the Court has jurisdiction in a subsequent action brought for that purpose, to set the judgment aside. Plaintiff sued to set aside a judgment recovered against him and alleged in the statement of claim "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-insurer was satisfied and discharged either prior or subsequent to the institution of said action as defendants well knew at the time: Held, dismissing an appeal from the order of Drake, J., dimissing the action: Per Hunter, C.J.: Fraud was not alleged in the statement of claim. Per Martin and Morrison, J.J.: Fraud was alleged—but, per Martin, J.: There was no positive averment of the recovery of judgment against plaintiff which was essential. *Richards* v. *Williams*, 11 B.C.R. 122.

8. Statute.] — Where there are two statutes, the short titles of which are identical, a party pleading one of them should make it appear clearly on which he relies, but he need not plead the particular section. *Kirk* v. *Kirkland*, 6 B.C.R. 442.

9. Sale of goods.]—In an action for the price of goods, damages for non-acceptance cannot be recovered where there is no alternative claim therefor. *Sells, Ltd.* v. *Thomson Stationery Company*, 19 B.C.R. 400.

II. Parties.

A. Representative Parties.

Trustees.]—Trustees are entitled to sue in their own names without joining their cestui qui trustent as parties. *Smith* v. *Mitchell*, 3 B.C.R. 450.

B. Substituting Right Plaintiff.

1. Bona fide mistake.]—While plaintiff's attorney-in-fact was pressing a claim on his behalf, plaintiff died abroad. Before proof of his death was produced the writ herein was issued. After proof of death, and probate granted, an application was made to substitute the executor as plaintiff: —Held, that there had been a bona fide mistake in naming the proper plaintiff, and that the substitution of the executor was necessary for the determination of the question involved. *Rakha Ram* v. *Tinn*, 16 B.C.R. 317.

2. On appeal.]—Where an action was brought by a joint stock company as assignee for the creditors of an insolvent, and the Court of Appeal affirming the decision of the lower Court, held that a company could not fill such an office, the Court refused to substitute a natural person as plaintiff. *Colonial Development Co.* v. *Beach*, 19 B.C.R. 247.

C. Joinder of Parties.

1. Plaintiffs.

1. Consent.]—A power of attorney to sue for and recover money due under a judgment does not authorize the attorney to consent on behalf of his principal to

being joined as plaintiff in another action. *Hill* v. *Hambly*, 12 B.C.R. 253.

2. Receivers and beneficiaries.]—Trustees having refused to bring an action to recover funds of the estate, certain of the beneficiaries brought the action in their own names and obtained an order removing the trustees and appointing a receiver in their place, with leave to substitute the receiver as plaintiff. He was substituted accordingly by a subsequent order. Neither of the above orders was appealed from, but at the trial the defendants, while not objecting to the receiver as plaintiff, objected that there was no cause of action in him, whereupon one of the beneficiaries previously struck out asked to be joined as plaintiff:—Held, that the action should be carried on in the names of the receiver and one of the beneficiaries, with leave to any of the other beneficiaries to apply to be added as plaintiffs. *Shallcross* v. *Garesche*, 5 B.C.R. 320.

3. Joinder of causes of action after quashing of conviction.]—Where several persons are fined in one summary conviction which had been quashed, they may not sue jointly to recover the fines paid, but must bring separate actions. The only ground of prohibition to an inferior Court is that it is exceeding its jurisdiction. *Five Chinamen* v. *The Corporation of the City of New Westminster*, 2 B.C.R. 168.

2. Defendants.

1. Action against a municipal corporation and the members of the council for improper diversion of corporate funds.]—In a suit by a ratepayer against a municipal corporation for the unlawful diversion of corporate funds, both the corporation and the members thereof responsible for the illegal action, should be parties defendant. *Elworthy* v. *Victoria Corporation*, 5 B.C.R. 123.

2. Joint claimants of mineral claim.]—All claimants under the Mineral Act to any part of the ground covered by the mineral claim of a plaintiff may be made defendants to an action by him to enforce an adverse claim by him against any one of such claimants. *Dunlop* v. *Haney*, 6 B.C.R. 169; 1 M.M.C. 232.

3. Partners.]—A chamber order allowed plaintiffs to amend the writ and statement of claim by adding as defendant "L. and C. carrying on business with defendant under the name of the P. P. Co. and the said P. P. Co.":—Held, on appeal, that the order should be varied by striking out the words "and the said P. P. Co." *Chong* v. *McMorran*, 8 B.C.R. 261.

4. Joint tort feasors.]—The statements of claim were so drawn as to charge the two different defendants with separate acts of negligence, causing damage to the plaintiff. It appeared, however, from the facts alleged, that if the actions lay at all, the two defendants each contributed to the injury in such manner as to make them joint tort feasors:—Held, that the plaintiffs were entitled so to join the defendants. *Bowness* v. *The City of Victoria and the Consolidated Railway Company; Gordon* v. *The City of Victoria and the Consolidated Railway Company*, 5 B.C.R. 503.

5. Joint tort feasors.]—A defendant in an action of tort has no right to an order to add other parties as co-defendants upon the ground that they are also responsible to the plaintiff. Such persons might be added as third parties under sec. 22, subsec. 108 (f), of the Municipal Act Amendment Act. *Holmes* v. *The Corporation of Victoria*, 4 B.C.R. 567.

6. Joint tort feasors.]—Plaintiff suing the defendant corporations for damage to his land by reason of the construction by the municipal corporation of certain embankments and obstructions and the building by the railway company of a car barn whereby a watercourse on plaintiff's land was obstructed or its capacity diminished, and the water could get away freely, the defendant municipal corporation applied for an order directing the plaintiff to elect as to which of the defendants he should abandon and which he should proceed against:—Held, that as the defendant corporations were alleged to be joint tort feasors they could properly be joined in one action. *Timms* v. *The Corporation of the City of Vancouver and the British Columbia Electric Railway Company, Ltd.*, 15 B.C.R. 336.

7. Joint tort feasors.]—When two companies have supplied each a tug to tow a ship, and in the course of the towage, an accident has happened due to the negligence of both tugs, both companies may be joined as defendants. *Sewell* v. *B. C. Towing Co.*, 9 S.C.R. 527.

8. Separate torts.]—The statement of claim was so drawn as to charge the two different defendants with separate acts of

negligence causing damage to the plaintiff. It appeared, however, from the facts alleged, that, if the action lay at all, the two defendants each contributed to the injury in such manner as to make them joint tort feasors. An application by one of the defendants to stay all proceedings in the action unless the other defendant was struck out, was dismissed. *Bowness* v. *The City of Victoria, and the Consolidated Railway Company*, 5 B.C.R. 185, 503.

9. Separate torts.]—In an action against the supposed owner of a building for injuries caused by the falling of a portion of a coping wall, it was, after issue of writ, discovered that defendant's wife was the registered owner, and she was joined as party defendant. After delivery of the statement of claim, an application to have plaintiff elect which defendant should be proceeded against was dismissed. *North* v. *Rogers and Rogers*, 17 B.C.R. 87.

10. Principal and agent.] — Where an agent is sued in respect of a liability incurred by him on behalf of his principal, and the principal wishes to dispute the liability, the latter is entitled to be added as a defendant on the application of both. *Trowbridge* v. *McMillan*, 9 B.C.R. 171.

11. Principal and agent.]—In an action for the rectification of a contract of sale of land, where it appears that the plaintiff has dealt with a third party as agent of the defendant who denies that such third party had any authority to act as such agent, the plaintiff is entitled to add such third party as a defendant. *Bradley* v. *Yorkshire Guarantee, etc., Co.*, 13 B.C.R. 68.

12. Specific performance.]—Where the owner of land authorizes two agents to make a sale for him and each enters into a contract to sell, in an action for specific performance by one purchaser, the other purchaser is entitled on his own application to be added as a defendant. *Bryce* v. *Jenkins*, 8 B.C.R. 32.

13. Partners.] — Sperling, Garbutt and Horne-Payne were residents of England, and members of the firm of Sperling & Co., which firm carried on business in England only. Plaintiffs issued two writs (neither of which was for service out of jurisdiction) in respect of the same cause of action, one being addressed against the firm and also against Sperling, Garbutt and Horne-Payne individually, and the other against the three individuals only. The writs were served on Horne-Payne while on a visit to British Columbia, and he entered conditional appearances and applied to have both writs set aside, and (in the alternative) as to the second action that it be dismissed as vexatious:—Held, by the Full Court, that (1) the name of the firm was wrongly inserted and should be struck out of the first writ; (2) That the plaintiffs should elect as to which action they would proceed with. *Oppenheimer* v. *Sperling*, 9 B.C.R. 166.

14. Real parties should be before Court.]—T. sued McM. as the drawer of a bill of exchange payable to T.'s order, with an alternative claim against McM. on a guarantee that the bill would be paid. T. was the manager of the P.C. Line of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. & W. H. N. Co., and these two principals had through T. and McM. entered into a charter-party providing that the steamer Mexico should carry certain freight for which the D. & W. H. N. Co. agreed to pay. McM. alleged he gave the bill of exchange sued on along with the guarantee to T. as the balance of the freight moneys due under the charter-party, and the company set up a claim for demurrage and advised McM. not to pay. On an application made by McM. and the company, an order was made adding the company as a defendant and giving leave to counter-claim against the P. C. Line:—Held, that the order was properly made as the real parties in interest should be brought before the Court. *Trowbridge* v. *McMillan*, 9 B.C.R. 171.

15. Shares in company.]—In an action against a company for a declaration that plaintiff was the owner of certain shares in the company, the company applied to have its president added as a defendant on the ground that he was the real defendant and was responsible for the action:—Held, that the defendant's remedy was by a third party notice. *Henley* v. *The Reco Mining & Milling Company, Limited Liability*, 7 B.C.R. 449.

16. Tax sale deed.]—In an action to set aside a tax sale deed obtained by defendant Tretheway, and for an account of damages against the municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed: Held, that the munici-

pality was not improperly joined as a party defendant. *Lasher* v. *Tretheway and the Townsite of Richmond*, 10 B.C.R. 438.

17. Right to be made co-defendants.]—Persons brought in on third party notice as liable to indemnify the defendants against the action, ought to be made co-defendants. At their own request, the third parties were substituted as defendants, upon giving security to the plaintiff for such amount as he might recover, and costs. *Wilkerson* v. *The City of Victoria*, 3 B.C.R. 367.

D. Third Party Proceedings.

1. Substituting as defendants.]—Where a corporation is sued for negligence in construction, and brings in the contractors who did the work as third parties, who admit their liability, the contractors should be substituted as defendants, upon giving security for the amount of the claim and costs. *Wilkerson* v. *City of Victoria*, 3 B.C.R. 367.

2. Company and directors.]—In an action against a company for a declaration that plaintiff was the owner of certain shares in the company, the company applied to have its president added as a third party on the ground that he was the real defendant and was responsible for the action:—Held, that the defendant's remedy was by third party notice. *Henley* v. *The Reco Mining and Milling Company, Limited Liability*, 7 B.C.R. 449.

3. Tort—Responsible third persons.]—A defendant in an action of tort has no right to an order to add other parties as co-defendants upon the ground that they are also responsible to the plaintiff. Such persons might be added as third parties under sec. 22, sub-sec. 108f, of the Municipal Act Amendment Act. *Holmes* v. *The Corporation of Victoria*, 4 B.C.R. 567.

4. Third party notice — Parties — Substituting for defendants—Parties liable to indemnify them.]—Persons brought in on third party notice as liable to indemnify the defendants, who admit their liability, ought to be made co-defendants. At their own request, the third parties were substituted as defendants, upon giving security to the plaintiff for such amount as he might recover and costs. *Wilkerson* v. *The City of Victoria*, 3 B.C.R. 367.

5. Third party — Right to bring in a fourth — When exercisable—Defendant.]—A third party notice under r. 128 can issue only at the instance of a defendant, and a person brought in by such notice as liable to indemnify the defendant, and who contests such liability, is not a defendant within the meaning of the rule, and cannot issue a notice bringing in and claiming indemnity over against a fourth party. Semble, a third party who has obtained an order under r. 133, admitting him to defend the action as against the plaintiff, is a defendant within the meaning of the rule. *Northern Counties Investment Trust* v. *Ross, McFie (Third Party)*, 4 B.C.R. 253.

6. Cross-examination by third party.]—The filing of an affidavit of merits is a condition precedent to the postponement of the hearing of a defendant's application for an order for directions under Order XVI., r. 52, at the instance of a third party, in order to cross-examine a plaintiff on his affidavits. *Patterson* v. *Hodges (Rowe, Third Party)*, 20 B.C.R. 598.

7. Costs.]—The question of allowing a third party his costs is purely one of discretion, dependent upon the circumstances of the case. *Baker* v. *Atkins (Martin, Third Party)*, 14 B.C.R. 320.

E. Practice.

Service of amended writ.]—There is no rule requiring a plaintiff who has amended the writ of summons by adding parties to serve any defendant who has appeared with the amended writ. *Baxter* v. *Jacobs*, 1 B.C.R., Pt. II., 373.

III. JOINDER OF CAUSES OF ACTION.

1. By plaintiff of unconnected causes.]—Misjoinder by a plaintiff of unconnected causes of action against different defendants is not objectionable on demurrer by any of the separate defendants, but is proper subject of motion to strike out as embarrassing, etc. *McKenzie and McGowan* (assignees for the benefit of the creditors of H. T. Read & Co.) v. *Bell-Irving, Paterson & Co., and Alexander McEwen*, 2 B.C.R. 241.

2. Where some objectionable.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the judge, after reading the plaint-

iff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs":—Held, by the Full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 10 B.C.R. 449.

3. Recovery of land.]—A claim indorsed on a writ of summons for a declaration that defendant is trustee of lands for plaintiffs and for a conveyance thereof to them, and for damages for breach of contract, and against one defendant for damages for misrepresentation in regard thereto, and for an injunction, is not a joinder of other causes of action with an action for the recovery of land within the meaning of Order XVIII., R. 2 (r. 147). *Fletcher* v. *McGillivray*, 3 B.C.R. 37.

IV. Statement of Claim.

1. Conformity with indorsement on writ.] — Plaintiffs issued a writ against three defendants, all resident in England, and served it on one of the defendants while temporarily in British Columbia, and then under Order XI. served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to plaintiff of shares according to agreement, and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against defendants for fraudulently manipulating certain companies so that the stock had become worthless:—Held, that the matters alleged in the statement of claim were within the scope of the indorsement. In deciding whether or not the cause of action indorsed on a writ has been unduly extended on the statement of claim, the fact that one of the defendants was served within the jurisdiction, and the others were subsequently served without the jurisdiction under Order XI., is immaterial. *Oppenheimer* v. *Sperling*, 10 B.C.R. 162.

2. Extending claim.]—After an action has been transferred from the County Court to the Supreme Court the plaintiff can extend his claim beyond the sum he originally claimed in the County Court. *Thurston* v. *Tattersall*, 7 B.C.R. 160.

3. Alternative causes of action.]—A plaintiff may in his statement of claim deduce from the facts alleged, and set up, alternative causes of action. Allegations that "as far as the plaintiff can discover," in such a statement of claim are not embarrassing. *Garesche* v. *Garesche*, 4 B.C.R. 444.

V. Defence.

A. In General.

1. General denial.]—A denial of all the allegations in the statement of claim is equivalent to an admission. *Hogg* v. *Farrell*, 6 B.C.R. 387.

2. Denial, sufficiency of.]—The plaintiff, by his statement of claim alleged a partnership between two defendants, one being married, whose name on a rearrangement of the partnership was substituted for that of her husband without her knowledge or authority:—Held, that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of the plaintiff's allegation. *Jackson* v. *Mylius*, 3 B.C.R. 149; 23 S.C.R. 485.

B. Special Defences.

1. Statute of Frauds—Mineral Act.]—To maintain the defence of the Statute of Frauds to an agreement for sale or transfer of a mineral claim, both that statute and sec. 34 of the Mineral Act must be pleaded. *Stussi* v. *Brown*, 5 B.C.R. 380.

2. Point of law not raised on pleadings.]—The objection that, upon the evidence, the act complained of was not done by the servant in the course or within the scope of his employment by defendants, and

was unauthorized by them, is not open to defendants upon motion for a non-suit, unless they pleaded it as a defence. *Adams* v. *The National Electric Tramway and Lighting Co.*, 3 B.C.R. 199.

3. Point not pleaded or taken in Court below.]—In an action by a passenger for damages for loss of baggage, the point that certain articles lost were not the wearing apparel of the plaintiff was not pleaded or taken at the trial:—Held, on appeal, that the point was not then open to defendants. *Wensky* v. *Canadian Development Co.*, 8 B.C.R. 190.

4. Tender.]—There cannot be a plea of tender to an action for unliquidated damages. *Wainwright* v. *Farmer*, 16 B.C.R. 468.

VI. COUNTERCLAIM.

1. Claim and counterclaim.] — Claim and counterclaim are treated as distinct actions up to execution. *Smith* v. *Hansen*, 2 B.C.R. 153.

2. Joint defendants—One may counterclaim in individual cause of action against plaintiff.] — One of two defendants sued jointly may counterclaim upon a cause of action which he individually has against the plaintiff. A counterclaim should not be entirely independent of the original cause of action, but where the counterclaim involved an issue raised as a defence, it was held to be sufficiently connected with the claim. The fact that a counterclaim, if successful, involves the taking of long accounts which will delay the disposition of the action, is not a sufficient cause for excluding it if otherwise unobjectionable. *Powell* v. *Lowenberg, Harris & Co.*, 3 B.C.R. 81.

3. Trial—After case in paper for.]—An order may be made adding a counterclaim after the case was in the paper for trial. *Beer Bros.* v. *Collister*, 3 B.C.R. 145.

4. Petition of right.]—There cannot be a counterclaim to a petition of right. *Spiers* v. *Reginam*, 4 B.C.R. 388.

VII. PARTICULARS.

1. Attorney-General — Dedication of townsite.]—In an action by the Provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the C.P.R. via certain streets in Vancouver, it was alleged that in 1870 Her Majesty by the officers of Her Colony of British Columbia, laid out and planned a townsite on Burrard Inlet, and dedicated certain parts of the townsite to public uses:—Held, that plaintiff must give (1) Particulars of the authority under which the townsite was laid out. (2) Of the nature and dates of dedication, and by whom made; and (3) Of what portions of the townsite were dedicated. *The Attorney-General for the Province of British Columbia, ex rel. The City of Vancouver* v. *The Canadian Pacific Railway Company*, 10 B.C.R. 184.

2. Negligence within defendant's knowledge.] — Particulars are ordered for the purpose of forwarding the applicant's case, and not to hamper the party ordered to give them. When a plaintiff is ordered to give particulars of negligence which are essentially within the defendant's knowledge, the order may provide that the plaintiff should not be confined at the trial to the particulars given. *Alaska Packers' Association* v. *Spencer*, 9 B.C.R. 473.

3. Undue influence.]—A party alleging undue influence will be required to give particulars of the acts thereof. *Hopper* v. *Dunsmuir*, (*No. 3*), 10 B.C.R. 159.

4. Defendant—Having means of knowledge.]—When it appears from the statement of claim that the defendant has, on the circumstances alleged, the means of knowing the details of the matters charged, and the plaintiff has not, general allegations are not embarrassing, and the defendant is not entitled to particulars until after he has given discovery. *Garesche* v. *Garesche*, 4 B.C.R. 444.

5. General allegation of plaintiffs' title —Rule 181.]—In an action by plaintiffs, who have never been in possession, to recover certain coal seams:—Held, that the statement of claim should state particulars of the title under which the plaintiffs claim. *E. & N. Railway Co.* v. *New Vancouver Coal Company*, 6 B.C.R. 188; 1 M.M.C. 237.

6. Negligence.]—In an action for damages for personal injuries, paragraph 5 of the statement of claim contained allegations of negligence which might or might not have been particulars of the negligence alleged in paragraphs 3 and 4. Plaintiff refused to comply with defendants' demand for particulars of the negligence alleged in paragraphs 3 and 4:—Held, that he must give the particulars or else state that they

were to be found in paragraph 5. *Kingswell* v. *Crow's Nest Pass Coal Company*, 9 B.C.R. 518.

7. Statutes—Where pleading.]—Where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section. *Kirk* v. *Kirkland*, 6 B.C.R. 442.

8. Discretion of Court to order.]—The Court has discretion to order defendant to make an affidavit of documents before delivery of defence for the purpose of enabling the plaintiff to give particulars of charges of fraud made in the statement of claim. *Beauchamp* v. *Muirhead*, 6 B.C.R. 418.

9. True function.]—The true function of particulars is not to give discovery, but to enable the opposite party to properly frame his pleading. *Steves* v. *Murchison*, 13 B.C.R. 188.

10. General allegation of defendants' title—Rule 210.]—The defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without showing the defendants' title in the defence, and further set up laches as an alternative defence:—Held, that the defendants were not bound to set forth their title in their statement of defence, but that particulars of the alleged laches ought to be stated. *Esquimalt and Nanaimo Railway Company* v. *New Vancouver Coal Company*, 6 B.C.R. 306.

11. General allegation of defendants' title—Rule 210.]—Statement of defence traversed allegation in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without showing the defendant's title in the defence, and further set up laches as an alternative defence:—Held, that the defendants were bound to set forth their title in their statement of defence. *Esquimalt and Nanaimo Railway* v. *New Vancouver Coal Co.*, 9 B.C.R. 162; 1 M.M.C. 284.

12. Discovery — Rule 158—Estoppel.]—Defendants in answer to an action for trespass to land by erecting a building thereon, set up in their statement of defence that the erection was upon land on defendants' side of boundaries, fixed by agreement between the parties, and also that the plaintiff was estopped by his conduct and representations from denying that the boundaries were as claimed by the defendants:—Held, that the specific acts and conduct causing the alleged belief relied on as an estoppel must be pleaded, and that particulars under the general allegation were properly ordered. The mere fact that particulars will necessarily disclose the names of witnesses is no objection if the party is otherwise entitled to them. *Guichon* v. *The Fisherman's Cannery Co.*, 4 B.C.R. 516.

13. Libel.] — A defendant in a libel action, who has pleaded a general justification, must furnish the plaintiff with the particulars of the facts relied upon as a justification before he can obtain discovery from the plaintiff. *Bullen* v. *Templeman*, 5 B.C.R. 43.

14. Mining case — Particularity.] — In mining cases, if the defendant wishes to rely on defects in the plaintiff's location he must set them forth specifically in his pleading. *Aldous* v. *Hall Mines Co.*, 6 B.C.R. 394; 1 M.M.C. 213; *Hogg* v. *Farrell*, 6 B.C.R. 387; 1 M.M.C. 79.

15. Tax sale.] — In an action to set aside a sale of land for arrears of taxes, the plaintiff will not be ordered to give particulars of the sale. *Turner* v. *Municipality of Surrey*, 16 B.C.R. 79; *Beavis* v. *Langley Corporation*, 18 B.C.R. 30.

VIII. Amendment.

A. Writ of Summons.

1. Style of cause—Amendment of.]—J. S., trading under the name of B.C. Furniture Company, commenced an action on 10th March, 1899, in such name in respect of a promissory note dated 20th January, 1893, payable sixty days after its date. A summons under Order XIV., having been dismissed on the ground that one person cannot sue in a firm name, plaintiff obtained an order amending the style of cause:—Held, that the writ was not a nullity, and that the irregularity was properly amended. *B.C. Furniture Company* v. *Tugwell*, 7 B.C.R. 361.

2. Address of plaintiffs.] — Where plaintiffs sue as trustees for a corporation it is not necessary to indorse on the writ the addresses of the individual plaintiffs. Plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland":—Held, insufficient address, but as there was nothing misleading in the address leave was granted to amend by stat-

ing the place of business of the company. *Dundas* v. *Mackenzie*, 10 B.C.R. 174.

3. Variance.]—The indorsement on the writ asked for the delivery up and cancellation of a certain document, dated the 24th of April, 1906. The statement of claim, when delivered, showed in effect that the document sought to be declared void was dated the 20th of September, 1906, and was of a different purport:—Held, that the indorsement was defective and erroneous, but that it might be amended and redelivered on payment of costs. *Chang Shee Ho Chong* v. *Culley*, 13 B.C.R. 18.

B. Pleadings.

1. At close of trial.]—The Court may allow the plaintiff's pleadings to be amended at the close of the trial to meet the facts proved, and in accordance with the course of the trial. *Foley* v. *Webster*, 2 B.C.R. 137.

2. At trial.] — Where an action was brought for wrongful dismissal when it should have been brought for refusal to receive into employment, an amendment was allowed at the trial. *Tuck* v. *Victoria Corporation*, 2 B.C.R. 179.

3. Terms of allowance.]—After an order fixing the date of trial amendments raising a new case will only be allowed on the terms of postponing the trial, if the opposite party is not ready for trial on the new issues raised. *Wolley* v. *Lowenberg, Harris & Co.*, 3 B.C.R. 197.

4. Delay.] — The plaintiff after long delays, obtained an order to amend his statement of claim:—Held, on appeal, that the intervening delay was no ground for setting it aside. *Clarke* v. *Eholt*, 3 B.C.R. 442.

5. Statute of Limitations.] — Plaintiff, who was injured in the defendants' sawmill, sued under the Employers' Liability Act and the common law. His action was launched against the Diplock-Wright Lumber Company, Limited, but he subsequently ascertained that the defendants were not an incorporated company, but a registered partnership. He therefore applied to amend accordingly. Defendants did not oppose the application, but asked and obtained, as one of the terms of the amendment, leave to be permitted to plead to the amended claim such defences as could have been pleaded thereto if the action had been commenced on the date of the order allowing the amendment. It transpired that at the latter date the action had become statute barred under the Employers' Liability Act. This fact was not disclosed at the time of the application for the order for amendment:—Held, on appeal, that the application not being one having the effect of adding new parties, but merely to correct a misnomer of parties, the defendants could not properly set up the Statute of Limitations as a bar. *Russell* v. *Diplock-Wright Lumber Company*, 15 B.C.R. 66.

6. Answer to Statute of Limitations.]—The Full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would, if proved, be a good answer to a plea of the Statute of Limitations. *Jones* v. *Davenport*, 7 B.C.R. 452.

7. Alternative claim.]—A plaintiff claiming damages under a generally indorsed writ, applied, some seven months after writ issued, to amend his statement of claim by adding an alternative claim particularly pleading the Employers' Liability Act:—Held, on appeal, that as his claim as originally framed, could be supported either under the common law or the Employers' Liability Act, the amendment must be allowed. *Mercer* v. *British Columbia Electric Railway Company, Limited*, 17 B.C.R. 465.

8. All proper amendments.] — All proper amendments should be made so as to cover the case made at the trial. *Jackson* v. *Mylius*, 3 B.C.R. 149; 23 S.C.R. 485.

9. Formulating amendments.] — Where leave to amend is granted at the trial, the terms of the amendment ought to be written out for the benefit of the Court of Appeal, if not for other reason. *McKissock* v. *McKissock*, 18 B.C.R. 401.

C. Judgment.

Excessive amount.]—Where judgment in default of defence is signed for an excessive amount owing to a clerical error:—Held, that the Court may under r. 319 order the judgment to be amended by the insertion of the proper amount. *McKinnon* v. *Lewthwaite*, 20 B.C.R. 55.

D. Service of Amended Writ.

1. Adding parties.] — There is no rule requiring a plaintiff who has amended the writ of summons by adding parties to serve any defendant, who has appeared,

with the amended writ. *Baxter* v. *Jacobs*, 1 B.C.R., Pt. II., 373.

2. Special indorsements.] — Where the special indorsement on the writ has been amended by leave, the amended writ must be re-served upon every defendant; if any defendant has appeared, such appearance stands as an appearance to the amended writ. *More* v. *Paterson*, 2 B.C.R. 302.

IX. CONDITIONS PRECEDENT.

1. Pleading.]—It is not necessary for the plaintiff to plead conditions precedent to his right of action, and where there is no specific denials, all such conditions will be taken to be admitted. *Hopkins* v. *Gooderham*, 10 B.C.R. 250.

2. Statutory conditions.]—The rule that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings," refers rather to cases founded on contract than to those where statutory authority is relied upon, and a party relying on such authority must plead the fulfilment of all enabling conditions. *Sandon, etc., Co.* v. *Byron N. White Co.*, 10 B.C.R. 361; 35 S.C.R. 309.

X. DEMURRER, PROCEEDINGS IN LIEU OF: STRIKING OUT PLEADINGS AND ALLEGATIONS.

1. Labour union — Pleading.] — It is open to either party to an action up to the time of the trial to attack the other's pleadings. Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing. *Centre Star Mining Co., Ltd.* v. *Rossland Miners Union*, 9 B.C.R. 531.

2. Foreshore—Allegation as to obstruction of.]—In an action for damages and an injunction, the plaintiff alleged in the statement of claim that the defendant company had wrongfully erected an embankment on the foreshore of Burrard Inlet, and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—Held, on an application to strike out the pleading as embarrassing, and as disclosing no cause of action, that the pleading was good. In such an action, it is not necessary for the plaintiff to allege ownership in the foreshore. A combined application may be made under Order XIX., r. 27, and Order XXV., r. 4, to strike out a statement of claim on the ground that it is embarrassing and discloses no reasonable cause of action, and such procedure is not limited to cases which are plain and obvious. *The Attorney-General for the Province of British Columbia, ex rel. The City of Vancouver* v. *The Canadian Pacific Railway Company*, 10 B.C.R. 108.

3. Libel—Offer of apology.]—An offer, alleged in a statement of defence to an action of libel, to publish an apology on such terms as the plaintiff could reasonably require, is no defence and embarrassing. *Hoste* v. *Victoria Times Publishing Co.*, 1 B.C.R., Pt. II., 365.

4. Statement of claim—Disclosing no reasonable cause of action to.]—The statement of claim disclosed that the defendant had brought an action to set aside a conveyance to the plaintiff, a married woman, from her husband, of certain lands, as being made for the purpose of defeating a judgment of the defendant against him; that the defendant had issued a certificate of lis pendens in that action and registered it against the lands in question, whereby the plaintiff was prevented from making an advantageous sale thereof; that "the defendant, although he was made aware of the circumstances surrounding the transaction in question, and of the loss of profit which he would thereby entail upon the plaintiff, wrongfully and maliciously refused to remove the said lis pendens," and that the defendant afterwards discontinued his action. Upon application by defendant to dismiss the present action as frivolous and vexatious, and an abuse of the process of the Court, and, under r. 235, as disclosing no reasonable cause of action:—Held, that the statement of claim disclosed no reasonable cause of action, and, upon all the facts (which appeared by affidavits filed for the purpose of defendant's contention, that the action was an abuse of the process of the Court), that no truthful amendment could be made to the statement of claim which would disclose a good cause of action. *Cowan* v. *Macaulay*, 5 B.C.R. 495.

5. Embarrassing.] — An allegation that a defendant is "not a company, corporation,

co-partnership or person, and not capable of being sued in this or any action" will be struck out as embarrassing. *Centre Star Mining Co.* v. *Rossland Miners Union*, 9 B.C.R. 531.

6. Action on a bond.]—By agreement with the Province of British Columbia, dated February 23rd, 1885, a railway company was bound to complete the undertaking by December 31st, 1886, and due performance of the agreement was secured by a bond in the sum of $250,000. The work was stopped, owing to certain landowners obtaining injunctions against the company, which were affirmed on appeal to the Full Court, but at length dissolved on appeal to the Supreme Court of Canada on December 7th, 1886, but the company was unable to complete the contract by the stipulated time:—Held, in an action on the bond, that a demurrer to the defence on the ground "that non-performance of a contract, or delay in performing a contract, cannot be excused or defended by setting up the order of injunction of a Court of Justice" was bad. *Her Majesty's Attorney-General for the Province of British Columbia* v. *The Canadian Pacific Railway Company, Donald A. Smith, Wm. C. Van Horne, and Sandford Fleming*, 1 B.C.R., Pt. II., 350.

7. Conducing to breach of trust.]—A defendant alleged to have induced his co-defendants to commit a breach of trust, even though a merely technical one, is not entitled to have the action dismissed as against him. *Scott-Elliott* v. *Hatzic Prairie Co.*, 18 B.C.R. 668.

8. Facts in controversy.]—A question of law raised on the pleadings will not be adjudicated upon where the facts on which the question is based are in controversy. *Crosbie* v. *Prescott*, 17 B.C.R. 199.

9. Affidavits.]—On an application to dismiss an action as frivolous or vexatious, if the plaintiff does not answer the affidavits filed in support, they must be taken as true. *W. D. Hofius and Company* v. *The Lenora, Mount Sicker Copper Mining Company, Limited*, 13 B.C.R. 226.

10. Inserting allegations struck out.]—Where an order has been made to strike out certain allegations from which no appeal was taken, such allegations should not be inserted in an amended pleading, even in the case of an order having been made in the meantime by the Court of Appeal giving leave to plead any matters which may be properly pleaded in aggravation of damages. *Hallren* v. *Holden*, 20 B.C.R. 489.

XI. ADMISSIONS.

Agency—Scope of admission of.]—In an action against the captain and owner of a steamer for trespass and false imprisonment in taking the plaintiff on board their steamship at Honolulu and conveying him to Vancouver, British Columbia, against his will, the statements of defence of each defendant alleged that "in receiving the said plaintiff on board the said steamship Warimoo, and conveying him to Vancouver aforesaid, he was acting as the agent of the Hawaiian Government, being a responsible government, and carrying out the lawful order of that Government, given in the said City of Honolulu and Island of Oahu, which were at that time under martial law." The plaintiff in his reply admitted the above paragraph:—Held, that the scope of the admission had reference to the substantive facts alleged in the defence, and not the extent of the agency, as alleged, which was a matter of legal deduction from the facts not susceptible of being concluded by admission. *Cranstoun* v. *Bird and Huddart*, 4 B.C.R. 569.

See MINES AND MINERALS.

See PRACTICE.

POSSESSION.

1. Proof.]—Possession of land must be considered in every case with reference to the peculiar circumstances, the character and value of the property, the suitable and natural mode of using it, and the course of conduct which its proprietor might reasonably be expected to follow with due regard to his own interest. *Kirby* v. *Cowderoy*, 1912, A.C. 599.

2. Proof.]—The plaintiff brought action for trespass to establish her title under the Statute of Limitations to a strip of land for which the defendant had the paper title:—Held, that upon the evidence, the plaintiff had not shown that she and her predecessors in title were in actual, constant, visible occupation of the land in question for the full period of 20 years before the alleged trespass. *Greaves* v. *Carruthers*, 18 B.C.R. 264.

3. Lost property.]—An article laid down and forgotten is not lost property in

the sense that the person picking up such article acquires title thereto against any person but the true owner. Thus, where a clerk in a bank, while attending to his duties behind the counter, noticed lying on a desk used by patrons of the bank in the public portion of the premises, a wallet containing money, and picked it up and handed it over to the manager for the rightful owner, who never was discovered or appeared to claim it:—Held, that the money could not be considered lost within the proper meaning of the term. *Heddle* v. *Bank of Hamilton*, 17 B.C.R. 306.

POST OFFICE.

Infringement of Post Office Act.]—The defendants contracted with an association to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres and sent them by express, consigned to the express company's agents in the respective places, with instructions to mail them in the local post offices. The local or drop letter postal rate of one cent on each letter was affixed:—Held, setting aside the finding of the magistrate, that this procedure of reaching the addressees was an infringement of the rights of the Postmaster-General under the Post Office Act. *Rex* v. *Baxter and Johnson*, 16 B.C.R. 6.

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I. IN GENERAL.

Pendency of action.]—So long as there remains anything to be done to work out the judgment in an action, the action is pending. *Peck* v. *Sun Life Assurance Co.,* 11 B.C.R. 215.

II. WRIT OF SUMMONS.

A. In General.

1. Citation to bring in grant.]—Where the rule requiring the issue of a citation to bring in the grant on commencing an action to revoke a probate has not been complied with, proceedings will be stayed until this has been done. *McLagan* v. *McLagan,* 11 B.C.R. 325.

2. Omission to state any address.]—The omission to state upon the writ of summons any address does not invalidate the writ, but is an irregularity merely, and amendable. *Mathews* v. *Corporation of Victoria,* 5 B.C.R. 284.

3. Plaintiff's address.]—Where the writ was in Form 2 of Appendix A. of the Rules and gave the plaintiff's address as "Victoria, British Columbia," it was held sufficient. *Carse* v. *Tallyard,* 5 B.C.R. 142.

4. Plaintiff's address where several suing as trustees.]—Where plaintiffs sue as trustees for a corporation, it is not necessary to indorse on the writ the addresses of the individual plaintiffs. Plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland":—Held, insufficient address, but as there was nothing misleading in the address, leave was given to amend by stating the place of business of the company. *Dundas* v. *MacKenzie,* 10 B.C.R. 174.

5. In name of a firm of solicitors.]—It is quite permissible to sign a writ in the name of a firm of solicitors. *Protestant Orphans' Home* v. *Daykin,* 12 B.C.R. 128.

6. Seal.]—The copy of a writ of summons served on the defendant need not indicate that the original was sealed. *Canada Settlers Loan Co.* v. *Steinburger,* 4 B.C.R. 353.

7. Receiver.]—It is improper to endorse on the writ a claim that a particular person may be appointed receiver. *Hudson's Bay Co.* v. *Green,* 1 B.C.R., Pt. I., 247.

B. Issue of.

1. Patent action.]—In an action for infringement of a patent, the writ need not be issued out of the registry nearest the place of residence or business of the defendants, but sec. 30 of the Patent Act is complied with if the venue is laid at the place of such registry. *Short* v. *Federation Brand Salmon Canning Co.,* 6 B.C.R. 385.

2. Patent action.]—In an action against a Company for infringement of a patent, the venue should be laid at the place of the registry which is nearest the head office of the company. *Short* v. *Federation, etc., Co.,* 6 B.C.R. 436.

C. Renewal of.

Delay.] — A delay of four months unaccounted for, from the date of the expiry of a writ, is fatal to a motion to renew the writ. *Loring* v. *Sonneman*, 5 B.C.R. 135.

D. Setting Aside.

1. Who may move.]—It is not necessary that a person who has been served with a writ of summons should be the actual defendant to entitle him to move to set it aside. *Fall* v. *Klondyke Bonanza, Ltd.*, 9 B.C.R. 493.

2. Motion before appearing.] — A defendant may move to set aside the service of the writ before appearing or entering a conditional appearance. *Garesche* v. *Holladay*, 1 B.C.R., Pt. II., 83. *Fletcher* v. *McGillivray*, 3 B.C.R. 40.

3. Summons before appearance.] — An application to set aside a writ of summons may be by summons in chambers, and may be made by the defendant without entering a conditional or other appearance. *Carse* v. *Tallyard*, 5 B.C.R. 142.

4. Conditional appearance.] — Notwithstanding Order XII., r. 19 (Rule 70), providing that a defendant may move to set aside service of a writ of summons without entering a conditional appearance, the fact that a defendant has entered a conditional appearance is not a good preliminary objection to such a motion. The fact that defendant includes in such application a notice to discharge an interim injunction granted before service of the writ is not a waiver of irregularity in the writ. *Fletcher* v. *McGillivray*, 3 B.C.R. 37.

5. Service of writ without indicating seal of Court.] — The seal of the Court affixed to a writ of summons is not a part of the writ itself, but merely authenticates it. The copy of the writ of summons served on the defendant did not indicate that the original was sealed. Upon motion to set aside the service thereof:—Held, dismissing the motion, that the writ was properly served. *Canada Settlers' Loan Co.* v. *Steinburger*, 4 B.C.R. 353.

6. Delay in service.]—Plaintiff having commenced an action to enforce an adverse claim, did not serve the writ within a year as provided by r. 31. The defendant moved in the action to set aside the writ and to vacate the adverse claim:—Held, that the action was out of Court, and no order could be made therein. *Troup* v. *Kilbourne*, 5 B.C.R. 547.

E. Service of, Within Jurisdiction.

1. Generally.

1. Defendant company's manager merely passing through Province.]—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:—Held, that the service was irregular. *Fall* v. *Klondyke Bonanza, Limited*, 9 B.C.R. 493.

2. Transitory action.] — Where the defendant was personally served with the writ of summons whilst within British Columbia, and the cause of action was transitory, an application to set the service aside was refused. *Parshley* v. *Hanson*, 17 B.C.R. 364.

3. Agents of solicitors.] — Where the general agents in Victoria of a firm of country solicitors have never acted as agents in a particular action, the service on them of a summons in the action is insufficient. *Barnes* v. *Gray*, 6 B.C.R. 219.

2. On Foreign Corporation.

1. Domicile of.] — The defendants, a foreign company, had a place of business in Victoria, where it carried on a trading business, although its principal place of business and head office, where the meetings of the governor, chief traders, and shareholders were held, were in England. The plaintiff, as administrator—appointed by the Court here to the intestate estate of McL., a deceased servant of the company—served a writ on one of the company's managers at Victoria. On an application to have the writ set aside:—Held, that inasmuch as by the company's rules the power to appoint, pay, and dismiss was with the England office, and as, by agreement, the deceased's account was kept at that office, and the balance due him from time to time was payable there, the English office must be regarded as the domicile of the company, and the company could not be sued here by the plaintiff as administrator of the deceased. *Wilson* v. *Hudson's Bay Company*, 1 B.C.R., Pt. II., 102.

2. Canadian Pacific Railway Co.] — In an action against the Canadian Pacific Railway Company, service of process against the company must be effected at the company's office in Vancouver appointed pursuant to 44 Vict., c. 1, sec. 9. *Jordan* v. *McMillan, Canadian Pacific Railway Company, garnishee*, 8 B.C.R. 27.

3. Substituted Service.

Sufficiency of affidavit — Supplying defects in.]—An affidavit leading to an order for substituted service under sec. 130 of the Companies Act on an extra-provincial company licensed to do business in British Columbia, should show 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 plaintiffs 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, will not interfere. *Centre Star Mining Company, Limited* v. *Rossland Great Western Mines, Limited (No. 2)*, 10 B.C.R. 262.

F. Service of, Out of the Jurisdiction.

1. Leave to Issue, Necessity for.

1. Irregularity.]—A writ of summons for service outside the jurisdiction is irregular if issued without leave. *Hull* v. *Schneider*, 3 B.C.R. 32.

2. Nullity.]—A writ was issued for service within the jurisdiction. Two defendants within the jurisdiction were served and an order was then taken out for leave to serve notice of the writ on a third defendant without the jurisdiction, who was then served with a copy of the order and the notice:—Held, that the order be set aside and that all proceedings thereunder were null and void. It is a condition precedent to the service that leave be granted to issue the writ under Order II., r. 4, and that leave be granted for service out of the jurisdiction under Order XI. *Bloom* v. *New York Tailoring Co.*, 18 B.C.R. 395.

2. Cases Within Order XI.

1. Action properly brought against person served within jurisdiction.]—T., the British Columbia agent for the P. C. Line, of Seattle, sued McM., the agent of the D. & W. H. N. Co., on a bill of exchange drawn by McM. on the company in favour of T. This bill was for the balance of freight moneys due under a charter-party entered into between the principals; and the company, having a claim against the P. C. Line for demurrage, obtained an order adding them as party defendants, and giving them and McM. leave to deliver a counterclaim and serve it upon the P. C. Line. An order was then made giving leave to McM. and the company to serve notice on the P. C. Line of the defense and counterclaim:—Held, that as no cause of action or counterclaim against T. was shown, there was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to make the order. *Trowbridge* v. *McMillan*, 9 B.C.R. 443.

2. Action to rescind purchase of shares in mining company.] — An action to rescind a 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 leave to issue a writ for service out of the jurisdiction. *Davies* v. *Dunn*, 8 B.C.R. 68.

3. Transfer of shares—Agreement.]—A writ for service out of the jurisdiction having been issued to enforce an agreement between residents of British Columbia and England for the 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.

4. Against mortgagee of ship.]—In an action by execution creditors against a mortgagee of a British ship to recover the surplus of the proceeds of sale under a power of sale, it was held that an order for service out of the jurisdiction on the mortgagee could not be made. *Wilson Bros.* v. *Donald*, 7 B.C.R. 33.

5. Foreign contract.]—A Seattle steamship company contracted with a Victoria firm to cary coal from Seattle to Alaska, and was paid the amount of the contract price. When the coal arrived at Dyea the company demanded and collected from the firm's agent an additional sum for taking the coal in lighters from Skagway to Dyea. The company's agent promised to repay this

amount in Victoria:—Held, setting aside a writ for service out of the jurisdiction, that the claim really arose out of the contract, and therefore the Court had no jurisdiction. *Shallcross, Macaulay & Co.* v. *Alaska Steamship Co.*, 8 B.C.R. 203.

6. Interest in land.]—An interest in a special timber license issued under the Land Act is an interest in lands, to enforce which a writ may be issued for service ex juris under the provisions of Order XI., r. 1 (b). *Vaughan-Rys* v. *Clary, Needler and Laidlaw*, 15 B.C.R. 9.

7. Promissory note.] — A promissory note not specifying any place of payment is prima facie payable at the place where it appears on its face to have been made, and where such place is without the jurisdiction, leave to issue a writ will not be granted. *Garesche, Green & Co.* v. *Holladay*, 1 B.C.R., Pt. II., 83.

3. Application for Leave to Issue.

1. Indorsement of writ—Must disclose reasonable cause of action.]—As the leave of the Court or a judge is (by r. 6) expressly required to be obtained before the issue of a writ for service outside the jurisdiction, the Court must, before sanctioning it, be satisfied that the indorsement discloses a reasonable cause of action. The promissory note as set out in the special indorsement showed the name of W., one of the defendants, sued as indorser, indorsed under that of the plaintiff, the payee of the note:—Held, prima facie evidence that W. was not liable on the note to the plaintiff, and that the plaintiff was not the holder of the note, and motion to issue the ex juris writ refused. *Tai Yune* v. *Blum*, 3 B.C.R. 21.

2. Affidavit.]—An affidavit leading to an order for a writ containing allegations of facts which must necessarily have been founded on information and belief only must state the source of information. *Tate* v. *Hennessey*, 8 B.C.R. 220.

3. Affidavit leading to order for—What it should show.]—An affidavit leading to an order for a writ should show the grounds on which deponent believes that the plaintiff has a good cause of action. *The Northern Counties Investment Trust, Limited (Foreign)* v. *Nathan*, 7 B.C.R. 136.

4. Affidavit leading to order for—Jurisdiction of local judge.]—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*, 7 B.C.R. 262.

5. Rescinding order.]—The allowance of service of a writ of summons upon a foreigner out of the jurisdiction of the Court is discretionary. Upon motion to the judge who made such an order to rescind the same, it appeared that the plaintiff's cause of action was upon a promissory note made at Portland, U.S.A., by the defendant, who resided there; no place of payment was mentioned in the note:—Held, rescinding the order, that prima facie the note was payable in Portland, and that the contract and breach arose in the foreign jurisdiction, and that the case was not within Order XI. (2) That the proper practice was to apply to the judge who made the order to rescind it, and not to appeal from it. *Garesche, Green & Co.* v. *Holladay*, 1 B.C.R., Pt. II., 83.

4. Substituted Service.

1. Affidavit.]—An affidavit for an order for substitutional service of a writ must show that the defendant is evading service of it. *Hull Bros.* v. *Schneider*, 3 B.C.R. 32.

2. Affidavit.]—To support an order for substitutional service of a writ of summons allowed to be issued for service out of the jurisdiction, it must appear upon the affidavit upon which the order is obtained that the defendant is evading service of the writ. Supplemental affidavit that such was the fact not admitted in answer to a motion to set aside the order. *Mellor* v. *Carter*, 3 B.C.R. 301.

G. Special Indorsement.

1. What Claims Subject of.

1. Liquidated damages.] — In order to obtain judgment under Order XIV., the indorsement on the writ must show beyond question that the claim is for a liquidated amount. Where, therefore, in a suit claiming $25 per day for default in a building contract, and no commencement was made on the building contracted for:—Held, that the claim for damages could not be said to be for liquidated damages, entitling plaintiff

to sign judgment under Order XIV. *Lembke* v. *Chin Wing*, 17 B.C.R. 218.

2. Liquidated amount.] — A claim for $1,000, "amount due upon an agreement whereby the defendant agreed to pay the plaintiffs the sum of $1,000 in the event of certain work in which the plaintiffs were engaged being wholly stopped by the defendant, and which has been wholly stopped by him," is a liquidated demand, and proper subject of special indorsement. *Lantz* v. *Baker*, 3 B.C.R. 269.

3. Contract of indemnity.]—Plaintiff's writ was specially indorsed to recover $1,000 for principal money due, under a covenant to pay the sum of $1,000 on 20th February, 1892. "The covenant, as set out in the affidavit, was to assume, pay and discharge all moneys due and to become due from the said assignor (plaintiff) to one Parker, under a certain agreement between them," and "to indemnify and save harmless him, the said assignor, from the payment of the same," etc. It did not appear that Parker had demanded payment from the plaintiff:—Held, that the contract proved was one of indemnity, and a claim for breach of such a contract is not a liquidated but an unliquidated demand. *Baker* v. *Dalby, Ballentyne & Claxton*, 3 B.C.R. 289.

4. Account stated.]—The particulars of the plaintiffs' claim indorsed on the writ were: "1899. November 30. To balance of account rendered, which balance has been stated, $51.70. Balance of account rendered and stated owing to Hunter Brothers, and duly assigned for value by an assignment dated the 1st day of December, 1889, to the plaintiffs, and of which express notice in writing has been given to the defendant, $167.15. Total, $218.85":—Held, not a special indorsement such as would support a judgment under Order XIV. *Rogers* v. *Reed*, 7 B.C.R. 139.

5. Claim of interest after maturity.]—The plaintiff's claim, indorsed on the writ, was upon a promissory note expressed to be payable "with interest at 9 per cent. per annum until paid." It claimed the amount of the note and interest at 7 per cent. from the date of the note to the date of the writ (in view of sec. 80 of the Bank Act, 1890, Stat. Can., c. 31), limiting the interest recoverable by certain banks to 7 per cent.:—Held, upon summons for judgment under Order XIV., that the claim for interest at 7 per cent. after the maturity of the note was for unliquidated damages. *Bank of Montreal* v. *Bainbridge & Co.*, 3 B.C.R. 125.

2. Claim for Interest.

1. Claim for interest till judgment at certain rate, necessitating computation.] —Plaintiffs' claim, as indorsed on the writ of summons, was for a sum certain for principal and interest due upon a covenant in a mortgage, and interest thereon until judgment:—Held, not a special indorsement entitling the plaintiffs to judgment under Order XIV. To a special indorsement for interest it is necessary: (1) That it is claimed to be due by contract or statute. (2) That a definite sum is claimed, as defendant cannot be called upon to take the risks of calculation. Secus, in the case of interest claimed on a promissory note. *B. C. L. & I. A.* v. *Thain*, 4 B.C.R. 321.

2. Interest under statute.] — Interest claimed under a statute cannot be the subject of special indorsement unless it is stated in the indorsement under what Act the interest is claimed. *Macaulay Brothers* v. *Victoria Yukon Trading Company*, 9 B.C.R. 136.

3. Foreign judgment.]—In an action on a Yukon Territory judgment the writ may be specially indorsed within Order III., r. 6, with a claim for interest on the judgment. It is not necessary in such an indorsement to state that the interest is due by statute. *Macaulay Brothers* v. *Victoria Yukon Trading Company*, 9 B.C.R. 27.

4. After maturity.] — The plaintiff's claim, indorsed on the writ, was upon a promissory note expressed to be payable "with interest at 9 per cent. per annum until paid." It claimed the amount of the note and interest at 7 per cent. from the date of the note to the date of writ:—Held, that the claim for interest at 7 per cent. after the maturity of the note was for unliquidated damages. *Bank of Montreal* v. *Bainbridge & Co.*, 3 B.C.R. 125.

5. Until payment or judgment.] — A claim for interest "until payment or judgment" is not a claim for a liquidated demand, within the meaning of Order III., r. 6, except, for example, where the cause of action is in respect to negotiable instruments, in which case the interest is by sec. 57 of the Bills of Exchange Act deemed to be liquidated damages. *Macaulay Brothers* v. *Victoria Yukon Trading Company*, 9 B.C.R. 136.

6. Until payment or judgment.] — A claim specially indorsed on a writ for the amount of an account rendered and "for interest thereon at six per cent. until judgment" is not a liquidated demand under Order III., r. 6. *McClary Manufacturing Co.* v. *Corbett*, 2 B.C.R. 212.

7. Until payment or judgment.] — In an action for the principal and interest due under a covenant in a mortgage, a claim for interest until payment or judgment is not the subject of a special indorsement. *Pike* v. *Copley*, 9 B.C.R. 52.

8. No provision for interest.]—A claim upon a promissory note containing no provision for interest, may include a claim for interest at the legal rate from the date of maturity to the date of judgment. *British Columbia Corporation, Limited* v. *Coughlan*, 3 B.C.R. 273.

3. Requisites of.

1. Sufficient particulars.] — Where a party is placed in the position of having judgment signed against him summarily, he is entitled to have sufficient particulars to enable him to satisfy his mind whether he should pay or resist. *Bank of Montreal* v. *Thomson*, 13 B.C.R. 218.

2. Heading—Statement of claim.]—A special indorsement, in order to support a judgment under Order XIV., must be headed with the words "statement of claim." *Vancouver Agency* v. *Quigley*, 8 B.C.R. 142.

3. Signature of solicitor.] — A special indorsement, in order to support a judgment under Order XIV., must contain the signature of the plaintiff's solicitor. *Oppenheimer* v. *Oppenheimer*, 8 B.C.R. 145.

4. Amount due.]—A specially indorsed writ should state specifically the amount due. *Macaulay Bros.* v. *Victoria Yukon Trading Co.*, 9 B.C.R. 136.

5. Amendment — Service of amended writ.]—When an order amending the special indorsement upon a writ of summons is made, the writ with the new special indorsement must be reserved upon every defendant affected by the amendment. If such defendant has already appeared, such appearance stands as an appearance to the amended writ, and the plaintiff can apply for judgment under Order XIV., but judgment cannot be directed to be entered against him before the lapse of eight days from the service of the amended writ. *More* v. *Patterson*, 2 B.C.R. 302.

6. No particulars of credits.] — An indorsement on a writ of summons claiming a balance due on a promissory note giving particulars of the note, but not of the credits, is a good special indorsement. *Mason* v. *Nason*, 4 B.C.R. 172.

7. Foreign judgment.] — Where a writ is specially indorsed with a claim for the taxed costs of a foreign judgment, the date of the taxation should be stated. *Macaulay Bros.* v. *Victoria Yukon Trading Co.*, 9 B.C.R. 136.

8. Action on covenant.]—An indorsement of a claim for principal and interest under a covenant in a mortgage, in order to be a good special indorsement within the meaning of Order III., r. 6, and Order XIV., r. 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.

9. Action on promissory note.]—In an action to recover the amount of a promissory note, presentment for payment, dishonour and notice thereof to the indorser, must be stated in the special indorsement of the writ to warrant an order for judgment against the indorser, under Order XIV., but need not be alleged to warrant judgment against the maker. *More* v. *Patterson*, 2 B.C.R. 302.

10. Action on promissory note.]—Plaintiff obtained an order for judgment under Order XIV., upon a specially indorsed writ against Coughlan & Mason as makers, and Stelly as indorser for the amount of a promissory note and interest as claimed from the date of its maturity at 6 per cent., no interest being provided for in the note. The indorsement stated that the note had been duly presented for payment and been dishonoured and that "notices of dishonour had been waived":—Held, that interest was payable on the note after maturity at 6 per cent., and was a liquidated demand under the Bills of Exchange Act (Can.), 1890, sec. 57, and that the special indorsement was sufficient. *British Columbia Corporation, Limited* v. *Coughlan & Mason and George Stelly*, 3 B.C.R. 273.

11. Action on promissory note — Presentation—Allegation of, necessary.]—Under sec. 86 of Bills of Exchange Act, 53 Vict. (Can.), c. 33, where a promissory note is made payable at a particular place,

presentation at that place must be alleged and proved in order to make a cause of action against the maker. A special indorsement upon a writ of summons in an action to recover from the maker the amount of a promissory note, stated the note as being made payable at a particular place, but did not allege presentment; a motion for judgment was dismissed on the ground that the special indorsement disclosed no cause of action. *Croft* v. *Hamlin*, 2 B.C.R. 333.

12. Action on promissory note—Presentment.] — The statement of claim indorsed on the writ alleged that the note sued on was payable at a particular place named, and in the same paragraph that the note was duly presented and dishonoured:—Held, a good special indorsement. *Union Bank of Halifax* v. *Wurzburg and Company, Limited*, 9 B.C.R. 160.

13. Claim of interest.] — Plaintiffs' claim, as indorsed on the writ of summons, was for a sum certain for principal and interest due upon a covenant in a mortgage, and interest thereon until judgment:—Held, not a special indorsement entitling the plaintiff to judgment under Order XIV. To a special indorsement for interest it is necessary: (1) That it is claimed to be due by contract or statute. (2) That a definite sum is claimed, as defendant cannot be called upon to take the risks of calculation. Secus, in the case of interest claimed on a promissory note. *British Columbia Land & Investment Company* v. *Thain*, 4 B.C.R. 321.

14. No allegation of recovery of judgment sued on.]—In an action on a foreign judgment the statement of claim indorsed on the writ did not allege specifically against whom the judgment was recovered: —Held, that the writ was not specially indorsed. *Boyle* v. *Victoria Yukon Trading Co., Limited*, 8 B.C.R. 352.

III. Change of Solicitor.

Subpœna to name a solicitor.] — The defendant appeared to the action by D., a solicitor, and then went to reside outside the jurisdiction. D. being elevated to the bench, the plaintiff afterwards obtained a summons for judgment under Order XIV., and served it upon H. (of the firm of H. & L. D.); the former partner of D., H., refused to accept or acknowledge the service. The plaintiff left the summons at the office of H., who returned it. Drake, J., upon the return day mentioned in the summons, treated the above as good service thereof, and no one appearing for the defendant, made an order giving the plaintiff leave to sign judgment for the amount claimed. The defendant appointed L. D., partner of H., solicitor ad hoc, and appealed to the Divisional Court from the order:—Held, overruling an objection that the defendant had no status on the appeal for want of notice to plaintiffs of appointment of a new solicitor to bring the appeal; that the plaintiffs, by serving D. with the original summons for judgment, and as it appeared they had done, writing H. & L. D. for the grounds of appeal, had waived the objection. That the order appealed from was not an ex parte order in the sense that an application to rescind it should have been made before Drake, J., instead of appealing to the Divisional Court. That the proper method of bringing the defendant before the Court on the summons for judgment was by subpœna to name a solicitor, which subpœna could be substitutionally served though the defendant had gone abroad since the service of the writ of summons, and that the judgment was a nullity. *Denny* v. *Sayward*, 4 B.C.R. 212.

IV. Appearance.

A. In General.

1. After judgment—Leave to enter.]—After judgment in default of appearance, an appearance cannot be entered without leave. *Chong Man Chook* v. *Kai Fung*, 8 B.C.R. 67.

2. Irregular appearance — Judgment signed as in default—Setting aside.]—Where an irregular appearance has been entered, the plaintiff cannot treat it as a nullity and sign judgment as in default. *Gordon* v. *Roadley*, 6 B.C.R. 305.

3. Amended writ.]—Where an amended writ is re-served upon a defendant who has appeared, such appearance stands as an appearance to the amended writ. *More* v. *Patterson*, 2 B.C.R. 302.

B. Conditional Appearance.

1. Effect of entering, where unnecessary.]—Notwithstanding Order XII., r. 19 (r. 70), providing that a defendant may move to set aside service of a writ of

summons without entering a conditional appearance, the fact that a defendant has entered a conditional appearance, is not a good preliminary objection to such a motion. *Fletcher* v. *McGillivray*, 3 B.C.R. 37.

2. To set aside writ.]—Where plaintiff obtained leave to serve notice of a writ on a foreigner out of the jurisdiction:—Held, that the defendant was not bound to appear or enter a conditional appearance before he applies to set aside the order. *Fowler* v. *Barstow* (L.R. 20, Ch. D. 240), observed upon. *Garesche, Green & Co.* v. *Holladay*, 1 B.C.R., Pt. II., 83.

3. Nullity.] — The defendant who had entered an appearance expressed to be conditional and for the purpose of moving to set aside the writ for irregularity, upon the dismissal of that motion moved to set aside two ex parte orders continuing an interim injunction upon the ground that they ought not to have been made ex parte after the appearance:—Held, (1) That the conditional appearance was not necessary to the motion to set aside the writ. (2) That being limited to the purposes of that motion, it did not survive after the disposition of it. (3) That defendant's counsel having appeared on the motion was a sufficient admission to the jurisdiction to permit the motion to be heard. (4) That the conditional appearance was a nullity, and the orders continuing the injunction were properly made ex parte. *Fletcher* v. *McGillivray*, 3 B.C.R. 40.

4. To set aside injunction.]—Defendant, on 7th July, entered an appearance expressed to be conditional, under protest, and without prejudice to an intended application to set aside an ex parte injunction for irregularity. Plaintiff on the same day served the solicitor so appearing for defendants with a notice of motion to continue the injunction. This notice gave less than the four days required by the rules for such notices. Neither party appeared upon it. On 8th July, plaintiff obtained an ex parte order continuing the injunction till 22nd July, and on that day obtained a further ex parte order continuing it to the hearing. A motion by defendant to set aside these ex parte orders for irregularity was dismissed. On appeal:—Held, (1) An appearance under protest is a proceeding unknown to the law and irregular. (2) That such irregularity was waived by the plaintiff by his notice of motion to continue the injunction, though itself not a sufficient notice. (3) That the ex parte orders obtained thereafter were irregular. (4) That as the first irregularity was committed by the defendant, he had no right to complain of irregularities into which his own error had led the plaintiff, and that the appeal should be dismissed without costs, with leave to apply on the merits to dissolve the injunction. *Fletcher* v. *McGillivray*, 3 B.C.R. 49.

C. Under Protest.

1. Invalid.]—An appearance under protest is a proceeding unknown to the law and irregular. *Fletcher* v. *McGillivray*, 3 B.C.R. 49.

2. Objection to jurisdiction.] — An appearance does not waive a right to object to the jurisdiction if notice of the objection be given to the plaintiff. A notice appended to an appearance, that it is filed under protest, is a sufficient notice for that purpose. *Loring* v. *Sonneman*, 5 B.C.R. 135.

V. Default of Appearance.

1. Irregular appearance.] — Where an irregular appearance has been entered, the plaintiff cannot treat it as a nullity and sign judgment as in default, but must move to set it aside. *Gordon* v. *Roadley*, 6 B.C.R. 305.

2. Stay of proceedings—Summons for —When stay operates.]—A summons calling for a stay of proceedings only operates as a stay from and after its return, and judgment by default of appearance signed after service of summons, but before it was returned, is regular. *Lantz* v. *Baker*, 3 B.C.R. 269.

3. Judgment by default — Special indorsement including a claim for interest —Liquidated or unliquidated demand.]—A claim specially indorsed on the writ for amount of account rendered and "for interest thereon at 6 per cent, until judgment," is not a liquidated demand under Order III., r. 6, and an order setting aside judgment thereon in default of appearance will be sustained. *McClary Manufacturing Co.* v. *Corbett*, 2 B.C.R. 212.

4. Setting aside.]—If one pays a judgment got against him by default, he cannot sue to recover back part thereof, but must apply to have the judgment set aside and for a new trial, which will be granted only

on the ground of surprise or mistake. *Goon Gan* v. *Moore*, 2 B.C.R. 154.

VI. DEFENCE.

A. Time for.

Dismissal of application for summary judgment.]—The dismissal of an application for leave to sign a judgment under Order XIV., is equivalent to giving leave to defend, and the defendant has therefore eight days in which to deliver his defence unless otherwise ordered. *Pounder* v. *Corner*, 6 B.C.R. 177.

B. Default of Defence.

1. Specially indorsed writ.]—To obtain judgment in default of defence it is not necessary that the writ of summons should be specially indorsed. *Mason* v. *Nason*, 4 B.C.R. 172.

2. Special indorsement.]—A statement of claim having been required, if no other statement of claim is delivered, there must be a good special indorsement to sustain a default judgment. *Hassard* v. *Riley*, 6 B.C.R. 167.

3. Joint liability.]—A plaintiff, who has obtained final judgment against one of two defendants sued upon a joint liability, may afterwards proceed to judgment against the other defendants. *Zweig* v. *Morrissey*, 5 B.C.R. 484.

C. Judgment by Default: Setting Aside.

1. Judgment by default — Surprise or mistake.]—(1) If one pays a judgment got against him by default, he cannot sue to recover back part thereof, but must apply to have the judgment set aside and for a new trial, which will be granted only on the ground of surprise or mistake. *Goon Gan* v. *Moore*, 2 B.C.R. 154.

2. Payment of smaller sum.] — Where the defendant, after service of the writ, paid to the plaintiff and the plaintiff accepted a sum smaller than that claimed in full settlement, and the plaintiff's solicitor, in ignorance of the settlement, signed judgment for the full amount of the claim and costs, it was held, on motion to set aside the judgment, that the plaintiff was entitled to maintain the judgment, as there had been no release under seal. *Soder* v. *Yorke*, 5 B.C.R. 133.

VII. SUMMARY JUDGMENT.

A. Application for.

1. Time.]—A judge has no power to shorten the four days' notice of a motion for judgment required by Order XIV., r. 2. *Wheaton* v. *Allice & Ault*, 3 B.C.R. 306.

2. Foreign affidavit — Notary — Motion for judgment—Irregularity.]—An affidavit sworn out of the Province of British Columbia before a notary public and certified under his hand and official seal, is admissible under the B.C. Oaths Act, 1892, sec. 12. The copy of the affidavit to accompany a summons for judgment under Order XIV., r. 2, must be a true copy. The affidavit was sworn before a notary public and the copy had no indication of the notarial seal upon the original:—Held, fatal, and motion dismissed. *First National Bank* v. *Raynes*, 3 B.C.R. 87.

3. Exhibit to affidavit.]—The summons for leave to enter final judgment under Order XIV., r. 1, must be accompanied by a copy of the affidavit and exhibits referred to therein. *Barker* v. *Lawrence*, 5 B.C.R. 460.

4. Exhibit to affidavit.]—The summons for leave to enter final judgment under Order XIV., r. 1, must be accompanied by a copy of the affidavit and exhibits referred to therein. *Hughes* v. *Hume*, 5 B.C.R. 278.

5. Affidavit—Cross-examination on.]—On a summons for judgment under Order XIV., it is only in exceptional cases that the defendant will be permitted to cross-examine the plaintiff on his affidavit, and then only after defendant has filed an affidavit of merits. *Ward* v. *Dominion Steamboat Line Co.*, 9 B.C.R. 231.

6. Variance between affidavit and indorsement.] — A variance between the special indorsement and the affidavit is fatal. *Baker* v. *Dalby, Ballentyne & Claxton*, 3 B.C.R. 289.

7. Amending writ — Re-service — Appearance — Whether that to original stands to amended writ—Judgment after —Time.]—When an order, amending the special indorsement upon a writ of summons is made, the writ with the new special indorsement must be re-served upon every defendant affected by the amendment. If such defendant has already appeared, such appearance stands as an appearance to the amended writ, and the plaintiff can apply for judgment under Order XIV., but judgment cannot be directed to be entered

against him before the lapse of eight days from the service of the amended writ. *More* v. *Patterson*, 2 B.C.R. 302.

8. Amendment.]—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 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*, 9 B.C.R. 52.

B. Leave to Defend.

1. Dismissal of application for judgment.]—The dismissal of an application for leave to sign judgment under Order XIV., is equivalent to giving leave to defend, and the defendant has therefore eight days in which to deliver his defence unless otherwise ordered. *Pounder* v. *Corner*, 6 B.C.R. 177.

2. Admitting to defend—Discretion.]—Upon a motion for leave to sign a final judgment under Order XIV., if a judge thinks that a good defence is bona fide intended to be set up, or if he is doubtful, he must give leave to defend, but he has a discretion as to the terms of the leave, and in exercising the discretion regard should be had to the chances of the defence being successful. *Hotz* v. *McAllister*, 2 B.C.R. 77.

3. Insufficiency of affidavit.] — In an action brought by the Union Bank of Canada to recover $2,975.16, amount of principal and interest owing on a certain promissory note dated at Vancouver, B.C., 11th of November, 1910, made by the defendant in favour of one James Johnson, payable at the Union Bank of Canada, Vancouver, B.C., on or before the 1st of April, 1911, and alleged to be held by the plaintiff in due course, the plaintiff's application for judgment under Order XIV., was supported by an affidavit of one John R. Major, wherein he alleged that he was manager of the Union Bank of Canada at Boissevain, and had knowledge of the matters therein deposed to. Said affidavit further set out a copy of the indorsement on the writ of summons and alleged that "the defendant at the commencement of this action was and still is justly and truly indebted to the plaintiffs in the sum of $2,975.16 in respect of the matters set forth in the indorsement on the said writ of summons." The defendant opposed the application on technical grounds, and also filed an affidavit on the merits, by the president of the defendant company, wherein he alleged that he believed that one Milladge, a former manager of the plaintiff Bank at Boissevain, was the beneficial holder of the said note and alleged an agreement which would have constituted a good defence against the said Milladge, but it did not appear from the affidavit whether the note sued on was given in renewal of two former notes given to said Milladge. Morrison, J., gave leave to sign judgment. An appeal from this order was dismissed on the ground that defendant's affidavit did not contain material which would justify interference on the part of the Court of Appeal. *Union Bank of Canada* v. *Anchor Investment Company, Limited*, 16 B.C.R. 347.

4. Allegation of fraud.] — Plaintiffs, being bona fide holders for value of a promissory note, sued for recovery of the amount due thereon. The defence was that it was obtained by fraud. On an application for judgment under Order XIV:—Held, that the defendant was entitled to unconditional leave to defend. *Bank of Ottawa* v. *Alder*, 17 B.C.R. 378.

5. Triable issue.] — Judgment should only be ordered under Order XIV., where, assuming all the facts in favour of the defendant, they do not amount to a defence in law. On motion for summary judgment under Order XIV., in an action against the makers and guarantors of certain promissory notes, the defence was raised that the notes were given to act as vouchers for an overdraft which had previously been verbally arranged for between the bank and the manager of the defendant company, but the only evidence of the arrangement produced by the defence in the motion was the affidavit and cross-examination of one of the defendants who had received his information from the manager of the defendant company, whose evidence was not given. The order for the final judgment was made:—Held, on appeal (per Macdonald, C.J.A. and Galliher, J.A.), that the appeal should be dismissed. Per Martin and McPhillips, JJ.A.: That it could not be said that there was no defence, and no question of fact to be determined which might not support it. The defendants should, therefore, be allowed to go to trial. The Court being equally divided, the appeal was dismissed.

The Canadian Bank of Commerce v. *Indian River Gravel Company, Limited*, 20 B.C.R. 180.

6. Prima facie defence.] — Upon a motion by the plaintiff for summary judgment under Order XIV., r. 1 (a), the defendant is entitled to unconditional leave to defend when he alleges facts which, however improbable or suspicious, would, if proved, be a good defence in law to the claim. *Wilson* v. *British Columbia Refining Company*, 20 B.C.R. 209.

7. Omission in affidavit.]—Where the defendant in an action on a promissory note, raised the defence of misrepresentation in his defence, but omitted to allege it in his affidavit in opposition to a motion for summary judgment, he was nevertheless given leave to defend. *Easefelt* v. *Houston*, 16 B.C.R. 353.

C. Costs.

1. Discretion.]—Order XIV., r. 9, gives the chamber judge a wide discretion as to costs, with which the trial judge cannot interfere. *Wilson* v. *British Columbia Refining Co.*, 20 B.C.R. 209.

2. Dismissal—Grounds of.]—On a summons for judgment under Order XIV., if the case is not within the order, or there are circumstances which render it improper to the grant of application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be dismissed with costs in any event, but not payable forthwith. When leave to defend is given, costs, as a general rule, will be in the cause. *Victoria Corporation* v. *Bowes*, 8 B.C.R. 15.

3. Where leave to sign judgment.]—A plaintiff who obtains leave to sign judgment, on a summons under Order XIV., issued after the expiration of the time limited for filing a defence, is entitled to the usual costs, and not only to such costs as he would have been entitled to had he signed judgment in default of defence. *Diamond Glass Co.* v. *Okell Morris Co.*, 9 B.C.R. 48.

VIII. TRANSFER FROM COUNTY COURT.

Increasing claim.]—After an action has been transferred from the County Court, the plaintiff may increase the amount claimed beyond the sum originally claimed in the County Court. *Thurston* v. *Tattersall*, 7 B.C.R. 160.

IX. CONSOLIDATION OF ACTIONS.

Numerous actions arising out of same occurrence.] — 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 on 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 in one), until after the decision of the appeal in the remaining action—proper provision being made in case that appeal did not properly dispose of the questions in all. The proper practice would have been to have applied to have the actions consolidated. *Bodi* v. *Crow's Nest Pass Coal Company, Limited*, 9 B.C.R. 332.

X. TEST ACTIONS.

1. Particulars.] — Where particulars of the statement of claim in a test action are struck out on an appeal to the Full Court and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another action which has since been settled on as the test action. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, (*No. 2*), 10 B.C.R. 404.

2. Right of selection.] — Forty-four actions were brought by different persons against defendants for damages caused by the death of relatives in an explosion extending over a large area of defendants' coal mine, and plaintiffs applied to consolidate these actions with 29 other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class, and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that one action would not be a fair test of all the others:—Held, that the defendants should have the right to select four actions as test actions for those of

the same class. *Ellyn* v. *The Crow's Nest Pass Coal Co., Ltd.*, 10 B.C.R. 221.

3. Substitution—Jurisdiction to allow.]—After one of a number of actions brought by different plaintiffs against the same defendants in respect of causes of action which are 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 defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on plaintiff's application an order for a test action was made, the order providing that defendants, if satisfied with the result of the test action, might apply to have the other actions proceeded with, and that they might apply to have any of the actions forthwith proceeded with if there existed any special ground for defence applicable to it, and not raised in the test action. After obtaining the order, plaintiff's solicitor discovered that on account of the particular place in the mine at 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. *The Crow's Nest Pass Coal Co., Ltd.*, 10 B.C.R. 103.

XI. COUNTERCLAIM.

1. Claim and counterclaim.]—Claim and counterclaim are treated as distinct actions up to execution, which will go for the difference or the sum of the two judgments, as the case may be. *Smith* v. *Hansen*, 2 B.C.R. 153.

2. Time for.]—An amendment adding a counterclaim may be allowed after the action has been set down for trial. *Beer* v. *Collister*, 3 B.C.R. 145.

3. Conditions of valid.] — One of two defendants sued jointly may counterclaim upon a cause of action which he has individually against the plaintiff. A counterclaim should not be entirely independent of the original cause of action, but where the counterclaim involves an issue raised as a defence, it is sufficiently connected with the claim. The fact that a counterclaim, if successful, will involve the taking of lengthy accounts which will delay the disposition of the action is not a sufficient cause for excluding it, if otherwise unobjectionable. *Powell* v. *Lowenberg*, 3 B.C.R. 81.

4. Principal and agents.] — Where the defendant is sued on a liability incurred as agent for his principal by the plaintiff to whom the liability was incurred as agent for his principal, the defendant's principal is entitled, if he wishes to dispute the liability, to be made a defendant, and to counterclaim against the plaintiff and his principal. *Trowbridge & McMillan*, 9 B.C.R. 171.

XII. PAYMENT INTO COURT.

Unliquidated damages.] — Where in an action for unliquidated damages, money is paid into Court with a plea of tender, the plaintiff is not entitled to treat it as a payment into Court with a denial of liability, and obtain its payment out on an ex parte application. *Wainwright* v. *Farmer*, 16 B.C.R. 468.

XIII. DECLARATORY JUDGMENT.

No consequential relief.] — 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. *Williams* v. *Jackson*, 11 B.C.R. 133.

XIV. DISCONTINUANCE.

Terms.]—In an action for damages for negligence under Lord Campbell's Act, defendants denied plaintiff was the widow of deceased, and at the trial on notice withdrew this defence, but were allowed to do so only on condition of paying costs of action up to and including first day of trial:—Held, on appeal, that they could withdraw any part of the defence on paying costs thrown away by issue raised. *Gordon* v. *City of Victoria*, 6 B.C.R. 129.

XV. DIRECTIONS.

1. Order XXX.—General summons for directions—Particular summons for examination — Costs.] — Where a summons is taken out with respect to any of the matters for which under r. 269, a general summons for directions should have been taken, the costs will be reserved, to consider whether, in the event of any other summons being taken out, all such applications could not have conveniently been dealt with under a general summons, and the costs only of such an application allowed. *Jones* v. *Pemberton*, 6 B.C.R. 67.

2. Delivery of statement of claim.]—The Court has jurisdiction, under Order 30, to direct the delivery of a statement of claim. Semble, Orders 20 and 30 may be read together for this purpose. *British Columbia Wire and Nail Company, Limited* v. *The Ottawa Fire Insurance Company*, 12 B.C.R. 212.

XVI. DISCOVERY.

A. Discovery of Documents.

1. In General.

1. Not obtainable as of right.]—A party in an action is not entitled as of right to an order for discovery of documents by the opposite party, but must show to the Court prima facie that there are documents to be discovered, and that they are material to the issue. *Elson* v. *Canadian Pacific Railway Company*, 6 B.C.R. 71.

2. Place of production.] — Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, but a judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations. *Davies, Sayward Mill and Land Company, Limited* v. *Buchanan*, 10 B.C.R. 175.

3. Sufficiency of affidavit.]—An affidavit of documents which described certain bank books as bill registers, current accounts and ledgers for stated periods, was held sufficient. *Bank of British Columbia* v. *Oppenheimer*, 7 B.C.R. 104.

4. Before defence.]—The Court has discretion to order defendant to make an affidavit of documents before delivery of defence for the purpose of enabling the plaintiff to give particulars of charges of fraud made in the statement of claim. *Beauchamp* v. *Muirhead*, 6 B.C.R. 418.

5. Discovery before particulars.] — When facts alleged in a statement of claim are within the knowledge of defendant, and not of plaintiff, defendant is not entitled to particulars before he has given discovery. *Garesche* v. *Garesche*, 4 B.C.R. 444.

6. By manager of company.] — The registered agent in British Columbia of the defendant foreign corporation advertised his clerk B., and B. also advertised himself, as local manager of the company. The plaintiff made an application for an affidavit of documents by B., which the company resisted upon the grounds that it had never authorized B. to act as its local manager, and that in fact his duties were merely those of clerk to the local manager:—Held, that for the purposes of the application B. must be treated as local manager of the company. *Richards* v. *British Columbia Goldfields Co.*, 5 B.C.R. 483.

7. Action for dissolution of marriage.] —In a petition for dissolution of marriage, the respondent applied for an affidavit of documents:—Held, on the respondent filing an affidavit showing that discovery is not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, that discovery ought to be ordered. *Levy* v. *Levy*, 12 B.C.R. 60.

8. Parties to action — Other persons who should be.]—It is not a valid objection to an application for discovery upon oath of documents that other parties, who might be affected by the discovery, ought to be parties to the action. *Beaven* v. *Fell and Worlock*, 4 B.C.R. 334.

2. Privilege.

1. Claimed by supplementary affidavit.] —An affidavit of documents which described certain bank books as bill registers, current accounts and ledgers for stated periods, was held sufficient. Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit:—Held, that this affidavit defeated the summons and that the claim of privilege must be allowed. *Bank of British Columbia* v. *Oppenheimer*, 7 B.C.R. 104.

2. Correspondence between agents of party.]—In an action for redemption of

shares in a public company deposited by plaintiff as collateral security to an overdraft, or in the alternative for damages for their improper sale by the bank, the defendants, in answer to an order for discovery, made an affidavit of documents disclosing possession of a number of letters relating to the matters in question which had passed between the manager of the Bank at Victoria and the manager of the Bank at Vancouver, which they objected to produce as being privileged:—Held, that the letters were not privileged and must be produced. *Van Volkenburg* v. *The Bank of British North America*, 5 B.C.R. 4.

3. Documents created for purpose of litigation.]—Photographs sworn to be part of the materials of the defendants' evidence in the action are privileged from production. Documents sworn to be called into existence in the bona fide belief that litigation might ensue, are not for this reason only privileged from production. *Feigenbaum* v. *Jackson and McDonald*, 7 B.C.R. 171.

4. Persons not party to action involved.]—Discovery cannot be resisted on the ground that the interests of other persons, not parties to the action, may be affected. *Beaven* v. *Fell*, 4 B.C.R. 334.

3. Further and Better Affidavit.

Contentious affidavit.]—Two orders for further and better affidavits of documents were made in an action on an agreement for the leasing of certain property and the erection of a building thereon. By one of the orders the plaintiffs were required to make a further and better affidavit of documents. This order was based upon the affidavit of defendant's solicitor that a mortgage and lease, not referred to in the pleadings, or in any admissions of the plaintiffs, appeared in the records of the land registry office as affecting the property in question in the action:—Held, that this order was erroneous, because "it cannot be shown by a contentious affidavit that the affidavit of documents is insufficient." *Irwin and Purvis* v. *Jung*, 17 B.C.R. 69.

4. Production.

Place of production.]—Where an order has been made for the production of documents, the documents should be produced in the city or town in which the writ was issued, but a judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's operations. *Davies* v. *Buchanan*, 10 B.C.R. 175.

B. Interrogatories.

1. Ex parte application.]—An order for leave to deliver interrogatories may be made ex parte. *Charles T. Daily Co.* v. *British Columbia Market Co.*, 8 B.C.R. 1.

2. Where refused.]—Where a party, having asked for and obtained particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the judge at chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused:—Held, that the judge was right. *Turner* v. *Municipality of Surrey (No. 2)*, 16 B.C.R. 349.

3. Objections to.]—In divorce, as in ordinary actions, where interrogatories are put, they must not be harsh, oppressive or objectionable. *M—.* v. *M—.*, 17 B.C.R. 336.

C. Examination for Discovery.

1. Who Liable to.

1. Examination of person for whose benefit the action is brought — Assignee from plaintiff.]—The debt to recover which the action was brought had been assigned to the plaintiffs by C. in part satisfaction of a judgment debt due by him to them:—Held, that C. was "a person for whose immediate benefit" the action was brought within the meaning of Rule 704, and that the defendant was entitled to examine him for discovery. *Tollemache* v. *Hobson*, 5 B.C.R. 214.

2. Nominal plaintiff.]—In an action on an assignment the defence alleged that plaintiff was only a nominal plaintiff and no consideration had been given for the assignment, and plaintiff, on his examination for discovery, objected to answer questions relating to the consideration and to the interest of the assignors:—Held, by the Full Court, that the question should be answered. *Boggs* v. *The Bennett Lake and Klondike Navigation Company, Limited*, 8 B.C.R. 353.

3. Examination for discovery of guardian ad litem, at same time party

defendant.] — A party defendant is not absolved from examination for discovery by reason of being also guardian ad litem of infant defendants. *Beaven* v. *Fell*, 5 B.C.R. 453.

4. After amendment of pleadings.]— Where a party, after being examined for discovery, materially amends his pleading so as to raise a new issue, he may be ordered to be examined again. *Bank of Montreal* v. *Major and Eldridge*, 5 B.C.R. 181.

2. Corporation, Officers of.

1. Officer of corporation—Examination of—Service of summons for.] — A summons, under r. 703, for the examination for discovery of past and present officers of a body corporate must be served personally on all past officers, and application adjourned to enable the past officers to be served. *Hobbs* v. *Esquimalt and Nanaimo Railway Company*, 5 B.C.R. 461.

2. Without order.]—The examination of an officer of a corporation may be had without an order being specially made for that purpose. *Robinson* v. *McKenzie Brothers, Limited; Marshall* v. *The Corporation of the City of Vancouver*, 14 B.C.R. 220.

3. Dual capacity—Subpœnas.] — Where it is sought to examine for discovery in his dual capacity one of the defendants in an action, who is also secretary of another defendant, two subpœnas are not necessary. *Centre Star Mining Co., Ltd.* v. *Rossland Miners' Union*, 9 B.C.R. 190.

4. Union a legal entity for purpose of.] —A miners' union entered an appearance in an action, and by statement of defence raised the objection that it was not shown that the defendant was a legal entity capable of being sued:—Held, that defendant by so pleading must be deemed, before the trial of the action, to be a corporation for the purposes of the litigation, and so compellable to make discovery. *Ibid.*

5. Fire warden.] — A person in the employ of a railway company, in the capacity of a fire warden, with other persons under him to make reports to him of fires in the district over which his jurisdiction extends, is an officer of the company within the meaning of r. 370c, examinable for discovery. *King Lumber Mills, Limited* v. *The Canadian Pacific Railway Company*, 17 B.C.R. 26.

6. Park commissioner.] — A park commissioner, being a legislative functionary, and not subject to the control or direction of the municipal corporation, is not an officer of the latter body within the meaning of Order XXXI.a, and is not examinable under said order before trial in proceedings against the corporation. *Anderson and Anderson* v. *The Corporation of the City of Vancouver*, 14 B.C.R. 222.

3. Application for.

Affidavit.]—An application for the examination of a party in any other county or judicial district than that in which the action is proceeding must be supported by affidavit. *Elson* v. *Canadian Pacific Railway Company*, 6 B.C.R. 71.

4. Time for.

1. After amendment.]—After an order for amendment of a statement of claim, the amended claim must be delivered before an order for examination of defendant can be made. *Cooley* v. *Fitzstubbs*, 3 B.C.R. 198.

2. Libel.]—A defendant in a libel action, who has pleaded a general justification, cannot obtain discovery from the plaintiff until he has furnished the plaintiff with the particulars of the facts relied on as a justification. *Bullen* v. *Templeman*, 5 B.C.R. 43.

5. Scope of.

1. Cross-examination.] — The omission to include in the Supreme Court Rules, 1906, the amendment of June, 1900, to Order LXI., r. 3, of the Rules of 1890, has not changed the examination for discovery from a proceeding in the nature of a cross-examination. *McInnes* v. *British Columbia Electric Railway Co.*, 13 B.C.R. 465.

2. Whether or not cross-examination allowed.] — The examination for discovery under r. 703 is in the nature of a cross-examination, but limited to the issues raised in the pleadings. *Bank of British Columbia* v. *Trapp*, 7 B.C.R. 354.

3. Cross-examination.] — The examination for discovery under r. 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues. *Hopper* v. *Dunsmuir*, (*No. 2*), 10 B.C.R. 23.

4. As in Court.]—Parties are entitled, upon an examination for discovery, to exam-

ine as fully as they could do in Court. *Beaven* v. *Fell*, 4 B.C.R. 334.

5. Cross-examination.] — An examination for discovery should be conducted as an examination in chief, and not as a cross-examination. *Carroll* v. *The Golden Cache Mines Company, Limited Liability*, 6 B.C.R. 354.

6. Disclosure of names of witnesses.] —A party is not, upon his examination for discovery under r. LXI., bound to disclose the names of his witnesses. The defendant in an action for maliciously swearing out a search warrant was asked upon such an examination to give the names of the persons upon whose information he proceeded, as constituting reasonable and proper cause for his action, which he refused to do. On an application under r. 715 to strike out his defence for such refusal:—Held, that there should be fair disclosure of the line of defence contemplated, but no identification of persons such as would enable the opposite party to fix upon the defendant's witnesses, and that the refusal was justified. *Jones* v. *Pemberton*, 6 B.C.R. 69.

7. Collecting information.]—A witness, an officer of a company, being examined under Order XXXI.a, may not be ordered off the witness stand to inform himself of the knowledge of his fellow servants or agents touching matters in question in an action. *Brydone-Jack* v. *Vancouver Printing and Publishing Company, Limited*, 16 B.C.R. 55.

8. As to interest of plaintiff in subject-matter of action.]—Where in an action by an assignee of a chose in action the defendant alleges that the plaintiff is only a nominal party, and that no consideration was given for the assignment, the plaintiff is bound, on his examination for discovery, to answer questions relating to the interest of the assignee and the consideration for the assignment. *Boggs* v. *Bennett, etc., Co.*, 8 B.C.R. 353.

6. Conduct Money.

1. Tender of.]—It is essential, where the evidence on discovery is sought of a party resident some distance from the registry in which the action is brought, that the proper conduct money should be tendered. *Parsons* v. *Francis*, 18 B.C.R. 157.

2. Objection on ground of insufficient.] —If a witness on an examination for discovery has an objection on the ground of payment of insufficient conduct money, he must take the objection before the examiner, and on failure to do so he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer. *Centre Star Mining Co., Ltd.* v. *Rossland Miners' Union*, 9 B.C.R. 190.

7. Failure to Give.

1. Striking out defence.] — Where a married woman, joint defendant with her husband, had not been served personally with an order for discovery examination, but the fact of the issue of the order, and its effect, had been explained to her, a further order, consequent upon her non-attendance was made. This was served upon her solicitor, but personal service upon her was not effected. Two orders were then made contemporaneously by Morrison, J., one striking out her defence, and another giving judgment against her:—Held, on appeal, that the orders must be sustained; it could not be said upon the evidence that defendant did not understand her position, as the situation had been explained to her. *Langhan* v. *Isaacson and Isaacson*, 16 B.C.R. 321.

2. Objections.] — Any objections must be taken before the examiner, and failure to do so precludes their being raised on an application to compel further and better answers. *Centre Star Mining Co., Ltd.* v. *Rossland Miners' Union*, 9 B.C.R., 190.

8. Use of, at Trial.

1. A party cannot use his own examination for discovery as evidence for himself at the trial.] — Defendant being absent at the time of trial, and counsel having put in evidence for plaintiff parts of the defendant's examination for discovery, defendant's counsel desired the trial judge to look at and direct certain other parts of the examination to be put in evidence under r. 725. The application was refused. *Lyon and Healey* v. *Marriott*, 5 B.C.R. 157.

2. Ex-officer.]—An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination. *British Columbia Electric Railway Company, Ltd.* v. *Manufacturers' Guarantee and Accident Ins. Co.*, 7 B.C.R. 512.

3. Examination of ex-officer of corporation—Reading depositions at trial.]—On an examination for discovery of an ex-officer of a corporation, the corporation's counsel attended and objected to certain questions being put:—Held, that the deposition was admissible at the trial. *Walkley* v. *City of Victoria*, 7 B.C.R. 481.

4. Examination of officer of corporation — Cross-examination on depositions — Reading depositions at trial.] — On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:—Held, that the deposition was admissible at the trial. *Royal Bank of Canada* v. *Harris*, 8 B.C.R. 368.

5. Examination of ex-officer of corporation—Reading depositions at trial.]—If an appointment is taken out for the examination of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial, it should not be received. *Bank of British Columbia* v. *Oppenheimer*, 7 B.C.R. 448.

6. Connected passages.]—In an action for redemption brought by the representative of a deceased mortgagor (one of two co-mortgagors) against the assignee of the original mortgagee, said assignee being also the wife of the still living co-mortgagor, who was also a party defendant, the latter was examined for discovery. On such examination he deposed to a settlement of accounts between himself and his co-mortgagor in 1892, under which he assumed the payment of the mortgage in question. He also deposed that as part of such settlement he received a deed of the property in question, which deed he had lost. At the trial the plaintiff put in evidence the first part of the above deposition:—Held, that the second part should also go in under Order XXXI.a, Marginal Rule 370r. *Semisch* v. *Keith and Keith*, 16 B.C.R. 62.

7. By judge.]—A judge in charging a jury may read to them parts of an examination for discovery additional to the parts put in evidence by counsel. *Adams* v. *Nat. Elec., etc., Co.*, 3 B.C.R. 199.

8. Partners.]—When a prima facie liability to the plaintiff is made out against one defendant, then, upon the issue of whether another defendant is also liable as being a partner of the first defendant, such defendants are "opposite parties," and therefore the examination for discovery of one of such defendants is admissible in evidence on behalf of the other. *British Columbia Ironworks Co.* v. *Buse*, 4 B.C.R. 419.

D. Attendance on Subpœna in Interlocutory Proceeding.

1. Order for.]—A subpœna under Order XXXVII., r. 20, cannot be issued without an order therefor, and an application for such an order must be supported by affidavit. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, 10 B.C.R. 206.

2. Solicitor.]—It is no valid objection to such an application that the person sought to be examined is solicitor to one of the parties. *Ibid.*

E. Cross-Examination of Deponent.

1. Compulsory.] — Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used. *Russell* v. *Saunders*, 7 B.C.R. 173.

2. Compulsory.] — Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit, if required by the opposite party, before such affidavit can be used. *Westphalen* v. *Edmonds*, 7 B.C.R. 175.

3. Conduct money.]—On an interlocutory application to change venue, defendant filed his own affidavit in support of the application, and on being served with an order and appointment for his cross-examination on such affidavit, attended for such cross-examination, but refused to be sworn or answer until paid his expenses of attendance:—Held, that he was not entitled to conduct money. *Emerson* v. *Irving*, 4 B.C.R. 56.

4. Affidavit leading to interim injunction.]—As a general rule an order under r. 401 will not be made for the attendance for cross-examination of a plaintiff who has made an affidavit leading to an interim injunction before the defendant files an affidavit of merits. *Leavock* v. *West*, 6 B.C.R. 404.

5. Cross-examination of plaintiff on application for summary judgment—Discretion to refuse.] — On a summons for judgment under Order XIV., it is only in exceptional cases that defendant will be permitted to cross-examine plaintiff on his affidavit, and then only after defendant has

filed an affidavit of merits. *Ward* v. *Dominion Steamboat Line Co.*, 9 B.C.R. 231.

XVII. SPECIAL CASE.

No determination of facts—Premature.]—A special case, asking the Court to determine suggested or possible points of law in advance of an agreement or determination as to the facts, is not to be encouraged. *National Trust Company, Limited* v. *Dominion Copper Company*, 14 B.C.R. 190.

XVIII. VENUE.

A. In Particular Actions.

1. Infringement of patent.] — In an action against a company for infringement of a patent, the venue should be laid at the place of the registry which is nearest the head office of the company. *Short* v. *Federation Brand Salmon Canning Company*, 6 B.C.R. 436.

2. Infringement of patent.] — In an action for damages for infringement of a patent, the writ need not be issued out of the registry nearest the place of residence or business of the defendants, but sec. 30 of the Patent Act is complied with if the venue is laid at the place of such registry. *Short* v. *Federation Brand Salmon Canning Company*, 6 B.C.R. 385.

B. Change of.

1. Burden of proof.]—Where a plaintiff has selected his place of trial, the venue will not be changed on the ground of greater convenience unless it is clear that a fair trial can be had at the place proposed by defendant. *Centre Star Mining Company, Limited* v. *Rossland Miners' Union*, 10 B.C.R. 306.

2. Preponderance of convenience — View—Fair trial.]—In an application by defendants to change the place of trial from Vancouver to Victoria of an action under Lord Campbell's Act for damages for the death of plaintiff's husband caused by the collapse of a bridge within the city limits of Victoria, owing, it is alleged, to the negligence of the corporation, it appeared that all the witnesses on both sides, except two from abroad, reside in Victoria, and that a view of the bridge by the jury was desirable. The plaintiff resisted the application on the ground that a fair trial could not be had in Victoria:—Held, that the place of trial should be changed to Victoria notwithstanding the suggestion that a fair trial could not be had there owing to the interest, adverse to the plaintiff, of the ratepayers of the defendant corporation. It was, however, made a term of the order that the defendants should obtain a jury of the county, none of whom were such ratepayers. *Biggar* v. *The Corporation of the City of Victoria*, 6 B.C.R. 130.

3. Preponderance of convenience.]—Defendant moved to change the venue on the grounds of preponderance of convenience and residence of the majority of witnesses at the place of trial proposed. Plaintiff resisted the motion on the ground that a fair trial could not be had at the proposed place. Bole, L.J.S.C., refused the application, leaving it to the trial judge to apportion the additional costs of trial in the venue as laid. *Lapointe* v. *Wilson*, 5 B.C.R. 150.

4. Grounds for.]—The plaintiff's right to select the place of trial is not to be lightly interfered with, and the onus is on the defendant to show that the preponderance of convenience is against the place selected. Where an action is brought by a relative of the registrar, and it is clear that the registrar is not the real plaintiff, the defendant is not entitled to invoke sec. 70 of the Act. *Phair* v. *Sutherland*, 12 B.C.R. 293.

5. Fair trial.]—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, 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 shown for supposing that a fair trial could not be had. *Fernie Lumber Company, Limited* v. *Crow's Nest Southern Railway Company*, 12 B.C.R. 148.

6. Amendment by changing place of trial—Not allowed on ordinary summons to amend claim.]—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 shows 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.

7. Application for, before delivery of amended defence.] — 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.

8. After order fixing.]—On a summons for directions the usual order was made, inter alia fixing the place of trial at New Westminster. There was nothing said as to venue, and no objection raised, on this application. Subsequently defendant applied to have the venue changed to Fernie, on the grounds of convenience of witnesses and the necessity for a view of the locus in quo. This application was refused:—Held, that the omission of the solicitor's agent to keep open the question of venue until he was properly instructed should not in the circumstances be permitted to work an undue hardship on the defendant. *Foss* v. *Hill*, 13 B.C.R. 403.

9. After order fixing.]—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 Company*, 13 B.C.R. 280.

XIX. Trial.

A. *Notice of.*

1. In General.

1. For which sittings.] — In January, plaintiff's solicitor gave notice of trial at the civil 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 plaintiffs must give notice of trial for the March sittings, otherwise the action will stand dismissed. *Wiles* v. *The Times Printing and Publishing Company, Limited Liability*, 10 B.C.R. 226.

2. Order setting down.] — An order, made on defendants' application to dismiss for want of prosecution, that plaintiff set down his action for the next sittings at Nelson, and proceed with the trial, otherwise the action do stand dismissed without further order, dispenses with a notice of trial; and if before the date fixed for the sittings at the time the order was made the sittings are 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.

3. Order to set down.]—An order that plaintiff set his action down for trial for a certain sittings, otherwise his action be dismissed without further order, is not a peremptory order for trial. *Thurston* v. *Weyl*, 9 B.C.R. 452.

4. Fresh notice.]—It is not necessary to give fresh notice of trial in consequence of the postponement of the statutory sittings. *Atwood* v. *Kettle Valley Railway Co.*, 14 B.C.R. 203.

2. Failure to Give.

Action part heard and adjourned.]—Supreme Court Rule 340, providing that "if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial or apply to the Court or a judge to dismiss the action, for want of prosecution," does not apply where the trial of the action has been partly proceeded with and adjourned. The proper mode for a defendant to get rid of the action in such case is to set it down for trial, and if the plaintiff does not appear, to ask for judgment dismissing the action, under Supreme Court r. 353. *Joseph Boscowitz* v. *T. H. Cooper, J. D. Warren and Hannah Warren*, 4 B.C.R. 88.

3. Countermand.

Adjournment of hearing.]—The adjournment at the trial of a hearing, by consent of counsel, is equivalent to a countermand of the notice of trial, and if the plaintiff does not proceed in due course, the defendant may thereafter either himself give notice of trial, or apply to dismiss for want of prosecution. *Harvey* v. *City of New Westminster*, 3 B.C.R. 398.

B. *Adjournment of.*

1. Countermand of notice of trial.]—The adjournment at the trial of a hearing, by consent of counsel, is equivalent to a

countermand of the notice of trial, and if the plaintiff does not proceed in due course, the defendant may thereafter, either himself give notice of trial or apply to dismiss for want of prosecution. *Harvey* v. *New Westminster Corporation*, 3 B.C.R. 398.

2. For purpose of appeal.]—An application to postpone the trial of an action to set aside a lease will not be granted to enable the plaintiff to appeal from an order under r. 426, directing that the action be tried without a jury. *Trimble* v. *Cowan*, (*No. 1*), 20 B.C.R. 237.

XX. WANT OF PROSECUTION, DISMISSAL OF ACTION FOR.

1. Delay.] — The proper mode for a defendant to take advantage of delays on the part of a plaintiff is by motion to dismiss the action. *Clark* v. *Eholt & Carson*, 3 B.C.R. 442.

2. No proceedings for a year.]—Supreme Court Rule 749, requiring a month's notice of intention to proceed when there has been no proceeding for one year from the last proceeding, applies to an application to dismiss an action for want of prosecution. *Macdonald* v. *Jessop and ors., Trustees of the Pandora Avenue Methodist Church*, 3 B.C.R. 606.

3. Action part heard and adjourned.]—Providing that "if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or apply to the Court or a judge to dismiss the action for want of prosecution," does not apply where the trial of the action has been partly proceeded with and adjourned. In such a case the proper procedure is to set down the action for trial, and if the plaintiff does not appear, to ask for judgment dismissing the action, under Supreme Court Rule 353. *Joseph Boscowitz* v. *T. H. Cooper, J. D. Warren and Hannah Warren*, 4 B.C.R. 88.

4. Adjournment by consent.] — The adjournment at the trial of a hearing, by consent of counsel, is equivalent to a countermand of the notice of trial, and if the plaintiff does not proceed in due course the defendant may thereafter either himself give notice of trial, or apply to dismiss for want of prosecution. *Harvey* v. *City of New Westminster*, 3 B.C.R. 398.

5. Dismissal of action for want of prosecution after notice of trial.]—A judge sitting in chambers has power to dismiss an action for want of prosecution, notwithstanding that the action has been entered for trial. *Sullivan* v. *Jackson*, 7 B.C.R. 133.

XXI. REFERENCE.

1. No jurisdiction.]—A reference cannot be made to determine questions of law and fact. *Stevenson* v. *Parks*, 10 B.C.R. 387.

2. Registrar's powers.] — An action, involving mainly the taking of accounts, was referred to the District Registrar, the referring order giving that officer all the powers of a judge as to certifying and amending. On this authority the District Registrar, on application, added certain parties plaintiff, upon plaintiff filing a consent thereto of the parties so added. The writ of summons and statement of claim were afterwards amended. Defendant Hambly took out a summons to strike out the amendments to the writ and pleadings on the ground that the amendments were made without an order of the Court or of a judge thereof, and that as to the plaintiffs added, no proper consent signed by them had been filed. The documents purporting to be consents were filed by the plaintiff under a power of attorney authorizing him to sue for, recover and receive the amount of a certain judgment debt recovered in another action:—Held, that the action in which the consents were filed was a new action, that the power of attorney was, in the circumstances, insufficient, and that the amendments made in pursuance of such consents so filed must be struck out:—Held, also, that the order conferring on the District Registrar power to amend would also authorize him to add parties:—Held, also that the application to strike out the amendments made by the District Registrar was not an appeal, but a substantive application to strike out certain amendments made by the District Registrar. *Hill* v. *Hambly and another*, 12 B.C.R. 253.

3. Appeal.] — Semble, that an appeal from the official referee lies to a judge in chambers. *Ibid.*

XXII. ATTACHMENT.

Prohibitory injunction — Disobeying — Remedy — Attachment or committal —

Indorsement — Service.] — Upon a motion for a writ of attachment against the manager of the defendant company for disobeying an injunction restraining the company, its agents, servants, etc., from blasting or depositing rock upon plaintiff's mineral claim, it was objected: (1) Under r. 451, that there was no memorandum of the consequence of his disobedience endorsed on the order. (2) That the notice of motion for attachment was not personally served on the manager, but only on the solicitor for the defendant company. Counsel had appeared for the manager and obtained several adjournments of the motion to obtain affidavits on the merits, which finally were not forthcoming:—Held, that committal and not attachment is the appropriate remedy for breach of a prohibitory injunction. That personal service of a notice of motion is an essential pre-requisite to committal, and that the party applying in a case proper for committal is not absolved from the necessity for such personal service by moving for attachment instead of committal. That the objection of want of personal service of the notice was not waived by the adjournments. *Golden Gate Co.* v. *Granite Creek Co.*, 5 B.C.R. 145.

XXIII. FIRMS, ACTIONS BY AND AGAINST.

1. Parties.]—One person cannot sue in a firm name. *B. C. Furniture Co.* v. *Tugwell*, 7 B.C.R. 84.

2. Firm and members.]—It is wrong to add the name of a firm as a party to an action, together with the names of the members of firm. *Chong* v. *McMorran*, 8 B.C.R. 261.

3. One person suing in firm name—Amendment of style of cause—Irregularity or nullity.]—J. S., trading under the name of the B.C. Furniture Company, commenced an action on 10th March, 1899, in such name in respect of a promissory note dated 20th January, 1893, payable sixty days after its date. A summons under order XIV. having been dismissed on the ground that one person cannot sue in a firm name, plaintiff obtained an order amending the style of cause:—Held, that the writ was not a nullity, and that the irregularity was properly amended. *B. C. Furniture Company* v. *Tugwell*, 7 B.C.R. 361.

4. Action against foreign firm.]—Sperling, Garbutt, and Horne-Payne were residents of England and members of the firm of Sperling & Co., which firm carried on business in England only. Plaintiffs issued two writs (neither of which was for service out of the jurisdiction) in respect of the same cause of action, one being addressed against the firm and the other against the three individuals only. The writs were served on Horne-Payne while on a visit to British Columbia, and he entered conditional appearances and applied to have both writs set aside and (in the alternative as to the second action) that it be dismissed as vexatious:—Held, (1) The name of the firm was wrongly inserted, and should be struck out of the first writ. (2) That the plaintiffs should elect as to which action they would proceed with. *Oppenheimer* v. *Sperling*, 9 B.C.R. 166.

XXIV. NON-SUIT.

1. Effect of.]—Judgment of non-suit is now equivalent to a judgment for defendant on the merits, and the Court has under the Judicature Act discretion as to the costs. *Phelps* v. *Williams*, 1 B.C.R., Pt. I., 257.

2. Plaintiff's right to refuse a.]—There cannot be a non-suit, nor can leave to enter a non-suit be reserved, without the consent of the plaintiff. *Patterson* v. *Victoria Corporation*, 5 B.C.R. 628.

3. Statutory remedy—Enforcement of.]—The Court is not disposed to grant a non-suit with leave to bring a fresh action, where the action is brought to enforce a purely statutory remedy contrary to common right, and fails for want of statutory pre-requisites. *Haggerty* v. *Grant & Duck*, 2 B.C.R. 173.

4. By Court of own motion.]—On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defandants were to receive a part of the moneys obtained by plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to

be dealt with, and he dismissed it out of the Court of his own motion, the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court with costs":—Held, by the Full Court, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 10 B.C.R. 449.

5. Trespass committed by servant.]—A corporation is liable for a trespass committed by its servant while conducting its business, although committed in the doing of an act ultra vires of the corporation itself. Where the servant of a corporation forms an erroneous judgment, and, in the supposed scope and discharge of the duty delegated to him, commits a trespass, the corporation is liable for it. The objection that, upon the evidence, the act complained of was not done by the servant in the course or within the scope of his employment by defendants, and was unauthorized by them, is not open to defendants upon motion for a non-suit unless they pleaded it as a defence. *Adams* v. *The National Electric Tramway and Lighting Co.*, 3 B.C.R. 199.

XXV. Motion for Judgment.

1. Findings of jury.]—The Court can give judgment finally determining all questions in dispute, although the jury may not have found on them all, but it cannot dispose of a case contrary to the findings of the jury. *Sewell* v. *B. C. Towing Co.*, 9 S.C.R. 527.

2. Withdrawing case from jury.]—The power which a judge has of withdrawing a case from the jury should be exercised only when it is clear that the plaintiff could not sustain a verdict in his favour. If the matter is reasonably open to doubt the judge should let the case go to jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported. *Nightingale* v. *Union Colliery Co.*, 9 B.C.R. 453.

3. When jury disagree, judgment cannot be entered for either party.]—Where an issue has been ordered to be found by a jury and the jury have disagreed, and been discharged without giving a verdict, the order for trial by jury is not exhausted, and the judge on motion for judgment, cannot direct judgment to be entered for either party. *Loo Chu Fan* v. *Loo Chock Fan*, 1 B.C.R., Pt. II., 172.

4. Abortive trial—Action on promissory note—Allegation of fraud—Disagreement—Judgment entered by Full 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, by the Full Court, allowing an appeal and entering judgment for plaintiffs, 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 & Securities Corporation* v. *Fulbrook & Innes and G. H. Cooper*, 9 B.C.R. 270.

XXVI. Chambers: Matters Disposable In.

1. Habeas corpus.]—An application in vacation for a rule nisi for a writ of habeas corpus should be made in chambers. *In re Soy King*, 7 B.C.R. 291.

2. Extending time for filing adverse claim.]—An order to extend the time for filing the affidavit and plan required by sec. 37 of the Mineral Act must be made by the Court and cannot be made by a judge in Chambers. *Murphy* v. *Star Exploring and Mining Company*, 8 B.C.R. 421.

3. Receivership order.] — Receivership orders must be made by the Court and cannot be made by a judge sitting in Chambers. *Wakefield* v. *Turner*, 6 B.C.R. 216.

4. Dismissal of action.]—A judge sitting in Chambers has power to dismiss an action for want of prosecution notwithstanding that the action has been entered for trial. *Sullivan* v. *Jackson*, 7 B.C.R. 133.

5. Setting aside writ.]—An application to set aside a writ of summons may be made by summons in Chambers. *Carse* v. *Tallyard*, 5 B.C.R. 142.

XXVII. ORIGINATING SUMMONS.

Trustees — Action for account.] — Trustees having received moneys under a decree in one of several actions relating to the same subject matter to which they were parties, an originating summons was obtained by other parties to the same actions calling upon the trustees for an account, not directed by the decree in question, and to pay into Court:—Held, that the proceeding, by originating summons, was warranted by r. 591, sub-sec. (c), (d), and an objection that the motion should have been made in one of the pending actions, overruled. *Boscowitz* v. *Belyea*, 4 B.C.R. 527.

XXVIII. NOTICE OF MOTION.

Special leave.]—Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. *Canadian Pacific Railway Company* v. *Vancouver, Westminster and Yukon Railway Company*, 10 B.C.R. 228.

XXIX. SUMMONS.

1. Place of return.] — A judge has power to direct a summons to be issued and to be made returnable in a registry other than whence the writ was issued. *Tanaka* v. *Russell*, 9 B.C.R. 24.

2. Summons not issued from registry wherein action brought—Effect of—Sec. 27, Supreme Court Act.] — A judge in Chambers has jurisdiction to entertain a motion made upon summons issued out of a registry, other than that out of which the writ of summons issued, notwithstanding sec. 27, supra. *Re Ellard*, 2 B.C.R. 235.

3. Summons — Must be issued where returnable.]—Where it is desired to make an application, under sec. 32 of the Supreme Court Act as amended in 1901, c. 14, sec. 13, to a judge at Victoria, Vancouver, or New Westminster, the summons must be issued at the place at which it is returnable. *Centre Star Mining Co., Limited* v. *Rossland and Great Western Mines, Limited, and East Le Roi Mining Co., Limited*, 10 B.C.R. 136.

4. Notice of use of affidavit.]—Rule 572 requiring every summons in Chambers to give notice of the affidavits to be read in support of it is imperative. *Leiser* v. *Cavalsky*, 3 B.C.R. 196.

5. Winding-up applications.] — All applications made to the Court in its winding-up jurisdiction must be made by summons. *Re Nelson Sawmill Company*, 6 B.C.R. 156.

6. Stay of proceedings.]—A term in a chamber summons, "In the meantime let all proceedings be stayed," does not operate as a stay, but only as an intimation that upon its return a stay will be asked for. *The Edison General Electric Co.* v. *Vancouver and New Westminster Tram. Co. and the Bank of British Columbia*, 4 B.C.R. 460.

7. When application takes effect.]—A summons asking for a stay of proceedings only operates as a stay from and after its return, and judgment in default of appearance signed after service of the summons, but before its return, is regular. *Lantz* v. *Baker*, 3 B.C.R. 269.

XXX. ORDERS.

A. In General.

1. Abandonment of order.]—An application to settle the minutes of an order was made fifteen days after it was pronounced in chambers:—Held, that the delay was not sufficient to constitute an abandonment of the order. *Baker* v. *The "Province,"* 5 B.C.R. 45.

2. Amendment of order.]—The omission of the name of the judge by whom an order is made which, by the Supreme Court Act, C.S.B.C. c. 31, is directed to be inserted in the caption, is an "accidental slip or omission" within r. 266, S.C. Rules, 1890, which may be amended by the Court or any judge thereof. A judge of the Supreme Court has power to sign an order for and on behalf of another judge. *Gordon* v. *Cotton*, 3 B.C.R. 499.

3. Amending judgment before drawn up.]—A judge has power to alter his decree in matters of detail before it is drawn up, but not to reverse it. *Zambesi* v. *Fanny Dutard*, 2 B.C.R. 91.

4. Minute of order.]—Where the registrar is present and takes a minute of an order, the minute so taken is conclusive even though the judge's recollection of the order is different. *Wallace* v. *Ward*, 9 B.C.R. 450.

5. Res judicata.]—An order once pronounced will be given effect to and followed by every judge and Court of inferior or co-ordinate jurisdiction, and no order will be made inconsistent therewith. *Gabriel* v. *Mesher*, 3 B.C.R. 159.

6. Order ultra vires—Whether nullity—Full Court—Jurisdiction on appeal.]—An order issued by and purporting to be an order of the Supreme Court (although made ultra vires) is not a nullity, but is valid until set aside by the Court. Although an appeal lies from such an order to the Full Court, the more convenient and inexpensive course is to move before a judge to rescind it. *Brigman* v. *McKenzie*, 6 B.C.R. 56.

7. Order ultra vires.]—An order made ultra vires should be moved against, not appealed from. *In re Kootenay Brewing Company*, 7 B.C.R. 131.

8. Jurisdiction to vary order of another judge.]—A judge has no jurisdiction to add to an order made by another judge for redemption of a mortgage on payment of the debt and costs to date of decree, a further term adding subsequent costs and requiring their payment as a further condition of redemption and charge upon the land. *Lehman* v. *Wilkinson*, 3 B.C.R. 19.

B. Ex Parte Orders.

1. Ex parte order—Rescinding—Appeal improper where original material to be displaced.]—Where an ex parte order is based on insufficient material, or can be displaced by other material, the proper course is not to appeal, but to move in chambers to rescind the order. *Garesche, Green & Co.* v. *Holladay*, 1 B.C.R., Pt. II., 83.

2. Rescinding.]—If a party aggrieved by an order made ex parte, becomes possessed of facts against the making of the order, he should at once apply to the judge who made it to set it aside, and not call upon another judge to investigate the circumstances under which it was made. *Morrison Thompson Hardware Co., Ltd.* v. *Westbank Trading Co., Ltd.*, 16 B.C.R. 33, 314.

3. When ex parte.]—Where an order is made after service of a summons upon which the opposite party does not attend, it will be treated as an ex parte order and may be reheard in chambers and rescinded. *Griffiths* v. *Canonica*, 5 B.C.R. 48.

4. Ex parte order—Whether appealable without motion to rescind—Rule 577.]—The Divisional Court will not entertain an appeal from an ex parte order made by a judge. The proper practice is in the first instance, to move before the judge making such an order to rescind same. *Hudson's Bay Co.* v. *Hazlett*, 4 B.C.R. 351.

5. Ex parte order—Whether order is ex parte when made on summons and no attendance contra.]—An order made in Chambers upon a summons duly served, no one appearing contra, is not an ex parte order, and an appeal will lie from it to the Full Court notwithstanding r. 577. *Biggar* v. *The Corporation of the City of Victoria*, 6 B.C.R. 130.

6. Ex parte restraining order by local judge.]—An ex parte restraining order made by a local judge must be obeyed until set aside. *Leberry* v. *Braden*, 7 B.C.R. 403.

7. Interim injunction.]—It is proper to apply ex parte for an interim injunction where the defendant has entered a conditional appearance. *Fletcher* v. *McGillivray*, 3 B.C.R. 40.

8. Injunction.]—Where a defendant enters an irregular appearance, but the plaintiff waives that irregularity, it is improper then to apply ex parte for an injunction. *Fletcher* v. *McGillivray*, 3 B.C.R. 49.

9. Varying order made on notice.]—An ex parte order varying the terms of an order made upon notice is irregular but not a nullity. *Foot* v. *Mason*, 3 B.C.R. 146.

XXXI. JUDGMENTS AND ORDERS: ENTERING.

1. Discretion.]—The Court has a discretion to compel the successful party to sign and enter the judgment he has obtained, or to allow the unsuccessful party to do so instead, and the Court may for good cause shown refuse to assist the unsuccessful party. *Lang* v. *City of Victoria*, 6 B.C.R. 104.

2. Drawing up.]—If the party upon whose summons the order is made refuses to draw it up, the other side may obtain a similar order upon a summons on their own account. If the order made is not within the summons, then the party in whose favour it is made can draw it up. *McColl* v. *Leamy*, 3 B.C.R. 360.

XXXII. ACCOUNTS AND INQUIRIES.

1. Application for further accounts.]—If it appears on the taking of accounts that the decree is so drawn as not to include all proper subjects, the proper practice is to apply to the Court to direct further and other accounts to be taken. *Van Volkenburg* v. *Western Canadian Ranching Co.*, 6 B.C.R. 284.

2. Varying certificate.] — On a motion to vary a certificate, the parties are confined to the decree. *Ibid.*

3. Damages.] — The Divisional Court, upon a motion for a new trial, being of opinion that there was no evidence upon which the damages assessed could be calculated, directed a further enquiry as to such damages, and adjourned the motion in the meantime. *Parks* v. *Blackwood*, 2 B.C.R. 346.

XXXIII. FURTHER CONSIDERATION.

Non-payment in foreclosure action.]—The certificate of the Registrar upon taking the accounts under the mortgage in a foreclosure action directed that the balance found due should be paid by the mortgagor in a certain manner. Upon motion for final decree upon the affidavit of non-payment as directed, made by the agent:—Held, that the affidavit of both principal and agent was necessary. *Canada Settlers' Loan Co.* v. *Renouf*, 5 B.C.R. 243.

XXXIV. PRESERVATION AND INSPECTION OF PROPERTY.

1. Apex of vein.] — The Centre Star Company had been enjoined from mining in the Iron Mask claim, which it was alleged was a continuation of a vein whose apex was in its own claim, and was also refused leave to do experimental or development work on the Iron Mask claim in order to determine the character or identity of the said vein:—Held, by the Full Court, on appeal, refusing to modify said orders, that it ought to be left to the trial judge to decide whether it was necessary to have any work done to elucidate any of the issues raised. *Centre Star Mining, etc., Co.* v. *Iron Mask Gold Mining Co.*, 6 B.C.R. 355.

2. Coal workings.]—Plaintiffs claiming title to certain coal fields which were being worked by the defendants, applied before pleading for an order for inspection of the defendants' workings. Defendants admitted working within the area claimed by the plaintiffs:—Held, (1) The chief ground on which such an order is made is to enable the plaintiff to get on with his case. (2) Under special circumstances, as where there is danger of flood, the order may be made to preserve the evidence. (3) That the inspection should be by indifferent persons who should not reveal any information without the sanction of the Court. *E. & N. Railway Co.* v. *New Vancouver Coal Company*, 6 B.C.R. 194.

3. Costs of adjournment for.]—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 plaintiffs alleging that such order necessitated inspection by them of other similar places on their property, with a view to furnishing evidence to rebut that which might be adduced by reason of the plaintiffs' inspection, and therefore on 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, etc., Co.* v. *Centre Star, etc., Co.*, 7 B.C.R. 66.

4. Underground work.]—Form of order providing for inspection of underground workings in an action for trespass to extralateral rights appurtenant to a mineral claim, settled. The inspection order should contain an undertaking for damages, and the practice does not require security to be given. *Star Mining and Milling Company, Limited Liability* v. *Byron N. White Company (Foreign)*, 9 B.C.R. 9.

5. Underground workings.]—The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings. (1) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery, and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive. (2) It is a proper and convenient practice to apply to the Court to enforce an order for inspection when the assistance is not contumacious. *Star Mining and Milling Company, Limited Liability* v. *Byron N. White Company (Foreign), (No. 2)*, 9 B.C.R. 422.

XXXV. SALE BY THE COURT.

Discretion.]—Rule 1 of order 50 provides in part "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold the Court or a judge may order the same to be sold":—Held, that this is a general power, to be exercised by the Court or a judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action. *Rainey* v. *Rainey*, 12 B.C.R. 494.

XXXVI. STAY OF PROCEEDINGS.

1. Discretion.]—Under order 58, r. 16 of the Supreme Court Rules, 1906, the granting of a stay of execution pending an appeal to be taken, is a matter of discretion to be exercised upon the facts of each particular case. *Reynolds* v. *McPhail*, 13 B.C.R. 159.

2. Special circumstances — Further material.] — Unless special circumstances are shown, stay of execution or adjournment will not be granted. Leave will not be granted to file further material on such application. *Williamson* v. *Grigor*, 17 B.C.R. 334.

3. Further material.] — An application for stay of execution pending appeal to the Court of Appeal will not be granted where the defendant has paid the sheriff and secured his withdrawal from possession of the goods held in execution. In any event the applicant must come prepared with all necessary material, and an adjournment will not be granted merely for the purpose of procuring affidavits. *Barnum* v. *Beckwith*, 17 B.C.R. 496.

4. Undertaking not to proceed.] — An undertaking not to proceed further until the trial of the action is observed, although proceedings are taken before the formal order or decree is drawn up, but after judgment delivered. *Dunlop* v. *Haney*, 7 B.C.R. 300; 1 M.M.C. 344.

5. Breach of order for.]—The registration of a judgment against lands of the judgment debtor is not a breach of an order staying proceedings upon it. *Edison General Electric Company* v. *Bank of British Columbia*, 4 B.C.R. 460.

6. Different plaintiffs against same defendants—Stay of proceedings, where similar orders are being appealed from, pending decision in one—Consolidation of action.] — Twenty-nine actions have been brought by different persons against the defendant company for damages caused by the death of relatives, and on twenty-nine summonses for better particulars of the plaintiff's 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 in one) until after the decision of the appeal in the remaining action—proper provision being made in case that appeal did not properly dispose of the questions in all. The proper practice would have been to have applied to have the actions consolidated. *Bodi* v. *Crow's Nest, etc., Co.*, 9 B.C.R. 332.

7. When operative.] — A term in a summons signed by a judge "in the meantime let all proceedings be stayed" does not operate as a stay. *Edison General Electric Company* v. *Bank of British Columbia*, 4 B.C.R. 460.

8. Costs.]—An application for a stay of proceedings is generally an application for an indulgence, and the applicant should pay the costs. *Alexander* v. *Walters*, 14 B.C.R. 250.

XXXVII. EXECUTION, DISCOVERY IN AID OF.

1. Corporation—Examination of officer of—Return of nulla bona.]—A judgment debtor is examinable under r. 486, notwithstanding that a fi. fa. in the sheriff's hands has not yet been returned nulla bona. *Steele* v. *Pioneer Trading Corporation*, 6 B.C.R. 158.

2. Costs — Examination where judgment for costs only.] — Sec. 11 of the Execution Act, C.S.B.C. 1888, c. 42, providing for the examination of a judgment debtor "as to the means or property he had when the debt or liability was incurred," refers to the debt or liability to recover which the action was brought and does not apply to a judgment for costs only. *Griffiths* v. *Canonica*, 5 B.C.R. 48.

3. Costs — Examination where judgment for costs only.]—A person against whom a judgment has been recovered for costs only, is examinable as a judgment debtor under r. 486, but not under R.S.B.C.

c. 10, sec. 19. *Drosdowitz* v. *Manchester Fire Assurance Company*, 6 B.C.R. 269.

4. Scope of.] — Under r. 610, of the Supreme Court Rules, 1906, the debtor must answer all questions affecting his property anterior to the recovery of the judgment. Section 19 of the Arrest and Imprisonment for Debt Act has not been displaced by r. 610. *Jackson* v. *Drake, Jackson & Helmcken*, 13 B.C.R. 62.

5. Right of, to counsel on examination.] — The examination of a judgment debtor is a personal examination, and he is not entitled to the assistance of counsel to take part in such examination, but he can have counsel to privately advise him. *Bank of Montreal* v. *Major and Eldridge*, 5 B.C.R. 156.

XXXVIII. JUDGMENT, INTEREST ON.

When to be computed from.]—Where the formal judgment decreed that "the defendants do pay forthwith after taxation thereof to the plaintiffs the costs":—Held, that there was no judgment debt until the taxation was had, and that therefore interest could be computed on the costs only from date of taxation. *Star Mining and Milling Company, Limited* v. *Byron N. White Company (Foreign)*, 15 B.C.R. 11. Reversed on appeal, 15 B.C.R. 161.

XXXIX. SERVICE OF ORDERS, ETC.

1. Agents — Service on.] — Where the general agents in Victoria of a firm of country solicitors have never acted as agents in a particular suit, the service on them of a summons in that suit is insufficient. *Barnes* v. *Gray*, 6 B.C.R. 219.

2. Mode of proceeding where defendant's solicitor removed pendente lite.]— Defendant appeared to the action by D., a solicitor, and then went to reside outside the jurisdiction. D. being elevated to the bench, plaintiff afterwards obtained a summons for judgment under Order XIV., and served it upon H. (of the firm of H. & L. D.), the former partner of D., H., refused to accept or acknowledge the service. The plaintiff left the summons at the office of H., who returned it. Drake, J., upon the day mentioned in the summons, treated the above as good service thereof, and no one appearing for the defendant, made an order giving the plaintiff leave to sign judgment for the amount claimed. The defendant appointed L. D., partner of H., solicitor ad hoc, and appealed to the Divisional Court from the order:—Held, that the proper method of bringing the defendant before the Court on the summons for judgment was by subpœna to name a solicitor, which subpœna could be substitutionally served, though the defendant had gone abroad since the service of the writ of summons, and that the judgment was a nullity. *Denny* v. *Sayward*, 4 B.C.R. 212.

XL. TIME.

1. Month's notice to proceed.] — Supreme Court Rule 749, requiring a month's notice of intention to proceed when there has been no proceeding for one year from the last proceeding, applies to an application to dismiss an action for want of prosecution. *MacDonald* v. *Jessop, Trustees of The Pandora Avenue Methodist Church*, 3 B.C.R. 606.

2. Month's notice to proceed.]—Where no proceedings have been taken in an action for more than one year, it is not necessary to give a month's notice of intention to proceed, under r. 973, before making an application to substitute as plaintiff, in lieu of the original plaintiff, a person upon whom the cause of action of the original plaintiff has devolved. *Goldstein* v. *Vancouver Timber and Trading Company*, 17 B.C.R. 356.

3. Month's notice to proceed.] — An application, ex parte, to amend the writ by adding to the indorsement a description of certain real estate, is a step in the proceedings, although the amending order was not served on the defendants. *Goldstein* v. *The Vancouver Timber and Trading Company*, 14 B.C.R. 408.

4. Abridging time.] — The Court has power to abridge the month's notice required from the party desiring to proceed in an action in which there has been no proceeding had for one year. *Bank of Montreal* v. *Horne*, 6 B.C.R. 68.

XLI. VACATION.

1. Habeas corpus.]—An application in vacation for a rule nisi for a writ of habeas corpus should be made in Chambers. *In re Soy King*, 7 B.C.R. 291.

2. Adjournment to a day in vacation.] —A cause called on for trial before vacation, and adjourned to a day in vacation

is not a trial pending within the meaning of r. 736, and so cannot be heard during vacation. *Gill* v. *Ellis*, 6 B.C.R. 157.

3. Whether trial pending.]—Where a trial was called before vacation but not proceeded with, and was adjourned to a day in vacation, and then proceeded with in the defendant's absence, the judgment may be set aside, as the trial was not "pending" within the meaning of r. 736, and so could not be heard in vacation. *Green* v. *Stussi*, 6 B.C.R. 193.

XLII. Irregularities.

A. In General.

Defect of process.] — Where, in an action to revoke a probate, the rule requiring the filing of an affidavit verifying the indorsement on the writ has not been complied with, the proceedings should not be invalidated, but the curative provisions of Order LXX., r. 1, ought to be applied. *McLagan* v. *McLagan*, 11 B.C.R. 325.

B. Waiver of.

1. Order — Amendment exceeding — Practice—Amending pleadings — Exceeding terms of order allowing—Waiver of right to object.] — Two weeks after the receipt of an amended statement of claim, defendants' solicitor wrote plaintiff's solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out amended statement of claim on the ground that it exceeded the terms of the order authorizing amendment:—Held, that the defendants had waived their right to object. *Centre Star, etc., Co.* v. *Rossland Miners' Union*, 9 B.C.R. 325.

2. Writ — Irregularity in.] — The fact that a defendant included in an application to set aside service of the writ of summons for irregularity, a motion to discharge an interim injunction granted before service of the writ, is not a waiver of the irregularity in the writ. *Fletcher* v. *McGillivray*, 3 B.C.R. 37.

3. Garnishment.]—Payment into Court by garnishee operates as waiver of right to object to any irregularity in affidavit. *Harris* v. *Harris*, 8 B.C.R. 307.

4. Security not furnished in time.]—A respondent, by applying to increase security for costs, waives his right to object that security was not originally furnished in time. *In re Oro Fino Mines Co.*, 7 B.C.R. 388.

5. Appeal—Security—Demand for after expiration of time for furnishing — Waiver.] — The respondent in an appeal from a winding-up order, after the time limited by sub-sec. 3 of sec. 27 of the Companies' Winding-up Act, 1898, for furnishing security had expired, demanded security for the costs of the appeal:—Held, that respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time. *In re The Florida Mining Company, Limited*, 8 B.C.R. 388.

6. Appearance under protest.] — The defendant entered an appearance expressed to be conditional under protest, and without prejudice to an intended application to set aside an injunction obtained on an ex parte application; the plaintiff on the same day served the defendant's solicitor with a notice of motion to continue the injunction, allowing less than the prescribed number of days for the notice. It was held that the irregularity in entering an appearance under protest was waived by the notice of motion, though such notice was not itself a sufficient notice. *Fletcher* v. *McGillivray*, 3 B.C.R. 49.

XLIII. Stamps.

County Court order—Omission to affix stamps.]—No law stamps being obtainable, a County Court summons was issued and served without being stamped, and the judgment was signed in default:—Held, that the omission to affix the law stamps did not, under the circumstances, constitute a knowing and wilful violation of the Act, and the order for the due stamping of the process was therefore properly made. *Aldrich* v. *Nest Egg Company*, 6 B.C.R. 53.

PRECIOUS METALS.

1. Conveyance of land by grantor to whom precious metals have passed — Whether precious metals pass without being mentioned.] — Where the precious metals have been passed out of the Crown to a grantee, a conveyance of the land by the latter to a third person in the ordinary form will pass the precious metals although

not specially mentioned. *In re St. Eugene Mining Co., and the Land Registry Act*, 7 B.C.R. 288; 1 M.M.C. 406.

2. Whether pass under grant of all minerals and substances whatsoever.]—A statutory grant of lands, "including all coal, coal oil, ores, stones, clay, marble, slate mines, minerals and substances whatsoever, thereupon, therein, thereunder," does not include the precious metals. *Bainbridge* v. *Esquimalt and Nanaimo Railway Company*, 4 B.C.R. 181; 1896, A.C. 561.

3. In railway belt.]—A conveyance by the Province of British Columbia to the Dominion of "public lands," being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interests in revenues arising from the prerogative rights of the Crown. The precious metals in, upon, and under such lands are not incidents of the land, but belong to the Crown, and under sec. 109 of the British North America Act, 1867, beneficially to the Province, and any intention to transfer them must be expressed or necessarily implied. *Attorney-General of British Columbia* v. *Attorney-General of Canada*, 14 S.C.R. 345; 14 App. Cas. 295; 1 M.M.C. 52.

PRESCRIPTION.

Light—Right to user and access.]—A right to the access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to show uninterrupted use for twenty years, and then the burden is shifted to the defendant to show such facts as negative the presumption of ancient lights. *Feigenbaum* v. *Jackson and McDonell*, 8 B.C.R. 417.

PRINCIPAL AND AGENT.

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I. Formation of Relation.

1. Promoters of company — Liability of, for each other's acts.]—Defendants, promoters of a public company, signed a memorandum of association for incorporation, under the Companies Act, 1862 (Imp.), and instructed the company to be incorporated, which was not done. At a meeting of the promoters subsequently held, at which some of the defendants were present, and others not, one B. was directed to incur certain expenses, the subject of the action:—Held, giving judgment against the defendants present at the meeting, and in favour of those not proved to have been present, that the defendants still occupied the position of promoters, and as such were not each other's agents, or liable for each other's acts. *Hung Man* v. *Ellis*, 3 B.C.R. 486.

2. Vendor and purchaser.] — Plaintiff, in the belief that defendant was a real estate agent, explained to the latter what he desired. Defendant recommended a certain lot at $2,500, and plaintiff, at a second interview on the same day, said he would

take the lot if defendant could get it for him, paying at the same time a deposit of $50 on account of the purchase price, one-third of which was to be paid within a few days. Defendant, on his own account, then procured the lot from the owner for $2,000, less $100 commission. Shortly after the payment of the one-third, plaintiff complained to defendant that he (defendant) had sold his own property, when plaintiff had understood that he was merely an agent. Defendant offered to refund the money paid, which was refused. Plaintiff, some two days after this, having learned what defendant had actually done, wrote to the defendant, accepting the offer to refund. Defendant refused. Plaintiff sued to recover the profit made by defendant, or, in the alternative, a rescission of the agreement and a return of the moneys paid. Plaintiff appealed:—Held, that plaintiff had failed to establish a relationship of principal and agent between himself and defendant. A man, as here, may undertake to sell property not his own, but if he secures title before the purchaser rescinds his offer, the latter cannot complain. *Stevenson* v. *Sanders*, 17 B.C.R. 158.

3. Authority to sell land.]—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. *Jull* v. *Rasbach*, 13 B.C.R. 398.

II. Relations Between Principal and Agent.

A. Rights of Principal Against Agent.

1. In General.

1. Payment to agent.]—Where an agent, vested with limited authority, receives a payment which does not fulfil the conditions on which he is authorized to receive payments, he should place the money in medio until further instructed by his principal. *McPherson* v. *Fidelity Trust and Savings Company, Limited, and Moses Gibson*, 17 B.C.R. 182.

2. Stock broker.]—A broker employed to purchase shares fulfils his duty when he delivers to his principal the share certificates, ex facie properly indorsed, and he is under no obligation to procure the registration of the transfer. *Castleman* v. *Waghorn*, 13 B.C.R. 351; reversed, 41 S.C.R. 88.

2. As to Care, Skill and Diligence.

1. Broker — Misrepresentation by.]—The action was for misrepresentation by defendants, financial brokers, concerning the value of the security and character of the borrower, made by S., a member of their firm, in recommending to plaintiff an investment on real estate mortgage security of $5,500. Defendants were in fact employed by the borrower, H., and they obtained a written valuation of the lands from two persons, who certified that they knew the lands personally, and that they were worth $9,700, or $7,000 at a forced sale. The mortgage becoming overdue, the lands proved unsaleable and not worth the amount of the loan, and H. had abandoned the property. At the trial the case was put, in the alternative, as an action for negligence on the part of defendants as plaintiff's agents in not obtaining an accurate valuation. The jury, besides finding that S. had misrepresented to plaintiff the value of the security, and the character of H., found that S. led the plaintiff to rely upon the belief that the defendants were acting for him, and that they were his agents in the matter; that S. did not show the valuation to the plaintiff, who acted solely on his advice; that the defendants adopted the valuation without further enquiry, and in doing so were guilty of negligence. Upon these findings Walkem, J., ordered judgment to be entered for the plaintiff for the full amount of the loan and interest, as damages, upon plaintiff executing an assignment to defendants of the security. Upon appeal to the Full Court, and motion to the Divisional Court for a new trial:—Held, per Crease, McCreight and Drake, JJ.: That there was sufficient evidence and findings of agency and negligence. Per Crease and Drake, JJ., affirming Walkem, J.: That the measure of damages was the whole loss on the loan. That the fact that the case was put to the jury as also involving actionable misrepresentation or deceit, and that findings were taken thereon, and that the learned judge charged the jury that the representations, if made, amounted to a guarantee by the defendants of the loan, were insufficient grounds of misdirection to call for a new trial. Per McCreight, J.: There was nothing amounting to a guarantee of the loan, and the damages should be reduced by the actual cash value of the security at the time of the loan, and a new trial had to

ascertain such value. *Wolley* v. *Lowenberg, Harris & Co.*, 3 B.C.R. 416; 25 S.C.R. 51.

2. Architect.]—In making his estimates of the cost of a building an architect is only required to use a reasonable degree of care and skill, and if he does so he is not liable for any loss caused by error in the estimates. *Grant* v. *Dupont*, 8 B.C.R. 7, 223.

3. Disclosure by agent.

1. Secret profit.] — A broker being informed by the owners that they would sell certain lands, entered a description of the property in his list of lands for sale through his agency. The lands being still unsold about three months later, the broker, in consideration of a payment of $50, obtained an exclusive option from the owners for the sale or purchase by himself, within thirty days, of the lands at a price named, which was to include his commission in the event of his effecting a sale, but without disclosing information of which he was then possessed that there was a probability of the lands selling within a short time at an increased price. Within a few days after the date of the option he effected a sale, in his own name, of the lands for double the price named therein, notified the owners that he exercised the option to purchase, and demanded a conveyance:—Held, that the broker was an agent for the sale of the lands at the time he procured the option, and having failed in his duty to disclose to his principal all material information he had as to the probability of the lands selling at a higher price than that mentioned, specific performance of the contract to sell to him must be refused. *Naismith* v. *Bentley*, 16 B.C.R. 308; 46 S.C.R. 477.

2. Fiduciary relationship.] — Where an agent is entrusted with the purchase of land for his principal, he must, before selling his own land to the principal, make the fullest disclosure. *Laycock* v. *Lee & Fraser*, 17 B.C.R. 73.

4. As to Accounts and Moneys Received on Principal's Behalf.

1. Moneys received by agent as price of option.]—W., acting for the owner of two lots, listed them with the defendant. Subsequently the defendant entered the plaintiff company's employ, with whom he listed the property. The defendant shortly afterwards obtained a better price for the property from W., and urged his employers to take an option themselves. Nothing came of this, however, and the defendant negotiated with C., who paid him $5 to obtain an option for ten days. The defendant saw W., who gave the option in C.'s name, for which he was paid $5. Two days later W.'s principals sold the property to other parties. The defendant and W. then came to a settlement whereby W. paid the defendant $250, and he received back the option given C. The defendant then paid C. $250, less $15, which he withheld for his own services. The plaintiffs claimed that the $250 was paid as a commission to which they were entitled, the defendant being in their employ, the defendant on the other hand claiming that the money was paid in consideration for the return of the option:—Held, on appeal, per Macdonald, C.J.A., and Martin, J.A., affirming the judgment of the trial judge, that the $250 was paid for the defendant's services, to which his employers were entitled. Per Irving and Galliher, JJ.A.: That the plaintiff's claim did not fall within the defendant's retainer, the money being paid in settlement of the claim of the option holder. The Court being equally divided, the appeal was dismissed. *Canadian Loan and Mercantile Company, Limited* v. *Lovin*, 18 B.C.R. 236.

2. Architect.]—An architect is bound to render to the building owner an account of all moneys expended under the architect's certificate, notwithstanding that the certificate is made final as between the building owner and contractor. *McDermott* v. *Coates*, 18 B.C.R. 439.

3. Secret profits.]—Z., a broker, purchased six acres of land in the name of W. at $500 an acre, later advising R. that he could purchase the property from W. at $750 an acre net. The two purchased the property jointly at that price, R. paying Z. $60 in addition for his services. Later they divided the property, each taking three acres, and R. then exchanged his three acres for a motor-car before it was disclosed to him that W. held the property for Z. when they made their joint purchase:—Held, that the relationship of principal and agent was established and that the difference in the prices paid for the land in the two sales could be recovered by R. as secret profit. *Riches* v. *Zimmerli*, 19 B.C.R. 127.

4. Secret profits.] — If an agent, employed to find the lowest price at which

property can be purchased, induces his principal to pay a larger amount than the owners will accept, he is liable to the principal for the difference. The defendant was instructed to offer certain lots for sale by one of the two owners, who were brothers, the one who gave the instructions living near Vancouver and the other in England. The defendant then listed the lots with one A. H., who shortly afterwards offered them for sale to one C. H., who was acting for the plaintiffs. C. H. asked A. H. to cable the English owner for his lowest price. A. H. stated he would do so if a deposit were made. C. H. then gave A. H. a cheque for $25 as a deposit. Shortly afterwards A. H. saw the defendant, gave him the cheque and explained what had taken place. The defendant then saw the owner in Vancouver, the result of which was that he telegraphed his brother that he was offered $75 a foot for the property, and advised acceptance. The next day a reply accepting the offer was received. On the following day the defendant was introduced to C. H. (plaintiff's agent) and he told him he had received a telegram and that the owners wanted $90 per foot, at the same time giving him a receipt for the $25 deposit, which read: "Re your deposit of $25 on Lots . . . ., I have received a letter and cable regarding same and am able to sell for $90 per foot," etc. In an action to recover secret profit, it was held that on the evidence he found as a fact that the defendant agreed to act as agent for the plaintiff in acertaining the lowest price at which the property could be bought, and the plaintiffs should recover. *Fry* v. *Yates*, 19 B.C.R. 355.

5. Secret profits.] — The defendant, a broker, undertook to obtain two parcels of land for the plaintiff as an investment of funds supplied by the plaintiff for that purpose at prices quoted. The defendant purchased one of the parcels at a price lower than that quoted, receiving, however, the full amount quoted from the plaintiff:—Held, that the defendant was the agent of the plaintiff, and must disgorge the secret profit. *Fleming* v. *Hutchinson*, 40 S.C.R. 134.

5. As to Property Acquired by Agent.

1. Mineral claim.] — A principal is entitled to have a claim located by an agent transferred to him. *Fero* v. *Hall*, 6 B.C.R. 421.

2. Former agent purchasing.]—The city of Nelson was incorporated in March, 1897, and in September, 1898, lands situated therein were sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—Held, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. In July, 1897, a real estate agent, on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—Held, that at the time of the sale the agent was not in a fiduciary relation to the owner. *McLeod* v. *Waterman* (*No. 2*), 10 B.C.R. 42.

B. Rights of Agent Against Principal.

1. Remuneration.

1. Breach of duty.]—Where an agent to sell colludes with the purchaser, he thereby disentitles himself to any remuneration from his principal. *Canadian Financiers, Ltd.* v. *Hong Wo*, 17 B.C.R. 8.

2. Sale effected through another.]—Where a broker, on the instruction of the vendor, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent. *Osler* v. *Moore*, 8 B.C.R. 115.

3. Architect.] — Where an architect is instructed to prepare plans for a building to cost not more than a certain sum, but which building must also comply with other conditions as to accommodation under a municipal bye-law, then although, in order to comply with such other conditions, the tenders sent in are in excess of the sum mentioned, the architect cannot recover for his services. *Wilson* v. *Ward*, 14 B.C.R. 131.

4. Settlement of claim.]—The plaintiff, the manager of a coal company of which the defendant was vice-president, suggested to him the advisability of purchasing certain coal properties consisting of two separate areas and including the surface rights of one of them. It was arranged that the plaintiff should buy the properties for the defendant for $65,150. The defendant commenced prospecting on the properties for coal with drills. While the work was in progress he wrote the plaintiff stating he would protect him for 11,000 shares in a

coal company to which it was his intention to sell, provided the sale netted him a profit of 22,000 shares, and that he would protect him for $25,000 as the sale of the surface rights progressed. This was the first reference as between the parties to remuneration for the plaintiff's services. Later developments from the prospecting showed that there was little coal value in the properties, and a sale of the properties was made on a smaller basis. The parties came together and the defendant paid the plaintiff $5,000 in promissory notes, which the defendant alleged were taken by the plaintiff as settlement in full, the plaintiff denying this and saying it was made in part payment of the amount due him. In an action for specific performance of the first agreement, it was held on the trial that the plaintiff was entitled to be paid for his services on a quantum meruit basis, and that the payment of the notes for $5,000 was a fair payment for what he did:—Held, on appeal, that the plaintiff's claim was settled in full when the promissory notes for $5,000 were given to him by the defendant. *Grant* v. *von Alvensleben*, 18 B.C.R. 334.

5. Conditions for recovery on sale of land.]—In an action by an agent to recover the amount of his commission, he must show that he has produced to the principal a purchaser ready, willing and able to enter into a binding agreement to purchase; and the agent is entitled to his commission if, the parties having been shown to be agreed upon the terms, the sale is subsequently prevented by the fault or default of the vendor. *Bagshawe* v. *Rowland*, 13 B.C.R. 262.

6. Efficient cause of the sale.]—A gave B. authority as agent to sell his coal leases. B. communicated with C., telling him that the leases were for sale, with the names of the owners, but did not advise A. of his conversation with C. as a possible purchaser. B. then, without having any further conversation with C., obtained an option on the property from A., and left the Province with a view of obtaining a purchaser in another market. About a month later B. notified A. of his failure to find a purchaser, and six weeks later A. sold the leases to C. In an action by B. for commission for his services in effecting the sale, the jury found in his favour:—Held, on appeal, that B. was not entitled to a commission, as by merely bringing the attention of the purchaser to the leases he was not the efficient cause of the sale, and the verdict of the jury in favour of C., in such circumstances, was perverse. *Astley* v. *Garnett and Stirling*, 20 B.C.R. 528.

7. Mandate fulfilled.]—Defendant listed with plaintiffs for sale or exchange ten acres of land. One Callaghan opened negotiations for an exchange. While the deal was being transacted defendant telephoned plaintiffs asking if any disposition of his property had been effected, and was replied to in the negative. He then said that he withdrew the property, and at or about the same time, consummated a deal for the property mentioned by Callaghan to the plaintiffs, Callaghan having opened up negotiations with him direct:—Held, that the relationship of vendor and purchaser had been brought about by the plaintiffs, and that Callaghan had endeavoured, by approaching defendant, to deprive them of their commission. *Lalande & Clough* v. *Caravan*, 14 B.C.R. 298.

8. Net price.]—Defendant commissioned plaintiff to sell his house and lot and agreed to pay five per cent. commission. Plaintiff offered it to R., the tenant who paid the rent to plaintiff as agent for defendant, who did not want to buy at the time. Defendant became dissatisfied at plaintiff's not being able to sell and told him he was going to put the property in another agent's hands for sale, but not withdrawing it from plaintiff's, and that his price was $3,000 net, and whoever sold it was to look for remuneration to what he could get a purchaser to pay above that sum. Another agent sold to R. for $3,150, defendant realizing $3,000:—Held, that the plaintiff was not entitled to a commission in respect of the sale. *Johnson* v. *Appleton*, 11 B.C.R. 128.

9. Sale more extensive than originally contemplated.]—In an action for commission on the sale of land, plaintiff claimed ten per cent. of the price for which defendants sold a half interest in certain lands, alleging that his agreement with defendants was that he was to receive ten per cent. commission "on all such sales as should be effected on his introductions." The jury at the trial so found, and plaintiffs having introduced F., that the sale in question resulted from such introduction:—Held, affirming the finding of the jury, that notwithstanding the fact that the sale in question was more extensive than the one in contemplation when the agreement was made, yet plaintiff was entitled to ten per cent. commission, as the sale resulted from

the introduction. *Tucker* v. *Massey,* 18 B.C.R. 250.

10. Sale of land.]—Plaintiff and one of the defendants, after a conversation, arranged on the selling price of a piece of real estate at $6,000. There was a conflict in the evidence as to whether that was to be a net price, but this difficulty was got over by the fact that on the occasion the parties next met, a few days later, the defendant in question said "property is gone up now, and I shall want $6,000 net." Plaintiff, on the same day, but before the change in price (the second occasion) brought the property to the notice of a purchaser, and told the defendant about him. Plaintiff also changed his advertisement to read $6,500 as the selling price. The purchaser refused to pay more than the $6,000, and eventually bought direct from the owners at that price:—Held, that plaintiff was not, in these circumstances, entitled to a commission. *Holmes* v. *Lee Ho and Lou Poy,* 16 B.C.R. 66.

11. Sale of land.] — As a result of negotiations for the sale of certain land in March, 1911, the defendant, the owner, agreed to accept $100,000 in case the plaintiffs found a purchaser. No sale resulted from this arrangement, and in the month of August following, the plaintiff Ericcsson brought a prospective purchaser named Milne to view the property, when the defendant, on account of certain improvements made in the meantime, raised the price to $105,000. Milne looked the land over, but left without making any offer. In January, 1912, the defendant sold to another broker for $90,000. It subsequently appeared that the broker was acting for Milne, who was the actual purchaser. The defendant denied any knowledge of Milne in his dealings with the broker. The plaintiffs sued for their commission on the sale of the property to Milne:—Held, that the charges of fraud, conspiracy and collusion not having been proved conclusively, the plaintiffs could not recover. *Ericcsson* v. *Marlatt,* 18 B.C.R. 120.

12. Sale of land.]—T., in 1904, having listed his property with plaintiff at the selling price of $30,000, the latter introduced P., who obtained from T. a three months' option, upon which $100 was paid. This was renewed for $50, and the second option was allowed to lapse. A small portion of the property was sold to one L. after the expiration of the second option, on which plaintiff received a commission. In 1906, negotiations were revived between T. and P., which resulted in a sale to P. of the property for $26,000, but plaintiff was unaware of either the negotiations or sale at the time. Plaintiff, on learning of the sale, claimed a commission:—Held, that he was entitled to recover. *Lee* v. *O'Brien and Cameron,* 15 B.C.R. 326.

13. Sale of land.]—An owner who had listed his property with an agent for sale on certain terms subsequently, and without notice to the agent, gave an option for sale to a third party. The latter, when the time for taking up his option arrived, had the property conveyed to a party originally found by the agent, and with whom the agent was negotiating for a sale. The purchase price was the same in both cases:—Held, that the circumstances connected with the granting of the option precluded any idea of a mere agency on the part of the optionholder, and his position as purchaser was not affected by the fact of his selling to the purchaser with whom the agent was negotiating. *White* v. *Maynard and Stockham,* 15 B.C.R. 340.

14. Sale of land.]—Plaintiff at one time obtained an option on defendant's ranch, with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission basis, $100,000 being the purchase price, and his commission or profit to be made by adding $5,000 thereto. He endeavoured to effect a sale in various quarters and ultimately introduced H. to the defendant, telling the former that the price was $105,000, and asking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid:—Held, that plaintiff was entitled to recover his commission of $5,000 from the defendant (vendor). *Rowlands* v. *Langley,* 16 B.C.R. 72; 46 S.C.R. 626.

15. Mandate to sell at a particular sum.]—H. being pressed by his mortgagees, applied to B. to procure a loan of $58,000. Negotiations to that end by B., and also further efforts to procure a sale of certain of the property for $56,000, failed. Subsequently the person with whom B. was negotiating was introduced by his (the prospective purchaser's) banker to the agent of the mortgagees, and a sale was brought about for $50,000, H. paying the agent a

commission. In an action by B. against H. for a commission for having first introduced the purchaser:—Held, that B. was engaged to find a purchaser at a certain figure, and having failed to do so, he was not entitled to a commission on a sale, although made to the person originally introduced by him. When, prima facie, the agreement is made to pay a commission on a named figure it is for the agent to show in the clearest way that the intention of the parties was to pay a commission on any figure at which the sale goes through. *Bridgman* v. *Hepburn*, 13 B.C.R. 389; 42 S.C.R. 228.

16. Sub-agent.]—R. agreed with C. (who had influence with the Kitsilano band of Indians) that if they, working together, could bring about a sale to the Province of the rights of the Indians in their reserve, he would pay C. $20,000. Negotiations proceeded, C. arranging meetings with the Indians, at two of which R. and C. were present, but without results. After the first meeting, R., who had a meeting with the Provincial representative, was induced by him to make A. a party to the transaction. Three days after the second meeting a third and final meeting was held with the Indians (an adjournment of the other meetings), at which R. and A. were present, but from which C. was excluded. The Indians came to terms at this meeting, and a form of option, which had been previously prepared by R. for use at the former meetings, was signed by the parties after A.'s name had been changed for R.'s. An action by C. for the recovery of the $20,000 was dismissed:—Held, that R. was bound to discharge his obligation to C. upon the success of the enterprise, and the fact that A.'s influence may have been most potent in bringing about a sale did not affect the relationship between R. and C. *Cole* v. *Read*, 20 B.C.R. 365.

17. Sub-agent.]—J. and G., members of the plaintiff Company, sold a newspaper plant to M., one of the terms of the sale being that G. should remain as manager of the paper for two months. Whilst so acting as manager, G., learning that M. required more extensive quarters owing to a contemplated enlargement of the plant, proposed to the defendant Martindale that his firm should obtain an option on a certain property. Acting on the suggestion, Martindale secured an option, and shortly after G. introduced M. to Martindale, who, after the usual negotiations, sold the property to M. and received $1,000 commission for the sale. G. claimed that from the time he proposed the defendants should take an option on the property in question it was understood between himself and Martindale that he was acting as a member of the plaintiff Company and agreed that they should share in the commission. Martindale, on the other hand, swore he looked upon G. as M.'s agent and knew nothing of the plaintiff Company or of the claim for a share in the commission until after M. had personally negotiated for the purchase of the property and very shortly before the sale was closed:—Held, that the plaintiffs had not established an agreement or promise by the defendants to pay the plaintiffs a share of the commission, although the defendants admitted that but for the fact that G., a member of the plaintiff's firm, was in the employment of the purchaser of the land, he and his firm would have been entitled to a commission, according to the usage of land brokers, for G. had introduced the purchaser to the defendants. *The Globe Realty Co.* v. *Martindale & Bate*, 18 B.C.R. 220.

18. Option to sell land.]—In the circumstances, it was held that plaintiff had earned only $800 of the commission claimed. *Beveridge* v. *Awaya Ikeda & Company, Limited*, 16 B.C.R. 474.

2. Reimbursement and Indemnity.

Injury to third party.]—Where an act is innocently done under the express direction of another, which occasions an injury to the rights of a third person, the principal must indemnify the innocent agent. *The Board of School Trustees of Victoria* v. *Muirhead & Mann, and the Albion Iron Works Company, Limited*, 4 B.C.R. 148.

III. Relations Between Principal and Third Person.

A. In General.

1. Election to take judgment against one of the parties.]—The plaintiff, Clara Semisch, sold a judgment of over $9,000 against K. to G., who was acting as agent for Mrs. K., to whom he at once assigned the judgment and received $1,000 from her thereof. G., by his instructions from Mrs. K., was limited to $1,000 as the purchase price of the judgment, but as he was inter-

ested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay plaintiff $1,000 in cash and $500 when the roof of the building was completed, or at the latest on 1st January, 1903, and he also agreed to enforce the judgment against K., and pay plaintiff half the proceeds he received. His agreement with plaintiff was contained in two writings, one being an assignment from plaintiff to G. of all her rights under the judgment for $1,000, and the other containing the additional terms of which Mrs. K. was not aware when she bought from G. G. failed to pay plaintiff the additional $500, and plaintiff sued for it in the County Court, and although the fact came out in evidence during the trial that G., in buying the judgment, had been acting as Mrs. K.'s agent, the plaintiff took judgment against G. Subsequently plaintiff sued G. and Mrs. K. to have the assignment set aside, or to have Mrs. K. declared a trustee for plaintiff:—Held, (1) that plaintiff, by taking judgment against G. founded upon his promise contained in one of the documents which made up the transaction, elected to treat him as the sole principal; and (2) that Mrs. K. bought the judgment without any knowledge of the agreement between plaintiff and G., and was not bound by its terms. *Semisch* v. *Guenther and Keith*, 10 B.C.R. 371.

2. Undisclosed principal.] — Where B. wrote an offer to sell land on letter paper headed Canadian Pacific Railway Company Land Department and signed his name above the word Commissioner, it was held that the form of the letter did not impart that B. was acting as agent for the Canadian Railway Company; that the contract was by B. in his own name; and that parol evidence was admissible to show that B. was contracting on behalf of an undisclosed principal. *Smith* v. *Mitchell*, 3 B.C.R. 450.

3. Undisclosed principal.] — Where an agent sells in his own name for an undisclosed principal, the principal is entitled to recover the price from the buyer, unless, in making the contract, the buyer was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account. R., a broker, sold mining shares in his own name to G., payable in sixty days, on behalf of an undisclosed principal. G., who knew that R. was carrying on a brokerage business, understood that the transaction was with R. on his own account:—Held. that G. was liable in an action brought by the principal for the price of the shares. *Baker* v. *MacGregor*, 20 B.C.R. 15.

4. Retention of profit.] — A principal cannot retain a profit made by the fraud of his agent, whether the principal authorized the fraud or not. *Canadian Financiers, Ltd.* v. *Hong Wo*, 17 B.C.R. 8.

B. Holding Out.

1. General authority limited by subsequent instructions.]—Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting bona fide. Whether authority has been conferred on an agent is a question of fact, which may be proved by showing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred. A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons, dispute its existence. *Sayward* v. *Dunsmuir and Harrison*, 11 B.C.R. 375.

2. Investing with special title.]—A company which invests one of their servants with the title of "Land Commissioner" is not estopped from denying his power to sell its lands. *The Elk Lumber Co.* v. *The Crow's Nest Pass Coal Co.*, 12 B.C.R. 433; 39 S.C.R. 169.

C. Principal's Liability for Torts Committed by Agent.

1. Servant of corporation.]—A corporation is liable for torts committed by its servants in the course of its business. *Adams* v. *National Electric Tramway & Lighting Co.*, 3 B.C.R. 199.

2. Fire.]—Farm labourers hired to do anything that may require to be done upon well-wooded farms are acting within the scope of their employment in setting out

fires, even if such setting out at the particular season of the year was contrary to the express orders of the employer, and therefore the employer will be liable to parties whose lands are injured by the fire. *Gallon* v. *Ellison*, 20 B.C.R. 504.

3. Hospital doctor.]—A body of persons conducting a hospital is not liable for a tort committed by a doctor in its employ, provided it has exercised reasonable care to ensure skilled and competent medical attendance. *Thompson* v. *Columbia Coast Mission*, 20 B.C.R. 115.

4. Tram conductor.]—Where, owing to a fog the defendant company's trams were not running according to the time table, and the tram on which was the plaintiff stopped and the conductor told the plaintiff to change to another tram ahead which would also take the plaintiff to her destination, and in making the change the plaintiff fell and was injured, it must be assumed, in the absence of evidence to the contrary, that the conductor had authority to use his discretion as to the best means of bringing the passengers to their destination. *Schnell* v. *British Columbia Electric Railway Company*, 15 B.C.R. 378.

IV. Relations Between Agent and Third Persons.

A. Rights of Agent.

Auctioneer.] — An auctioneer sold two horses, by public auction, to a purchaser who settled for the price by giving the auctioneer his cheque, post-dated several days after the sale, and the auctioneer then gave his cheque for the purchase price, less his commission, to the owner of the animals. The purchaser took possession of the horses, but, on the following day, discovering that a third person held a lien on them, stopped payment of the cheque:—Held, that the auctioneer was entitled to recover the amount of the cheque from the purchaser. *Trapp* v. *Prescott*, 17 B.C.R. 298; 50 S.C.R. 263.

B. Liabilities of Agent.

1. On Contracts.

Representative capacity.] — An agreement by defendant Company for the purchase of a quantity of salt, f.o.b. at San Francisco, to be delivered at Nanaimo, in British Columbia, was signed by the president and secretary-treasurer. Under their signatures was added: "We, the undersigned, guarantee payment of the obligation as noted above, Imperial Fisheries, Ld., J. O. Hearn, president; Saml. J. Levy, secretary-treasurer; William Kilroy, vice-president":—Held, that the three officers signing the guarantee following the execution of the agreement were personally liable, and that judgment under Order XIV. was properly allowed. *Johnson, Lieber & Van Bokkelen, Limited* v. *Imperial Fisheries, Limited, Hearn, Levy and Kilroy*, 16 B.C.R. 445.

2. On Warranty of Authority.

1. Director of company.]—The defendant L., representing himself as managing director of one of the defendant Companies, gave an exclusive option to the plaintiff to purchase the two defendant Company's properties, the option to remain in force until the vendor gave written notice of cancellation, subject to the purchaser having a reasonable opportunity to complete any negotiations he might have in progress towards carrying out the agreement. The purchaser was to receive a nine per cent. commission in the event of a sale going through. L. in fact was not the managing director of one of the defendant Companies, having resigned shortly prior to his signing the option. He was, however, president of one of the companies and a shareholder in the other. Upon obtaining the option the plaintiff arranged with brokers, who then communicated with one Ward. Ward then entered into an arrangement with two men in April, 1910, who eventually brought about a sale of the two properties. L. wrote the plaintiff on the 27th of May, 1910, cancelling the option. The trial judge dismissed the action:—Held, on appeal, that L. had no authority to bind either Companies:—Held, further, that the plaintiff brought about the sale; that he undertook the work of procuring a purchaser on the strength of the option under which he was to obtain a commission, and that L. was liable on the implied contract that he had the authority to bind the Company, and was not relieved by his notice of cancellation of the option. *Picard* v. *Revelstoke Sawmill Company, Limited*, 18 B.C.R. 416.

2. Representation.] — A. delivered five tons of oats to the servant of M. to be carried and delivered to C. The servant, by the fraudulent direction of D., delivered the oats to E. and they were lost. A. sued M.

for the value of the oats:—Held, that the property in the oats had never passed from A., and the loss of the goods through delivery by M.'s servant to a wrong person made him responsible. *Alberta Pacific Grain Company, Limited* v. *Merchants Cartage Company*, 20 B.C.R. 1.

3. Measure of damages.]—C. had property for sale which was listed with the defendant Exchange for some months. Plaintiffs, having inquired from the Exchange whether the property was still for sale, received the information that it had not been withdrawn, and thereupon entered into negotiations for its sale to one of their customers, accepting a deposit on the purchase price and paying same to the Exchange, from which an order was given on C. for the commission. It transpired that C. had previously sold the property:—Held, that plaintiffs' damages were what they would have gained by the contract which the defendant Exchange warranted should be made, viz.: the full amount of the commission involved. *Austin & Company* v. *The Real Estate Listing Exchange and Casher*, 17 B.C.R. 177.

3. For Moneys Received by Agent.

Money paid to agent.]—An action does not lie against an agent for recovery of money paid to him. *Williams* v. *Wilson and Morrow*, 3 B.C.R. 613.

V. Duration and Termination of Relation.

1. Cessation of dealings.]—In July, 1897, a real estate agent, on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—Held, that at the time of the sale the agent was not in a fiduciary relation to the owner. *McLeod* v. *Waterman* (*No. 2*), 10 B.C.R. 42.

2. Withdrawal of authority.]—Where a principal listed property with an agent for sale for a certain period, after which time he was to give written notice of intention to withdraw the property from sale or change the price or terms:—Held, that this was a listing for the period mentioned, and after that an agency until the property was withdrawn, in the absence of proof of notice having been given. *Goddard & Son* v. *Elliott*, 16 B.C.R. 379.

3. Death.]—Where the holder of shares in a joint stock company directed his wife to sign a transfer of the shares, but no actual transfer was effected before his death, it was held that the authority of the wife to deal with the certificate was revoked by the holder's death. *Castleman* v. *Waghorn*, 13 B.C.R. 351; 41 S.C.R. 88.

PROBATE FEES.

Rules of Court.]—By Order LXXIV., r. 1 (R.S.C. 1890), the appendices to the Supreme Court Rules form part thereof, and by sec. 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. to the rules may be collected as having been imposed by statutory enactment. *In re Porter*, 10 B.C.R. 275.

PROFIT A PRENDRE.

Unity of title.]—Where the titles to the land and any profit issuing out of the land become united in one person, the profit falls into the inheritance and becomes extinct. *MacCrimmon* v. *Smith*, 12 B.C.R. 377.

PROHIBITION.

I. When It Lies, 856.
II. Persons To or Against Whom Writ May Be Granted, 857.
III. Procedure, 858.

I. When It Lies.

1. Want of jurisdiction.]—Where want of jurisdiction is shown on the proceedings, even though the Court below has given itself jurisdiction by coming to an erroneous conclusion of law, a writ of prohibition will issue notwithstanding that the defendant appeared at the trial and launched an appeal which he subsequently abandoned. *Simpson* v. *Widrig*, 15 B.C.R. 5.

2. Want of jurisdiction.]—Where the objections to the jurisdiction of an inferior Court appears upon the face of the proceedings, prohibition lies at any time, even after

judgment. The defendants are entitled to the writ as of right, even though they had an alternative remedy by motion to set aside the judgment. *Camosun Commercial Company, Limited* v. *Garetson & Bloster*, 20 B.C.R. 448.

3. Want of jurisdiction.] — The only ground of prohibition to an inferior Court is that it is exceeding its jurisdiction. *Five Chinamen* v. *New Westminster Corporation*, 2 B.C.R. 168.

4. Error in law.]—Where a magistrate gives himself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie. *R.* v. *Sparks*, 18 B.C.R. 116.

5. Water records.] — Under the Land Act, 1865, errors in the statutory conditions precedent to the grant of a water record should be raised by prohibition. *Carson* v. *Martley*, 1 B.C.R., Pt. II., 281.

6. Waiver.]—Sec. 15 of the Small Debts Act, which provides that the decision of the magistrate must be given in open Court, may be waived, either expressly or by the conduct of a suitor, and prohibition in such case will be refused. *Chase* v. *Sing*, 6 B.C.R. 454.

II. Persons To or Against Whom Writ May Be Granted.

1. Elections—Voters' lists.]—After the collector of votes, under the Provincial Elections Act, 1897, as amended in 1899, has placed on the register of voters the names of persons objected to, an application for prohibition, on the ground that the collector proceeded without jurisdiction, is too late. Semble, in any event prohibition is not the proper remedy. *In re Provincial Elections Act, and In re O'Driscoll* v. *Wright*, 8 B.C.R. 424.

2. Appeal from Court of Revision.]—The judge of the County Court mentioned in sec. 137 of the Municipal Clauses Act is persona designata, and the authority conferred upon him by said section may not be exercised by the judge of another County acting on his request or in his absence. The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal. *Corporation of the City of Slocan* v. *The Canadian Pacific Railway Company*, 14 B.C.R. 112.

3. Gold Commissioner.] — Prohibition will lie to a Gold Commissioner assuming to act as judge of a mining Court. *Burk* v. *Tunstall*, 2 B.C.R. 12.

4. Jurisdiction of justices.]—The Municipal Act, 1896, provided (sec. 212): "No justice of the peace shall adjudicate upon or otherwise act in any case for a city where there is a police magistrate, except in the case of illness, or absence, or at the request, of the police magistrate," and by sec. 213 the Act preserves the jurisdiction of the justices in regard to any offence committed in any city where there is no police magistrate. An information was laid before a justice of the peace against the police magistrate for the City of Kaslo. The police magistrate was not ill or absent, nor did he request the justice to act. The justice granted a summons, and it was held that, for the purposes of the case, there was no police magistrate in Kaslo, and therefore the justice had jurisdiction. *R.* v. *Chipman*, 5 B.C.R. 349.

III. Procedure.

1. Contradicting statements of fact.]—Statements of fact necessary to found jurisdiction in the inferior Court appearing in the order of the inferior Court in question on the motion, may be contradicted. *Re W. N. Bole*, 2 B.C.R. 208.

2. Use of affidavits.] — Affidavits may be used on applications for prohibition to show what the facts necessary to found jurisdiction were. *Simpson* v. *Widrig*, 15 B.C.R. 5.

PROMISSORY NOTE.

See Bills of Exchange.

PROMOTER.

See Company.

PUBLIC INQUIRIES.

Power of Lieutenant-Governor.] — The Corporation of the City of Vancouver petitioned the Lieutenant-Governor-in-Council, alleging that certain societies incorporated under the provisions of the Benevolent Societies Act were abusing their corporate powers and applying them to purposes other than those authorized by the statute, and praying that, under the powers thereby conferred, these societies be dissolved. The Lieutenant-Governor-in-Council appointed a commissioner under the authority of sec. 4 of

the Public Inquiries Act to inquire into the facts bearing upon the allegations contained in and the prayer of the petition:—Held, that the power of the Lieutent-Governor-in-Council to dissolve societies created under the provisions of the Benevolent Societies Act, though not for any public purpose, is one of the powers of government exercisable by the Executive, and the investigation of the facts leading to a conclusion on the question whether that power shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters connected with the good government of the Province within the meaning of sec. 4 of the Public Inquiries Act. *Re Railway Porters' Club*, 11 B.C.R. 398.

PUBLIC LANDS.

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I. Applications.

A. In General.

Waiver of conditions.]—A department of the Government cannot waive the performance of any of the conditions imposed by the Legislature. *Peck* v. *Reg*, 1 B.C.R., Pt. II., 11.

B. Restraining.

Injunction.] — The courts should not, upon the ground that the claim appears invalid, restrain a party from applying to the proper department of the government for a grant of Crown lands. *Nelson, etc., Ry. Co.* v. *Parker*, 6 B.C.R. 1.

C. Effect of.

1. Locus standi of applicant.] — An application to purchase Crown lands, which is refused, does not confer on the applicant any locus standi in judicio to attack anyone in possession of the lands. *Hall* v. *Reg*, 7 B.C.R. 89; 480.

2. Locus standi of applicant.] — The right given by the Land Act to apply for a timber license does not, although all conditions have been complied with, confer on the applicant any legal or equitable interest in the subject applied for. *Wilson* v. *McClure*, 16 B.C.R. 82.

II. Pre-emption.

A. Unoccupied Lands, What Are.

1. Unoccupied Crown lands.] — H., in 1893, applied to the Crown to pre-empt the land in question, and obtained a record thereof in his own name from the Crown upon a mis-statement that the same was "unoccupied and unreserved Crown land within the meaning of the Land Act." C., in 1889, made application to the Crown to purchase the land, and, in the belief that his purchase and title from the Crown were completed, entered into actual occupation, and made improvements on the land to the value of $600. H., at the time of his application and record, was aware of the occupation and improvements of C.:—Held, sustaining the decision of the Crown Lands Commissioner, that at the time of the application of H. the lands were not "unoccupied" Crown lands within the meaning of sec. 5 of the Act, and were not open to pre-emption and record. That sec. 14 of the Land Act, as amended by the Land Amendment Act, 1891, sec. 1, "That occupation in this Act required shall mean a continuous bona fide residence of the pre-emptor, or of his family, on the land recorded by him," relates to sec. 13, which provides for cancellation of the record of a settler "if he shall cease to occupy such land," and does not govern the question of what lands are "unoccupied" for the purposes of sec. 5, supra. *Hereron* v. *Christian*, 4 B.C.R. 246.

2. Reserves.]—Where Crown lands are reserved from settlement by the Lieutenant-Governor-in-Council under sec. 86 of the Land Act (C.S.B.C. 1888, c. 66), it does not again become open for settlement until cancellation of the reserve by the same authority under sec. 87. *Nelson, etc., Ry. Co.* v. *Parker,* 6 B.C.R. 1.

B. Collusive Application.

Meaning of.]—Butters obtained a pre-emption record of the land in dispute in 1901. Bessette applied for a record in respect of the same land in 1904. In the year 1893, one Kitchen had obtained a pre-emption record of this land and made certain improvements thereon to the value of about $1,000. In March, 1900, Kitchen applied for and obtained a pre-emption record of certain other lands, and in April, one Boutilier obtained a pre-emption record of a certain portion of the lands in question. Boutilier abandoned his pre-emption right, and Kitchen and Butters entered into an agreement whereby Kitchen agreed that Butters pre-empt the land on his paying for the improvements $200 in cash and the balance when he should realize the same out of the land, and Kitchen, until so paid, should retain an interest in the land. Bessette's application, which set up non-occupation of the land by Butters, and collusion between Butters and Kitchen, was refused by the Assistant Commissioner, who found against the charge of collusion, and on that of non-occupation, he came to the conclusion that there was no provision in the Land Act for cancelling a certificate of improvements when once issued. On appeal this decision was affirmed:—Held, by the Full Court, that the arrangement entered into between Butters and Kitchen was, in the circumstances, not such as to preclude Butters from making the statement set forth in Form 2 of the Land Act, as the term "collusion" as used in the Form means collusion with somebody to defeat the provisions of the Act. *In re Bessette,* 12 B.C.R. 228.

C. Cancellation of Record.

1. Jurisdiction.] — The Legislature has refrained expressly from conferring upon the Commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact. Semble, it is a condition of the power conferred by sec. 13 that the Commissioner shall find a cessation of occupation in fact, and the section has no application to any question arising under sec. 7 or sec. 8. *In re Bessette,* 12 B.C.R. 228.

2. Notice of application.]—Although a commissioner of lands must give a pre-emption record holder thirty days' notice of the hearing of an application to cancel his pre-emption record, yet, if the pre-emptor appear and attend on the hearing at an earlier date, he cannot object afterwards that he has not received proper notice:—Held, further, on the facts, that the commissioner was right in cancelling the record for non-compliance with the Land Act as to occupation of the land. *Heselwood* v. *Jones,* 16 B.C.R. 485.

D. Buildings, Etc.

1. Abandonment of house.]—In 1888, one Patterson erected a house on a portion of a pre-emption taken up by him in 1886. A small portion of the house, as shown by a survey made in 1903, was upon adjoining property, at the time of action held by plaintiffs under lease from the Crown. The house was built in connection with a mining venture of Patterson's, which did not prove successful, and before his death in 1891, he became indebted to William Palmer, defendant's testator, to whom the house and mining property were transferred as security. In 1894, one Morton, plaintiffs' testator, obtained a pre-emption record to the same land, and a Crown grant in 1908. Various acts of ownership of the building were exercised by Palmer in the interval, but in April, 1908, defendant went upon the land and tore down and removed the building. It was given in evidence that Patterson had defaulted in his payments under the pre-emption record, and it had been cancelled, but when, or on whose application, was not shown. By such cancellation lands and improvements thereon become forfeited to the Crown under the Land Act:—Held, that the house was a chattel in connection with the mining property, that it did not pass to the plaintiffs' testator under his pre-emption record as improvements on the land, and that, on the evidence, defendant or her husband could not be said to have abandoned the house, although its removal was not undertaken until 1908. *Taylor and Smith* v. *Palmer,* 16 B.C.R. 24.

2. Compensation — Trespasser.] — Semble, that a party who has improperly obtained a record is not entitled to compensation for improvements. *Hereron* v. *Christian*, 4 B.C.R. 246.

E. Sale.

1. Escrow.] — Where the holder of a pre-emption record signed an undated deed conveying the same, and delivered it as an escrow pending the issue of the Crown grant, it was held that the transaction was not invalidated by the prohibition in the Land Act of tranfers of pre-emption claims. *Hjorth* v. *Smith*, 5 B.C.R. 369.

2. Agreement to sell.]—A contract to sell a pre-emption claim is void under sec. 26 of the Land Act, 1888. *Turner* v. *Curran*, 2 B.C.R. 51.

3. Contract to sell.]—A contract to sell land comprised in a pre-emption record is not void as being an infraction of the Land Act, R.S.B.C., 1911, c. 129, sec. 159. Semble, even a transfer is not stricken with invalidity, the effect of the section being merely to suspend its validity. *Simpson* v. *Proestler*, 18 B.C.R. 68.

4. Contract to sell.]—The holder of a homestead entry in the railway belt died without obtaining a Crown grant or recommendation for patent. The official administrator obtained an order for the administration of the estate and a further order under the Intestate Estates Act, authorizing him to sell deceased's real estate. He then executed an agreement for sale of the homestead to the plaintiff. In an action for specific performance of the agreement:—Held, that the agreement for sale was null and void under the provisions of sec. 28 of the Regulations Affecting Dominion Lands in Railway Belt in British Columbia. *Johnson* v. *Anderson*, 20 B.C.R. 471.

5. Timber.]—An agreement to sell the timber on a pre-emption claim after the issue of the Crown grant is not illegal. *Manley* v. *O'Brien*, 8 B.C.R. 280.

III. Location and Survey.

A. Crown Grants.

Establishment of true line.]—Where the description of land in a Crown grant gives a point of commencement, the position of which is not disputed, and from which the true boundaries of the land granted can be ascertained by a proper survey according to the description in the Crown grant, it is not within the power of the officials of the Crown lands department to establish as the true line one erroneously run by a negligent or incompetent surveyor. Sec. 2 of the Official Surveys Act deals only with boundaries that are surveyed and run under the authority of the government, and does not apply to a survey run at the instance of the land owner, the notes of which are received by the proper officials in the Crown lands department. The chief commissioner of lands has no jurisdiction under the Land Act to determine a dispute concerning lands already Crown granted. *Seippel Lumber Company* v. *Herchmer*, 19 B.C.R. 436.

B. Timber Leases and Licenses.

1. Incorrect survey.]—When the holder of a timber berth, after having the claim surveyed and the plan and field notes filed and accepted by the Land Department, subsequently finds that the survey is incorrect and does not include certain ground falling within a corrected survey of the location:—Held, that he is entitled to all the timber within the proper boundaries of the location:—Held, further, that he is not estopped from asserting his rights as against a trespasser on the ground not included in the incorrect survey:—Held, further, that the trespass being committed through the error in the survey, the trespasser, by continuing the trespass after being warned of the error, is not deemed to be a deliberate and wilful trespasser. The damages should therefore be assessed on the milder scale and limited to the value of the standing timber. *Joseph Chew Lumber and Shingle Manufacturing Company, Limited* v. *Howe Sound Timber Company, Limited*, 18 B.C.R. 312.

2. Misdescription.]—An action for trespass will not lie, where, through a misdescription in the timber license, it cannot be clearly shown that the timber cut by the defendant was within the limits of the plaintiff's claim. Where the boundaries of a timber berth are so misdescribed in the license that by following the boundaries the finishing point does not connect with the point of commencement, a surveyor undertaking to close the gap must do so in such a way as not to take in any additional territory, but rather by curtailing from that which, under a correct description, might have been within the boundaries of

the location lines. *Laursen* v. *McKinnon* (*No. 3*), 18 B.C.R. 682.

IV. Reserves.

1. Military reserve—Deadman's Island—Recitals in private Acts—Whether binding on the Crown.]—The statement in the Vancouver Incorporation Acts, which are private in their nature, that certain land was a "Government Military Reserve," is not conclusive on the Crown in right of the Province, and on the facts it was not shown that Deadman's Island was a military reserve called into existence by properly constituted authority, and, therefore, that it belongs to the Province and not to the Dominion. Remarks as to the powers of Governor Douglas and as to what constituted a "reserve." *The Attorney-General of British Columbia* v. *Ludgate and The Attorney-General of Canada. Deadman's Island Case*, 8 B.C.R. 242; 11 B.C.R. 258; 1906, A.C. 552.

2. Cancellation.] — Where Crown lands are reserved from settlement by the Lieutenant-Governor-in-Council, they do not again become open for settlement until the cancellation of the reservation by the same authority. *Nelson, etc., Railway Co.* v. *Parker*, 6 B.C.R. 1.

V. Foreshore and Bed of the Sea.

Leases of.]—Held, that the provisions of sec. 41 of the Land Act, as enacted in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters. *Capital City Canning and Packing Company, Limited* v. *Anglo-British Columbia Company, Limited*, 11 B.C.R. 333.

VI. Timber.

A. Leases.

Rights as between Crown grant and lease.]—Plaintiff obtained a Crown grant to certain lands, to the timber on which a lease for 21 years had been previously given. The grant from the Crown was silent as to the timber lease. At a date subsequent to the said grant, the timber lease had to be surrendered for renewal under the provisions of the Land Act:—Held, that the rights given the grantee under his Crown grant were subject to the existing timber lease, and that the lessees did not lose their priority by taking a renewal under the Act. *Brohm* v. *British Columbia Mills, Timber and Trading Company*, 13 B.C.R. 123.

B. Reservation of.

Effect of.]—A grant of land issued pursuant to secs. 14 and 15 of the Dominion Land Regulations (c. 100, Consolidated Orders in Council) contained, inter alia, a reservation to the Crown or its assigns of all merchantable timber. Subsequently an Order in Council was passed cancelling such reservation and declaring that all persons who had received homestead entries for lands similarly granted shall be entitled to the timber on their homesteads free of dues. The owner, MacCrimmon, sold the timber to defendants Johnston and Cook, who in turn transferred their interest to defendant Smith. MacCrimmon's mortgagees claiming under a mortgage of the 5th of August, 1893, brought an action for an injunction and damages for trespass:—Held, that the cancellation operated either as an extinguishment of the reserve, or a grant of the right in gross to the owner of the land; that the owner thereby became possessed of both the land and the profit which issued out of it, the profit becoming extinct and falling into the inheritance. That the reserve mentioned in the Crown grant was merely a license to enter and cut the timber, and was not a reservation. *MacCrimmon, Pelly and Pelly* v. *Smith, Johnston, Cook and Smith*, 12 B.C.R. 377.

C. Seizure for Contravention of the Act.

Use or manufacture in the Province.]—Sec. 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. Sec. 4 gives to the Chief Commissioner of Lands and Works, his officers, servants and agents, power to do all things necessary to prevent a breach of sec. 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 sec. 2. 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 sec. 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. *Emerson* v. *Skinner*, 12 B.C.R. 154.

VII. APPEAL FROM COMMISSIONER.

Time.]—The time for taking an appeal, under sec. 163 of the Land Act, to the Supreme Court, is to be computed from the date of the decision of the minister. Thus, where a district, or local commissioner advised an applicant to purchase land that the minister had given instructions not to accept any applications for certain land until further advised, and on a later date returned the application and deposit of purchase money, with the information that a record of the land had been issued to another person:—Held, that the second, or later act, was the one from which an appeal lay, and such appeal not having been taken within one calender month from such date, it was out of time. Where a party appealing from a decision of the commissioner files his petition at different dates in two registries, that on which he proceeds to hearing must be taken as the petition on which he relies. *Caskie* v. *Minister of Lands*, 17 B.C.R. 398.

See CONSTITUTIONAL LAW.

See MINES AND MINERALS.

See WATERS AND WATER COURSES.

QUIA TIMET ACTION.

Nature of.]—It must be shown that if danger does occur at any time it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied him in a quia timet action. *Peatt* v. *Rhode*, 2 B.C.R. 159.

QUI TAM ACTION.

Limitation of time.]—The period prescribed by the Municipal Elections Act for taking proceedings by way of election petition or quo warranto does not apply to a qui tam action brought under the Municipal Act. *Falconer* v. *Langley*, 6 B.C.R. 444.

QUIETING TITLES ACT.

Title by possession.]—A declaration of title in fee simple will be made under the Act on proof of twenty years continuous and undisturbed possession and other acts of ownership, such as payment of taxes, non-payment of rent, and non-acknowledgment of title. *In re Loewen*, 2 B.C.R. 135.

QUO WARRANTO.

Disqualification of municipal alderman.]—Semble, that quo warranto is the only mode of procedure, where it is sought to remove from office an alderman who has become by statute disentitled to sit and vote, where no other relief is asked. *Coughlan and Mayo* v. *Victoria Corporation*, 3 B.C.R. 57.

RAILWAY.

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I. LIABILITY OF SHAREHOLDERS.

1. Tramway.]—A tramway company is a railway within the meaning of the British Columbia Railway Act, and the provisions relating to the liability towards creditors of the holders of shares not fully paid up apply to shareholders in tramway companies. *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

2. Enforcement.] — It is questionable whether sec. 38 of the British Columbia Railway Act, 1890, providing that every shareholder shall be individually liable to the creditors of the company for the debts of the company to an amount equal to the amount unpaid on the shares held by him, can be worked out in any other way than by a winding-up of the company and the making of calls on the contributories. *Edison General Electric Co.* v. *Edmonds*, 4 B.C.R. 354.

II. RIGHTS AND DUTIES UNDER PRIVATE ACTS.

A. British Columbia Electric Railway Company, Limited.

1. Agreement between street railway company and municipality—Whether company compelled to operate to city limits extended after agreement made — B. C. Statutes 1890, c. 52, and 1894, sec. 63.] —The promoters of a street railway company entered into an agreement with the city 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 its rights, powers and privileges and ratifying the agreement of 1898, between the city and the original promoters:—Held, in an action for a declaration that the company was bound to operate its tram system along Douglas Street to the extended city limits, that the company was not bound to do so. *Yates* v. *B. C. Electric Railway Company, Limited*, 7 B.C.R. 323.

2. Limitation of action.]—The statutory exemption as to limitation of actions provided by sec. 60 of the Consolidated Railway Company's Act, 1896, does not enure to the benefit of the British Columbia Electric Railway Company's operations as carried on in the City of Victoria. *Crompton* v. *British Columbia Electric Railway Company, Limited*, 14 B.C.R. 224.

3. Limitation of action.]—The limitation of time for bringing actions provided by sec. 60 of the Consolidated Railway Company's Act (S.B.C. 59, Vict. c. 55), has no application to an action brought against the company for breach of duty as a carrier. *Trawford* v. *British Columbia Electric Railway Company*, 18 B.C.R. 132; 49 S.C.R. 470.

4. Limitation of actions.]—The British Columbia Electric Railway Company having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company under the provisions of The Consolidated Railway Company's Act, 1896 (59 Vict. c. 55, B.C.), is entitled to the benefit of the limitation of actions provided by sec. 60 of that statute. *Crompton* v. *British Columbia Electric Railway Company*, 14 B.C.R. 224; 43 S.C.R. 1.

5. Injury by electric wire.]—The limitation so provided applies to the case of a minor injured while residing in his mother's house, by contact with an electric wire in use there under a contract between his mother and the company. *Ibid.*

6. Limitation of action.]—The limitation section in the Consolidated Railway Company's Act (sec. 60), does not apply to an action brought under the Families' Compensation Act. *Gentile* v. *British Columbia Electric Railway Company*, 18 B.C.R. 307; 1914, A.C. 1034.

7. Limitation of action.] — Deceased, a workman employed by the defendant Cook on a contract work for the defendant company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th of August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th of July, 1905. Defendant company set up, as a bar to the action as against them, sec. 60 of their Act of incorporation, which limits the time to

six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the company:—Held, that Lord Campbell's Act is a special Act; creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation. *Green* v. *The British Columbia Electric Railway Company, Limited, and Edward Cook*, 12 B.C.R. 199.

8. Limitation of action.]—Lord Campbell's Act gives a limitation of twelve months within which an action for damages caused by the death of a relative may be brought, so that the writ here was issued in ample time to comply with that statute. But in the defendant Company's Act of Incorporation, a limitation of six months is set for bringing actions to recover damages incurred by reason of the tramway or railway or works or operations of the company. Per Irving, J.A.: The limitation in the company's statute was not applicable. Per Martin, J.A.: The section was applicable and the action was therefore barred. *McDonald* v. *British Columbia Electric Railway*, 16 B.C.R. 386.

9. Limitation of action.] — The action was brought under the Families Compensation Act, R.S.B.C. 1911, c. 82, under sec. 5 of which all actions must be brought within one year from the death of deceased. The accident happened on the 7th of October, 1911, and the action was brought in June, 1912. The defendants set up as a bar to the action as against them sec. 60 of their Act of Incorporation, which limited the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway or works or operations of the Company:—Held, that the provisions of the Families Compensation Act do not come within the scope of the Consolidated Railway Company's Act, 1896, and that the plaintiff had therefore, under sec. 5 of the Families Compensation Act, one year from the death of the deceased within which to bring the action. *Gentile* v. *British Columbia Electric Railway*, 18 B.C.R. 307.

10. Limitation of action.]—Plaintiff, on the 26th of December, 1903, was injured on defendants' tramway in Vancouver, in stepping off a movable platform provided by defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which plaintiff stepped, severely injuring her knee. On the 24th of December, 1904, she brought an action to recover damages for her injuries. Defendant Company set up, inter alia, sec. 60 of their Act of Incorporation, c. 55 of the Statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage was sustained":—Held, that the words "by reason of the tramway or railway or the works or operations of the Company," should be read separatim, as describing different branches of the Company's undertaking, and that the section does not apply to a case like that at bar, which was based on the defendant Company's duty to carry the plaintiff safely. *Sayers* v. *The British Columbia Electric Railway Company, Limited*, 12 B.C.R. 102.

11. Point Grey bye-law.]—The agreement of the Corporation of Point Grey with the Company for the use of the streets, and the bye-law authorizing it, did not amount to a charter granting a franchise so as to require the assent of the electors. *Stewart* v. *British Columbia Electric Railway Company*, 16 B.C.R. 374; 1913, A.C. 816.

12. Construction of statute.] — Where there was a repugnancy between the Consolidated Railway Act, 1896, and the Municipal Clauses Act, 1896, the former, being the later chapter of the statutes for that year, must prevail. *Stewart* v. *British Columbia Electric Railway Company*, 16 B.C.R. 374; 1913, A.C. 816.

B. Canadian Pacific Railway Company.

1. Canadian Pacific Railway — Powers of charter—Expropriation.]—On the construction of the Canadian Pacific Railway Act, 1881:—Held, that the construction of the Canadian Pacific Railway from Port Moody to Coal Harbour and English Bay clearly comes within the powers of the Company under their Act of Incorporation, and carries with it, as incident thereto, the right

of appropriation of land (necessary for its construction), in the mode provided for by the Consolidated Railway Act of 1879. It is immaterial whether the portion so constructed be called an extension or a branch, sub-secs. 17 and 19 of sec. 7 of the Consolidated Railway Act, 1879, being inapplicable. It can come within the 14th paragraph of the contract, and, as a branch, is fully authorized by the 15th section of the company's Act. *The Canadian Pacific Railway Company* v. *Major*, 1 B.C.R., Pt. II., 287; 13 S.C.R. 233.

2. Canadian Pacific Railway—Terminus of.]—Held, on the construction of the Canadian Pacific Railway Act, 1881, and the contract and charter incorporated therewith: 1. That Port Moody is thereby constituted the western terminus of the Canadian Pacific Railway. 2. That sub-sec. 19 of sec. 7 of the Railway Consolidated Act, 1879, forbidding the extension of any line beyond the terminus is, by sec. 18 of the company's charter, imported into the Act of 1881, and is not inconsistent with the general power of the company, given by such last mentioned Act, to construct branches from any point along their line to any other point in Canada. 3. That the company has no power to take lands for any purposes not authorized by some Act of Parliament, and therefore, no power to interfere with or construct a line on the plaintiff's lands, which were all to the westward of Port Moody. *Edmonds and others* v. *The Canadian Pacific Railway Company*, 1 B.C.R., Pt. II., 272.

3. Canadian Pacific Railway—Terminus of—Power to construct beyond.]—On the construction of the Canadian Pacific Railway Act, 1881, and the contract and charter incorporated therewith:—Held, by the Divisional Court: 1. That Port Moody is thereby constituted the western terminus of the Canadian Pacific Railway. 2. That sub-sec. 19 of sec. 7 of the Railway Consolidated Act, 1879, forbidding the extension of any line beyond the terminus is, by sec. 18 of the company's charter, imported into the Act of 1881, and is not inconsistent with the general power of the company, given by such last mentioned Act, to construct branches from any point along their line to any other point in Canada. That the company has no power to take lands for any purposes not authorized by some Act of Parliament, and, therefore, no power to interfere with or construct a line on the plaintiff's lands, which were all to the westward of Port Moody:—Held, that wherever the provisions of the Consolidated Railway Act, 1879, were inconsistent with or contrary to the provisions of the Canadian Pacific Railway Act, the former were, as to the undertaking carried under the latter Act, to be inoperative. *The Canadian Pacific Railway Company* v. *Edmonds and others*, 1 B.C.R., Pt. II., 295.

4. Application of Railway Act.]—In an action for damages caused by sparks from a railway engine, the Railway Company claimed the benefit of sec. 27 of the Consolidated Railway Act, 1879, which was incorporated into their charter by Parliament. Said sec. 27 provides, in part, that all suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months next after the time of such supposed damage sustained:—Held, that by virtue of sec. 20 of the Interpretation Act (Dominion), the Railway Act, 1903, applies to the Canadian Pacific Railway. *The Northern Counties Investment Trust, Limited* v. *The Canadian Pacific Railway Company*, 13 B.C.R. 130.

5. Foreshore.] — Sec. 18 (a) of the respondent's incorporating Dominion Act (44 Vict., c. 1) is not controlled by the Consolidated Railway Act, 1879, and applies to Provincial as well as Dominion Crown lands. Power given thereunder to appropriate foreshore includes a power to obstruct any right of access previously existing across it. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company*, 11 B.C.R. 289; 1906, A.C. 204.

6. Foreshore—Crown grant of—Public way—Plan—Registration of—Registering plan showing public street — Who can dedicate.]—In 1881, by letters patent under the great seal, and issued pursuant to statute of Canada, 49 Vict., c. 1, sec. 18a, and having, by sec. 2, the force of an Act of Parliament, plaintiffs were granted the right to "take, use and hold the beach and land below high water mark in any navigable water, gulf, or sea, to such extent as shall be required by the company for its railway and other works, as shall be exhibited upon a map or plan thereof deposited in the office of the Minister of Railways." In November, 1885, plaintiffs deposited a plan of the townsite of Vancouver, and made sales of lots by it, such plan showing a street, Gore Avenue, opening at right angles upon the foreshore of Vancouver Harbour at the point in question. In March, 1886, plaintiffs deposited in the office

of the Minister of Railways a plan exhibiting that they required for their railway and works all the land below high water mark along the shore line at the point in question; and they afterwards constructed their line of railway upon an embankment along such foreshore about half way between high and low water mark, in such manner as to cut off public access to the sea by way of the street. In May, 1892, defendants proposed to run Gore Avenue across the plaintiff's railway embankment, and to continue the street as a wharf to deep water, and for that purpose commenced an embankment to run across the foreshore and plaintiff's embankment. Plaintiffs thereupon obtained an injunction restraining such proceedings. Upon motion after the trial for judgment:—Held, dissolving the injunction and dismissing the action: 1. That the registration of their townsite plan in November, 1885, operated at a dedication by plaintiffs of a public way over the foreshore from the foot of Gore Avenue, shown as opening upon it, and as an estoppel against their setting up their subsequently acquired rights over the foreshore against such public right of way. 2. That if plaintiffs, in 1886, acquired any title to the foreshore inconsistent with such public right of way, such title fed the estoppel. 3. A public right of way is extinguished by Act of Parliament only by express words, or where it clearly authorizes the doing of a thing which is physically inconsistent with the continuance of such right, and sec. 18a, supra, does not do so. 4. The Crown was a necessary party to the action. Upon appeal to the Full Court:—Held, giving judgment for plaintiffs, and reinstating and continuing the injunction: 1. The plaintiffs' right to occupy the foreshore under sec. 18a, supra, was exclusive. 2. There was no dedication by plaintiffs by the registration of their map of 1885, as there can be no dedication except by owners of the soil. 3. There is no power of dedication where there is no power to alienate. *The Canadian Pacific Railway Company* v. *The City of Vancouver*, 2 B.C.R. 306; 23 S.C.R. 1.

C. Esquimalt and Nanaimo Railway Company.

1. Vancouver Island Settlers' Rights Act — Construction.] — The Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservation as to mines or minerals should be issued to settlers therein defined, and thereunder a grant was made to the defendant of the lot in suit. By an Act (47 Vict., c. 14), land which included the said lot had been granted, with its mines and minerals, to the Dominion Government in aid of the construction of the plaintiff's railway, and in 1887 had been by it granted to the plaintiff under the provisions of a Dominion Act passed in 1884:—Held, that the Act of 1904, on its true construction, legalized the grant thereunder to the defendant, and superseded the plaintiff's title. *Esquimalt and Nanaimo Railway Company* v. *McGregor*, 12 B.C.R. 257; 1907, A.C. 462.

2. Right of pre-emption by agricultural settler.] — Where the appellant claimed as "an actual settler for agricultural purposes" that by sec. 23 of the Island Railway Act (47 Vict., c. 14) he was entitled to a right of pre-emption over certain lands included in a Government grant for the purpose of the respondent railway, and it appeared that the land in question had, prior to the Act, been reserved as a townsite, it was held that a settler means a person entitled to record land under the Land Act, 1875, by reason of compliance with its provisions; that the Act did not apply to reserved lands; that no new right of pre-emption was given, nor was the word settler used in any new sense; that only "unreserved and unoccupied lands" could be pre-empted under the Land Act; and that the appellant had not entered upon the lands as an "actual settler for agricultural purposes," but had entered with express notice that the lands were not open for settlement; and that therefore the appellant was not within the Act. *Hoggan* v. *Esquimalt and Nanaimo Railway Company*, 20 S.C.R. 235; 1894, A.C. 429.

3. Island Railway Act — Precious metals.]—By sec. 3 of the Island Railway Act (47 Vict., c. 14), land was granted to the Dominion Government, predecessors in title to the railway company, "including all mines, minerals, and substances whatever thereupon, therein and thereunder":—Held, in an action for wrongful ejectment by the holder of a free miners' certificate under the Placer Mining Act (54 Vict., c. 26), that he was entitled to mine for gold and other precious metals, the above words not being sufficiently precise to transfer to the railway company's predecessors in title the right of the Provincial Legislature to admin-

ister the precious metals in the lands assigned. *Bainbridge* v. *Esquimalt and Nanaimo Railway Company*, 4 B.C.R. 181; 1896, A.C. 561.

III. CONSTRUCTION AND OPERATION.

A. Injurious Affection.

Release of claims for injurious affection.]—Where a company with statutory authority to construct a tramway acquires a strip of land from the plaintiff, who thereupon grants a release for all damages which he might sustain by reason of the construction and operation of the tramway, the general language of the release will be construed so as to restrict it to the matters in regard to which it has been granted with reference to the proper exercise of the powers of the company and not so as to apply to injuries occasioned by the company's negligence. *Hounsome* v. *The Vancouver Power Co.*, 18 B.C.R. 81; 49 S.C.R. 430.

B. Liability to Liens for Work Done.

Mechanic's lien—Stat. B. C. 1891, c. 23—Whether lien given by for work done on a railway — Whether statute applicable to a railway within the exclusive legislative authority of the Dominion —Conflict of laws.]—The Mechanics' Lien Act, 1891, British Columbia, c. 23, sec. 8: "Every mechanic's lien shall absolutely cease after the expiration of thirty-one days after the work shall have been completed, etc., unless in the meantime the person claiming the lien shall file . . . . an affidavit . . . . stating in substance (c) the time when the work was finished or discontinued . . . . which affidavit shall be received and filed as a lien against such property, interest, or estate. The Registrar-General, District-Registrar and every Government Agent shall be supplied with printed forms of such affidavits in blank, which may be in the form or to the effect of Schedule 'A' to this Act, and which shall be supplied to every person requesting the same and desiring to file a lien." The form of affidavit in Schedule "A" had the clause: "That the work was finished or discontinued on or about the.....day of ....." Per Spinks, Co. J., discharging the lien: That an affidavit stating the time when the work was finished as "on or about," etc., was insufficient. Upon appeal to the Supreme Court, the Court expressed no opinion as to the correctness of the ruling of the learned County Court judge, but declined to maintain his judgment on that ground. Per Crease, J.: The requirements of the various sections of the Dominion Acts governing the railway in question are so at variance with the recognition of mechanics' liens thereon under a Provincial statute that it is impossible for the two to stand together, and, therefore, the Dominion legislation must prevail. Per McCreight, J.: The language of the Mechanics' Lien Act, British Columbia, 1891, sec. 4, is insufficient to confer a lien upon a railway in respect of work done thereon. The provisions of the Act as to the priority of mechanics' liens upon the property charged being inconsistent with the provisions of the Dominion Railway Act, 1888, as to the priority of mortgages upon railways, it is to be inferred that the Provincial Legislature did not intend the Act, and it is not to be construed, to apply to railways within the control of the Dominion Parliament. *Larsen* v. *Nelson and Fort Sheppard Railway Company*, 4 B.C.R. 151.

C. Intersecting Lines of Different Companies.

Order of Railway Committee of Privy Council.] — The defendant company had obtained from the Railway Committee of the Privy Council an order permitting it to cross the Canadian Pacific Railway track. Pending an appeal by the Canadian Pacific Railway Company from the order to the Full Cabinet, the defendant company proceeded to lay the crossing, and the Canadian Pacific Railway Company applied for an injunction:—Held, that defendant company was not exceeding the terms of the order, which was binding on the Court until reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing notice should be given of the time at which it is intended to commence the work. Failure by a company to give such notice constitutes good cause for depriving it of the costs of successfully resisting a motion for an injunction. *Canadian Pacific Railway Company* v. *Vancouver, Westminster and Yukon Railway Company*, 10 B.C.R. 228.

D. Fencing.

1. Ultra vires.]—The provisions in the Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless it erects proper fences on its railway, shall be responsible for cattle injured or killed thereon, is ultra vires. *Madden* v. *Nelson and Fort Sheppard Railway Company,* 5 B.C.R. 541; 1899, A.C. 626.

2. Duty to.]—Plaintiff's animals were killed on defendants' track, the right of way of which passed in front of his land. There was no fence erected on this portion of land, either by the railway company or plaintiff. The north end of the plaintiff's ranch was within 800 yards of the municipal limits of Fernie. There were about two acres of the ranch with a frontage of 450 feet on the right of way, and about 250 feet off was an enclosure used as a goat pen, about 20 by 30 feet. There was also a potato patch of about three-quarters of an acre, and a moveable fence separating this patch from a grassy portion. This, together with a piece of fencing along a waggon road, but not reaching the right of way by some 225 feet, was the only fencing on the ranch. There was evidence of scattered places in the vicinity, some being fenced and others not, but with unfenced and unoccupied land intervening:—Held, that as the land in question per se could not be classed as a settled or inclosed locality, there was no obligation on the Company to fence its right of way in the absence of an order from the Board of Railway Commissioners to do so; and that their contiguity to the limits of an incorporated town did not constitute the lands a portion of the settled locality of such town. Having regard to the powers given the Board of Railway Commissioners by sec. 254 of the Railway Act, and particularly the language of sub-sec. 4, the word "locality" must be construed without reference to the proximity of town limits. *Cortese* v. *The Canadian Pacific Railway Company,* 13 B.C.R. 322.

3. Farm crossing.]—Plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of defendant Company, presumably at a place called Morton's crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farmer's crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing, by which the animal was presumed to have reached the track from the public road, but there was a cattle-guard (over which the animals crossed) put there by agreement with Morton. Plaintiff was not an adjoining owner:—Held, that Morton's crossing being a farm and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle-guard did not relieve the Company from its obligation to provide a fence or gate on the west side of the crossing. *Coen* v. *The New Westminster Southern Railway Company,* 12 B.C.R. 419.

4. Barbed wire fence—Whether inherently dangerous.] — The company maintained along its line of railway a barbed wire boundary fence, without any pole, board or other capping connecting the posts. Plaintiff's horse, picketed in their field adjoining, became frightened from some cause unexplained, and ran into the fence, receiving injuries on account of which it had to be killed:—Held, that the fence was not inherently dangerous, and therefore the company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. *Plath and Ballard* v. *The Grand Forks and Kettle Valley Railway Company,* 10 B.C.R. 299.

E. Crossings.

1. Right to.] — In 1910 plaintiff, by absolute conveyance, sold a strip of land to defendants for a right of way. By the Railway Act, R.S.B.C. 1911, c. 194, it was enacted that where land is severed by a railway, the company shall provide a crossing:—Held, that the subsequent enactment gave the plaintiff no right to a crossing. *Hounsome* v. *Vancouver Power Company, Limited,* 18 B.C.R. 81.

2. Maintenance of ways.] — Where a railway company had the right under the statute to construct, maintain and operate a street railway along and over certain highways and bridges in a municipality, and in one of the bridges over which the company's line ran, which had been destroyed, the municipality commenced the construction of a new bridge of insufficient strength to carry the rails and cars, it was held that the company was merely a grantee of a right of way, and had no right to compel the construction of a bridge of a strength sufficient for its own particular

purposes. *Cons. Ry. Co.* v. *City of Victoria*, 5 B.C.R. 266.

F. Moving in Reverse Direction in City, Town or Village.

Definition of train.] — Plaintiff, on the occasion in question, had driven across the tracks after having been delayed by a train, and on returning found four dead, or unattached, cars in his way. He diverted from the regular crossing in order to pass behind the cars. As he did so, a train backed down on and coupled with these cars, moving them so that they struck the plaintiff's vehicle, threw him out, and caused injuries which may prevent his being able to walk. The jury found in favour of the defendant Company in a general verdict, and plaintiff appealed:—Held, granting a new trial, that the trial judge should have drawn the attention of the jury to the provisions of sec. 100 of the Railway Act, R.S.B.C. 1897, c. 163, which imposes upon the Company the duty of stationing a man on the rear car of any train moving in a reverse direction in any city, town or village, to warn persons standing on or crossing the track; and also that the jury should have been given a definition of what constitutes a "train." *Helson* v. *Morrissey, Fernie and Michel Railway Company*, 17 B.C.R. 65.

G. Injuries to Persons On or Near Track: Licensees: Trespassers.

1. Coal train — Travelling without ticket.] — The plaintiff's intestate had a contract with the defendant company to repair a bridge, and the jury found, inter alia, that he went thither 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.

2. Tramway — Invitation to alight — Passenger travelling on pass.] — Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W., limited to the use of himself and the members of his family between Vancouver and Central Park Station. The plaintiff, who lived in Vancouver, went to visit the W.'s, travelling, as was her custom, on W'.s ticket, although not a member of the family. W. lived beyond Central Park Station, and the company gratuitously and for her own convenience carried the plaintiff some four hundred yards further on, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted, for his own convenience, to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing, as alleged, to some defect in the condition of the plank supporting it:—Held, in an action for damages, that the company was not liable. *Burke* v. *British Columbia Electric Railway Co., Ltd.*, 7 B.C.R. 85.

H. Fire, Liability for.

1. Origin of fire.]—In an action against a railway company subject to the Railway Act of this Province, if there is no evidence that the company had knowledge or notice of the existence of a fire on their right of way, not caused by the operation of the railway, the fact that the condition of the right of way facilitated the spreading of the fire to adjoining property, which is destroyed, does not amount to actionable negligence. *Laidlaw* v. *The Crow's Nest Southern Railway Co.*, 14 B.C.R. 169; 42 S.C.R. 355.

2. Evidence.]—Fire was seen smouldering in a dry stump on a high bank, about level with an engine smokestack, on defendant Company's right of way. Evidence was given that one engine passed the place ten hours, and another six hours previously. Evidence also went to show that the right of way contained inflammable material, and that there were other fires, whose origin was unknown, in the vicinity of the right of way. The fire in question was first seen by some of plaintiffs' workmen, when it was insignificant in extent and the weather was calm, but the wind rising, the fire spread and burnt plaintiffs' mill property and a large extent of timber area:—Held, that there was no evidence to connect the setting of the fire by sparks from the defendant Company's engines. *Laidlaw and Laurie* v. *The Crow's Nest Southern Railway Company*, 14 B.C.R. 169.

3. Evidence.] — The timber on the plaintiffs' property was destroyed by a fire

that started close to the tracks of the defendant Company's railway. The fire was first seen about two o'clock in the afternoon, about half an hour after a freight train had passed. The engine of this train had started the day before from Cranbrook for Crow's Nest, and had undergone the usual examination and was found in good condition before starting. There was no evidence that the engine was again examined at Crow's Nest before leaving on the return trip:—Held, that the fire which destroyed the plaintiffs' property was caused by sparks from an engine of the defendants. *Kerr* v. *Canadian Pacific Railway Company*, 18 B.C.R. 389; 49 S.C.R. 33.

4. Limitation of liability.] — Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the road-bed itself:—Held, that it must be considered that the company have occupied the full statutory allowance. The jury, after answering several of certain specific questions, gave a general verdict of $18,000, in objection to which sec. 239 of the Dominion Railway Act was set up on appeal:—Held, that there being a finding that the defendant Company left inflammable material on their right of way, the section could not be invoked, as the limit only applies where there is no negligence. *Blue and Deschamps* v. *The Red Mountain Railway Company*, 12 B.C.R. 460; 39 S.C.R. 390; 1909, A.C. 361.

I. Animals at Large.

1. What constitutes.] — The plaintiff, while at work on a railway-grading contract, turned out his horses each night for pasture on unenclosed lands adjoining the defendant's railway and drove them back to camp in the morning. The railway was not fenced at this point and the land was within the railway belt. There was some evidence that the pasture land belonged to a man who had given the plaintiff permission to use it. One morning, while on the way back to camp, one of the horses escaped from control, ran onto the railway track, and was killed by a passing train. In an action for the recovery of the value of the horse:—Held, that the horse was not "at large" within the meaning of sec. 294 of the Railway Act, and the plaintiff could not recover. *Hupp* v. *Canadian Pacific Railway Company*, 20 B.C.R. 49.

2. Pasture.] — Plaintiff's animals were set at large to pasture in the open country, and were killed at a place where the Company were not bound to fence:—Held, that he could not invoke the aid of sec. 237, subsec. 4 of the Railway Act, 1903. *McDaniel* v. *The Canadian Pacific Railway Company*, 13 B.C.R. 49.

J. Standpipes.

Order of Board of Railway Commissioners.]—The Board of Railway Commissioners, by an order dated the 2nd of February, 1910, approved of the defendant Company's plan of water standpipes, to be placed not less than seven feet six inches from the centre of the track. By a general order, dated the 9th of November following, the Board directed that "water standpipes shall not be nearer than two feet six inches from the widest engine cab." Plaintiff was injured by being knocked off the side ladder of a freight car by coming in contact with a water standpipe which was only sixteen and a half inches from the cab of the engine pulling the train in question. In an action for damages, the jury found in favour of the plaintiff, but the trial judge set aside the verdict:—Held, that as the first order was a special one, and was not overruled or displaced by the second one, and moreover had the effect of a statute, the defendants could not be held guilty of negligence. *Clark* v. *Canadian Pacific Railway Company*, 17 B.C.R. 314.

See COMPULSORY PURCHASE.

See MASTER AND SERVANT.

See NEGLIGENCE.

See TORT.

RAPE.

See CRIMINAL LAW.

REALTY.

Fee simple—Grant of, on defeasible condition.]—On the grant of a fee simple, defeasible on breach of a condition, no estate

is left in the grantor, but only a possibility of a reverter, and, therefore, before breach there is nothing capable of assignment. After breach, where the deeds do not provide for ipso facto forfeiture, the fee does not revest automatically, and until revesting, by suit or otherwise, there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and re-convey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—Held, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. *Clark* v. *The Corporation of the City of Vancouver*, 10 B.C.R. 31; 35 S.C.R. 121.

RECEIVER.

I. APPOINTMENT: REMOVAL, 885.
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B. *Effect of*, 885.
C. *Eligibility*, 886.
D. *In what cases appointed*, 886.
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III. CLAIMS AGAINST: PRIORITIES, 888.

I. APPOINTMENT: REMOVAL.

A. Jurisdiction.

Orders for.]—Receivership orders must be made by the Court, and cannot be made by a judge sitting in chambers. *Wakefield* v. *Turner*, 6 B.C.R. 216.

B. Effect of.

Servants of the company.] — The appointment of a receiver and manager of the assets of a company operates as a discharge of the company's servants. *Rolfe* v. *Canadian Timber and Saw Mills, Ltd.*, 12 B.C.R. 363.

C. Eligibility.

Partner.]—It is no objection to a person proposed as receiver of a trust estate that he is the partner of the husband of one of the cestui que trustent. *Garesche* v. *Garesche*, 4 B.C.R. 310.

D. In What Cases Appointed.

1. Appointment of receiver—No right to have, by way of equitable execution until legal remedies exhausted.] — A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguishable from equitable) remedies. *Davidge* v. *Kirby*, 10 B.C.R. 231.

2. Partnership.]—A joint creditor may maintain an action for a receiver against the representative of a deceased partner and the assignee for the benefit of creditors of the surviving partners. *Hudson's Bay Co.* v. *Green*, 1 B.C.R., Pt. I., 247.

3. Partnership—Creditor of, entitled to receiver.]—A creditor of a partnership is entitled, under the Judicature Act, in an otherwise proper case, to a receiver of the partnership estate in an action against surviving partners, and personal representatives of a deceased partner, and trustees under an assignment for the benefit of creditors by the surviving partners, and the rule formerly prevailing in equity, that to obtain such relief there must be some fiduciary relationship between plaintiff and defendant, does not apply since the Judicature Act, which gives the power to grant a receiver by interlocutory order in all cases in which it shall appear to the Court to be just or convenient. *The Hudson's Bay Co.* v. *Green*, 1 B.C.R., Pt. I., 247.

4. Salary of government servant.]—A receiver will not be appointed of the salary of an official of the Dominion Government. *Cane* v. *Macdonald*, 9 B.C.R. 297.

5. Partnership — Salary of Dominion Government official.] — While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary. C. sued for a declaration

that he was entitled to half the salary since the dissolution and asked that a receiver be appointed of it and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—Held, by the Full Court, that no receiver of the salary could be appointed; that although the amount of the book debts was small there should be a receiver in respect to them. *Cane* v. *MacDonald*, 9 B.C.R. 297.

6. In place of trustees.] — Where the period of the trust had almost expired, and nothing remained but to wind up the estate, a receiver was appointed instead of trustees who had been removed by the Court. *Garesche* v. *Garesche*, 4 B.C.R. 310.

7. Joint adventure.]—Where a business is carried on jointly, and one of the parties refuses to perform his part of the bargain or to render accounts, a receiver will be appointed, whether the agreement for joint working constitute a partnership or not. *Roedde* v. *The News-Advertiser Publishing Co.*, 4 B.C.R. 7.

II. Practice.

A. In General.

1. Application.] — Since the Judicature Acts, the formal matters which used to be essential on an application are no longer necessary, but the substantial grounds for granting a receiver have not been changed. Thus the application may be made in a case sounding in damages or the like, but the applicant must still show some claim upon the subject matter of the suit, or some special relation with the defendants. *Hudson's Bay Co.* v. *Green*, 1 B.C.R., Pt. I., 247.

2. Indorsement.] — It is improper to indorse on the writ a claim that a particular person be appointed receiver. *Hudson's Bay Co.* v. *Green*, 1 B.C.R., Pt. I., 247.

B. Actions by and Against Receiver.

Right of action.] — Trustees having refused to bring an action to recover funds of the estate, certain of the beneficiaries brought the action in their own names and obtained an order removing the trustees and appointing a receiver in their place with leave to substitute the receiver as plaintiff. He was substituted accordingly by a subsequent order. Neither of the above orders was appealed from, but the defendants, while not objecting to the receiver as plaintiff objected that there was no cause of action in him, whereupon one of the beneficiaries previously struck out asked to be joined as plaintiff:—Held, that the action should be carried on in the names of the receiver and one of the beneficiaries, with leave to any of the other beneficiaries to apply to be added as plaintiffs. *Shallcross* v. *Garesche*, 5 B.C.R. 320.

III. Claims Against: Priorities.

1. Appointment of — At instance of judgment creditor—Whether an "execution" within meaning of Execution Act.] —The appointment of a receiver of the estate of a judgment debtor at the instance of his judgment creditor by way of recovering upon the judgment is not an "execution" within the meaning of the Execution Act, sec. 21, and clerks and servants of the execution debtor have no right to an order for payment of their wages out of the amount realized by the receiver in priority to the claim of the judgment creditor. *Aspland* v. *Hampson & Co.*, 3 B.C.R. 299.

2. Creditors' Relief Act, 1883 — Whether a receiver is within Act.] — M. had obtained a judgment in the action against L. The defendant being examined swore that he had no goods nor lands upon which execution could be levied on a fi. fa.; but that there were some contingent payments which he expected to receive shortly. Thereupon M. procured an order appointing himself receiver, without previously taking out a useless fi. fa. Afterwards certain unpaid workmen of L. asked, under the above Act, that M. should be ordered to satisfy their claims, preferentially, out of any moneys coming to him as receiver:—Held, that as there was no writ of fi. fa. nor any execution thereon, nor any lands or goods, the statute did not authorize the application. Semble, it is not sufficient in such a case that the workmen should claim to be in arrear of wages; the claim should be established against both the judgment debtor and the execution creditor, or at least against the judgment debtor. Semble, a receiver is not within the Act. An act which takes away the legal right of a diligent litigant to bestow it gratis on a stranger is to be construed strictly according to its letter. *Muirhead* v. *Lawson, In re Creditors' Relief Act*, 1883. *McLean's Case*, 1 B.C.R., Pt. II., 113.

3. Garnishment.]—Money in the hands of a reciver is not a debt due from him to the persons interested in the estate, and cannot be garnisheed. *Gray* v. *Purdy*, 5 B.C.R. 241.

See ADMIRALTY.

See COMPANY.

See EXECUTION.

RECTIFICATION.

See EQUITY.

REGISTRATION OF TITLE TO LAND.

I. SCOPE OF THE ACTS, 889.
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I. SCOPE OF THE ACTS.

1. Land Registry Ordinance, 1870.]—The object of the Ordinance, with reference to real estate, is not for the purpose of giving validity to the title or rendering registration necessary to its confirmation; the general object is rather for the protection of creditors, the prevention of frauds, the public convenience in the investigation of titles, and supplementing the loss of original title deeds, or enabling them to be read in evidence without further proof of execution. *In re Klaukie*, 1 B.C.R., Pt. I., 76.

2. Character of the Acts.]—Discussion of the objects, history, and working of the Land Registry Acts. *In re Shotbolt*, 1 B.C.R., Pt. II., 337.

II. REGISTRATION.

A. Who May Register.

1. Foreign company.]—The registrar is justified in refusing to register a non-registered foreign company as the owner of land. *Ex parte New Vancouver Coal Mining and Land Co.*, 2 B.C.R. 8.

2. Foreign company.]—Decision of Sir M. B. Begbie, C.J., reported in 2 B.C. 8, holding that the registrar was justified in refusing to register a non-registered foreign company as the owner of land, reversed. *Ex parte New Vancouver Coal Mining and Land Company*, 9 B.C.R. 571.

B. What Interests Registrable.

1. Debentures.] — A company issued debentures which created a charge upon all its property without describing the property:—Held, that the debentures were capable of registration under the Land Registry Act. *In re The Land Registry Act*, 10 B.C.R. 370.

2. Surface rights of a mineral claim.]—The grant from the Crown of the surface rights of a mineral claim is not an interest which can be separately transferred by the grantee so as to become registrable under the Land Registry Act. *In re Reliance Gold Mining & Milling Co., Ltd.*, 13 B.C.R. 482.

C. Unregistered Instruments.

1. C.S.B.C. c. 67, sec. 35.] — Quære, whether the sub-lessee of registered real estate is a purchaser of any registered real estate, or registered interest in real estate, within the meaning of sec. 35, supra. *Griffiths* v. *Canonica*, 5 B.C.R. 67.

2. Land Registry Act — Priorities between equitable mortgage and subsequent registered conveyance—Constructive notice.] — Action to foreclose an equitable mortgage by deposit of title deeds, brought by the plaintiffs against the mortgagor K. and a person R., who appeared on the title as the grantee of the lands under

deed made to him by K. subsequent to, and, as the plaintiffs' claim alleged, in fraud of the mortgage, which deed he had registered not as a fee, but as a charge against the lands. K. had suffered judgment by default. Neither notice of the mortgage nor want of valuable consideration for the deed were charged against R. in the statement of claim, or negatived by him in his defence, in which he claimed that, under sec. 31 of the Land Registry Act, his registered charge was entitled to prevail over the plaintiffs' unregistered charge, and also set up the Statute of Frauds. At the trial, R. called no evidence, and maintained that the onus probandi to displace his prima facie statutory priority was on the plaintiffs, and that he was entitled to judgment: —Held, per Walkem, J., on motion for judgment, dismissing the action as against R., that his registered charge had a prima facie validity and priority, under sec. 31, and that the onus of proof of want of consideration, fraud, or notice to him of the mortgage, was on plaintiffs. The Statute of Frauds is not a defence to an equitable mortgage:—Held, by the Full Court on appeal:—Per Crease, J.: That in the state of the pleadings and evidence, fraud on R.'s part could not be assumed by the Court, but that there should be a new trial to determine the question of the bona fides of the deed. Per McCreight, J.: That before the statute the burden of proof would have been upon R. to show that he made enquiries for the title deeds and gave valuable consideration for his deed from K., as being facts peculiarly within his knowledge and not of the plaintiffs, and not having done so he was, by their absence, affected with constructive notice of the mortgage. That by sec. 35 he was only relieved from the effect of such notice by proving himself a purchaser for value, and that the onus of doing so was therefore on him, and that as to the effect of notice, sec. 31 must be read as subject to sec. 35, which alone deals with that question. Quære—Whether the non-compliance with secs. 13, 19, 54 and 55 of the Act, as to production of the deeds, vitiated the registration. Per Drake, J.: That, on the facts, the presumption was that R. had actual or there was constructive notice to him of the equitable mortgage, and the onus was on him to allege and prove valuable consideration for his deed. That the deed in fee was improperly registered as a charge and that the plaintiffs should not be prejudiced by the mistake of the registrar. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 3 B.C.R. 330.

3. Land Registry Act—Registered title and prior unregistered charge—Constructive notice.]—The registrar registered a conveyance from K. to R., as a charge, without either the title deeds or certificate of title being produced or accounted for by R. They were, in fact, outstanding in the hands of plaintiffs, as prior equitable mortgagees of the lands. Express notice to R. of the equitable mortgage was not proved, but he inquired of K. for the title deeds and certificate, and they were not accounted for. The action was for foreclosure of the equitable mortgage:—Held, per Walkem, J.: The Act devolves upon the registrar the duty of satisfying himself of the prima facie title of an applicant, as a pre-requisite to its registration, either by requiring production of the title deeds, or an affidavit satisfactorily explaining their non-production, and that the registration of R.'s conveyance was invalid, as against the plaintiffs, for want of the authorization of the registrar upon the basis required by the Act, and that, as an unregistered purchaser, he was not protected by sec. 35 against the plaintiffs' prior unregistered charge. On appeal to the Full Court (per Davie, C.J., Crease, J., concurring, overruling Walkem, J.): (1. The purchaser of a registered title is within the protection of sec. 35, whether he registers his own conveyance or not.) (2. The principle of Lee v. Clutton, 45 L.J. Ch. 43, 46, L.J. Ch. 484, is applicable to the British Columbia Land Registry Act. The policy of the Act is to free the purchaser of a registered title from the imputation of constructive notice, and in the absence of express notice such a purchaser of lands for valuable consideration will, under sec. 35, have priority over a prior unregistered charge, notwithstanding that he knew that the title deeds were in the possession of persons other than the vendor and abstained from enquiry.) To take such a purchaser out of the protection of sec. 35, he must be guilty of conduct equivalent to fraud, and as fraud is never presumed, it will not be imputed by inference or in the absence of proof of express notice of the facts, the knowledge of which constitutes the fraud. Per McCreight, J. (dissenting): The Act has not absolved a purchaser from the duty to enquire for the title deeds, but accentuates it, particu-

larly in regard to the certificate of title, and neglect to enquire indicates a design inconsistent with bona fides, to avoid knowledge. Constructive notice of a prior unregistered charge is sufficient to take the purchaser out of the protection of sec. 35, and, on the facts, notice thereof must be imputed to the purchaser and his title postponed to such charge. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 4 B.C.R. 536.

4. Easement.]—Plaintiff and defendant both purchased adjoining properties from a common vendor on the same date. Defendant registered his title on the 25th of June, 1910, and plaintiff registered on the 26th of July following. Plaintiff for two or three years occupied as a tenant the property which she purchased, and during such tenancy her house was drained into the adjoining property, which was purchased by defendant. On the 3rd of June defendant disconnected and stopped the drain at the boundary of his lot, and denied the plaintiff's right to use the drain and cesspool. Grant, Co. J., before whom the action was tried, gave judgment for plaintiff in $1,000 damages on the ground that defendant, not having any registered title, under sec. 74 of the Land Registry Act, had no right to tear up or stop the drain:—Held, on appeal, that neither party having any registered ownership in the lands at the time of the occurrences in question, the appeal should be allowed and the action dismissed. *Goddard* v. *Slingerland*, 16 B.C.R. 329.

5. Qualification for municipal office.]—A candidate for alderman in the City of Victoria had, prior to his nomination, conveyed away the lands on the alleged ownership whereof he claimed qualification under sec. 13, sub-sec. (b.) of the Municipal Clauses Act, but the conveyance remained unregistered. In an action to establish disqualification, and for penalties under sec. 20 of the Act:—Held, that the effect of sec. 74 of the Land Registry Act, c. 23, 1906, is to make registration of conveyances taking effect after the 30th of June, 1905, a sine qua non of the vesting of any interest, legal or equitable, in the grantee. *Levy* v. *Gleason*, 13 B.C.R. 357.

6. Actual notice.]—The defendant Edwards is the owner of certain property in Kamloops, fronting on the Thompson River. In July, 1909, he agreed to sell to the plaintiff for $2,500, the sum of $600 down, and the balance on time. The first payment was made, but there was some delay about the second on account of Edwards having only a possessory or unregistered title to a part of the property, and he was endeavouring to complete his title. In July, 1910, the defendant Clark wanted to purchase some property on the river front, and was shown the property in question by the defendant Benson, a real estate agent. Clark told Benson that if he could secure it at anything under $6,000 he would pay him $300 on his bargain. Benson thereupon saw the plaintiff, Chapman, and tried to purchase the lot from him, but being unable to arrange terms with him, went to Edwards, who agreed to sell the property at $5,500. He made an agreement for sale to Benson on the 30th of July, 1910, which agreement was at once assigned to Clark and placed in the Land Registry office for registration. Benson had reported to Clark his negotiations with Chapman, and about Chapman being in possession. Gregory, J., gave judgment in favour of plaintiff for specific performance as to those lots to which the title was not in dispute, and as to the lot to which plaintiff had only a possessory title, it was decreed that plaintiff accept such title as Edwards had, and if that should not be acceptable, that there be an abatement of the purchase price and a reference to the registrar to settle the amount. Defendant Edwards appealed, and the appeal was dismissed on the ground that he had actual notice of Chapman's title and could not be allowed in the circumstances, to take advantage of sec. 74 of the Land Registry Act. *Chapman* v. *Edwards, Clark and Benson*, 16 B.C.R. 334.

7. Constructive notice.]—Plaintiff owned lot 19, and defendant owned lot 20 of a certain subdivision in the City of Vancouver. Lots 19 and 20 were at one time owned by the same person, who built a house partly on both lots. The plaintiff company brought an action for a declaration that the house belonged to it, and based its action on the fact that the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots, the plaintiff company was entitled to the whole building, claiming that the defendant, who is now the owner of lot 20, had constructive notice of the claim of the plaintiff company:—Held, that, under sub-secs. 3 and 4

of sec. 43 of the Land Registry Act the defendant, being a purchaser for valuable consideration and claiming under the registered owner of lot 20, was not in any way affected by any relation that might exist between the original owner of lots 19 and 20, and the plaintiff company in connection with the said building having been erected with the proceeds of a loan obtained by the said original owner from the plaintiff company. *Canadian Birkbeck Investment and Savings Company* v. *Ryder*, 12 B.C.R. 92.

8. As against assignee for creditors.]—Notwithstanding sec. 74 of the Land Registry Act, c. 23 of 1906, an unregistered deed confers a good title upon the grantee as against a registered assignment for the benefit of creditors of the grantor, if the grantee, or any one claiming under him, can subsequently effect registration. *Westfall* v. *Stewart and Griffith*, 13 B.C.R. 111.

9. In action for specific performance.]—The registered owner under the Land Registry Act (Stat. of Brit. Col., 1906, c. 23), sec. 15 of an "absolute fee" in certain land in the province, entered into an agreement to sell it to the first respondent, who thereupon registered himself under sec. 25 of that Act as owner of a "charge" upon the land. The appellant claimed to be and, unless precluded by the Act, was entitled to the land under an unregistered conveyance made by the vendor before registration of the "absolute fee." The respondents (the second respondent being a subpurchaser), claimed specific performance of the agreement of sale against the vendor and the appellant, and the latter counterclaimed for a declaration of her title and for rectification of the register. At the trial the unregistered conveyance was put in and evidence was given that the vendor in an affidavit, and by verbal testimony in previous proceedings, had admitted the title of the appellant; the vendor did not defend the counterclaim:—Held, that the prima facie title of the vendor, under sec. 24 of the Act, as registered owner of an "absolute fee," could be rebutted by her admissions of the appellant's title, although by reason of sec. 75, the unregistered conveyance was not admissable for that purpose; that the purchaser was in effect merely the registered owner of an interest commensurate with that which equity would decree by way of specific performance and that the appellant was entitled to adduce the unregistered conveyance as a material circumstance in deciding whether specific performance should be granted; that, consequently, specific performance should not be decreed against the vendor and that the appellant was entitled to a declaration of her title and to rectification of the register. *Howard* v. *Miller and Another*, 20 B.C.R. 227; 1915, A.C. 318.

D. Certificates.

Preparation of.]—Observations on the proper method of preparing certificates. *Rorison* v. *Kolisoff*, 15 B.C.R. 419.

III. Indefeasible Title.

1. Devisee in fee from testator — Whether entitled to certificate of indefeasible title.]—A devisee in fee from a testator who was entitled to a certificate of indefeasible title, but which had not been issued, is not entitled to such certificate except upon the usual conditions. Semble, that even if such certificate had been issued to the testator the devisee would not ipso facto have been entitled. *In re Trimble, In re the Land Registry Act*, 1 B.C.R., Pt. II., 321.

2. Indefeasible title — Retrogression.]—Under the Land Registry Acts, the transferee of an indefeasible title in fee simple is entitled to be registered as the owner of the same estate, and there is no retrogression after the stage of indefeasibility has been reached. *In re Shotbolt, and In re Part of Lot* 173, *Victoria*, 1 B.C.R., Pt. II., 337.

3. Certificate of—When grantable.]—By the Land Registry Act, C.S.B.C. 1888, c. 67, sec. 63: "The owner in fee of any land, the title to which shall have been registered for the space of seven years, may apply to the registrar for a certificate of indefeasible title." The applicants applied to the registrar at Vancouver for a certificate of indefeasible title to the lands in question upon an affidavit that they "are the owners in fee of the lands, the title of which lands has been registered for the space of seven years." The registrar held that the applicant must prove a seven years' registered title in himself, and refused the application. Upon appeal to a judge: McCreight, J., affirmed the registrar and dismissed the appeal. Upon appeal from McCreight, J., to the Full

Court:—Held, per Begbie, C.J., and Drake, J., that the construction of the registrar and McCreight, J., was correct, and that the appeal should be dismissed. Per Crease and Walkem, J.J., that all that was necessary under the language of the Act was that the applicant should be the owner of the lands, the title, not his title, to which has been a registered title for seven years, and that the appeal should be allowed. *In re The Vancouver Improvement Company, in the matter of the Land Registry Act*, 3 B.C.R. 601.

IV. Absolute Fee.

1. Land Registry Ordinance, 1870—Registration of title—Equity of redemption, how registered — "Absolute fee," how construed.] — The purchaser of the equity of redemption in fee is entitled to be registered in the "Register of Absolute Fees," as the sole owner of the "absolute fee" under sec. 19 of the Land Registry Ordinance, 1870. The expression "absolute fee" in L.R.O., 1870, does not necessarily mean "clear of all incumbrances." *Re Land Registry Ordinance*, 1870, *In re Sir James Douglas*, 1 B.C.R., Pt. I., 84.

2. Certificate of title based on tax sale.]—A certificate of title based on a tax deed does not ipso facto, oust a prior certificate of title outstanding in the hands of the former owner, and the holder of such later certificate must affirmatively show the regularity of all the tax sale proceedings in order to make good his title. *Kirk* v. *Kirkland*, 7 B.C.R. 12.

V. Charge.

A. Effect of Registration of.

1. Priorities between equitable mortgage and subsequent registered conveyance—Fraud—Constructive notice—Onus of proof—Pleading—Statute of Frauds.] —Action to foreclose an equitable mortgage by deposit of title deeds, brought up by the plaintiffs against the mortgagor, K., and a person, R., who appeared on the title as the grantee of the lands under a deed made to him by K. subsequent to, and, as the plaintiffs' claim alleged, in fraud of the mortgage; which deed he had registered, not as a fee but as a charge against the lands. K. had suffered judgment by default. Neither notice of the mortgage, nor want of valuable consideration for the deed, were charged against R. in the statement of claim, or negatived by him in his defence, in which he claimed that, under sec. 31 of the Land Registry Act, his registered charge was entitled to prevail over the plaintiffs' unregistered charges, and also set up the Statute of Frauds. At the trial R. called no evidence, and maintained that the onus probandi to displace his prima facie statutory priority was on the plaintiffs, and that he was entitled to judgment:—Held, per Walkem, J., on motion for judgment, dismissing the action as against R., that his registered charge had a prima facie validity and priority, under sec. 31, and that the onus of proof of want of consideration, fraud, or notice to him of the mortgage, was on plaintiffs:—Held, by the Full Court on appeal, per Crease, J.: That in the state of the pleadings and evidence, fraud on R.'s part could not be assumed by the Court, but that there should be a new trial to determine the question of the bona fides of the deed. Per McCreight, J.: That before the statute the burden of proof would have been upon R. to show that he made inquiries for the title deeds, and gave valuable consideration for his deed from K., as being facts peculiarly within his knowledge and not of the plaintiff's, and that, not having done so, he was by their absence, affected with constructive notice of the mortgage. That by sec. 35 he was only relieved from the effect of such notice by proving himself a purchaser for value, and that the onus for so doing was therefore on him, and that as to the effect of notice, sec. 31 must be read as subject to sec. 35, which alone deals with that question. Quære, whether the non-compliance with secs. 13, 19, 54 and 55 of the Act as to production of title deeds vitiated the registration. Per Drake, J.: That, on the facts, the presumption was that R. had actual, or that there was constructive notice to him of the equitable mortgage, and the onus was on him to allege and prove valuable consideration for his deed. That the deed was improperly registered as a charge, and that the plaintiff should not be prejudiced by the mistake of the registrar. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 3 B.C.R. 330.

2. Land Registry Act, sec. 35—Registered title and prior unregistered charge—Whether constructive notice of charge sufficient.]—The registrar registered a con-

veyance from K. to R. as a charge, without either the title deeds or certificate of title being produced or accounted for by R. They were, in fact, outstanding in the hands of plaintiffs, as prior equitable mortgagees of the lands. Express notice to R. of the equitable mortgage was not proved, but he inquired of K. for the title deeds and certificate, and they were not accounted for. The action was for foreclosure of the equitable mortgage:—Held, per Walkem, J.: The Act devolves upon the registrar the duty of satisfying himself on the prima facie title of an applicant, as a prerequisite to its registration, either by requiring production of the title deeds, or an affidavit satisfactorily explaining their non-production, and that the registration of R.'s conveyance was invalid, as against the plaintiffs, for want of the authorization of the registrar upon the basis required by the Act, and that, as an unregistered purchaser, he was not protected by sec. 35 against the plaintiff's prior unregistered charge. On appeal to the Full Court (per Davie, C.J., Crease, J., concurring, overruling Walkem, J.): (1) The purchaser of a registered title is within the protection of sec. 35, whether he registers his own conveyance or not. (2) The principle of Lee v. Clutton, 45 L.J. Ch. 43, 46 L.J. Ch. 484, is applicable to the British Columbia Land Registry Act. The policy of the Act is to free the purchaser of a registered title from the imputation of constructive notice, and in the absence of express notice such a purchaser of lands for valuable consideration will, under sec. 35, have priority over a prior unregistered charge, notwithstanding that he knew that the title deeds were in the possession of persons other than the vendor, and abstained from inquiry. To take such a purchaser out of the protection of sec. 35, he must be guilty of conduct equivalent to fraud, and, as fraud is never presumed, it will not be imputed by inference, or in the absence of proof of express notice of the facts, the knowledge of which constitutes the fraud. Per McCreight, J. (dissenting): The Act has not absolved a purchaser from the duty to inquire for the title deeds, but accentuates it, particularly in regard to the certificate of title, and neglect to inquire indicates a design, inconsistent with bona fides, to avoid knowledge. Constructive notice of a prior unregistered charge is sufficient to take the purchaser out of the protection of sec. 35, and, on the facts, notice therefore must be imputed to the purchaser and his title postponed to such charge. *The Hudson's Bay Co.* v. *Kearns & Rowling*, 4 B.C.R. 536.

B. Mortgage by Devisees.

Residuary devise.]—Where the residuary devise was of "the balance and remainder of the property and of any estate" of the testator, and the residuary devisee incumbered the lands, the mortgagees, who had notice of the will, notwithstanding that they had registered their mortgages, were postponed to a legatee under the will. *Cameron* v. *Harper*, 2 B.C.R. 15; 21 S.C.R. 273.

C. Merger of.

Conveyance of the equity of redemption.] — A conveyance of the equity of redemption by a mortgagor to a mortgagee of lands does not constitute a discharge of the mortgage by merger, unless it is made to appear that such a result was intended by the parties; and when a mortgagee applies to register a conveyance of the equity of redemption the registrar should not mark the mortgage merged unless at the request of the mortgagee. *In re Major*, 5 B.C.R. 244.

VI. Maps and Plans.

1. Registered plan — Description of land by reference to plan—Right to object to validity.]—The owner of a district lot registered in 1885 a plan of it drawn to scale, but not showing the sub-divisions, and afterwards had another plan made from a survey and which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16, and registered the deed which did not refer to the plan. On 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890, the defendant bought from Kilby lot 16, the deed showing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the boundaries which were then according to the unregistered plan. Lot 16, according to registered plan, overlapped lot 15, according to the unregistered plan:—Held, in an action for possession by the owner of lot

16: (1) That both plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyance in conformity with the Land Registry Act. (2) It was not open to defendant who had accepted and registered a conveyance of land according to a registered plan, to afterwards object, in an action respecting the title to the same land, to the validity of that plan. *Fowler* v. *Henry*, 10 B.C.R. 212.

2. Crown grant of adjoining lots—Description of land — Estoppel.]—In an action for the declaration of title in a piece of land claimed by plaintiff as part of lot 276 and by defendant as part of 202. Defendant's title was derived through B., to whom, in 1870, a Crown grant was issued, granting that lot "numbered 202 on the official plan" said to contain "150 acres, more or less." In 1876-77, the Lands and Works Department having caused an official survey of the adjoining lots to be made, found the official plan by which the boundaries of B.'s lot were defined to be incorrect, and with a view to retain the acreage proper to each grant and to make the boundaries run true to the cardinal points, gave the defendant, without notifying him, in the new official plan of survey, a new southern boundary. Three years after the completion of this survey, defendant filed in the Land Registry office a plan of the greater part of lot 202, according to a private survey made by his own directions in which he implicitly followed, as to his southern boundary, the survey of 1876-77. In 1881 a Crown grant to lot 376—the boundaries thereof being as determined by the survey of 1876-77—was issued to plaintiff:—Held, that the defendant having, by filing his map in 1880, adopted the survey of 1876-77, was precluded as against the plaintiff, from treating that survey as a nullity. *Johnston* v. *Clarke*, 1 B.C.R., Pt. II., 56; overruled, 1 B.C.R., Pt. II., 81.

3. Registration of mortgage.]—The map or sketch required on the registration of a mortgage of a portion of a lot is governed by sec. 100 of the Land Registry Act. Sec. 90 of said Act does not apply. *Ex parte Williams*, 18 B.C.R. 248.

VII. Roads and Streets.

Bordering on navigable waters.]—Sec. 68 of the Land Registry Act, c. 23 of 1906, dealing with the sub-division of l town or other lots, provides, inter a in case a lot borders on the shore navigable water, streets leading to tinuing to such water, must be sh not greater distance apart than 60 Held, that the object of the sectio require land abutting on navigabl to be sub-divided so as to provide and continuous access to the water vals of not less than 600 feet. F tin, J.: The section does not appl the streets leading to the water *In re Lonsdale Estate*, 12 B.C.R. 3

VIII. Judgments.

1. Certificate of judgment.]—T tration against lands of a certificat judgment appealed from is not a pr by way of execution thereof, and superseded by appellant giving secu the whole judgment debt and cost R.S.C. c. 135, sec. 47. *Foley* v. 2 B.C.R. 251.

2. Executor mixing private fun estate—Judgment by general lega amount of legacy—Priority of, as prior judgment against executor ally.]—In 1874, one E. H. became to a general legacy of $10,000 beq to him by his brother J., who appo his executor another brother, T whom he was in partnership. On J.' T. entered into possession of the wh nership property, and paid half th to E. in 1875. E. sued T. and r judgment by default for the bala January 24th, 1889, which judgm registered February 28th, 1889. meantime T. had charged the whol erty for large sums to various credit obtained and registered judgments January 24th, 1889, before which d judgment was obtained against registered by a simple contract cred Receivers having been put in posse T.'s estate, sold the same under o Court, and after certain mortgag and expenses were paid off, with th tion of the Court, the balance l insufficient to pay off the charges re before E.'s judgment. In an actio for an inquiry as to what assets of into the hands of T. or the recei have his judgment declared enti priority over the other registered c and to restrain the receivers:—Hel

the action lay as against the simple contract creditor, C., but not, semble, as against the secured creditors, by reason of secs. 32-36 of the Land Registry Act. *Harper* v. *Harper*, 2 B.C.R. 15; 21 S.C.R. 273.

3. Sale of land under judgment — Equitable mortgagee—Notice—Right to dispose of timber—Estoppel by course of litigation.] — In 1891, O'Brien pre-empted Provincial Crown land, and, in 1898, Manley obtained a judgment against him, which provided that he might cut timber from off O'Brien's pre-emption and apply the proceeds in satisfaction of the judgment, and which restrained O'Brien for six months from cutting or selling timber. Manley registered his judgment in 1899. In January, 1900, O'Brien agreed to sell to Mackintosh 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 Mackintosh the Crown grant was delivered to him as security for such advance. Plaintiff moved for liberty to sell the land under his judgment, and Drake, J., made an order for sale, and holding that Mackintosh, being an equitable mortgagee, was excluded by the statute:—Held, by the Full Court, reversing Drake J., that the sale should be subject to Mackintosh's interest: Held, also, that as the plaintiff at the trial induced the Court to grant him a judgment recognizing defendant's right to timber, he was estopped from afterwards contending that the defendant had no right to dispose of timber. *Manley* v. *O'Brien, In re Mackintosh*, 8 B.C.R. 280.

4. Registered judgment — Whether mortgage given by debtor affected by or not.]—A registered judgment binds only the interest of the debtor existing at the time of registration and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. *Yorkshire Guarantee and Securities Corporation* v. *Edmonds*, 7 B.C.R. 348.

5. Priority as against unregistered interest.] — Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of sec. 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that sec. 74, making registration of conveyances a sine qua non to the passing of any title, at law or in equity, to lands, governed:—Held, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff. *Entwisle* v. *Lenz & Leiser*, 14 B.C.R. 51.

IX. Lis Pendens.

A. Right to File Certificate of.

Interest of plaintiff in action.] — Plaintiff claimed in the endorsement on his writ, on behalf of himself and the other creditors of the defendant Marie Schneider, a declaration that a conveyance made by her to her husband (co-defendant) of certain lands, was fraudulent and void as against them, and obtained and registered in the Land Registry Office a lis pendens against the land in question. On motion to set aside the lis pendens:—Held, that the statement of claim in the writ showed an interest in the plaintiff, as a creditor, in the subject matter, sufficient to maintain the action and the registration of the lis pendens, though only a declaratory order, and no consequent relief was prayed. *Bevilockway* v. *Schneider*, 3 B.C.R. 90.

B. Against What Interest.

Purchase money.]—Upon a contract for the sale of land, the purchase price of which is payable by instalments, the vendor retains an interest in the land proportional to the amount of purchase money unpaid, which is capable of being affected by the filing of a certificate of lis pendens. *Peck* v. *Sun Life Assurance Co.*, 11 B.C.R. 215.

C. Effect of Filing Certificate of.

By way of notice.]—In 1894, a husband conveyed certain lands to his wife and from her by agreement in October, 1896 (registered in March, 1897), plaintiff contracted

to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors and registered a lis pendens on 24th September, 1897, and by the judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. Plaintiff on applying to register his title first learned of the action and the lis pendens. Plaintiff sued to have the registration of the lis pendens cancelled:—Held, (1) The estate acquired by the conveyance to plaintiff from the wife remained subject to the rights of the company, as they should be determined by the result of its action against the wife. (2) The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he has paid since the registration of the lis pendens. (3) Notice of the company's adverse claim was not imputed to plaintiff by reason of the registration of the lis pendens. (4) Secs. 85-88 of the Land Registry Act providing for the cancellation of a lis pendens are not available in practice where, as in this case, the nature and extent of the interest affected by the lis pendens are not ascertained. (5) The plaintiff was entitled to a declaration of right only and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the lis pendens did not affect the interest acquired by the plaintiff under his contract and that the defendant company has a charge on the lands for the amount of purchase money unpaid. *Peck* v. *Sun Life Assurance Company of Canada*, 11 B.C.R. 215.

D. Cancellation of Certificate of.

1. Security.]—On a summons to cancel lis pendens, the judge being of opinion that the plaintiffs could not succeed in the action, ordered that the lis pendens be cancelled on the applicants giving the nominal security of $1:—Held, on appeal, that it was not a case for cancellation of the lis pendens, but that the plaintiffs should be put on terms to speed the action. *Merrick* v. *Morrison*, 7 B.C.R. 442.

2. Where damages not adequate remedy.]—An order will not be made cancelling a lis pendens under sec. 85 of the Land Registry Act in a case where damages would not be a complete compensation. *Towne* v. *Brighouse*, 6 B.C.R. 225.

X. REGISTRAR.

A. Duties of.

Applications.]—It is the duty of the registrar either to comply with applications for registration or to give a written refusal forthwith. *Byrnes* v. *McMillan*, 2 B.C.R. 163.

B. Powers of.

1. To refuse application after sanction of plan refused.]—The owner of a parcel of land sub-divided into lots and applied for the approval of the plan of the sub-division by the municipal council of the municipality in which it lay, pursuant to sec. 92 of the Land Registry Act. The council refused to approve of the sub-division, as sufficient allowance had not been made for streets, and the registrar of titles then refused to accept the plan. Subsequently the petitioners, who purchased lots within the sub-division, applied to register as charges their agreements of sale, in which each lot was described by metes and bounds, and attached thereto was a plan of the lot. The lots were identical with certain lots shown on the plan of the sub-division that had been rejected, but no reference was made to the rejected plan in the description of the lots. The registrar refused to register the agreements as charges affecting the original parcel:—Held, that the applications for registration were wrongfully rejected. *In re Ryan and the District Registrar of Titles*, 19 B.C.R. 165.

2. To require exclusion of beds of lakes or rivers.]—Upon an application to register the title deeds to certain lands which included within its boundaries a portion of the bed of a river and of a lake, the registrar refused to register on the ground that the map and deeds lodged in support of the application required amendment to exclude the beds of lakes and rivers:—Held, that every certificate of title must be read as being issued subject to the

reservations and limitations expressed in the original grant from the Crown, and a registrar has no authority to refuse to register a title unless the applicant amends his application so as to exclude the beds of the lake and river. *In re Gardiner and District Registrar of Titles,* 19 B.C.R. 243.

3. To refuse conveyance containing no covenants.] — The absence of the usual covenants for title in a conveyance of land does not, per se, justify a registrar of titles refusing to register such conveyance on the ground that the applicant has not a good, safeholding, marketable title, as required by sec. 15 of the Land Registry Act. *Re Dalgleish,* 15 B.C.R. 217.

4. Where doubt on construction of will.]—Where a doubt exists on the construction of a will, the Registrar of Titles under the ordinance properly refused to register and issue certificate of title, until removal of the doubt by adjudication. In such a case the registrar is entitled to his costs. *In re Henry Jerome (deceased),* 1 B.C.R., Pt. I., 87.

5. Cancellation of ordinary certificate on issuance of indefeasible title.] — The Registrar-General has power, under sec. 61 of the Land Registry Act, B.C. 1888, to cancel an ordinary certificate of title issued under sec. 17 of the Act, upon the issue to the registered owner of a certificate of indefeasible title, under sec. 63 of the Act. *In re Turner,* 2 B.C.R. 244.

XI. VALUATION.

1. Of mortgage security.] — On an application under sec. 176 of the Land Registry Act to register a mortgage, the mortgage shall be valued at its true value as provided by sec. 175, dealing with application for the registration of a fee. If, therefore, the registrar be not satisfied as to the correctness of the value affirmed, he may require production of other evidence, or of a certificate under the hand of a valuator. There not having been any such course adopted in this case, but the inspector of legal offices having ruled that the value of a mortgage for registration purposes is necessarily the full amount of money for which it is given as security:—Held, that there is no provision authorizing the registrar to make such a ruling, but that the procedure set out in secs. 175 and 176 must be adhered to, unless the registrar, "for sufficient cause shown," direct otherwise. Semble, that the registrar may vary the methods for adducing such further proofs as he may require, on the applicant for registration showing him sufficient cause why the provisions of sec. 176 are impracticable or inconvenient. *In re The Royal Trust Company, Limited,* 17 B.C.R. 329.

2. On transfer to new trustees.]—The fee payable for registration of a transfer of realty to new trustees is based on the value of the lands included in the conveyance to such new trustees. *In re Hall Mining and Smelting Company, Limited,* 11 B.C.R. 492.

See EXECUTION.

RELEASE.

Setting aside on ground of fraud.]—In an action for damages for the death of a husband and father, defendants set up that deceased had, after the injury, executed an agreement, in consideration of the payment of $1,000, releasing defendants from present and future liability to himself or his heirs. Plaintiffs' answer was that the release had been fraudulently obtained. They sued under the Families Compensation Act, there being no executor or administrator of deceased's estate. The only evidence given at the trial was the proof of deceased's signature to the release. The trial judge took the case from the jury and dismissed the action because plaintiffs had not brought into Court, to abide the result of the trial, the $1,000 paid by defendants to deceased:—Held, that although the plaintiffs were not the legal personal representatives of deceased, and were not parties to the release, yet they had a right to attack it on the ground of fraud when set up in bar to their claim under the statute, without repaying or tendering the $1,000 or directly asking to have the release set aside. *Trawford* v. *British Columbia Electric Railway Company, Limited,* 18 B.C.R. 132; 49 S.C.R. 470.

REPLEVIN.

I. NATURE OF ACTION.
II. PRACTICE.

I. NATURE OF ACTION.

1. Action for—Whether it is an action for tort—Can husband maintain it against his wife?—Married Women's Property Act, R.S.B.C. 1897, c. 130, sec. 13.]—A replevin action is an action for a tort, and therefore a husband cannot maintain it against his wife. *McGregor* v. *McGregor*, 6 B.C.R. 432.

2. Ship.] —A ship may be replevied. *Dunsmuir* v. *The Klondike & Columbian Goldfields, Ltd.*, 6 B.C.R. 200.

II. PRACTICE.

1. Practice and procedure.]—The Court procedure and practice existing under the old Replevin Act are still in force, although the new Act contains no reference to pleading or practice other than to enable them to be dealt with by Rules of Court to be made. *McGregor* v. *McGregor*, 6 B.C.R. 258.

2. B.C. Replevin Act, 1873—Affidavit for writ of replevin—Sufficiency of.]—On an application to set aside a writ of replevin under the B.C. Stats. 1873, c. 24:—Held, (1) That the affidavit under sec. 4 need not state that the deponent is the "servant" or "agent" of the claimant; (2) That the delivery to the sheriff of the bond is not a necessary preliminary to the issue of the writ. *Keefer* v. *Todd*, 1 B.C.R., Pt. II., 249.

3. Bond—Requirements as to sureties.]—It is not necessary under the Replevin Act, C.S.B.C. 1888, c. 101, that the sureties on a replevin bond should be worth the amount of the bond, or that there should be sureties at all, but only that there shall be a bond in double the value, etc., to the satisfaction of the sheriff. *Dunsmuir* v. *The Klondike & Columbian Goldfields, Ltd.*, 6 B.C.R. 200.

4. Supreme Court Rules.] —By the Supreme Court Rules, 1906, proceedings in actions for replevin are made uniform with those in other classes of actions. *Emerson* v. *Skinner*, 13 B.C.R. 121.

5. Court of Record.]—The Court of a Police Commissioner is a Court of Record for British Columbia within the meaning of the Replevin Act, 1873, sec. 2. *Keefer* v. *Todd*, 1 B.C.R., Pt. II., 249.

REPRESENTATION.

See MISREPRESENTATION AND FRAUD.

RES JUDICATA.

See ESTOPPEL.

RESTRAINT OF TRADE.

See CONTRACT.

ROSSLAND WATER AND LIGHT COMPANY INCORPORATION ACT, 1896.

Rights of City of Rossland.] —Under sec. 11 of the above-named Act, the rights of the City of Rossland to the waters of Stoney Creek are paramount but not exclusive, and the Gold Commissioner has jurisdiction to adjudicate on an application under sec. 18 of the Water Clauses Consolidation Act (R.S.B.C. 1897, c. 190) 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.

SALE OF GOODS.

I. PASSING OF PROPERTY, 910.
II. CONDITIONS, 911.
III. WARRANTY, 911.
IV. NON-ACCEPTANCE, 912.
V. NON-DELIVERY, 912.
VI. INSPECTION, 912.

I. PASSING OF PROPERTY.

Appropriation.] —A bookseller relying on an advertisement in a newspaper of a certain book, ordered 25 copies from a publisher. Upon receipt of twelve copies (for which the bookseller paid) he immediately cabled a cancellation of the balance of the order. The publisher had not sent the 13 remaining copies, nor had he appropriated them to the bookseller prior to the receipt of the cable, but he persisted in forwarding them, and the bookseller refused to accept them. In an action to recover the price of the books, judgment was given by the trial judge in favour of the plaintiff:—Held, that the cancellation operated to prevent any appropriation by the publisher effective to pass the property in the books to the bookseller. *Sells, Limited* v. *Thomson Stationery Company, Limited Liability*, 19 B.C.R. 400.

II. CONDITIONS.

1. Return of unsound goods.]—Where, upon the sale of a team of horses, the vendor warranted them sound, and they were returned as unsound in three days pursuant to an agreement that in the event of their turning out unsound within ten days they could be returned, and they were accepted and retained by the vendor:—Held, that the purchaser was entitled to a refund of the price paid for the horses; and was not driven to sue for breach of the warranty. *Holt* v. *Brooks*, 18 B.C.R. 301.

2. Invoices.]—Where the purchase price of a stock of merchandise was fixed at an advance of ten per centum on the "invoice price," failure to produce the invoices does not relieve the purchaser from performing the contract if the purchaser consents to the ascertainment of the price in another manner. *Periard* v. *Bergeron*, 17 B.C.R. 339; 47 S.C.R. 289.

III. WARRANTY.

1. Breach of.] — A completed sale of chattels cannot be rescinded for a breach of warranty. *William Hamilton Mfg. Co.* v. *Knight*, 5 B.C.R. 391.

2. Particular purpose.] — Where the vendors of a marine boiler to be used, to the vendors' knowledge, in a steam tug, stated to the purchasers "that if it was not right they would make it right," it is doubtful whether this is an express warranty; but in such a case there is an implied warranty that the boiler is fit for the purpose for which it was bought. *William Hamilton Mfg. Co.* v. *Victoria Lumber, etc., Co.*, 4 B.C.R. 101.

3. Capacity of motor waggon.]—The defendant sold a motor-truck to the plaintiff, whose purchasing agent had no knowledge of motor-trucks, on the representation that it was a "three-ton Mack truck" and that it was rated as such, when the truck was in fact classified by the manufacturer as a two-ton truck:—Held, that the plaintiff should succeed on a breach of warranty, as the issue was not whether a new truck would carry three-ton loads for a period of several months, but whether it was, according to the judgment of those skilled in the manufacture of trucks, capable of maintaining a three-ton standard for the period which could be considered the life of the truck. *Victoria and Saanich Motor Transportation Company* v. *Wood Motor Company, Limited*, 20 B.C.R. 537.

IV. NON-ACCEPTANCE.

Pleading.]—Damages cannot be recovered for breach of contract by refusal to accept the goods when the action has been brought solely for the price. *Sells, Ltd.* v. *Thomson Stationery Co.*, 19 B.C.R. 400.

V. NON-DELIVERY.

Premature action.] — There can be no right to damages for non-delivery before the time appointed in that behalf. *Oppenheimer* v. *Brackman*, 9 B.C.R. 343; 32 S.C.R. 699.

VI. INSPECTION.

1. Place of.]—Prima facie the examination by a buyer under sec. 45 of the Sale of Goods Act in order to ascertain whether the goods tendered are in conformity with the contract, should be had at the place of delivery; and a removal of the goods by buyer without exercising his right of examination will prevent him from afterwards refusing to accept. But if the goods delivered are not in fact in conformity with the contract, the buyer is entitled to a reduction in the agreed price. *Brooks-Scanlon-O'Brien Company* v. *Red Fir Lumber Company*, 14 B.C.R. 439.

2. Correspondence with description.]—The plaintiffs sold the defendant a railway contractor's plant, consisting of cars, scrapers and other equipment. The plant, which was a second-hand one, was examined by the defendant before he purchased. Two of the defendant's servants kept tally on the goods as they were loaded at Cloverdale, the place of shipment. Upon reaching the defendant's shops in Vancouver, the goods, without being checked, were so dealt with as to make it impossible to ascertain whether or not they conformed to the description in the contract. On appeal from the judgment in favour of the plaintiff in an action for the price of the goods:—Held, that the judgment of the trial judge should not be disturbed, as it was based upon the direct evidence of the only persons who examined the goods, and made a list of them, the defence having failed in their duty to ascertain, upon receipt of the goods, whether or not they corresponded with the

description in the contract. *Ironside* v. *Vancouver Machinery Depot, Limited,* 20 B.C.R. 427.

SALE OF LAND.

See VENDOR AND PURCHASER.

SALVAGE.

I. WHO ENTITLED, 913.
II. SALVAGE SERVICES, WHAT ARE, 913.
III. AMOUNT OF AWARD, 914.
IV. PRACTICE, 915.

I. WHO ENTITLED.

Wrongdoer.]—Although the salving and the salved ship are both to blame, the former may be awarded salvage. *Zambesi* v. *Fanny Dutard,* 2 B.C.R. 91.

II. SALVAGE SERVICES, WHAT ARE.

1. Extraordinary towage services.] — Where towage services cannot be said to have saved the ship from being lost, but were of extraordinary service, owing to her condition, and involved more than ordinary trouble and risk, they should be allowed for, not as salvage, but as extraordinary towage services. *Dunsmuir* v. *The Harold,* 3 B.C.R. 128.

2. Contract for towage—Whether towage or salvage — Impending danger.] — The ship S. was found by the tug M. in a dangerous position in foul waters. The captain of the tug agreed to tow the ship into the open sea, the amount payable for such services to be left to the respective owners. The owners being unable to agree:—Held, on the evidence, that the ship was in impending danger of loss and injury from her situation and the ignorance of her captain of the locality, and that the service of the tug was therefore a salvage, and not a towage service. *Canadian Pacific Navigation Co.* v. *The C. F. Sargent,* 3 B.C.R. 5.

3. Expenses incurred in navigating after salving ship.] — Plaintiffs, having salved the ship, incurred expenses in navigating her along a dangerous coast at a rough season of the year:—Held, on the facts, that besides a salvage reward of one-half of the proceeds of the sale of the ship, the plaintiffs were entitled to expenses to be estimated at a lump sum. *Jacobsen* v. *Ship "Archer,"* 3 B.C.R. 374.

III. AMOUNT OF AWARD.

1. Absence of danger—Depreciation.] —The O., a freight steamer, fully laden with coal, had gone ashore on Danger Reefs, at the northerly end of Thetis Island, and about seven and a half miles, by the ship's course, from Ladysmith, British Columbia. She had sprung a leak and the water had put out her fires. About 10 feet of her forefront was on the rock, while her stern was in deep water. The P. sighted the stranded vessel in the night time and went to her relief, taking a hawser passed to her by the O., and waiting for the tide and daylight. Just before 6 o'clock in the morning the P. started to pull straight ahead at full speed, and shortly succeeded in getting the O. off the reef. The P. then cut the O.'s hawser, so as to lose no time, backed up to the O. and made fast to her with the P.'s hawser, and succeeded in towing her under forced draft into Ladysmith, where the O. was tied up to a wharf in a position of acknowledged safety:—Held, that the services performed by the P., while without the specially meritorious features of saving human life or danger to herself and crew, were as skilfully conducted as the nature of the case permitted, and valuable, and as such were entitled to corresponding recognition, even though they were of short duration. Salvage awarded in an amount of $2,200. In finding the value of the ship and cargo, the District Registrar allowed a yearly depreciation in the value of the ship of 7 per cent., following a practice with reference to wooden vessels said to prevail in British Columbia:—Held, that whatever may be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she had subsequently received, but, in any event, it could not be applied to the ship in respect of which salvage services were rendered in this case, as she is a better built ship than the average, and has been well cared for and maintained. *Dunsmuir* v. *The Otter,* 18 B.C.R. 435.

2. Derelict.] — The tug Escort No. 2 (with crew of 11 men, estimated value, $10,000) became disabled owing to a broken propeller on the 22nd of November, 1913,

and was in such a position (a little to the S.E. of Hannah Bank, in the Sea Otter Group, Smith Sound) that in a short time she would, beyond reasonable doubt, have become a total wreck, had not the S.S. Humboldt (estimated value, $150,000; cargo, $150,737) come to her assistance. After an hour's manœuvring in a position of peril to an appreciable degree (being from one-half to three-quarters of a mile from a reef), she made fast to the Escort and took her in tow, bringing her to Alert Bay, a distance of about 50 miles, with a divergence from her course of about five miles. The heavy swell made it impossible to take the master and crew off the Escort, and they had, before the arrival of the Humboldt, made preparations to abandon her, take to their boat and make a hazardous trip of 15 miles to shore. In an action for salvage services:—Held, the value of the services rendered should be estimated in the ordinary way and not on the basis of the tug being regarded as a derelict, as she was not abandoned at the time she was taken in tow. The award is $2,000. *The Humboldt* v. *The Escort No. 2*, 20 B.C.R. 595.

IV. PRACTICE.

Assessors.] — Where necessary assessors will be appointed in salvage cases. *Vermont S.S. Co.* v. *The Abby Palmer*, 10 B.C.R. 380.

SEAMAN.

See SHIPPING.

SET-OFF.

Unlawful seizure under mortgage.]—Where the plaintiff succeeded in an action for damages for the unlawful seizure of his goods by the defendant under a chattel mortgage:—Held, that such damages should not be set off against the amount due under the chattel mortgage. *Suttie* v. *Pelletier*, 20 B.C.R. 212.

See PRACTICE.

SETTLED ESTATES.

1. Appointment of guardian.] — Where a guardian to an infant has already been appointed by the Court it is not necessary to appoint a guardian for the special purpose of presenting a petition for sale of the infant's estate under the Settled Estates' Act, 1887, sec. 49. *In re Ash Estate*, 5 B.C.R. 672.

2. Sale by administratrix.] — Deceased, who left a widow and one child, was at the time of his death the owner of some four acres of land. The child was taken in charge by a Children's Aid Society. Letters of administration were issued to his widow. She subsequently obtained registration of the property in her own name, based upon a conveyance to her from her late husband, and on the title so obtained entered into an agreement for sale of the property, receiving a payment of $500 on account of the purchase price. It afterwards developed that there had been cross deeds between the husband and wife, but that that from the wife to the husband had never been registered. She then applied to Morrison, J., for, and obtained authority to carry out the sale as administratrix. The Children's Aid Society appealed on behalf of the infant:—Held, on appeal, that the learned judge had not jurisdiction to make the order confirming the sale. *In re Harry Howard (deceased)*, 16 B.C.R. 48.

SHERIFF.

I. RIGHTS.
II. DUTIES.
III. ACTIONS AGAINST.

I. RIGHTS.

1. Free miner's certificate—Renewal.] —A sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under sec. 4 of the Mineral Act Amendment Act of 1899 in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse. *McNaught* v. *The Hardy Van Norman Co.*, 9 B.C.R. 131; 32 S.C.R. 690.

2. Person arrested on capias—Custody of.]—A sheriff is required to keep a person arrested on a capias safely, and as there is no common gaol in Vancouver, the sheriff of Vancouver is entitled to lodge such a person in New Westminster gaol and charge mileage therefor. *Carson* v. *Carson*, 10 B.C.R. 83.

3. *Seizure of goods in possession of* receiver—Jurisdiction of Supreme Court

to direct interpleader—Practice.]—Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action in rem in the Exchequer Court to enforce a mortgage of the ship, such property cannot be seized by a sheriff under a writ of fieri facias issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no jurisdiction, on the application of the sheriff, to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

II. Duties.

Execution Act — Responsibility for error in notice of sale caused by error in land registry office.]—A sheriff discharges his duty under sec. 37 of the Execution Act if he publishes a correct copy of the information as furnished him by the Land Registry Office, and is not responsible for loss arising out of errors committed therein. *Byrnes* v. *McMillan*, 2 B.C.R. 163.

III. Actions Against.

1. Bailiff.]—A County Court bailiff is entitled to notice of action for anything done under process of the Court by virtue of the 9 & 10 Vict., c. 95, sec. 138, introduced by the County Court Ordinance, 1867. *Johnson* v. *Harris*, 1 B.C.R., Pt. I., 93.

2. Exemption.]—An action is not maintainable against a sheriff who has, in obedience to a valid order, seized property privileged from execution, without a prior legal notification of its exemption. *Johnson* v. *Harris*, 1 B.C.R., Pt. I., 93.

SHIPPING.

I. Mortgages, 917.
II. Hire of Ship, 918.
III. Contracts of Carriage, 918.
IV. Masters and Seamen, 918.
V. Coasting Trade, 920.

I. Mortgages.

Unregistered.] — An unregistered mortgage of a ship is effectual as against execution creditors of the mortgagor. *Imperial Timber & Trading Co.* v. *Henderson*, 14 B.C.R. 216.

II. Hire of Ship.

Injury to ship, liability for.]—The boiler of a steamer chartered by the defendants from the plaintiff Company was injured through the carelessness of the engineer. Under the terms of the charter-party the master and engineer were subject to the approval of the owners, and the vessel was at owner's risk, but the charterers were to take all reasonable precautions regarding her safety. The owners had approved of the engineer in charge:—Held, in an action for damages by the owners, that the defendants were not liable under the express provisions of the contract. The engineer must be held to be competent, because his appointment was approved by the owners, and the charterers were not bound to have some person superintend his work. Per Martin, J.A.: The words "owner's risk" protect the defendants from all liabilities, except wilful misconduct. *British Columbia Canning Company, Limited* v. *McGregor*, 18 B.C.R. 663.

III. Contracts of Carriage.

Bill of lading—Exceptions in, applicable to matters occurring during the voyage—Breach of obligation to provide reasonably fit ship—Clause limiting liability of ship owners, scope of.]—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 sea-cock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the afterhold and damaged the plaintiff's goods. 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.*, 8 B.C.R. 228.

IV. Masters and Seamen.

1. Discharge.]—There is no custom at 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, leave their employer's service in the same manner, in either case receiving their wages to the date of termination of the service; and if there were such custom the Court would refuse to enforce it on the ground of unreasonableness. *Roberts* v. *The Tartar*, 13 B.C.R. 474.

2. Duty of ship owner to provide medical attendance.] — A ship owner is under no duty, either at common law or under sec. 207 of the Merchants' Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. *Morgan* v. *The British Yukon Navigation Company, Limited*, 10 B.C.R. 112.

3. Certificate of discharge.]—Plaintiff, who shipped for a voyage from Shields, England, to Victoria, British Columbia, 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 of July, a certificate of discharge under sec. 31, but this was not filled out until the 22nd of August, when 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 sec. 31, but as there had been an error, though unintentional, in computing his wages, thus necessitating plaintiff bringing action therefor, he was entitled to his costs. *Cable* v. *Ship "Socotra,"* 13 B.C.R. 309.

4. Desertion.] — 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. Sec. 52 of the Seamen's Act merely creates a concurrent tribunal for securing a speedy settlement of claims for wages. 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 Company, Limited*, 13 B.C.R. 83.

5. Offences by seamen.]—It is essential in a conviction under sec. 287 of the Canada Shipping Act to state that the act charged was wilfully committed, and the omission to do so is fatal to the validity of the conviction. *Rex* v. *Bridges*, 13 B.C.R. 67.

V. Coasting Trade.

Towage—By American tug—Between Canadian ports.] — Goliath, an American tug, with a clearance from Port Townsend for Victoria, picked up on the high seas ship Abercorn, bound for Port Moody, and contracted to tow her to that port. Goliath towed Abercorn to mouth of Victoria harbour, and there left her while tug went into Victoria for coal and clearance for Port Townsend. On coming out Goliath resumed towing and carried Abercorn to within 14 miles of Port Townsend, and then cast off and ran into that port for a clearance for Port Moody; the Goliath then towed the Abercorn into Port Moody. In an action for penalty under statute:—Held, that this was "a towage from one port or place in Canada to another," and defendant was liable. Semble, "distress" applied to the tow and not the tug. *Hamley* v. *Libby*, 1 B.C.R., Pt. II., 44.

See Admiralty.

See Carriers.

See Collision.

See Salvage.

See Towage.

SLANDER.

See Defamation.

SLANDER OF TITLE.

Lis pendens.]—The filing of a lis pendens against land, notwithstanding that the person filing it afterwards discontinues the action, and that the person against whose lands it is filed is prevented from selling them, does not per se constitute a cause of action. *Cowan* v. *Macaulay*, 5 B.C.R. 495.

SOLICITOR.

I. Right to Practise, 921.
A. In general, 921.
B. Admission, 921.
C. Payment of fees, 922.

II. Discipline, 923.
A. *Summary jurisdiction*, 923.
B. *Striking off the roll*, 923.
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A. *Retainer*, 923.
B. *Liability*, 924.
C. *Dealings between solicitor and client*, 924.
IV. Costs, 924.
A. *Agreements as to*, 924.
B. *Recovery*, 925.

I. Right to Practise.

A. In General.

1. Unqualified person.]—A person other than a barrister or a solicitor has no right to conduct proceedings in the Supreme Court on behalf of another. *In re Land Registry Act, 1870, and E. M. Johnson*, 1 B.C.R., Pt. II., 334.

2. Legal Professions Act, 1895—Secs. 68, 72—Practising, etc., without qualification—Evidence—Contempt of Court.]—Upon motion by the Law Society of British Columbia to commit the defendant, it appeared that the offence charged was that he had written two letters on behalf of clients, the first threatening that proceedings would be instituted for slander unless retraction was made, and the other stating that he had instructions to proceed against R. for taking certain goods without authority, and for trespassing and forcibly removing goods subject to a lien. The defendant adduced evidence that he was a solicitor of Manitoba, carying on business in British Columbia as a debt collector, and had made application to be admitted in British Columbia; that no fees had been charged against or paid by the person to whom the letter was written, and that he had disclaimed being a solicitor entitled to practise in British Columbia, and had refused to accept legal business offered to him:—Held, that the first letter did not constitute an offence, and that any presumption of practising which may have been raised by the second letter was rebutted by the evidence adduced by the defendant. *In re C——*, 5 B.C.R. 530.

B. Admission.

1. Abridgement of term of study.]—To come within the exception of sub-sec. 5 of sec. 37 of the Legal Professions Act, the applicant must have had his term of study shortened because he was a graduate. *King* v. *The Law Society of British Columbia*, 8 B.C.R. 356.

2. Abridgement of term of study.]—To come within the exception in sub-sec. 5 of sec. 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate. An applicant who obtained his degree after call or admission would come within the exception. *Calder* v. *The Law Society of British Columbia*, 9 B.C.R. 56.

3. Of solicitor from another province.]—An attorney from another Province who, if originally admitted in British Columbia, would have had to serve five years, must show five years' service before he can be admitted in British Columbia. *Gwillim* v. *Law Society of British Columbia*, 6 B.C.R. 147.

4. Female candidate.]—The Legislature, when framing the Legal Professions Act, had not in mind the probability of women seeking to enter the profession; therefore any remedy for the omission lies with the Legislature and not with the benchers of the Law Society. *In re Mabel Penery French*, 17 B.C.R. 1.

C. Payment of Fees.

Condition precedent to call.]—Under sec. 37 (g) of the Legal Professions Act, the benchers of the Law Society, having been empowered to make rules governing "the fees to be paid to the Society upon call to the bar . . . .," passed a rule, 103, directing that "the following fees shall be paid to the Society . . . . on examination for call to the bar, $100. In the event of an unsuccessful examination $75 will be returned"; and r. 60, "the prescribed fees must accompany the notice." Plaintiff was entitled to apply for call under sec. 41 of the statute, "upon passing such examination . . . . and upon payment of the prescribed fees." He gave notice and presented a petition for call, but declined to pay at that time the fee prescribed:—Held, that "call to the bar" includes all the preliminary proceedings and steps connected therewith, such as payment of the fee, the examination and compliance with other proper requirements of the Act and Rules; that when the Society imposed, by r. 103, a fee of $100

upon call to the bar, they intended to impose the fee authorized by sec. 37, and were entitled to insist upon payment of that fee before entering upon the expense to be incurred by calling the applicant to the bar. The rider to r. 103, providing for the return of $75 to an unsuccessful applicant is separable from the part prescribing the fee. *Hovell* v. *The Law Society of British Columbia*, 15 B.C.R. 167.

II. DISCIPLINE.

A. Summary Jurisdiction.

Fraud.]—A solicitor who has obtained a transfer of property in fraud of the transferor's creditors will be ordered to restore it or pay its value into Court under pain of attachment. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 11 B.C.R. 194.

B. Striking Off the Roll.

Suspension for wrongfully retaining moneys of client.]—B., a barrister and solicitor, was suspended from practice for six months by the Benchers in 1894, for wrongfully retaining moneys of a client. On the expiration of the period of suspension, the client, not having yet received her money from B., again complained to the Law Society, and on the hearing of the complaint in 1896, B. was disbarred and struck off the roll of solicitors:—Held, on appeal to the judges of the Supreme Court, as visitors of the Law Society: 1. That B. was not obliged to apply to the Benchers for reinstatement under sec. 48 of the Legal Professions Act before bringing his appeal; 2. That the Benchers, by suspending B. in 1894, had not exhausted their powers, but that they had power to disbar, and disbar and strike B. off the rolls, if they found that he was still wrongfully retaining his client's money and not a fit and proper person to remain on the roll; 3. That the judges will not allow an appeal which would have the effect of reinstating a barrister or solicitor while still in default in respect to the transaction for which he was disbarred or struck off. *In re John Joseph Blake*, 6 B.C.R. 276.

III. DUTY AND LIABILITY.

A. Retainer.

1. Duration of.]—A retainer to prosecute an action does not terminate when the judgment is obtained, but makes it the duty of the solicitor, without further instruction, to proceed after judgment and endeavour to obtain the fruits of the recovery, including the making it, by registration, a charge on the lands of the judgment debtor. *John Roland Hett* v. *Pun Pong*, 18 S.C.R. 290.

2. Disputed retainer.]—On all questions as to the retainer of a solicitor, where there is no written retainer and there is a conflict of evidence as to the authority between the solicitor and the client without further circumstances, weight must be given to the denial of the party sought to be charged rather than to the affirmation of the solicitor. *MacGill & Grant* v. *Chin Yow You*, 19 B.C.R. 241.

3. Solicitor to a corporation.]—An appointment as solicitor to a municipal corporation operates as a general retainer. *Drake* v. *City of Victoria*, 1 B.C.R., Pt. II., 165.

B. Liability.

Negligence.]—A solicitor is liable in damages to his client for neglecting to obey instructions to register a judgment and thereby precluding the client from recovering the amount of his judgment debt. *John Roland Hett* v. *Pun Pong*, 18 S.C.R. 290.

C. Dealings Between Solicitor and Client.

Contract between.]—There is no principle of law upon which any agreement, which a solicitor and client may choose to make, is to be set aside, if no deception is practised and no advantage taken, merely because of the existence of the relationship. The plaintiff, being unable to raise money to pay off a mortgage, applied to a solicitor, who, in consideration of the payment of certain interest and commissions, agreed to advance the necessary amount, and also to obtain time from the plaintiff's unsecured creditors, and took as security a conveyance of the equity of redemption in the mortgaged proportion, with a short period for redemption. It was held that in the absence of fraud and unfair dealing the transaction must stand. *Bell* v. *Cochrane*, 5 B.C.R. 211.

IV. COSTS.

A. Agreements as to.

Fees—Charge of a lump sum—Yukon advocate.]—Plaintiffs, advocates in the

Yukon, sued 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 10 per cent. if collected by them:—Held, per Drake J., that by Yukon law an advocate cannot legally obtain a lump sum for professional services except 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.

B. Recovery.

1. Settlement—Collusion.] — Defendant after service of a writ claiming $152.16, settled with plaintiff personally by payment of $60, taking a receipt in full. Plaintiff's solicitor, being unaware of the settlement, signed judgment for the full amount and costs. Upon motion by the defendant, to set aside the judgment as a breach of the settlement:—Held, that as there was no release under seal of the balance of the debt, or consideration for the agreement to accept a part in full discharge, the plaintiff was entitled to maintain the judgment. The plaintiff consenting to accept the amount of the settlement:—Held, that the plaintiff's solicitor had a right to maintain the judgment as to his costs, and the judgment was allowed to stand for the amount of the settlement and costs. *Soder* v. *Yorke*, 5 B.C.R. 133.

2. Settlement behind solicitor.]—Where a defendant in good faith settles an action with the plaintiff in such a way as to deprive the plaintiff's solicitor of his costs, such solicitor is not entitled to leave to proceed with the action for the recovery of his costs. *Rideout* v. *McLeod*, 6 B.C.R. 161.

SPECIAL JURY.

See JURY.

SPECIFIC PERFORMANCE.

I. IN GENERAL, 926.
II. OF WHAT AGREEMENTS, 926.
III. VENDOR, WHEN ENTITLED TO, 926.
IV. DEFENCES, 927.
A. Statute of Frauds, 927.
B. Delay, 928.
C. Misrepresentation, 929.
D. Mistake, 929.
E. Uncertainty, 930.
F. Breach of duty, 930.
G. Agency, 930.
H. Doubtful title, 931.
I. Ratification, 931.
V. INQUIRY AS TO TITLE, 931.

I. IN GENERAL.

Remedies.]—A party to a contract cannot be decreed, uno flatu, both specific performance and rescission, and where he obtains rescission he cannot have damages, which are only given in lieu of specific performance. *Smith* v. *Mitchell*, 3 B.C.R. 450.

II. OF WHAT AGREEMENTS.

Consideration of marriage.] — A contract by a woman, in consideration of marriage, to make her husband sole heir, will be specifically enforced, notwithstanding that she has subsequently disposed of her estate by will to the exclusion of her husband. *Raser* v. *McQuade*, 11 B.C.R. 161.

III. VENDOR, WHEN ENTITLED TO.

1. Title.]—It is not necessary, in an action for specific performance, that the vendor should have title at the time of the contract if he can procure a grant in fee from the owner to the purchaser. *Foot* v. *Mason*, 3 B.C.R. 377.

2. Title.]—Where the purchaser at the time of the contract knew that the vendor had not then title to the lands, but had contracted to buy them, and was entitled to call for a conveyance on payment of the purchase price, the vendor was held to be entitled to a reasonable time to make a good title. *Williams* v. *Wilson*, 3 B.C.R. 613.

3. Lis pendens.]—Under an open contract, where the purchase price is payable by instalments, the purchaser may require the vendor to show a good title before payment of the first instalment. A lis pendens filed against land is a cloud on the title which the purchaser has the right to have removed. *Townend* v. *Graham*, 6 B.C.R. 539.

IV. DEFENCES.

A. Statute of Frauds.

1. Part performance.]—B., a resident of British Columbia, wrote to his sister in England that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders, and my relations would get nothing." On hearing the contents of these letters, T., a son of B.'s sister, and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you, and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram, which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd.) B." Under these circumstances T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death:—Held, affirming the judgment of the Court below, that as there was no agreement in writing for the transfer of the property to T., and the facts shown were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Thomas Turner and Alice Turner* v. *James Charles Prevost*, 17 S.C.R. 283.

2. Misdescription—Falsa demonstratio.]—B., on behalf of D., negotiated with C. for the purchase of C.'s property on the N.W. 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 reformed 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*, 10 B.C.R. 493; 35 S.C.R. 282.

B. Delay.

1. Unreasonable delay.]—In a proceeding to enforce specific performance by the Crown, unreasonable delay on the part of the petitioners is fatal to the application. *Peck* v. *Regina*, 1 B.C.R., Pt. II., 11; 1 M.M.C. 13.

2. Dishonest delay.] — Where the purchaser in a contract for the sale of land, under which the purchase price is payable by instalments, wilfully neglects to pay the instalments as they become due, and holds off with the intention of paying if the market for land appears promising, and of abandoning the contract if the market price of land should fall, the Court will not decree specific performance, though it may relieve against the forfeiture of that part of the purchase price already paid. *Verma* v. *Donahue*, 18 B.C.R. 468.

3. Innocent delay.] — Defendant purchased from plaintiff Company certain lands for the sum of $75,000, of which $2,000 was paid on execution of the agreement, and of the further instalments, the first was to be $5,000, and interest, on the 14th of June, 1910. Time was of the essence of the agreement, and it was provided that on default in payments, forfeiture should ensue. In addition to the land, defendant also purchased certain personal property on the premises, and, before the first instalment of $5,000 was due, expended some $3,000 in improvements. Defendant, when the instalment fell due, requested grace, and was granted until the 7th of July. He did not then pay, but asked that forfeiture proceedings be suspended until he had had time to

have an interview with the Company. On the 9th of July the plaintiff Company declared the contract terminated, and three days later sold at an advance of $25,000:—Held, that the plaintiff was entitled to relief against forfeiture and to specific performance. *The British Columbia Orchard Lands, Limited* v. *Kilmer*, 17 B.C.R. 230; 1913, A.C. 319.

C. Misrepresentation.

1. Inducement.]—A defendant may successfully resist specific performance by proving that the plaintiff has not fulfilled some material representations, as to his future plans or acts, made by the plaintiff at the time of, and as an inducement to the contract. *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.*, 12 B.C.R. 433; 39 S.C.R. 169.

2. Failure to carry out representations.]—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, that the plaintiff company having failed to carry out some of the material representations made by its agent at the time of and as an inducement to the defendant to enter into the contract, specific performance would be refused. *The Crow's Nest Pass Coal Company, Limited* v. *Mills*, 12 B.C.R. 402.

D. Mistake.

1. Minerals, reservation of.] — A contract for the sale of land containing no reservation of the minerals thereunder, made by the agent of the vendor, who also receives a deposit on account of the purchase price, but who had in fact instructions to reserve the minerals out of the contract, will be specifically performed, where the mistake is only unilateral. *Hobbs* v. *Esquimalt and Nanaimo Railway Co.*, 6 B.C.R. 228; 29 S.C.R. 450.

2. Sale by executors.]—The executors of a deceased were authorized by will to sell such portion of the realty as they in their discretion should think necessary to pay off a mortgage and such debts as the personalty would not discharge. They offered for sale at auction a lot described as 60 acres (more or less), of a particular section, giving the boundaries on three sides; the lot was unsurveyed and was offered for sale by the acre at an upset price of $35. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchasers. S. purchased the lot for $36 an acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity alleging that only some $2,000 was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered by S.:—Held, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity. *Sea* v. *McLean*, 1 B.C.R., Pt. II., 67; 14 S.C.R. 632.

E. Uncertainty.

Vague words.]—A promise in regard to land that the promiser would "make (the purchaser), a profit of $30,000 within sixty days or take the property himself," is too uncertain to be enforced. *Fletcher* v. *Holden*, 19 B.C.R. 567.

F. Breach of Duty.

Fiduciary relationship.] — Where an intending purchaser by disguising his intentions under a role of disinterested friendship imposes on the confidence thus established and induces the owner of land to accept an offer for the purchase of it which would otherwise probably not have been accepted, without independent investigation, specific performance of the contract will not be granted. *Henderson* v. *Thompson*, 41 S.C.R. 445.

G. Agency.

Lack of authority.]—Where a contract to sell land is made by an agent specific performance will not be decreed in the absence of any proof of authority of the agent to sell the lands of the defendant. *The Elk Lumber Co.* v. *The Crow's Nest Pass Coal Co.*, 12 B.C.R. 433; 39 S.C.R. 169.

H. Doubtful Title.

Construction of doubtful will—Rule in Shelley's case.] — By the terms of the whole will 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 on the devisee:—Held, that 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*, 8 B.C.R. 89.

I. Ratification.

Waiver of defences.] — Where, in an action for specific performance, it appears that the vendor, after deliberation, had demanded of the purchaser that he carry out the contract in question, he (the vendor), cannot then plead inadequacy of consideration or unfair dealing on the part of the purchaser when the contract was entered into. *Baxter* v. *Bradford*, 18 B.C.R. 369.

V. Inquiry as to Title.

Waiver of right to.]—The mere fact that the purchaser has improved the property does not per se constitute a waiver of his right to an inquiry as to title. *Townend* v. *Graham*, 6 B.C.R. 539.

STATUTES.

I. Effect of Formal Parts, 932.
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I. Effect of Formal Parts.

A. Interpretation Clause.

1. Construction of—Whether can be assisted by definition of same words in another statute.] — The interpretation of general terms in a statute cannot be assisted by reference to the interpretation clause in another statute, by which the same terms are in it given a special construction. *Bainbridge* v. *The Esquimalt & Nanaimo Railway*, 4 B.C.R. 181; 1896, A.C. 561.

2. Definition.] — Where a disorderly house is defined by the Statute, its definition by the common law must be disregarded. *In re Farquhar Macrae*, 4 B.C.R. 18.

3. Definition.]—Unless specially so provided, the word "person" does not include a firm. *In re Wah Yun & Co.*, 11 B.C.R. 154.

4. Public or private.]—An Act is not a public one because it contains a clause to that effect and is placed among public acts in the statute book. *First of May Mining Co.* v. *Cariboo Gold Fields, Ltd.*, 2 M.M.C. 292.

B. Coming into Force.

Subject to proclamation — Lieutenant-Governor.]—The Fire Insurance Policy Act B.C. 1893, providing statutory conditions, was passed subject to a provision that "This Act shall not come into force until a day to be named by the Lieutenant-Governor-in-Council." The Lieutenant-Governor-in-Council named 1st November, 1893, and advertised the same in the "Gazette," but before that date published a further notice, and afterwards further notices, postponing the day for the Act to come into force until a date after that of the making of the policy in question:—Held, that the Lieutenant-Governor-in-Council was the delegate of the Legislature for the purpose only of proclaiming the Act in force, and upon his doing so the Act came into operation, and he was functus officio and could not afterwards postpone the date. *Cope & Taylor* v. *Scottish Union Co.*, 5 B.C.R. 329.

II. Construction.

A. In General.

1. Meaningless.] — The Court will not hold any legislation to be meaningless or absurd, unless the language is absolutely

intractable. *Esquimalt Water Works Co.* v. *City of Victoria*, 10 B.C.R. 193.

2. Previous legislation.]—In construing the Mineral Act and its amendments, the language of the particular enactment governing the question under consideration should be taken and read in connection with the other language of the same statute, in its natural significance, and effect should be given thereto notwithstanding the way in which the subject matter has been dealt with previously by the Legislature. *Spruce Creek Power Co.* v. *Muirhead*, 11 B.C.R. 68.

3. Derogating from rights of others.]—A right granted by a statute, which does not in express terms, derogate from the rights of others, cannot be held to have done so by implication. *Columbia River Lumber Co.* v. *Yuill*, 2 B.C.R. 237.

4. Schedule.] — Words printed in a schedule to an Act of Parliament, and which appear to contradict the meaning of the Act, are to be rejected. *Houghton's Case*, 1 B.C.R., Pt. I., 89.

5. Repugnancy between statutes of the same year.]—Where there is a repugnancy between two statutes of the same year, the former must prevail. *Stewart* v. *British Columbia Electric Railway Company*, 16 B.C.R. 374; 1913, A.C. 816.

6. Firm.]—Unless specially so provided, the word "person" does not include a firm. *In re Wah Yun & Co.*, 11 B.C.R. 154.

B. Constitutionality.

1. When in question.] — The constitutionality of a statute will only be considered, when it is necessary for the decision of a question before the Court. *In re Dickinson*, 2 B.C.R. 262.

2. Presumption of validity.]—It must be presumed that the Legislature contemplated only subjects intra vires of its powers. *Scott* v. *Scott*, 4 B.C.R. 316.

C. General Words.

1. In statutory grant.] — A statutory grant of lands, "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein and thereunder," does not include the precious metals. The interpretation of general terms in a statute cannot be assisted by reference to the interpretation clause in another statute by which the same terms are in it given a special construction. Under sec. 95 of the Crown Lands Act, 1888, all lands in the province, both public and private, are subject to the right of entry by free miners to search for the precious metals, subject to the conditions precedent contained in the Placer Mining Act, 1891, c. 26. *Bainbridge* v. *The Esquimalt and Nanaimo Railway*, 4 B.C.R. 181; 1896, A.C. 561.

2. Creating an offence — Exemption from — Game Protection Act, 1895.]—The existence of an exception nominated in the description of an offence created by statute, must be negatived in order to maintain the charge, but if a statute creates an offence in general with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso. The generality of the prohibition contained in the statute (sec. 7) against purchasers having in possession with intent to export, causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province. *Regina* v. *Strauss*, 5 B.C.R. 486.

D. Ejusdem Generis.

1. Ascertainment of object of statute.]—The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being ejusdem generis with things specified therein "and others," is to look to the object or mischief aimed at by the statute. All similar things that come within that object, though not in the abstract ejusdem generis, are so for the purposes of the statute. *Regina* v. *Mee Wah*, 3 B.C.R. 403.

2. Reference to category.]—Under sec. 100 of the Forest Act "all timber cut on certain areas shall be used in this Province or be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber." The plaintiff company manufactured in their mill cedar blocks for export to the United States, where they were made into shingles. The blocks were 16 and 24 inches long, consisting of a section of a tree or log sawn squarely at each end and also sawn longitudinally so as to present a number of even surfaces of varying widths, a small arc only of the original circumference of the log being in evidence. These blocks were seized by the officers of the Department of Lands in course of tran-

sit out of the Province in contravention of the Act:—Held, that the ejusdem generis rule of construction should be applied in this case as the particular items, "boards, deal, joists, lath, shingles," fall within the class or category of "finished product." The term "finished product" is the category within which the general phrase "or other sawn lumber" must be confined. The cedar blocks, not being a "finished product," did not fall within the general phrase. The seizure, therefore, was justified. *The Excelsior Lumber Company, Limited* v. *Ross*, 19 B.C.R. 289.

E. General and Special Acts.

1. Conflict between special and general Acts.]—Wherever there is a particular enactment and also a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative to the exclusion of the other. *Bailey* v. *Vancouver Corporation*, 4 B.C.R. 433.

2. Conflict between agreement and statute.] — Where a railway company entered into an agreement with a municipal corporation and subsequently a statute was passed dealing with the same subject matter, and a clause in the agreement was repugnant to a clause in the statute, it was held that the latter must prevail. *City of Victoria* v. *British Columbia Electric Railway Company*, 15 B.C.R. 43.

3. Abrogation.]—A general later statute, and a fortiori a statute passed at the same time, does not abrogate an earlier special act by mere implication. *Bailey* v. *City of Vancouver*, 25 S.C.R. 62.

F. Retroactivity.

1. Enactments Relating to Procedure.

1. Rules of Court.]—The amendment of June 15th, 1900, to Order LXI., r. 3 of the Rules of 1890, is retroactive. *Bank of British Columbia* v. *Trapp*, 7 B.C.R. 354.

2. Taxation of costs.]—The introduction by statute of a new scale for the taxation of costs is legislation relating to procedure, and therefore retrospective. *Youdall* v. *Douglas*, 2 B.C.R. 342.

3. Time for appealing.]—The provision, regulating the time for appealing from interlocutory orders, contained in the Supreme Court Act Amendment Act, 1899, is not retrospective. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 480.

4. Right of appeal.]—Statutes affecting the right of appeal are not statutes relating to procedure and are not retroactive. *The Koksilah Quarry Co.* v. *Reg.*, 5 B.C.R. 600.

5. Right of appeal.]—An Act conferring a new right of appeal does not apply to a case tried before the Act came into force and decided afterwards. *Canadian & Yukon, etc., Co.* v. *Casey*, 7 B.C.R. 373.

6. Right of appeal.]—An Act conferring a new right of appeal applies to an action pending when the Act came into force, but tried and decided afterwards. *Courtnay* v. *Canadian Development Co.*, 7 B.C.R. 377.

7 Mineral Act.]—Sec. 11 of the Mineral Act Amendment Act, 1898, providing that each party shall give affirmative evidence of his title, applies to proceedings commenced before the passing of the Act. *Schomberg* v. *Holden*, 6 B.C.R. 419.

8. Method of taxation.] — Legislation affecting the method of levying a tax is legislation affecting procedure and has a retroactive effect. *Murne* v. *Morrison*, 1 B.C.R., Pt. II., 120.

2. Substantive Enactments.

1. Immigration.] — Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he travelled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law:—Held, that the Act was not retrospective in this regard and did not apply; and as the old Act contained no provision for the deportation of such a person, he could not be deported thereunder. *In re Rahim*, 16 B.C.R. 469.

2. Railway Act.]—The provisions of the Railway Act (R.S.B.C. 1911, c. 194, sec. 157), whereby the company are bound to provide a crossing where land is severed by the railway are not retrospective. *Hounsome* v. *Vancouver Power Co.*, 18 B.C.R. 81.

3. Unlicensed company's right of action.]—Where an extra-provincial company, commenced an action on a contract, which was held to constitute a carrying on

of business within the statutory prohibition, having obtained a license before the commencement of the action, but after the performance of the contract, and subsequently an Act was passed providing that upon the granting of a license, any action might be maintained as if such license had been granted before the institution of the action, the proceedings by the company were held not to be validated, as the ex post facto legislation was not retroactive. *Komnick Brick Co.* v. *British Columbia Pressed Brick Co.*, 17 B.C.R. 454.

4. Repeal.]—An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R.S.C., c. 164, sec. 58, which was not re-enacted by the Criminal Code:—Held, that the alleged crime, having been committed before the code came into force, was not affected by its provisions. *Major* v. *McCraney*, 5 B.C.R. 571; 29 S.C.R. 182.

G. Imperative or Directory.

1. Performance of judicial act—"may."]—In a statute providing that the Court may perform a judicial act for the benefit of a party under given circumstances, the word "may" is imperative. *Fenson* v. *City of New Westminster*, 5 B.C.R. 624.

2. Indorsement of names of witnesses.]—The provisions of sec. 645 of the Criminal Code, that the names of all witnesses examined by the grand jury be indorsed on the bill of indictment are directory only. *R.* v. *Holmes*, 9 B.C.R. 294.

3. Statements before justices.]—The provisions of the Administration of Justice Act (11 and 12 Vict., c. 42, sec. 18), relating to the cautioning of the accused before his making a statement are directory only. *R.* v. *Kalabeen*, 1 B.C.R., Pt. I., 1.

III. Conflict Between Public Statutes.

Statutes of same year.]—Where there is a repugnancy between statutes of the same year, the statute later in date must prevail. *British Columbia Electric Railway Co.* v. *Stewart*, 1913, A.C. 816.

IV. Penal Acts.

1. Coal Mines Regulation Act.]—The Coal Mines Regulation Act, by sec. 4, provided: "No boy under the age of twelve years, and no woman or girl of any age, should be employed in or allowed to be for the purpose of employment in any mine to which this Act applies below ground." By sec. 12, if any person contravenes or fails to comply with, etc., "any provision of this Act with respect to the employment of women, girls, young persons, boys or children, he shall be guilty of an offence against this Act." By sec. 95, "every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is the manager, $100." In 1890, sec. 4 was amended by inserting the words, "and no Chinamen" after the word "age." The defendant was convicted before two justices of the peace of having employed a Chinaman in a coal mine under ground, and was fined $100. Upon application for certiorari to quash the conviction:—Held, that a contravention of the amendment to sec. 4, prohibiting the employment of Chinamen was not made an offence under the Act for which any penalty is imposed, and that the penal Act should not be extended beyond the reasonable construction which the words used would bear. The Interpretation Act, sec. 8, sub-sec. 21, providing that "any wilful contravention of any Act which is not made an offence of some kind shall be a misdemeanor and punishable accordingly," did not assist the conviction. *Regina* v. *Little*, 6 B.C.R. 78.

2. Policy and object of Legislature.]—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 harmonizes 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. *McGregor* v. *The Canadian Consolidated Mines, Limited*, 12 B.C.R. 116; 2 M.M.C. 428.

V. Local and Personal Acts.

1. Recitals.]—The statement in the Vancouver Incorporation Acts which are private in their nature, that certain land was a "Government Military Reserve," is not conclusive on the Crown in right of the province. *The Attorney-General of British Columbia* v. *Ludgate and the Attorney-*

General of Canada. Deadman's Island Case, 8 B.C.R. 242.

2. Authorizing municipality to make bye-laws — Construction of — Bye-laws beyond terms of statute ultra vires.]—The Municipalities Act, 1881, authorized municipalities to make bye-laws inter alia "to regulate the erection of wooden buildings notwithstanding any Act or law in force in the province." The municipality assumed thereunder to pass a bye-law that "no wooden buildings within the fire limits shall be altered without the written permission of the inspector and the majority of the fire wardens":—Held, on motion to quash a conviction under this bye-law, the statute contained no authority for regulating alterations, but only original erection of buildings. *Regina* v. *On Hing,* 1 B.C.R., Pt. II., 148.

VI. Effect of One Act on Another.

Imperial Act.]—20 and 21 Vict. c. 43 (Imp.), giving the power to a magistrate exercising summary jurisdiction under Jervis' Act, to state a case for the opinion of the Superior Court, is not provided for or inconsistent with Can. Stat. 37 Vict., c. 42, and is not repealed by sec. 7 thereof. *Regina* v. *Ah Pow,* 1 B.C.R., Pt. I., 147.

See Inheritance Act.

See Interpretation Act.

See Island Railway Act.

See Master and Servant.

See Metalliferous Mines Act.

See Mines and Minerals.

See Railway.

See Vancouver Island Settlers Rights Acts.

See Waters and Water Courses.

STATUTE OF FRAUDS.

See Contract.

See Specific Performance.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

SUBMISSION.

See Arbitration.

SUMMARY JURISDICTION.

See Criminal Law.

STENOGRAPHER.

Refusal of—To furnish transcript of notes.]—A person who undertakes to act as Court stenographer cannot refuse to furnish parties to a suit with a transcript of his notes merely because his fees have not been paid by the Crown. *Pender* v. *War Eagle,* 6 B.C.R. 427.

SUCCESSION DUTY.

I. In General, 940.
II. In Respect of What Property, 940.
III. As to Beneficiaries, 941.
IV. Rate of, 941.

I. In General.

Validity of tax.]—The tax imposed by the Succession Duty Act is not an indirect tax and the Act is within the powers of the Provincial Legislature. The impost is laid expressly upon the property passing on death, and there is no legal obligation to pay the duty imposed upon any person or persons other than the beneficiaries, and even as them the liability is only inferential, or arises under an order of the Court made in the course of the enforcement of the charge upon the property. *In re Doe,* 19 B.C.R. 536.

II. In Respect of What Property.

1. Life policy — Beneficiary domiciled in British Columbia.]—The proceeds of a life policy payable at death without the province are not liable, in the hands of a beneficiary domiciled in the province, to succession duty under R.S.B.C., c. 175. *Re Templeton,* 6 B.C.R. 180.

2. Money on deposit in bank by foreigner—Revenue—B.C. Stat. 1899, c. 68, sec. 4]—Succession duty is payable upon money, on deposit in a bank in this province, belonging to a person domiciled in a

foreign country at the time of his death. *In re Scott McDonald,* 9 B.C.R. 174.

III. As to Beneficiaries.

Amount payable by half-sister of testator.] — The words "sister of the deceased," in sub-sec. 4 of sec. 2 of the Succession Duty Act Amendment Act, of 1889, include a half-sister. *In re Oliver,* 8 B.C.R. 91.

IV. Rate of.

Principle of calculation — B.C. Stat. 1899, c. 68.]—Under sec. 4 of the Succession Duty Act, where the aggregate value of the property exceeds $200,000, only the excess over that amount is subject to a duty of $5 for every $100 of the value. *In re Todd; Todd* v. *Todd,* 7 B.C.R. 115.

SUNDAY.

1. Vancouver Incorporation Act—Barber shops — Keeping open on.]—The Vancouver Incorporation Act, 1900, empowered the city to pass a bye-law to prohibit "the keeping open of barber shops on Sunday," and the city thereupon passed a bye-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. Appellant was charged with an offence under the bye-law, and before the magistrate he admitted he had shaved customers on Sunday, and the magistrate thereupon convicted him of having "kept open":—Held, allowing an appeal, that a barber by shaving customers on a Sunday does not necessarily "keep open":—Held, also, that the city had no power to pass a bye-law prohibiting a barber from exercising his trade or calling on Sunday. *Re Lambert,* 7 B.C.R. 396.

2. Vancouver Incorporation Act—Sale of personal property on—Selling fruit.]—The Vancouver Incorporation Act, 1886 (private), as amended by Stat. British Columbia, 1886, c. 68, sec. 18, gave the municipal council of the city power to pass bye-laws: "For the prevention of sales . . . of any . . . personal property whatsoever, except . . . milk, drugs or medicine . . . on Sundays." The city passed a bye-law prohibiting the sale on Sundays in the city of any personal property with the exceptions mentioned in the statute. Upon appeal by defendant from a conviction under the bye-law for selling fruit on a Sunday:—Held, 1. That the Provincial Legislature having power to deal with the subject, it was no objection that the provision was inconsistent with the Lord's Day Act, 29 Car. II., c. 7. A bye-law cannot be successfully attacked upon the ground of unreasonableness where its provisions are in the terms of the enabling statute, for the objection is then to the unreasonableness of the statute. *Regina* v. *Petersky,* 4 B.C.R. 385.

3. Imperial Acts — Provincial and Dominion legislation.]—The prohibition of 29 Car. II., c. 7, against the pursuit of their ordinary callings by tradesmen on the Lord's Day, and the exposure of merchandise for sale was, under the English Law Ordinance, 1867, in force over the whole of British Columbia at the time of Confederation. The Sunday Observance Act, Consolidated Statutes of British Columbia, 1888, c. 108, by which the application of the Imperial Act was limited, is ultra vires. The effect of sec. 16 of the Dominion Lord's Day Act, Revised Statutes of Canada, 1906, c. 153, was to leave any valid Provincial law in force. It did not adopt or confirm any ultra vires legislation. If the revised statute of 1911 (Sunday Observance Act) is not to be regarded as new legislation, but as the old consolidated Act of 1888, being carried on in subsequent revisions, the case is governed by the Imperial Acts which were introduced by the English Law Ordinance of 1867; if, on the other hand, the revised statute of 1911 is to be regarded as new law, enacted after the passage of the Dominion Act, then the case is governed by the general prohibition contained in sec. 5 of the Dominion Act: and in either event, speaking generally, a tradesman who sells his wares on Sunday violates the law. *Rex* v. *Laity,* 18 B.C.R. 443.

4. Excepted employments — Emergency.]—In dealing with cases of labour on board ships, the word "emergency," as applied in the Lord's Day Act, must be given a liberal, elastic meaning, as such labour is dependent on wind, weather and tide. In this case, plaintiff having expressly undertaken employment which necessitated work on Sunday, he could not come to the Court for relief when he had deliberately disobeyed the lawful commands of the ship's

officers. *Murray* v. *The Coast Steamship Company; Linden* v. *The Coast Steamship Company*, 17 B.C.R. 469.

See CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS.

SUPREME COURT REFERENCE ACT.

1. "Court" — "Judge" — Reference to particular judge—Whether authorized by statutory power to refer to the Supreme Court.]—By the Supreme Court Reference Act, 1891, sec. 1, "The Lieutenant-Governor-in-Council may refer to the Supreme Court of British Columbia, or to a Divisional Court thereof, or to the Full Court, for hearing and consideration, any matter which he thinks fit to refer, and the Court shall thereupon hear and consider the same." Under this statute the Lieutenant-Governor-in-Council assumed to refer a certain question and issue "to the Honourable Mr. Justice Drake for decision and report." On appeal to the Full Court from the report of Mr. Justice Drake:—Held, that there was no power to refer otherwise than to the Supreme Court, and that the proceedings appealed from before Mr. Justice Drake were coram non judice. *Re Horsefly Mining Co.*, 4 B.C.R. 165.

2. Appeal—Jurisdiction.]—The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a Provincial Court upon a reference made by the Lieutenant-Governor-in-Council upon a Provincial statute authorizing him to refer to the Court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the Court. *Union Colliery Co. of British Columbia* v. *Attorney-General of British Columbia*, 27 S.C.R. 637.

TAXATION.

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I. POWERS OF TAXATION: WHAT TAXABLE.

A. In General.

1. Taxes on Property Acts—Construction of.] — On the construction of the Taxes on Property Acts, 1876, 1877, 1878, 1879, 1880:—Held, (1) Land contracted to be purchased from the Crown, but only part paid for, and in respect of which no Crown grant has issued, is taxable under the Act of 1876, sec. 8. (2) The surcharge of 25 per cent. interest on unpaid taxes is unconstitutional and void. (3) The affidavit required by sec. 40 as to the correctness of the roll extends to all lands taxed, whether belonging to resident or to non-resident taxes. (4) Such last mentioned affidavit, and also the certificate of the clerk of the Court of Revision that the roll has been finally passed, are not merely directory, but precedent and obligatory provisions, and without them no tax is so imposed on the land as that it can be levied by forced process. (5) The Act of 1876, sec. 12, authorized "The Lieutenant-Governor-in-Council from time to time to appoint one or more person or persons to be assessors in each district for the purposes of the Act." The Provincial Secretary reported to the Executive Council, sitting as a committee without the Lieutenant-Governor, that it would be expedient to appoint H. to be assessor in New Westminster District. The committee adopted the report, recommended it to the Lieutenant-Governor for his approval. The Lieutenant-Governor subsequently approved of the report (how or when did not appear), but nothing further was done:—Held, that such approval was not an "appointment" within sec. 12 so as to bring a sale by H. within the protection of 1880, sec. 30, as being a sale by "a person duly authorized to collect and enforce payment of taxes." The provisions of these Acts are to be construed strictly and followed strictly. The principle

laid down by Mr. Justice Shaw in *Torrey* v. *Milbury*, 21 Pick. 64, approved, viz.: "All measures intended for the security of the subject, for securing equality of taxation, are conditions precedent; and if they are not observed, the subject is not legally taxed." *Murne* v. *Morrison*, 1 B.C.R., Pt. II., 120.

2. Wild land — Assessment — Uniform rate.]—In assessing 500,000 acres of wild land consisting largely of inaccessible mountains and valleys the assessor acted on instruction received from the Provincial Assessment Department and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken and an average value of 45 cents per acre was fixed. An appeal was taken to the Full Court on the grounds that the valuation was too high, and that so far as some of the lands were concerned, they were exempt from taxation under the Company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—Held, per Drake, J., that as some of the land was of some value and some of it of no value, the fixing of a uniform rate was not a compliance with sec. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. Per Irving, J.: The evidence did not enable the Court to form any opinion as to the value of the land within the meaning of sec. 51, and as the assessment was improperly levied at the outset the Court should simply declare that there was no proper assessment in respect of which an appeal will lie:—Held, also, that by the operation of sec. 3 of the Amending Act, with respect to all the lands granted to the company, the exemption from taxation confered by sec. 7 of the Subsidy Act expired with the expiration of the period of ten years, beginning with 8th April, 1893, and that, therefore, the lands claimed to be exempt were assessable. *In re The Assessment Act and the Nelson and Fort Sheppard Railway Company*, 10 B.C.R. 519.

B. Equality: Uniformity: Discrimination.

Discriminating against a class unconstitutional.]—Sec. 14 of the Chinese Regulation Act, 1884, providing "no free miner's certificate shall be issued to any Chinese except on payment of fifteen dollars," the fee for such certificate for other classes being five dollars, was unconstitutional, as imposing an unequal and differential tax on a class. *Regina* v. *Gold Commissioner of Victoria District*, 1 B.C.R., Pt. II., 260.

C. Land Tax.

1. Land contracted to be purchased from the Crown.]—On the construction of the Taxes on Property Acts, 1876, 1877, 1878, 1879, 1880:—Held, land contracted to be purchased from the Crown, but only part paid for, and in respect of which no Crown grant is issued, is taxable under the Acts of 1876 and 1878. *Murne* v. *Morrison*, 1 B.C.R., Pt. II., 120.

2. Statutory declaration of title.]—H. entered into an agreement on February the 11th, 1898, to sell to A. and S. all the stock and bonds in a Railway Company, including the land grant, subject to a proviso that A. and S. would, on the completion of the sale, cause a formal instrument to be executed by the Railway Company, in such form as H. might reasonably devise and present for that purpose, showing that H. was entitled to an undivided one-half interest in the land grant. The instrument aforesaid was never presented by H. for execution. Later, in an action for partition, in which A. and S. and the Railway Company were plaintiffs and H. was defendant, the Supreme Court of Canada held that under the agreement H. acquired neither a legal nor an equitable interest in the lands in question. Subsequently the Government agreed, by instrument in writing, dated the 31st of January, 1912, to repurchase the lands from the Railway Company, which agreement was ratified, confirmed and embodied in an Act of Parliament (c. 37, B.C. Stats. 1912). The agreement recited that H. had become entitled to a one-half interest in the said lands under the agreement of 1898, first referred to. Under subsec. (2) of sec. 5 of the Taxation Act Amendment Act, 1913, H. was assessed for an undivided one-half interest in said lands. On appeal to a special Court of Review it was held that the interest acquired by H. in the land in question under the agreement of 1898 was subject to taxation under said statute:—Held, on appeal, that by the recitals in the agreement of the 31st of January, 1912, which is embodied in the Railway Subsidy Lands Repurchase Act, supplemented by certain operative declarations in the covenants therein contained,

the Legislature has declared that H. is entitled to an undivided one-half interest in the land grants in question, which must be given effect to by the Court, rendering his interest liable to assessment. *In re Assessment Act and Heinze, (No. 1)*, 20 B.C.R. 99.

D. Income Tax.

1. Income.]—On the true construction of the Assessment Act (R.S.B.C. 1897, c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious, whatever may be the principle or basis of calculation. *Attorney-General of British Columbia* v. *Ostrum*, 1904, A.C. 144.

2. Net income.]—The "income" made liable to taxation eo nomine by the Assessment Act, C.S.B.C. 1888, c. 111, sec. 3, means net income. *In re Marquis of Biddle Cope*, 5 B.C.R. 37.

3. Income of locomotive engineers.]—The earnings of railway locomotive engineers, who receive pay according to the number of miles they run their locomotives, are "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and so liable to taxation. *In re The Assessment Act*, 9 B.C.R. 60.

4. Income of locomotive engineers.]—The earnings of railway locomotive engineers, who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and are therefore not liable to taxation. *In re The Assessment Act*, 9 B.C.R. 209.

5. Ore treated by company.] — The respondent Company operated a smelter in which it treated the ores of its own mine, the Mother Lode, and also ores of other mines which were called custom ores. During the years 1902-07 the Company did not make any return of income, and the assessor having received certain information with regard to the Company's profits, assessed it for a sum of between $700,000 and $800,000 during the period mentioned. The Company appealed from this assessment, and a Court of Revision and Appeal levied upon only $249,000 for income. Under the provisions of the Assessment Act, 1903 (Form 9), the Company was entitled to deduct from its gross income "loss and bad debts arising out of the business from which (the) income is derived, irrecoverable and actually written off during the year, but not otherwise," and under this there was deducted the loss which the Company sustained in treating its own ores. By sec. 10 of the Assessment Act, as enacted by sec. 5 of c. 38, 1900, a tax of two per cent. is levied on the assessed value of ore or mineral bearing substances obtained from land and which have been sold or removed from the land, but ore-bearing mines not yielding $5,000, and placer or dredging mines not producing a gross value of $2,000 per annum, are entitled to a refund of half the tax in the case of ore producing mines, and the whole of the tax in the case of placer or dredging mines. This tax is in substitution for all taxes upon the land, and also all personal property used upon the mines, so long as the land and personal property are used in connection with the working of the mines. In arriving at his assessment, the assessor took the quarterly returns of the Company, made for the purposes of the mineral tax, in connection with their own mines and ore, and comparing these figures with the operating expenses of their own mines, it was found that their own ores were treated at a loss. The profit and loss statement showed a profit, and as the only other source of revenue was the treatment of custom ores, he claimed that the losses on the Company's operations with its own ore must have been met with the profits from custom ores, and he accordingly assessed the Company for income on the profit shown in its statement and on the deficit shown in the treatment of its own ores:—Held, on appeal, affirming the finding below, that the result of the Company's operations in the treatment of its own ores was "income" within the definition in the Act, and therefore was used in "producing or endeavouring to produce income during the year," thus coming within the class of deductions allowed by the Act. *In re British Columbia Copper Co.*, 16 B.C.R. 184.

6. Deductions.] — Form 1 of the schedule of forms to the Assessment Act, as enacted by c. 50 of the statutes of 1905, provides among the deductions permitted in making returns of incomes earned by banks: Losses written off during the year, such losses being written off within six months of the time they were ascertained, and not covering transactions antedating that date more than 18 months:—Held, on appeal,

reversing the decision of the Court of Revision, that, the enactment being doubtful as to whether the inception or completion of the transaction was meant, the doubt must be resolved in favour of the taxpayer. *In re Bank of Montreal,* 14 B.C.R. 282.

7. Deductions.] — By the Assessment Act (B.C. Stat. 1905, c. 2) it is provided that banks shall be taxed upon their actual gross income derived from business transacted within the Province, subject to certain deductions which are set out in Form 1 of the Act. Form 1 provides, inter alia, a deduction on account of outgoings or necessary expenses incurred and actually paid by the bank in the production of income. The Bank of Hamilton operates two branches in British Columbia, and there was charged as a deduction a certain sum which was ascertained by deducting four per cent. on the average of the weekly sums which, in the books of the head office, were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not show whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amount of money employed by the Bank in its banking business in British Columbia in obtaining income. The charge of four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the Bank, and one per cent. was a charge representing the general expenses of the Bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a considerable sum of money on which interest was paid by the Bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—Held, that had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that the said moneys had actually been employed in the British Columbia business, then the said three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction:—Held, also, that said deduction of one per cent. was rightly not allowed by the Court of Revision, as it included elements which did not properly enter into the computation of the statutory deductions. *In re Bank of Hamilton,* 12 B.C.R. 207.

E. Revenue Tax.

Canners furnishing tackle.] — Where canners furnish fishermen with fishing apparatus, but there is no agreement binding the fishermen to sell their catch to the canners, the latter are not liable for the revenue tax in respect of such fishermen. *Campbell* v. *United Canneries,* 8 B.C.R. 113.

F. Probate Fees.

Imposed by appendix to Supreme Court Rules.]—By r. 1065, the appendices to the Supreme Court Rules form part thereof, and by sec. 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.

II. Exemption.

A. In Respect of Persons.

Dominion official—Provincial tax on—Ultra vires.]—The imposition of a tax upon the income of a Dominion official is ultra vires of the Provincial Legislature. *Regina* v. *Bowell,* 4 B.C.R. 498.

B. In Respect of Subject-Matter.

1. Mortgages.] — Where the person of incidence was a company which took mortgages on lands in the Province and deposited such mortgages with bankers in England as security for moneys advanced to the company, giving debentures containing a specific charge on specific mortgages, and it was sought to tax it on the amount of the mortgages, the company was held to be entitled under the Assessment Act (C.S.B.C. 1888, c. 111, sec. 3, sub-sec. 19) to an exemption to the extent of the money so borrowed

on the security of the mortgages. *In re Yorkshire, etc., Co.*, 4 B.C.R. 258.

2. Taxes—Exemption — Esquimalt and Nanaimo Railway Act—"Sold or alienated."]—By Stat. B.C. 47 Vict., c. 14, sec. 22 (Esquimalt and Nanaimo Railway Act), certain lands acquired by the company for the construction of the railway "shall not be subject to taxation unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold, or alienated." In January, 1889, the Esquimalt and Nanaimo Railway Company, by agreement, gave to the appellant the right to enter and select 50,000 acres of the said lands, the appellant agreeing to pay $5 per acre in certain instalments, with interest, etc., the lands to be conveyed to the appellants as soon as the purchase money was fully paid, etc. The appellants had entered and surveyed the lands but never occupied the same, nor had they fully paid the purchase money. The Provincial Government assessed the lands for the purpose of taxation, and the Court of Revision confirmed the assessment:—Held, by the Full Court on appeal: That the Esquimalt and Nanaimo Railway Company had not "leased, sold or alienated" the lands within the meaning of the Act, and that the same were not liable to taxation. *Victoria Lumber Company* v. *The Queen*, 3 B.C.R. 16.

3. Railway lands—Alienation.]—By the Statute British Columbia, 47 Vict., c. 14 (Esquimalt and Nanaimo Railway Act), sec. 22, it was provided that certain public lands granted by the Act to the railway, in aid of its construction, "shall not be subject to taxation unless and until the same are used by the company for other than railway purposes, or leased, occupied, sold or alienated." In January, 1889, the Esquimalt and Nanaimo Railway Company, by agreement, gave to H. the right to enter and select 50,000 acres of the said lands, to be paid for at the rate of $5 per acre, in certain instalments, with interest, etc. H., in February, 1890, assigned all his interest under the agreement to the lumber company. The lands had been selected and surveyed, but the purchase money was not fully paid. The Provincial Government assessed the lands for the purpose of taxation, but the Court of Revision, upon the authority of *Victoria Lumber Company* v. *The Queen*, 3 B.C.R. 16, discharged the assessment:—Held, by the Full Court on appeal, that the question was not concluded by the *Victoria Lumber Co.* v. *The Queen, supra*, as counsel for the Crown in that case did not press the point involved. That the word "alienated," in view of the sense in which it is used throughout the Act, must be given a construction sufficiently wide to include such a transaction. *The Queen, appellant* v. *The Victoria Lumber and Manufacturing Company, respondents*, 5 B.C.R. 288.

III. Where Taxable: Situs.

Tax sale—Provincial assessor—Assessment Act.]—The City of Nelson was incorporated in March, 1897, and in September, 1898, lands situated therein were sold by the Provincial Assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—Held, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. *McLeod* v. *Waterman*, 10 B.C.R. 42.

IV. Assessment.

Insufficient evidence.]—Where land is assessed at an average value of so much per acre, and the evidence adduced does not enable the Court to form a proper opinion as to the value of the land, the assessment will be set aside. *In re Nelson and Fort Sheppard Railway Co.*, 10 B.C.R. 519.

V. Courts of Revision.

Jurisdiction.] — The jurisdiction of the Court of Revision is confined to the question whether the assessment was too high or too low. *Re Crow's Nest Pass Coal Company, Limited, Assessment*, 13 B.C.R. 55.

VI. Tax Sale.

A. Effect of.

Burden of proof of validity.]—A certificate of absolute title issued on the registration of a deed from the assessor of taxes issued to a purchaser at a sale for arrears of taxes does not of itself oust the prior registered owner of the land, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. *Kirk* v. *Kirkland*, 7 B.C.R. 12; 30 S.C.R. 344.

B. Action to Set Aside.

1. Arrears—Laches—Action for money paid to use of defendant.]—In 1876 M. pre-empted land in New Westminster district, and paid one instalment of the purchase money. The other instalment was payable on the 18th November, 1878. M. paid also the taxes for 1876, 1877 and 1878, but no further tax or instalment. The taxes for 1879 became delinquent on the 1st March, 1879. M. left the Province early in 1880, his address being wholly unknown. In December, 1879, the land was sold to W., by tax sale. Subsequently W. paid all arrears of taxes, and the balance of the purchase money, and in 1881 a Crown grant issued to him, and he entered, and improved and mortgaged the land. The Crown grant and mortgages were duly registered. In 1883 M. returned to the Province and claimed the land:—Held, that M., by his laches, has disentitled himself from sustaining such claim. The Crown had not declared M.'s first instalment forfeited, but had allowed W. the benefit of it:—Held, that M. might, under the prayer for general relief, recover the amount of such instalment as money paid for the use of W. *Moriarty* v. *Wadhams*, 1 B.C.R., Pt. II., 145.

2. Certificate of title based on — Whether ousts a prior certificate in hands of former owner or not—Land Registry Act.]—A certificate of title based on a tax deed does not, ipso facto, oust a prior certificate of title outstanding in the hands of a former owner, and the holder of such later certificate must affirmatively show the regularity of all the tax sale proceedings in order to make good his title. *Kirk* v. *Kirkland*, 7 B.C.R. 12; 30 S.C.R. 344.

C. Rights of Purchaser.

Lien for—Discharge of by tax sale.]—A sale of land for taxes under a bye-law passed pursuant to the Municipal Act, 1892, sec. 104, sub-sec. 115, exhausts the lien of the municipality upon the lands, for taxes, given by sec. 202 of the Act; and the purchaser at the tax sale takes the lands discharged of any lien in respect of taxes actually due at the time of the sale, over and above the taxes for which the land was sold. *Jamieson* v. *City of Victoria*, 6 B.C.R. 109.

D. Sale of Goods.

Notice—Lien.]—The provision in sec. 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser ab initio. Sec. 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under sec. 80. *The Canadian Canning Company, Limited* v. *Fagan and Foster*, 12 B.C.R. 23.

See MUNICIPAL CORPORATION.

See SUCCESSION DUTY.

TENANT.

See LANDLORD AND TENANT.

TENDER.

1. Evidence of, or dispensation with.]—Placing money to the credit of a solicitor in a bank, in a place where the solicitor resides, and notifying him thereof, does not constitute a good tender. Silence on the part of the solicitor is not a waiver. *Dunlop* v. *Haney*, 6 B.C.R. 185.

2. Coupled with condition.]—A profer of money accompanied by a statement that it is to be accepted in full satisfaction of the debt is not a good tender. *Wainwright* v. *Farmer*, 16 B.C.R. 468.

3. Defence of tender.] — Where the plaintiff sued for unliquidated damages, and defendants pleaded tender before action, and paid into Court a sum of money which the plaintiff accepted and obtained payment out upon an ex parte order:—Held, that the tender was of no value inasmuch as it was accompanied by a statement that it was to be accepted in full satisfaction, and that the defence of tender was improper. *Wainwright* v. *Farmer and Lindsay*, 16 B.C.R. 468.

TIMBER.

See PUBLIC LANDS.

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TORT.

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XII. STATUTORY DUTY, BREACH OF, 969.

I. IN GENERAL.

1. Committed abroad.] — In order to entitle a plaintiff to succeed in an action on a wrong committed in the State of Washington, it must be shown to be actionable in British Columbia as well. *Gillis Supply Co.* v. *C. M. & P. S. Ry. Co.*, 16 B.C.R. 254.

2. Contribution—Indemnity of innocent agent.]—Where an act is innocently done under the express direction of another, which occasions an injury to the rights of a third party, the principal must indemnify the innocent agent. *Victoria School Trustees* v. *Muirhead*, 4 B.C.R. 148.

II. PARTIES TO.

A. In General.

Successors in title to wrongdoer.]—A company is not liable for the tort of its predecessor in title unless it adopts it. Where a company, after taking over a mining property, discovers that certain ore lying on a dump and believed to be waste and of no market value was wrongfully taken by its predecessor, yet takes no steps to return it, but does not deal with it in any way, that is not an adoption of the conversion thereof by the original trespasser. *Centre Star Mining Co., Limited* v. *Rossland-Kootenay Mining Co., Limited*, 2 M.M.C. 232; 11 B.C.R. 231; 2 M.M.C. 271.

B. Principal and Agent.

Independent contractor.]—The defendant company, having become aware that the poles for an electric transmission line erected by them had become insecure, employed an independent contractor to strengthen the poles and to string wires upon them. The plaintiff, a linesman employed by the contractor, ascended a pole before it had been secured, without first having ascertained that it was safe for him to do so, in order to string wires upon it. The pole fell while he was at work upon it and he was injured:—Held, that the accident was the result of the default of the contractor in relation to the work he had undertaken in regard to the strengthening of the poles, and consequently the owners of the transmission line were not liable for the damages sustained by the plaintiff. *Velasky* v. *The Western Canada Power Co.*, 18 B.C.R. 407; 49 S.C.R. 423.

III. EFFECT OF DEATH.

A. Families Compensation Act.

1. Proof of Damage.

Reasonable expectation of benefit.]—In an action for damages resulting from the death of a workman, the employers admitted liability under the Employers' Liability Act, but disputed the right of the parents to sue as defendants, or that they had any reasonable expectation of benefit from the continuance of his life. There was evidence that the deceased had sent money on two occasions to his parents, but they had in the first instance assisted him by advancing

money for his passage to Canada:—Held, on appeal, that the parents had failed to show that they had any reasonable expectation of benefit from the son had he lived. The proceedings at the trial showed that there had been no attempt, by commission or otherwise, to prove the financial condition of the parents:—Held, that a new trial should not be granted to enable the plaintiffs to make out a stronger case. *Brown* v. *British Columbia Electric Railway Company, Limited,* 15 B.C.R. 350.

2. Limitation of Action.

1. Limitation in special Act.] — The Families Compensation Act (R.S.B.C. 1911, c. 82) provides that actions thereunder shall be commenced within twelve calendar months of the death of the deceased. The company operated a tramway under powers conferred by an Act which, by sec. 60, provided a six months' period of limitation in respect of "actions for indemnity for any damage or injury sustained by reason of the tramway, or the operations of the company." One of the company's tramcars having knocked down and instantly killed a man, the plaintiff commenced an action against it under the Families Compensation Act for the benefit of the father and mother of the deceased. The action was commenced more than six months but less than twelve months after the accident and death:—Held, that the cause of action under the Families Compensation Act was a different cause of action from that which the deceased would have had if he had lived, and was not one to which the limitation section in the company's Act applied, and that the action was accordingly maintainable. *Gentile* v. *British Columbia Electric Railway Company,* 18 B.C.R. 307; (1914), A.C. 1034.

2. Limitation in special Act.] — The limitation of six months for bringing actions provided by the Consolidated Railway Company's Act (S.B.C. 59 Vict., c. 55) has not the effect of altering the general limitation of twelve months provided by the Families Compensation Act (R.S.B.C. 1911, c. 82, sec. 5). *Trawford* v. *British Columbia Electric Railway Company,* 18 B.C.R. 132; 49 S.C.R. 470.

3. Release.

1. Setting aside.]—Where a release by the deceased is relied upon by the defendants in an action under the Families Compensation Act (R.S.B.C. 1911, c. 82), the plaintiffs may take exception to the release on the ground that it was fraudulently procured, although such plaintiffs are the dependents of the deceased, and his personal representative is not a party to the action. *Trawford* v. *British Columbia Electric Railway Company,* 18 B.C.R. 132; 49 S.C.R. 470.

2. Tender.]—Such an exception may be entertained by a Court of Equity notwithstanding that the money paid as consideration for the release is neither tendered to the defendants nor brought into Court to abide the result of the action. *Ibid.*

IV. General Exceptions to Liability.

A. Exercise of Common Rights.

1. Irrigation—Nuisance, abatement of.] —In British Columbia the cultivation by means of irrigation of land so situated as not to be otherwise capable of cultivation is a natural and reasonable user of such land; and an injury to the defendant's land caused by such irrigation of his own land by an adjoining proprietor could not lawfully be averted by any erection upon the defendant's own land diverting it upon the property of another. Upon appeal to the Full Court:—Held, per Drake, J.: The owner of land may protect himself from injury arising from an accumulation of water on his neighbour's land, and which, under ordinary circumstances, would find its way on to his own land, but in thus protecting himself he must not injure an innocent third party. Where an injury is caused to the land of another by artificial means, such as using water on one's own land for irrigation, the party injured can abate the nuisance in a manner least injurious to the person creating it. Per Irving, J.: That the water was diverted upon the plaintiff's land by means of an artificial erection on the land of the defendant which was not a natural user of his land, but was a violation of the rule of law expressed in the maxim sic utere tuo, etc. Walkem, J., concurred. *Canadian Pacific Railway Company* v. *McBryan,* 6 B.C.R. 136; 29 S.C.R. 359.

2. Injunction — Damage — Use of natural watercourse to improve drainage.] —Where a person is commencing lawful operations for the purpose of enabling him to utilize his own property, the mere fact

that such operations may be injurious to another is not enough to induce the Court to interfere by injunction. There must at least be proof, not only of imminent danger, but that the damage, if it comes, will be irreparable. The owner of land may make use of any natural watercourses on his property for the purpose of improving its drainage, and if damage arising from the increased flow of water ensue to another proprietor, it is damnum absque injuria. *Peatt* v. *Rhode*, 2 B.C.R. 159.

3. Water.]—Where water is squandering itself over the surface of land before it has arrived at a natural defined course the owner of the land over which it is squandering itself may do what he likes with it, irrespective of what effect his action may have on the lands of neighbouring proprietors. *Graham* v. *Lister*, 14 B.C.R. 211.

B. Injury by Authorized Works.

1. Flood gate insufficient to carry off accumulation of water in ditch—Construction of embankment by railway under charter—Outlet—Duty of company as to.]—The plaintiffs were the owners of land having a slope and natural drainage towards the sea. The defendants, under authority of an Act of Parliament, had constructed a line of railway through this land (which was then owned by the plaintiffs' predecessors in title) and had thereby cut off the ditches which had been constructed on the lands in question for the purpose of drainage. The defendants, for the purpose of protecting their line, cut a ditch parallel with the embankment on which the line was built and cutting across the ditches on the plaintiff's lands, which thereafter emptied into the defendants' ditch. The defendants constructed a flood gate for their ditch, and the flood gate being insufficient to carry off the water accumulated in the defendants' ditch, the plaintiffs' lands were flooded:—Held, that under the defendants' special Act (incorporating sec. 16 of the Railway Clauses Consolidation Act, 1845), the construction of the embankment and ditch were authorized by the Legislature, and that the plaintiffs could not complain of the flooding of their lands caused by the construction of the embankment:—Held, also that no duty or obligation was imposed on the defendants to see that the plaintiffs had an outlet through their ditch for the water which collected on their lands. *Hornby* v. *New Westminster Southern Railway Company*, 6 B.C.R. 588.

2. Operation of an electric power house.]—Where an electric railway company has statutory power to operate a street railway and construct, operate and maintain electric works, power-houses, generating plants, and such other appliances and conveniences as are necessary and proper for the generating of electricity or electric power, the building and operating of a power-house pursuant to such statute does not render the company liable, apart from any statutory right to compensation, for damages to an adjoining property owner owing to the noise and vibration, except upon proof of negligence. The fact that the power-house has been placed in close proximity to the house of another does not increase the liability of the company. *Leighton* v. *British Columbia Electric Railway Company, Limited*, 20 B.C.R. 183.

3. Deprivation 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, is not liable for damages for loss of support caused to lands adjoining the street. *MacDonell* v. *British Columbia Electric Railway Company*, 9 B.C.R. 542.

4. Negligence.]—The contractors having the construction of the railway, followed the plan of freely blasting out the rock, in doing which they scattered it over plaintiff's land:—Held, that the plaintiff was entitled to damages for the injury thus caused to his land by way of trespass or nuisance. *Hounsome* v. *Vancouver Power Co.*, 18 B.C.R. 81; 49 S.C.R. 430.

5. Permissive statutory powers.] —Wherever according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and the authority given is in the strict sense of the law permissive only and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others. *Canadian Pacific Railway Co.* v. *Parke*, 6 B.C.R. 6; (1899), A.C. 535.

6. Irrigation.]—Where the effect of the legislation was to authorize the defendants to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake or river, by conveying it over

lands which do not belong to them, and to run the surplus waters after irrigation through adjacent lands by means of flumes, ditches or drains, all subject to provisions for compensation, and the defendants brought water upon their lands in such manner as to be the substantial cause of damage to the plaintiff's line of railway by causing a slide of their lands, it was held that, in the absence of provisions showing an intention on the part of the Legislature to take away the plaintiff's right to protect their property from invasion, it was entitled to an injunction to prevent the defendants' user of the water in disregard of their common law obligation to do no damage to the plaintiff's lands. *Canadian Pacific Railway Company* v. *Parke*, 6 B.C.R. 6; (1899), A.C. 535.

7. Damnum absque injuria.]—There is no remedy for damage caused by the exercise of a statutory power or the performance of a statutory duty, unless the power or duty has been negligently exercised or performed or unless the remedy by action has been preserved by the statute. *Jones* v. *City of Victoria*, 2 B.C.R. 8.

8. Obstruction of navigable waters.]—An application to compel the defendant company to cease obstructing certain navigable waters and to remove a temporary bridge built across one of them, and make openings in two permanent bridges, was refused, as the requirements of the Railway Act (R.S.C. 1906, c. 37) had been complied with and the Minister of Public Works had sanctioned the temporary obstruction of the streams. *British Columbia Express Co.* v. *Grand Trunk Pacific Railway Co.*, 20 B.C.R. 215.

9. Independent contractor.] — Where statutory powers respecting the construction of works are being exercised through an independent contractor, the correlative obligation of the beneficiaries of those powers to see that due care is taken to avoid unnecessary injurious consequences to the property of other persons is not discharged when the contractor fails to perform that duty and they are responsible accordingly. *Hounsome* v. *The Vancouver Power Co.*, 18 B.C.R. 81; 49 S.C.R. 430.

10. Negligence.]—A company with statutory power to construct a tramway let the work of construction to a contractor who, in the course thereof, blasted away a hillside by a method which resulted in throwing large quantities of rock upon the plaintiff's adjoining land, which result could have been prevented by proper precautions:—Held, that the company was liable for the omission of the contractor to take the precautions necessary to prevent the blasting operations from causing injury to the plaintiff's lands. *Hounsome* v. *The Vancouver Power Co.*, 18 B.C.R. 81; 49 S.C.R. 430.

C. Acceptance of Risk.

1. Finding of jury.] —To support the defence of *volenti non fit injuria* there must be a direct and positive finding by the jury that the plaintiff not only knew of the danger, but voluntarily incurred the risk. *Scott* v. *B. C. Milling Co.*, 3 B.C.R. 221; 24 S.C.R. 702.

2. Knowledge.] — Where a guest in a hotel is injured by fire by reason of the failure of the proprietor to provide a fire escape as required by the Act, the defence of *volenti non fit injuria*, based on the guest's knowledge of the lack of a fire escape, is not applicable in view of the breach of the statutory duty. *Love* v. *The New Fairview Co.*, 10 B.C.R. 330

3. Loss of guest's goods—Volenti non fit injuria.] — A person retaining goods under an innkeepers' lien for board must take reasonable care of them. Defendant, an innkeeper, detained plaintiff's trunk for the amount owed him for board and lodging. Plaintiff assisted in carrying trunk to reading-room, the ordinary baggage-room being full. The trunk was broken open and several articles lost:—Held, that the fact that plaintiff had assisted to place the trunk in the reading-room, there being no evidence that he requested it to be placed there, did not show contributory negligence on his part, or that he accepted the risk incurred thereby, nor did it discharge the liability of the landlord to take reasonable care. *Frank* v. *Berryman*, 3 B.C.R. 506.

D. Inevitable Accident.

Act of God.]—While plaintiff's tugboat the Vigilant was tied to a wharf in Vancouver harbour, defendant brought his tugboat the Lois alongside and tied her to the Vigilant. The next night (Christmas) 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 was absent,

bumped against the Vigilant and damaged her:—Held, in an action for damages for negligence, that it had not been shown 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,* 11 B.C.R. 62; 35 S.C.R. 293.

E. Act of State.

Scope of defence.]—In an action against the captain and owner of a steamship for trespass and false imprisonment in taking the plaintiff on board their steamship at Honolulu, and conveying him to Vancouver, B.C., against his will, the statement of defence of each defendant alleged that "in receiving the said plaintiff on board the said steamship Warrimoo, and conveying him to Vancouver aforesaid, he was acting as the agent for the Hawaiian Government, being a responsible government, and carrying out the lawful order of that government, given in the said city of Honolulu and Island of Oahu, which were at that time under martial law." The plaintiff in his reply admitted the above paragraph. Drake, J., at the trial, non-suited the plaintiff, on the ground that the scope of the allegation was that the act of state, and agency of the defendants for the Hawaiian Government in carrying it out, covered the conduct complained of outside as well as within the territorial limits of Hawaii, and that the admission was fatal to the cause of action:—Held, by the Full Court, granting a new trial, that the scope of the admission had reference to the substantive facts alleged in the defence, and not the extent of the agency as alleged, which was a matter of legal deduction from the facts not susceptible of being concluded by admission. That the jurisdiction afforded by a defence of agency for a responsible government in the execution of an act of state only extends to acts done within the territorial jurisdiction of that state. *John Cranstoun* v. *Charles Edward Bird and James Huddart,* 4 B.C.R. 569.

V. False Imprisonment.

Timber afloat—Lien for salvage—Joint arrest by defendant and constable.] — Plaintiff took possession of Mason's float, which he found adrift on a lake. Mason, although aware that plaintiff claimed a lien for salvage, made no move towards recovering the float until after twelve weeks, when he, in company with a constable, demanded it, and on plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under Sec. 338 of the code for taking and holding timber found adrift, was dismissed:—Held, that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment. *Robitaille* v. *Mason,* 9 B.C.R. 499.

VI. Conspiracy.

1. Acts of an examining body.] — Plaintiff tendered himself as a candidate for examination to be admitted to the practice of dentistry, and after examination was informed that he had not passed. He brought an action against the College, the registrar and the examiners for conspiracy in refusing to allow him the full number of marks obtained and thereby excluding him from the practice of his profession. There was some evidence that his papers were undermarked, and it also developed that after the commencement of the action, and up to discovery, the papers of other candidates at the same examination had been kept, but were destroyed during proceedings on discovery, but before a demand had been made for them. It was not shown that they had been tortiously destroyed, although disposed of before the time limited by the rules of the College. Nor was it shown that the defendants had acted in any way in concert:—Held, on appeal, that the trial judge was right in non-suiting the plaintiff in the absence of evidence of conspiracy. *Richards* v. *The College of Dental Surgeons of British Columbia, Verrinder, Smith, McLaren, Spencer and Minogue,* 17 B.C.R. 114.

2. Interference with employment by a trade union.] — Plaintiff, a stone-mason, 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 plaintiff stated that he had been accustomed to "sandstone work." After some delay, plaintiff was told he could submit to a test in any kind of stone work 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. Plaintiff having been discharged, brought an action, claiming an injunction and damages:—Held, that plaintiff had not shown 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.

VII. Trade Marks and Trade Names.

1. Secondary meaning.]—While there is no property in the name of a manufactured article, yet where a particular article has for many years been manufactured and sold under a particular name, other persons fraudulently taking advantage of such name will be restrained. A firm had for a number of years been manufacturing glue under the name of Le Page. They sold out their business and goodwill to a company which continued the manufacture and name of the article. A member of the original firm, named Le Page, subsequently formed a company and manufactured and sold glue under the old name:—Held, that the term or name "Le Page" as applied to glue had acquired a trade distinctiveness, a secondary meaning, and that the plaintiffs were entitled to the relief asked for. *The Russia Cement Company* v. *The Le Page Liquid Glue, Oil and Fertilizer Company, Limited*, 14 B.C.R. 317.

2. Company.]—A company incorporated under the Provincial Act may not use the same name as that already used by a company incorporated under the Dominion Act. *Semi-Ready, Ltd.* v. *Semi-Ready, Ltd.*, 15 B.C.R. 301.

3. Calculated to deceive.]—The name of the British Columbia Permanent Loan & Savings Company is not so similar to the name of the Canada Permanent Loan & Savings Company as to be calculated to deceive. *Canadian Permanent, etc., Co.* v. *British Columbia Permanent, etc., Co.*, 6 B.C.R. 377.

VIII. Maintenance.

1. Special damage.]—An action lies for maintenance, notwithstanding that the party who was maintained was successful, on proof of special damage. *Newswander* v. *Giegerich*, 12 B.C.R. 272; 39 S.C.R. 355.

2. Damages.]—A defendant against whom an action has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the action by a third party who has not been guilty thereby of maliciously prosecuting unnecessary litigation. *Newswander* v. *Giegerich*, 12 B.C.R. 272; 39 S.C.R. 354.

IX. Conversion.

Liability of successors in title to wrongdoer.] — A mining company which purchases the assets of an old company whose debts and liabilities it agrees to pay and satisfy is not liable to a stranger to the contract for a tort committed by the old company. Defendants purchased a mineral claim having ore on the dump which had been wrongfully taken from plaintiffs' claim; they let the ore remain where it was at plaintiffs' disposal:—Held, there had been no conversion of the ore by defendants. *Centre Star Mining Co., Limited* v. *Rossland-Kootenay Mining Co., Limited*, 11 B.C.R. 231; 2 M.M.C. 232, 271.

X. Duties Connected with the Ownership, Use or Occupation of Real Property.

1. Guarding line of railway.]—The company maintained along its line of railway a barbed wire boundary fence, without any pole, board or other capping connecting the posts; plaintiffs' horse, picketed in their field adjoining, became frightened for some cause unexplained, and ran into fence, receiving injuries on account of which it had to be killed:—Held, that the fence was not inherently dangerous, and therefore the company was not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions, and not whether it is dangerous to a bolting horse. *Plath and Ballard* v. *The Grand Forks and Kettle River Valley Railway Company*, 10 B.C.R. 299.

2. Damage from bush fire.] — A fire started in brush and fallen timber by the

defendant for the purpose of clearing his land spread on to the plaintiff's lands adjoining:—Held, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it. *Crewe* v. *Mottershaw*, 9 B.C.R. 246.

3. Electric wire—Defective fire alarm—Liability of municipality.]—A fire alarm wire belonging to a municipality broke and fell upon an electric wire belonging to a private corporation, and thereby sent a fatal current into the plaintiff's horse:—Held, that the municipality was liable. *Earle* v. *The Corporation of the City of Victoria*, 2 B.C.R. 156.

4. Contract for supplying gravel—Independent contractor—Negligence.]—A municipal corporation which had statutory power to enter lands and take, without payment, gravel for its roads, let a contract for grading and gravelling a road within its limits, which contained no provision as to where the gravel was to be obtained. The contractor entered adjacent private property and took gravel from a pit thereon in such manner as to undermine a large tree standing close to the road allowance, which, by reason thereof, afterwards fell upon and killed plaintiff's husband who was driving on the road. To be assured of its quality, the taking of the gravel was superintended by the municipal road inspector. The jury found that the excavation was done by the order or permission of the corporation, and that, irrespective of who caused the excavation, the subsequent condition of the tree was a dangerous nuisance to the highway, of which the corporation had notice:—Held, per Davie, C.J., on motion for judgment, that, upon the finding of the jury, the corporation was liable: 1. For negligent misfeasance in regard to the excavation, and that a contention that the act was that of an independent contractor, was untenable; 2. For knowingly maintaining a dangerous nuisance causing the injury. Upon appeal to the Full Court, per McCreight, J., Walkem, J., concurring: 1. The corporation was responsible for the act of the contractor in undermining the tree, to the same extent as if he was a labourer acting under the orders of the road inspector or the board of works; 2. If one employs a contractor to do a work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, and the employer accepts the work in that condition, he becomes at once responsible for the nuisance; 3. He who knowingly maintains a nuisance is as liable for its consequences as he who created it; 4. The jury may believe part and reject part of witness' evidence; 5. Cross-examining questions to a jury are not to be encouraged, as they are calculated to induce the jury to stand on their undoubted right to return a general verdict. Per McColl, J.: The corporation was under an obligation to the public so to exercise its powers of repairing the highway as not to render its use dangerous to the lives of passengers thereon by the absence of reasonable precautions against obvious risks from falling trees, and the circumstance that the corporation exercised its powers through the instrumentality of their contractor, did not absolve it. Per Drake, J. (dissenting): 1. That the contractor was, on the facts, an independent contractor, and was not a servant of the corporation. That the work to be done for the corporation, as provided by the contract was not necessarily attended with risk in regard to the tree, and in that the negligence was therefore casual and collateral to the performance of the contract, and the corporation was not liable for it; 2. That the statutory authority to the corporation to enter lands and take gravel for roads, did not extend to their contractor, and he was not therefore its agent quoad hoc; 3. That the negligence alleged and proved consisted in leaving a tree standing which ought to have been removed, and was therefore mere nonfeasance and not actionable. *Steves* v. *The Corporation of the District of South Vancouver*, 6 B.C.R. 17.

XI. Licensees, Duty to.

1. Measure of duty.]—Although a railway company may have failed to properly maintain a bridge under its control so as to ensure the safety of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. *Nightingale* v. *The Union Colliery Co.*, 9 B.C.R. 453; 35 S.C.R. 65.

2. Authorized trespass.] — Plaintiff, while walking on the defendant company's track, was overtaken by a car and injured. The evidence was that this portion of the

line was used, to the knowledge of the company, by the public in going to and coming from the station. The day on which the accident occurred was windy, thus lessening, if not preventing, a person so walking from hearing the whistle:—Held, affirming the verdict of the jury awarding the plaintiff damages, that he was on the line by the leave and license of the company, and, further, that on the evidence the motorman could, by reasonable care, have avoided the accident. *Andrews* v. *British Columbia Electric Railway Company, Limited,* 18 B.C.R. 25.

XII. Statutory Duty, Breach of.

1. Hotel—Fire escape wanting—Breach of statutory duty.]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. The defence arising from the maxim volenti non fit injuria (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty. *Love* v. *The New Fairview Corporation, Limited,* 10 B.C.R. 330.

2. Breach of bye-law.]—Bye-law No. 4 (1912) of the Corporation of Point Grey provides that no person shall blast with dynamite, gunpowder, or other explosives within the limits of the municipality, unless there has been granted to him by the reeve or engineer thereof a permit so to do. Sundar Singh, a Hindu, while in the employ of the defendant company, clearing land within the said municipality, was killed by a stone shot from the blast of a tree stump, charged and set off by an employee of said company. In the clearing of said land it was the custom to set off blasts at 12 o'clock, noon. About five minutes before 12 o'clock on the day of the accident, the deceased and a number of other Hindus working with him moved off to a spot about 1,000 feet from where the blast was about to be set off. They knew that the blast was about to go off, and were facing it at the time. The man who charged and set off the blast had been so employed by the defendant company for four or five years, and was a competent and proper person to perform the work, but he had not obtained the license required under the bye-law referred to. There was evidence that an unusually large charge of powder had been used in this particular case, as the stump was shattered into fragments. The learned trial judge dismissed an action for damages by the administrator of the estate of the said Sundar Singh, on behalf of his wife and children, holding that a breach of statutory duty does not entail liability in an action for negligence, unless it is the proximate cause of the accident:—Held, that the plaintiff was not entitled to invoke the bye-law so as to avoid the consequences of the negligent act of a fellow servant. There is no class which the bye-law is particularly designed to benefit or protect, but simply the public at large, and the infringement of the general prohibition gives no cause of action. *Thacker Singh* v. *Canadian Pacific Railway Company,* 19 B.C.R. 575.

See Collision.

See Malicious Persecution.

See Master and Servant.

See Misrepresentation and Fraud.

See Negligence.

See Nuisance.

See Principal and Agent.

See Trespass.

TOWAGE.

I. Towage Service, What Is, 970.
II. Rights and Liabilities of Tug, 971.
III. Coasting Trade, 972.

I. Towage Service, What Is.

1. Concealment by owners of tow—Dangerous condition—Extraordinary towage.]—The concealment by the owners of a ship, through the officers in charge, of the fact that the ship is in a leaky and dangerous condition, avoids a contract to tow her to port for a specified sum, made with him by the captain of a tug, in ignorance of her true condition. Where towage services cannot, on the facts, be said to have saved the ship from being lost, but were of extraordinary service, owing to her condition, and involved more than ordinary trouble and risk, they should be allowed

for, not as salvage but as extraordinary towage services. *Dunsmuir* v. *The Owners of the Ship "Harold,"* 3 B.C.R. 128.

2. Contract for — Ship in impending danger—Ignorance of position by captain of tug—Whether towage or salvage.]—The ship S. was found by the tug M. in a dangerous position in foul waters. The captain of the tug agreed to tow the ship into the open sea, the amount payable for such services to be left to the respective owners. The owners being unable to agree:—Held, on the evidence, that the ship was in impending danger of loss and injury from her situation, and the ignorance of her captain of the locality, and that the service of the tug was therefore a salvage and not a towage service. *Canadian Pacific Navigation Co.* v. *The C. F. Sargent*, 3 B.C.R. 5.

II. Rights and Liabilities of Tug.

1. Lost or not lost.]—Under a contract to tow logs the tug is entitled to be paid only for the logs delivered and where the special term that the tug 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.

2. Liability under contract.] — The B.C.T. Co. entered into a contract with the plaintiff to tow the S. S. Thrasher from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship had been towed to Nanaimo, an arrangement was made between the B.C.T. Co. and the M.S. Co. whereby the remainder of the engagement was undertaken by the two companies, and the M.S. Co.'s tugboat Etta White, and the B.C.T. Co.'s tug Beaver proceeded to tow the Thrasher out of Nanaimo on her way to sea, the Etta White being the foremost tug. While thus in tow the ship was drawn onto a reef, and became a total wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the chart and sailing directions; and there was on the other side of the course they were steering upwards of ten miles of open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those on board were strangers to the coast. In an action for damages for negligently towing the ship, it was held that as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable. *Sewell* v. *B.C. Towing, etc., Co.*, 9 S.C.R. 527.

III. Coasting Trade.

By foreign steamer—38 Vict. (Can.) c. 2 — "From one Canadian port to another" — "Distress."] — Goliath, an American tug, with a clearance from Port Townsend for Victoria, picked up on the high seas, ship Abercorn, bound for Port Moody, and contracted to tow her to that port. Goliath towed Abercorn to mouth of Victoria harbour, and there left her while tug went into Victoria for coal and a clearance for Port Townsend. On coming out, Goliath resumed towing, and carried Abercorn to within fourteen miles of Port Townsend, and then cast off and ran into that port for a clearance for Port Moody. In an action for penalty under statute:—Held, that this was a "towage from one port or place in Canada to another," and defendant was liable. Semble, "distress" applied to the tow and not to the tug. The collector of customs has the right to sue in his own name for the penalty, under (Can.) Stat., 1877, c. 10, sec. 101. *Hamley* v. *Libby*, 1 B.C.R., pt. II., 44.

See Salvage.

TRADE UNION.

1. Discovery—Miners' Union—Witness in dual capacities—One subpœna—Conduct money—Objection as to sufficiency of — When to be taken.] — A miners' union entered an appearance in an action, and by statement of defence raised the objection that it was not shown that the defendant was a legal entity capable of being sued:—Held, that defendant by so pleading must be deemed, before the trial of the action, to be a corporation for the purpose of the litigation, and so compellable to make discovery. Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two sub-

poenas are not necessary. On an examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer. *Centre Star* v. *Rossland Miners' Union*, 9 B.C.R. 190.

2. Watching and besetting—Conspiracy—Sec. 523 of the Criminal Code—Interlocutory injunction.] — Injunction granted in the terms of the order made by Farwell, J., in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants (1901), A.C. 426. *Le Roi Mining Company Limited*, v. *Rossland Miners' Union, No.* 38, *Western Federation of Miners*, 8 B.C.R. 370.

See TORT.

TRADE MARKS AND TRADE NAMES.

See TORT.

TRESPASS.

I. WHO MAY SUE, 973.
II. NATURE OF ACT, 974.
III. DEFENCES, 974.
IV. RIGHT TO RESIST, 976.
V. DAMAGES, 977.

I. WHO MAY SUE.

1. In possession.]—A person in possession of waste lands of the Crown, with the consent of the Crown, can maintain trespass against persons having no title. *Nelson and Fort Sheppard Railway Company* v. *Parker*, 6 B.C.R. 1.

2. In possession.] — A person having actual possession of Crown land with the consent of the Crown, can maintain an action for trespass against a wrongdoer. *Brown & Bayley* v. *Mother Lode Sheep Creek Mining Co., Ltd.*, 17 B.C.R. 248.

3. Evidence of title.]—Acts of ownership, such as payment of license fees, and the making of surveys accepted by the Crown, are sufficient evidence of title to timber lands as against a wrongdoer. *Adams Powell Timber Co.* v. *Canadian Puget Sound Lumber Co.*, 19 B.C.R. 573.

II. NATURE OF ACT.

1. Fall of tree.]—S. owned unimproved land adjoining R.'s house and lot, on which were a number of cedar trees in a state of semi-decay. R. warned S. of the dangerous condition of one of the trees, that was within falling distance of his house, S. replying that R. was at liberty to cut the tree down if he wished to do so. The tree fell on R.'s house during a high wind and damaged it:—Held, that there was no cause of action. *Reed* v. *Smith*, 19 B.C.R. 139.

2. Fire.]—Where A., without negligence, sets a fire upon his land and the fire, being unwatched, spreads to the land of B., and there does damage, A. is liable in trespass to B. Farm labourers hired to do anything that might require to be done upon ordinary well-wooded farms or ranches within the Province, are acting within the scope of their employment in setting out fires, even if such setting out at the particular season of the year was contrary to the express orders of the employer, who would accordingly be liable at common law to neighbours whose lands are injured by the fire. *Gallon* v. *Ellison; Knowles* v. *Ellison*, 20 B.C.R. 504.

3. Destruction of fences.]—The plaintiff's fences enclosed part of the highway abutting on his land. The defendant tore down the fences, although his right of passage along the highway was not really interfered with:—Held, that the plaintiff was in possession, and could maintain trespass; and the defendant, as a private individual, had no right to abate the nuisance caused by the obstruction of the highway. Injunction and damages awarded. *Waddell* v. *Richardson*, 17 B.C.R. 19.

III. DEFENCES.

1. City of Victoria Official Map Act, 1880.]—The City of Victoria Official Map Act, 1880, and amending Acts, have reference to streets only:—Held, therefore, that nothing in those Acts could justify an interference by private individuals with the boundaries of a lot held by purchase and 20 years' possession. *Crowther* v. *Beaven*, 1 B.C.R., Pt. II., 116.

2. Proof of boundaries.] — The posts planted at the time of the survey of a city lot having been destroyed by a general fire which swept over the block of land in which the lot was included:—Held, on appeal, that

a surveyor could not determine the location of the lot by apportioning the apparent shortage among all the lots in the block. *Barry* v. *Desrosiers*, 14 B.C.R. 126.

3. Justification — Health regulations — Victoria Health Bye-law, 1893, secs. 33, 35 — "Infected locality" — Proof of — "Exposed to infection."]—Action of trespass against the medical health officer of the City of Victoria for causing the plaintiff, one of a number of Chinamen, who landed at Victoria in a steamer last from Hong Kong in China, to be removed to the "Suspect station" and there detained and subjected to cleansing process under colour of sec. 35 of the Municipal Health Bye-law, 1893, giving him, as medical health officer, power "to stop, detain and examine every person or persons, freight, cargoes, railway and tramway cars coming from a place infected with a malignant or infectious disease," in order to prevent the introduction of such into Victoria. The plaintiff had been passed by the Dominion Government Quarantine Officer, as entitled to land at Victoria. The white passengers from Hong Kong on the same steamer were not interfered with. The only evidence of Hong Kong being a place infected, etc., was that of a medical man resident in Victoria, who said "that in China smallpox was endemic, because there inoculation was the universal practice. That there was danger from white passengers, but not the same danger as from Chinamen." There was no direct evidence of the existence of smallpox to a dangerous extent in Hong Kong at the time of the departure thence of the steamer, or that it was "a place infected," etc., or that the plaintiff had been exposed to infection: —Held, that the facts were insufficient to justify the action of the health officer under the bye-law. *Wong Hoy Woon* v. *Duncan*, 3 B.C.R. 318.

4. Distraint for taxes—Action for trespass—Leave and license.]—Defendant, a municipal assessor, distrained for taxes assessed on three lots, standing in assessment roll in plaintiff's name. One of these lots was the separate property of plaintiff's wife. This objection was not pointed out to the assessor, although the plaintiff in protesting against the legality of the levy as to all lots, raised a number of technical objections, and, as to the particular lot, claimed that the assessment was too high. The assessor, at plaintiff's request, seized certain cattle in preference to other articles:—Held, in an action for trespass, that this did not amount to leave and license, and that the plaintiff was entitled to damages. But inasmuch as the plaintiff could have prevented the trespass, but did not, but rather encouraged it, with a view to an action for damages:—Held, that he was entitled to no damages beyond the auction value of the goods seized and sold; and the Court having a discretion as to costs, each party was left to bear his own. *Vedder* v. *Chadsey*, 1 B.C.R., Pt. II., 76.

IV. Right to Resist.

1. Natural watercourse — Injunction— Damages.]—S. diverted water from a river on to his land for irrigation purposes. The water flowed thence on to the adjoining lands of the defendant, who thereupon erected a dam and penned the water back. The plaintiffs subsequently constructed their railway across the defendant's lands, between the dam and S.'s lands upon an open trestle, which did not interfere with the existing conditions of the water flow, but afterwards filled in the trestle with a solid embankment leaving an open culvert, the effect of which was to concentrate the water flow from S.'s upon defendant's land, to meet which defendant raised and lengthened his dam, which had the effect of throwing the water back on plaintiff's embankment so as to injure it. The plaintiffs sued, claiming an injunction and damages, alleging "the defendant penned back water flowing through a natural water course running through his land by means of a dam throwing the water back on to and causing it to flood plaintiffs' right of way, etc." The defence denied the allegation of "natural water course," and set up that the injury was caused by misconduct of S. At the trial the plaintiffs abandoned the allegation that the water course was natural. Walkem, J., at the trial, upon the facts, gave judgment for plaintiffs. Upon appeal to the Full Court, per Davie, C.J., and McCreight, J.:—Held, that the facts proved suggested that the injury complained of by the plaintiffs was attributable to their own act in concentrating the waterflow so as to increase the previously existing mischief caused by it to the defendant, and that, if so, as against the plaintiffs, it was permissible for defendant to so enlarge his dam as to meet that trespass on their part, and that there should be a new trial to

obtain proper findings on that question. That plaintiffs should pay defendant's costs of bringing witnesses to meet the allegation of natural watercourse. Per Drake, J., affirming the judgment of Walkem, J.: That as the waterflow would not have injured the plaintiffs' embankment but for defendant's dam, he was liable, as S. was the primary cause of the mischief and not the plaintiffs. Semble, the allegation that the watercourse was natural was immaterial to the cause of action. *Canadian Pacific Railway Co.* v. *McBryan*, 5 B.C.R. 187.

2. Flooding.]—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level, he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts. *Canadian Pacific Railway Company* v. *McBryan*, 6 B.C.R. 136; 29 S.C.R. 359.

V. DAMAGES.

1. Measure of.] — The measure of damages for ore negligently abstracted by trespass workings is the same as if the trespass were wilful, and only the cost of bringing the ore to bank will be allowed. The value of the ore so abstracted is its value to the owner at the time of the taking. *Last Chance Mining Co.* v. *American Boy Mining Co.*, 2 M.M.C., 150.

2. Measure of.]—In the case of wilful or negligent trespass, and the wrongful cutting of timber, the trespasser must pay the fair market price of the timber cut, less the cost of felling the trees and fitting them for removal, and where, owing to the trespass, there is an increase in the cost of logging the timber remaining on the area trespassed upon such increased cost is recoverable from the trespasser. *Adams Powell Timber Co.* v. *Canadian Puget Sound Lumber Co.*, 19 B.C.R. 573.

TRIAL.

See CRIMINAL LAW.

See NEW TRIAL.

See PRACTICE.

TROVER AND CONVERSION.

See TORT.

TRUSTS.

I. EXPRESS TRUSTS, 978.
II. RESULTING TRUSTS, 979.
III. CONSTRUCTIVE AND IMPLIED TRUSTS, 980.
IV. NEW TRUSTEES, 981.
A. Appointment and removal, 981.
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A. In general, 983.
B. Costs, 983.
VIII. CHARITABLE TRUSTS, 984.

I. EXPRESS TRUSTS.

1. Oral agreement—Statute of Frauds.] —The plaintiff, having acquired an interest in land, entered into an oral agreement with his wife whereby they were to become jointly interested in the land, with the right of survivorship. The arrangement was carried out by a conveyance to the wife, and a will made by her in the plaintiff's favour. Later the wife made a new will revoking the former will, and leaving half her property to the plaintiff and half to a daughter by a former marriage:—Held, that the property was received by the wife subject to a trust in favour of the plaintiff, which continued up to the time of her death, whereupon the plaintiff became the sole owner:—Held, further, that the interest of the wife having been acquired subject to a trust in favour of the plaintiff, the Statute of Frauds cannot be set up as a cloak to a fraud. *Breitenstein* v. *Munson*, 19 B.C.R. 495.

2. Absolute conveyance.]—A trust may be declared of property conveyed by a deed absolute in form. *Bowker* v. *Laumeister*, 20 S.C.R. 175.

3. Mining claim.] — By agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that, if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement N. promised and agreed that a company should immediately be formed and that B. should have a reasonable amount of stock according to its value. No company was

formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims or that the agreement should be specifically performed:—Held, that the dual agreement was for a transfer at a nominal price in trust to enable N. to capitalize the properties and form a company to work them on such terms as to allotting stock to B. as the parties should mutually agree upon, and that, on breach of said trust, B. was entitled to a reconveyance of his interest in the claims and an account of moneys received or that he should have received from the working thereof in the meantime. *Briggs* v. *Newswander*, 8 B.C.R. 402; 32 S.C.R. 405.

II. Resulting Trusts.

1. Donation for municipal purposes.]—In an action for a declaration that certain lots conveyed to a municipality for the purposes of a city hall site had reverted to the plaintiff on account of the municipality having ceased to occupy the property for the purposes for which it was given, it was in evidence that the defendants had erected buildings and used them as a city hall on the property for about eleven years, but owing to the general progress the building and locality became unsuitable for the original purpose. The deed of conveyance, except for a reference to an agreement to give the property, was an absolute gift:—Held, that there was no condition subsequent to be deduced from the language of the conveyance, and that there was nothing in the evidence on the trial to warrant reforming the deed by inserting a clause. There was to a substantial degree a performance of the agreement, the expressed consideration for the grant, and there was no ground for suggesting an illusory performance to secure the property so as to give jurisdiction to declare a resulting trust on the ground of fraudulent acquisition of the legal estate. *Powell* v. *The Corporation of the City of Vancouver*, 17 B.C.R. 379.

2. Land purchased in name of another.]—In an action by a husband against his wife for a declaration of trust, the evidence showed that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. A purchaser from her received notice that she was not a widow, and notwithstanding that, before completing the agreement for sale, he received notice from the husband's solicitors warning him, he did complete it:—Held, that there was a resulting trust in favour of the husband. A purchaser in the foregoing circumstances proceeding to anticipate the agreement for sale by accepting an immediate conveyance:—Held, that plaintiff should recover from the purchaser the amount of purchase money which he had paid to secure such immediate conveyance. *Dudgeon* v. *Dudgeon and Parsons*, 13 B.C.R. 179.

3. Failure of condition.] — By deed between B., the grantor, of the first part, certain named persons, as trustees, of the second part, and P., grantee, of the third part, B. conveyed his property to the trustees, the trusts declared being that if P. survived B. and performed certain conditions intended for the support or advantage and security of B. which by the deed P. covenanted to perform, the trustees should convey the property to P., and it should be re-conveyed to B. in case he survived. No trust was declared in the event of P. surviving and failing to perform the conditions, or of failure in the lifetime of both parties. In an action by B. to have the deed set aside, on the ground that P. had failed to perform the conditions:—Held, that the conditions to be performed by P. were precedent to his right to a conveyance of the property; that by failure to perform them the trust in P.'s favour lapsed and that the grantor, being the only person to be benefited by the trust, could revoke it at any time and demand a re-conveyance of the property. *Poirier* v. *Brule*, 20 S.C.R. 97.

III. Constructive and Implied Trusts.

1. Mineral claim.]—Where one person on behalf of another locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal. *Fero* v. *Hall*, 6 B.C.R. 421.

2. Purchase by agent.]—Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. The expenses of the timber cruiser, of the advertising and

other preliminaries of the acquisition of the second lot of licenses, including a sum of $2,000 for fees to the Crown, were paid by the company, and were charged in the company's books in a manner exactly similar to that adopted in respect of the first lot of licenses. When the second lot of licenses were found to be of great value, the defendant attempted to treat these disbursements as loans to himself from the company:—Held, that the defendant was a trustee for the company. *Kendall* v. *Webster*, 14 B.C.R. 390; 15 B.C.R. 268.

IV. New Trustees.

A. Appointment and Removal.

1. Trustee—Removal of, whose interest conflicts with his trust.]—There is an inherent jurisdiction in Courts of Equity to remove trustees and appoint new ones in proper cases. A trustee for creditors who is also employed as solicitor to manage an insolvent estate is a person whose interest conflicts with his duty to the creditors as trustee. *Re Dickenson*, 2 B.C.R. 262.

2. Removal of trustees.]—The Court, in the exercise of its discretion, may remove trustees who unreasonably decline to bring an action for the benefit of the trust estate upon request of the beneficiaries. It appearing that the period of the trust had almost expired, and that nothing remained but to wind up the estate, a receiver was appointed instead of new trustees. If it appears that the continuance of the trustee would be detrimental to the execution of the trusts, if for no other reason than those beneficially interested, or those who act for them, are unable to work in harmony with him, and if there is no reason to the contrary from the intention of the framer of the trust to give the trustee a benefit or otherwise, the trustee is generally advised by his counsel to resign. If without any reasonable ground he refuses to do so, the Court may remove him. *Garesche* v. *Garesche*, 4 B.C.R. 310.

3. Removal.]—The particular facts of this case afforded no ground for the removal of the trustee. *Bingham* v. *Shumate*, 17 B.C.R. 359.

4. Disobedience to order of Court.]—Where the trustees of a company refused to obey an order of the Court, directing them to join with other trustees in making calls on certain shares, they were removed by the Court. *Fraser River Mining Co.* v. *Gallagher*, 5 B.C.R. 82.

B. Transfer of Trust Estate.

1. Vesting order—Service of petition for.]—A petition to vest the trust estate in certain trustees within the jurisdiction ought to be served on the absent trustee. *In re Spinks Trusts*, 6 B.C.R. 375.

2. Heirs of deceased trustee out of jurisdiction—Appointment of new trustees—Vesting order.]—The survivor of two trustees under a will in his lifetime refused to convey the realty into the joint names of himself and a new trustee resident outside the jurisdiction who was duly appointed by the widow in place of the deceased trustee under power contained in the will, and died intestate as to the trust estate, leaving heirs, many of whom were resident in distant places outside the jurisdiction. Upon petition by the beneficiaries and the new trustee, Davie, C.J., made an order appointing a second trustee who was resident within the jurisdiction, and vested the realty in him and the trustee appointed by the widow. *Re Bossi, deceased*, 4 B.C.R. 584.

3. One of trustees resident outside jurisdiction—Vesting order.]—Where one trustee is resident out of the jurisdiction the Court will not vest the estate in the trustees within the jurisdiction on the ground that it will not reduce their number. *In re Spinks Trusts*, 6 B.C.R. 375.

V. Breach of Trust.

1. Sale.]—In 1885 the trustees of a 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 so, and in 1893 he sold out his interest at a large profit. In 1903 some of the beneficiaries commenced an action for breach of trust against C. and the representatives of his deceased co-trustee on the ground that the sale was really one to C.:—Held, that considering the length of time since the sale was made, the Court must accept the trustee's account of the transaction. *Camsusa* v. *Coigdarripe*, 11 B.C.R. 177.

2. Declaration of forfeiture.]—C. conveyed lands to the city for the purpose of a park or public recreation place with conditions prohibiting their use for certain specified purposes and, within a time limited, that the city should clear the land of stumps and roots, plough, level and harrow the same according to the natural contour of

the ground, seed it down, built a road to it and "maintain the same in such fit, proper and good condition, as aforesaid." In an action by the assignee of C. for a declaration that the city held the lands in trust, and for re-conveyance of the same to him, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, "virgin forest," but that the remainder had been cleared and made fit for "ordinary athletics, Scotch athletics," although not suitable for games or sports requiring "nice" level ground. It appeared also that the road had been built, but that, as population did not increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, they had not been used, and had become somewhat covered with undergrowth of chaparal and bracken:—Held, that there was no such breach of the trusts as could warrant a declaration of forfeiture under the provisoes of the deed of conveyance. *Clark* v. *City of Vancouver*, 10 B.C.R. 31; 35 S.C.R. 121.

VI. Misappropriation of Trust Funds.

Agreement to restore trust property misappropriated.]—It is doubtful whether sec. 12 of the 20 & 21 Vict., c. 54, is in force in British Columbia. If it is in force it applies only to the misappropriation of property held upon express trusts. *Major* v. *McCraney*, 5 B.C.R. 571; 29 S.C.R. 182.

VII. Actions By and Against Trustees.

A. In General.

Vindication of character.] — Trustees who are charged with merely a technical breach of trust are not entitled to go to trial for the mere purpose of vindicating their character. *Scott-Elliott* v. *Hatzic Prairie Co.*, 18 B.C.R. 668.

B. Costs.

Personal liability.] — Trustees having received moneys under a decree in one of several actions relating to the same subject matter to which they were parties, an originating summons was obtained by other parties to the same actions calling upon the trustees for an account, not directed by the decree in question, and to pay into Court:—Held, that the trustees were properly ordered personally to pay the costs of the motion, and that they should also personally pay the costs of the appeal. *Boscowitz* v. *Belyea*, 4 B.C.R. 527.

VIII. Charitable Trusts.

Invasion of — Attorney-General necessary party—Crown grant to public uses —Right to divert to other uses—Information — Injunction — Practice — Amendment.]—The Corporation of Victoria was, under Act of Parliament, seized of 120 acres, upon trust, to lay out and maintain the same as a public park or pleasure ground for the enjoyment and recreation of the inhabitants:—Held, that the corporation could not convey any of such lands free from that trust:—Held, that cattle lairs, an agricultural hall for the exhibtion of farming implements and products, and an emigrants' home were not within the objects of the trust. An individual inhabitant cannot sue to restrain a misuse of the park, unless specially injured thereby; but the Attorney-General must join or be joined. It is the duty of the Attorney-General, in cases of disputed rights, to remove obstacles in the way of trial of those rights, receiving an indemnity as to costs. *Anderson* v. *Victoria Corporation*, 1 B.C.R., Pt. II., 107.

VANCOUVER ISLAND SETTLERS' RIGHTS ACT.

1. Power of Legislature.]—Sec. 3 of the Vancouver Island Settlers' Rights Act, 1904, enacts that upon application being made to the Lieutenant-Governor-in-Council, within twelve months from the coming into force of the Act, showing that any settler occupied or improved land within the said railway belt prior to the enactment of c. 14 of 47 Victoria (the Settlement Act), with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler. Sec. 4 provides that the rights of such grantees shall be asserted by and defended at the expense of the Crown:—Held, that the Legislature considered that there may be persons who have valid claims to lands

within the Company's land grant, but who by reason of poverty or limited means are unable to assert their rights; that it decided to enable such rights, if any, to be effectively asserted by authorizing Crown grants in fee, which grants would transfer any interest left in the Crown and throw the onus of the litigation on the Railway Company, while the rights, if any, of the grantee are to be upheld by the Province, but that there is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown, or attempts to deprive the Company of any interest vested in it under its patent from the Dominion:—Held, further, on the evidence, in this respect, that the defendant had no legal authority for his entry upon and occupation of the lands in question when he went upon them in 1879, that he was never recorded as a pre-emptor, and that, therefore, there was no valid alienation of the land in question taking it out of the grant to the railway. There being no interest left in the Crown, in right of the Province, to convey, the grant given to the defendant by the Province was inoperative. *Esquimalt and Nanaimo Railway Company* v. *McGregor*, 12 B.C.R. 257; reversed, 1907, A.C. 462.

2. Locus standi of applicant.] — The Vancouver Island Settlers' Rights Act, 1904, defines a settler as a person who, prior to the passing of the British Columbia statute, c. 14 of 47 Vict., occupied or improved lands situate within that tract of land known as the Esquimalt and Nanaimo Railway land belt with the bona fide intention of living thereon, and sec. 3 of said Act provides that upon application being made to the Lieutenant-Governor-in-Council within 12 months from the coming into force of the Act, showing that any settler occupied or improved land within the said land belt prior to the enactment of said c. 14, with the bona fide intention of living upon the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant in fee simple in such land shall be issued to him or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler. The lands within the said belt had been conveyed by the Province originally to the Dominion for the purposes of the railway, and by the Dominion transferred to the Railway Company, which, in giving grants or conveyances of portions thereof, reserved the minerals. Defendant, who held from her predecessor in title, applied for and obtained a grant under said sec 3:—Held, that the Railway Company was entitled to be heard upon such application:—Held, further, that a grant issued without such opportunity being given to the Railway Company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it:—Held, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor-in-Council, and the absence of compliance with such condition was fatal, but:—Held, further, that in the circumstances here the defendant should be permitted, on giving notice to the Railway Company, to proceed with her application and that the Crown need not be a party to the action. *Esquimalt and Nanaimo Railway Company* v. *Fiddick*, 14 B.C.R. 412.

See RAILWAY.

VENDOR AND PURCHASER.

I. THE CONTRACT AND MATTERS RELATING THERETO, 986.
- *A. Agreements for sale*, 986.
  - 1. Parties, 986.
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- *A. Cancellation*, 993.
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I. THE CONTRACT AND MATTERS RELATING THERETO.

A. Agreements for Sale.

1. Parties.

Statute of Frauds — Agent of undisclosed principal — Specific performance

and rescission.]—In an action in their own names by the vendors, who were trustees for specific performance by defendants of an agreement to purchase lands, or damages in lieu thereof, or rescission of the contract and ejectment, it appeared that the negotiations for purchase were carried on between the vendees and one B. by means of a written correspondence, B.'s letters containing the terms of sale offered, which were accepted by the defendants. These letters were written on printed letter forms headed "Canadian Pacific Railway Company Land Department," and under B.'s signature was the word "Commissioner." The defendants pleaded the Statute of Frauds, and maintained that the only written contract was, on its face, between the Canadian Pacific Railway Company and the defendants, and that evidence that the plaintiffs were the undisclosed principals of B. was not admissible:—Held, the form of the writing did not import that B. was contracting as agent for the Canadian Pacific Railway Company. (2) That the contract was by B. in his own name. (3) That evidence was admissible to show that the contract was made by B. on behalf of unnamed principals. (4) That such principals, being trustees, were (under r. 98) entitled to sue on the contract in their own names without joining their cestuis que trustent as parties. (5) That a party to a contract cannot be decreed, uno flatu, both specific performance and rescission, and where he obtains rescission he cannot have damages, which are given as in lieu of specific performance. *Smith* v. *Mitchell*, 3 B.C.R. 450.

2. Mistake.

1. Agreement for sale—Reservation of minerals — Unilateral mistake—Authority of agent.]—An agreement for a sale of lands, containing no reservation of the minerals thereunder, issued by the land agent of a railway company to an intending purchaser, accompanied by a deposit, does bind the company to convey the minerals even if the agent had instructions to reserve them, on the ground that there was a unilateral mistake against which the Court will not relieve. *Hobbs* v. *Esquimalt and Nanaimo Railway Company*, 6 B.C.R. 228; 29 S.C.R. 450.

2. Specific performance — Mistake in quantity.] — Defendants' trustees under a will containing a power of sale "to sell such portion of his real estate as they in their discretion should think necessary." Some 60 acres, more or less, of sec. 78 were offered for sale, but two only of the three boundaries of the lot were defined in the particulars and the conditions of sale. At the sale the auctioneer produced a map showing the property offered for sale and marked 60 acres, but stated that the exact contents of the land and the amount to be paid would have to be ascertained by a survey at the joint expense of the vendors and purchaser, but bids would be received per acre. Plaintiff was the highest bidder at $36 per acre, and the subsequent survey showed that the lot contained 117 acres:—Held, that the plaintiff was entitled to a conveyance of the 117 acres at that price; and held, that the ignorance of the defendants as to the exact acreage of the lot was not such a mistake as entitled them to relief. *Sea* v. *McLean and Anderson*, 1 B.C.R., Pt. II., 67; 14 S.C.R. 632.

3. Implied Covenants.

Agreement to sell according to plan.]—An agreement to sell land "according to a plan deposited in the Land Registry Office, and numbered 319," does not convey a warranty that the plan is deposited in accordance with the provisions of the Land Registry Act. *Thompson* v. *Courtney*, 2 B.C.R. 89.

4. Assignment.

1. Covenant against.] — The plaintiff Company, under an agreement of sale, agreed to sell land to A. By a clause in the agreement, no assignment thereof was to be valid unless approved by the vendor. A. agreed to assign the agreement of sale to the defendant and wrote the vendor advising him of the assignment and requesting formal approval thereof, but the approval was never obtained. Before the assignment to the defendant was finally executed, A. made another assignment to B., with the approval of the vendor. B. paid the balance due the vendor and secured a deed of the land without actual notice of the defendant's claim. The plaintiff succeeded on the trial of an action for the withdrawal and cancellation of a caveat and lis pendens filed by the defendant:—Held, on appeal, that an assignment of an agreement for sale of lands containing a restriction against

assignment, without the approval of the registered vendor, has no status to file a lis pendens or caveat without obtaining such approval. Per Martin, J.A.: Such an assignee cannot be said to have an interest in land; he has merely a personal right against his own vendor. *Atlantic Realty and Improvement Company, Limited* v. *Jackson*, 18 B.C.R. 657.

2. Purchaser for value without notice.]—An agreement for the sale of certain real property was entered into between defendant and one Franks on the 31st of December, 1910, in respect of which a first payment of $50 was to have been made. This payment was made partly by cash and a post-dated cheque for $24. The cheque, which was dated the 11th of March, 1911, was dishonoured, whereupon defendant notified Franks of the cancellation by him (defendant) of the agreement. Franks, prior to the receipt by him of this notification, assigned all his rights under the agreement to plaintiff on the 13th of March, 1911. Plaintiff tendered to defendant the balance considered by him to be due under the agreement, viz.: $200, and $10 for interest and cost of conveyance, and claimed specific performance:—Held, on appeal, that if the plaintiff relied on his position as an innocent purchaser, and as such claimed an equitable right, apart altogether from the assignment, he should have supported his claim with evidence. *McKenzie* v. *Goddard*, 17 B.C.R. 126.

3. Failure of agent to account for payments.]—Defendant Williams entered into an agreement to purchase the land in question from plaintiff. He assigned the agreement to defendant Schank, who continued the payments to one Moss, agent of Williams, according to the allegation of Schank. Williams denied the agency of Moss, who failed to account for the moneys received. Grant, Co. J., gave judgment against Williams for $750 and costs, dismissed the action for foreclosure, and also dismissed the action against Schank, with costs:—Held, on appeal, that the judgment should be vacated; that the contract between plaintiff and defendant Williams should be rescinded unless all payments in arrear be made within a time certain. In the alternative, in the event of defendant Schank making such payments, he, Schank, should have judgment against defendant Williams, with costs and interest. *Southwell* v. *Williams and Schank*, 17 B.C.R. 209.

B. Options.

Exercise of.]—In an option to purchase land, it was provided that 25 per cent. of the purchase money was to be paid at the time of "exercising the option." The purchasers had until a certain time to "accept the option," but did not tender or pay the 25 per cent. with the letter of acceptance:—Held, that the 25 per cent. became due and payable at the time of exercising the option, i.e., with the letter of acceptance. *Lawrance, Swift and Rear* v. *Pringle*, 17 B.C.R. 250.

II. Rights and Liabilities Arising Out of the Contract.

A. Vendor's Duties.

1. Specific performance — Title to lands.]—An agreement for the sale of land provided for the payment of the purchase money by instalments, and that on payment of the purchase money by the vendees, the vendor would convey by a good and sufficient deed in fee simple, free from encumbrances:—Held, that the vendees were not entitled to call for a title until after payment by them of the purchase money. Semble, it is not necessary, in an action for specific performance of the contract for the sale of lands, that the vendor should be the holder of the title if he can obtain a grant in fee from the holder to the purchasers. *Foot and Carter* v. *Mason and Nicholles*, 3 B.C.R. 377.

2. Rescission—Reasonable time to make title allowed to vendor.]—In an action for the rescission of an agreement for the sale of lands it was proved that the vendee tendered a conveyance for execution to the agent of the vendor, who was not proved to have been authorized under seal to execute deeds for the vendor:—Held, insufficient to bind the vendor. The vendee, at the time of the agreement, knew that the vendor had not then a title, but that he was the holder of an agreement from his vendors, upon payment of his purchase money, to give a deed when required:—Held, that the vendor was entitled to a reasonable time to make title, and that there was, on the facts, a waiver on the part of the vendee of his right to call forthwith for a conveyance. *Williams* v. *Wilson and Morrow*, 3 B.C.R. 613.

3. Making title.] — Where under an agreement of sale the vendor agrees to deliver a clear title and the land is described

as lot 1, "according to a plan to be registered," it was held that, there being no registered plan, the purchaser is bound to accept a conveyance containing a description of the land by metes and bounds. Where a vendor is unable to transfer a property for which the purchaser has paid, the proper course for the purchaser is to notify the vendor that unless a transfer is produced within a reasonable time an action will be brought for rescission of the contract and recovery of the moneys paid. *Fraser* v. *Columbia Valley Lands, Limited,* 20 B.C.R. 508.

4. Abstract of title.]—In the absence of any express or implied stipulation to the contrary in a contract for the sale of land in British Columbia, which is not held under a certificate of indefeasible title, the purchaser is entitled to the production of an abstract of the vendor's interest in the lands agreed to be sold. *Langan* v. *Newberry,* 17 B.C.R. 88; 47 S.C.R. 114.

5. Disclosure of title.]—In a contract for the sale of an interest in land for a price payable by instalments at specified dates there was a condition for defeasance at the option of the vendor for default in punctual payment, time was made of the essence of the contract, and receipt of a deposit on account of the purchase price was acknowledged. Some time before the date fixed for payment of the first instalment the purchasers requisitioned for the production for inspection of the vendor's evidence of title to the interest he was selling, and the vendor refused to comply with the requisition. The payment was not made on the appointed date and the vendor declared the contract to be cancelled:—Held, that the vendor was bound, upon requisition made within a reasonable time by the purchasers, to produce for their inspection the documents under which he claimed the interest in the lands he was selling; and until he had complied with such demand the purchasers were not obliged to pay any of the instalments. *Langan* v. *Newberry,* 17 B.C.R. 88; 47 S.C.R. 114.

6. Purchase by instalments—Investigation of title during term of credit—Lis pendens—Cloud on title.]—On a purchase of land, the balance of the purchase price for which is payable by instalments, the purchaser may require his vendor to show a good title before parting with the first instalment. A lis pendens registered against real estate is a cloud upon the title, and as such, a purchaser is entitled to have it removed from the registry. The mere fact that the purchaser made some improvements on the property does not constitute a waiver of his right of inquiry as to title. *Townend* v. *Graham,* 6 B.C.R. 539.

B. Purchaser's Duties.

1. Accord and satisfaction.]—An agreement for the sale of mineral claims provided for payment by instalments and contained a proviso that "failure to make any of the above payments to render this agreement void as to all parties thereto, and the said (vendees) can quit at any time without being liable for any further payments thereunder from such time on." At the request of the vendees, the vendors, without consideration, extended the time for payment of one of the instalments. After the original, but before the extended period for making the payment, the vendees notified the vendors that they had abandoned the contract. In an action to recover the amount of the instalment:—Held, that the liability of the defendants, the vendees, to pay the instalment in question was absolute upon the day named in the original agreement, and remained unaffected by the voluntary concession of further time to pay. *Webb* v. *Montgomery,* 1 M.M.C. 129; 5 B.C.R. 323.

2. Preparation of conveyance.]—Under an agreement for the sale of land in which the place and manner of completion of the contract are not mentioned, the vendor is only called upon to show that he has a good title. It is the duty of the purchaser to prepare the conveyances (covering the legal and equitable estate with the usual covenants), pay over the purchase price, and have the conveyances executed. In the absence of an express stipulation that the vendor is to produce a registered title, the purchaser must rely upon the vendor's covenants. *Thompson* v. *McDonald and Wilson,* 20 B.C.R. 223.

III. PERFORMANCE OF THE CONTRACT.

A. The Conveyance.

1. Minerals.]—Under a contract to sell lands without any exception of the minerals, the purchaser is entitled to a conveyance without any exception of the minerals. *Hobbs* v. *Esquimalt and Nanaimo Railway Company,* 6 B.C.R. 228; 29 S.C.R. 450.

2. Parties.]—Cestuis que trustent are not necessary parties to a conveyance of lands contracted to be sold by the trustee, nor can they be compelled by the trustee to join in the conveyance. *Bingham* v. *Shumate*, 17 B.C.R. 359.

B. Compensation.

1. After conveyance executed.] — Plaintiff purchased 87 acres of land from defendants, paid cash, and was given a conveyance containing the usual statutory covenants. There was no preliminary contract by way of agreement for sale. Some six months afterwards he discovered, on having the land surveyed, that there were only 25 acres in the property. Fraud was not alleged or set up:—Held, in an action for compensation, that as the conveyance had been executed and there was no preliminary contract for compensation, the plaintiff was not entitled to relief. *Jackson* v. *Irwin and Billings Company, Limited*, 18 B.C.R. 225.

2. Damages.] — Where the purchaser, after obtaining the conveyance, found that part of the mineral claims sold to him had already been conveyed to another, he was held to be entitled only to a return of a proportionate part of the purchase price, with interest thereon at the statutory rate, as he had offered no evidence to show that the mineral claims were of any commercial value. *Hird* v. *Esquimalt and Nanaimo Railway Company*, 14 B.C.R. 382.

IV. Dissolution of the Contract.

A. Cancellation.

1. Notice.]—It is incumbent on a person seeking cancellation of an agreement for sale of land to show that the cancellation notice relied upon is in strict accord with what the agreement requires it should be. Therefore, a notice of cancellation of an agreement, dated the 23rd of December, delivered on the 21st of January, calling for payment within "thirty days from this date," and demanding compound interest, was held to be bad. Where a purchaser had shown a continuous intention to fulfil his bargain, to the knowledge of the vendor (almost half the purchase money being paid on the first instalment) and a readiness and ability to pay the overdue instalment within two or three days after the expiration of the limit in the cancellation notice, and vendor had indicated the futility of attempting to pay, a tender before action was not necessary. *Brown* v. *Roberts*, 17 B.C.R. 16.

2. Notice.]—Where a contract for the sale of land provided for its cancellation on notice being sent to an address in Vancouver, and the vendor, with knowledge that the purchaser was in England, sent the notice to the address in Vancouver in an envelope addressed in a woman's handwriting and marked private, the notice was held bad. *Mills* v. *Marriott*, 17 B.C.R. 171.

B. Rescission.

1. Right of vendor on repudiation by purchaser.]—Where the purchaser under a contract to buy land pays part of the purchase money, but afterwards repudiates the contract and sues for rescission, the Court will not restrain the vendor, who has accepted the repudiation and retaken the property, from dealing with it as he sees fit. *Christie* v. *Fraser*, 10 B.C.R. 291.

2. Innocent misrepresentation.] — An executed contract for the sale of a mineral claim, being an interest in land, will not be rescinded for mere innocent misrepresentation. But where by error of both parties, and without fraud or deceit, there has been a complete failure of consideration, a Court of Equity will rescind the contract and compel the vendor to return the purchase money. Thus, where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims, whereby the purchaser got nothing for his money, the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. *Pope* v. *Cole*, 1 M.M.C. 257; 6 B.C.R. 205; 29 S.C.R. 291.

3. Agreement for sale — Time as essence of contract—Specific performance —Tender.]—Vendor had a good title to the lands at the time of the contract, which made punctual payment of the instalments of purchase money of the essence of the contract, and in default the vendor to have a right to re-sell. It also gave the vendee the right to pay the whole of the purchase money at any time and demand a deed. The lands were of speculative value. After the date of the contract and payment of deposit an action was brought against the vendor involving her title to the lands, and a lis pendens registered. Vendor and vendee then agreed that no further payments should

be made until it was removed. After the original period for completion, and before the lis pendens was removed, the vendee tendered the whole amount of the purchase money, and a conveyance for execution, to the vendor, who asked time to see her solicitor. No further tender was made. The lis pendens was afterwards removed. The action was brought by the vendee for rescission of the contract and return of the deposit, and the vendor counterclaimed, demanding specific performance:—Held, per McCreight, J., ordering rescission, refusing return of the deposit, and dismissing the counterclaim: 1. That time was of the essence on both sides. That the avowedly speculative character of a purchase makes time of the essence, even where not so provided in the contract. 2. That, on the facts, the vendee had not waived his right to rescind. 3. Quære, whether the existence of the registered lis pendens was a good ground for refusal of the title. 4. The Court may refuse to order return of the deposit where the vendor had a good title at the time of the contract. Upon appeal to the Full Court: Crease and Walkem, JJ., affirmed McCreight, J. Per Drake, J. (dissenting), dismissing the plaintiff's claim, and ordering specific performance by him: 1. Where a purchaser has a right to rescind for want of title, time being of the essence of the contract, the effect of his giving further time to the vendor to cure the defect is not to waive that right, but he must, after default upon the extended period, give the vendor a reasonable time to complete. 2. That the purchaser had no right to rescind at the time he offered the money and deed for execution, and in any case the tender and refusal proved were insufficient. 3. That the purchaser having originally had a right to rescind, which he did not exercise, could not complain that the property had afterwards considerably depreciated, and such depreciation and the fluctuating value of the property were not therefore grounds for refusing the vendor specific performance. 4. Quære, whether the existence of the registered lis pendens was a good ground for the refusal of the title. *Manson* v. *Howison*, 4 B.C.R. 404.

4. Waiver.]—In an agreement for the purchase of land, with possession, purchaser covenanted, inter alia, giving vendor power to enter and determine tenancy on default, and that notice of default addressed to purchaser at Vancouver, British Columbia, 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, that the time allowed purchaser was not a waiver of the right of rescission under the agreement. *Scott* v. *Milne*, 13 B.C.R. 378.

5. Election.]—A purchaser who elects to affirm a voidable contract for the sale of land, with full knowledge of all the facts, is precluded from afterwards setting up a right for rescission thereof. *Jackson* v. *Irwin & Billings Co., Ltd.*, 20 B.C.R. 487.

C. Forfeiture of Moneys Paid.

1. Of instalments of purchase price.]—No matter how stringently the clause in an agreement for sale of land providing for retention of instalment payments may be drawn, it is against equity for a vendor who has resold the land at a profit under his power of sale, to retain the instalments. This does not apply to the initial deposit, which may be regarded as earnest money. *Butchart* v. *Maclean*, 15 B.C.R. 254; reversed on appeal, 16 B.C.R. 243.

2. Repudiation of contract.] — The plaintiff agreed to purchase a piece of land from the defendant and paid $1,000 as a deposit in part payment of the purchase price, the second payment under the agreement being due and payable in 35 days. Thirteen days afterwards the plaintiff notified the defendant by letter that he cancelled the sale on the ground that it had been brought about by the defendant's misrepresentations, and demanded the return of the $1,000. The next day the defendant replied denying any misrepresentations on his part and stating that the plaintiff must either complete the transaction or forfeit the deposit. Seventeen days later the plaintiff commenced action for the cancellation of the agreement and the return of the $1,000. Four days later the defendant sold the property to another party. The trial judge found that there was no misrepresentation by defendant, but ordered the return of the $1,000 to the plaintiff and gave the defendant the costs of the action:—Held, on appeal, that the plaintiff having repudiated the contract by bringing his action, the defendant was at liberty to sell the property, and that plaintiff was not entitled to

a return of the $1,000. *Stinson* v. *Hoar*, 18 B.C.R. 360.

3. Abandonment.]—Where, a purchaser being in default, the vendor sues upon a covenant to pay the balanace due under an agreement for the sale of land, and in the event of failure to pay, for cancellation of the agreement and forfeiture of the payments made, and it appears that the purchaser has abandoned the agreement, the Court will order cancellation of the agreement, and forfeiture of the payments made. *The Vancouver Land and Investment Company, Limited* v. *Pillsbury Milling Company, Limited*, 19 B.C.R. 40.

4. Option to rescind.]—Plaintiff agreed to purchase land from defendant and to pay the balance of the purchase price on 1st July, 1904, the agreement providing that time should be of the essence of the contract, and that in case of plaintiff's failure to pay the balance at the time agreed defendants should be at liberty to treat the contract as cancelled. A deed of the property was executed in Toronto and sent to defendants' agent in Vancouver to deliver to plaintiff when he paid up. Plaintiff did not pay the balance on 1st July, and on 18th July defendants notified him they treated the agreement as cancelled and that they had re-sold the land:—Held, that defendants had exercised their option of rescinding within a reasonable time and that plaintiff was not entitled to any relief. *Peirson* v. *Canada Permanent and Western Canada Mortgage Corporation*, 11 B.C.R. 139.

5. Relief.]—A contract for the sale of land by the company for a price to be paid in instalments at specified dates contained a clause of forfeiture both of the agreement and of all payments of past instalments of purchase money in case of default of punctual payment of any one instalment; and time was declared to be of the essence of the agreement. Default having been made, the company sued to enforce the forfeiture. The purchaser paid into Court the instalment due, and counterclaimed for specific performance:—Held, that the condition of forfeiture was in the nature of a penalty from which the purchaser was entitled to be relieved on payment of the purchase money due. *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, 17 B.C.R. 230; 1913, A.C. 319.

6. Time of the essence.] — Where a clause in a contract for the sale of land provides uno flatu that time is to be considered of the essence of the agreement and for forfeiture by notice on default in punctual payments, the stipulation as to time applies not to mere default in payment at the dates provided in the contract, but only to failure to pay within the time limited after the giving of the notice. *Bark Fong* v. *Cooper*, 18 B.C.R. 271; 49 S.C.R. 14.

7. Notice.]—Where a notice is given in the terms of a stipulation in a contract for the sale of land providing for forfeiture on default in punctual payment of the purchase moneys, such notice constitutes an admission that there is a subsisting contract and excludes all the anterior time in the computation of delay. *Bark Fong* v. *Cooper*, 18 B.C.R. 271; 49 S.C.R. 14.

8. Default in payment.]—In a contract for the sale of land for a price to be paid, as to one half on the execution of the contract and as to the other half by instalments, there was a provision for forfeiture upon default in punctual payments. Time was made of the essence of the contract, and on default in payment the vendor had the right to give the purchasers thirty days' notice in writing demanding payment; in case of continuous default at the expiration of the time, the forfeiture would become effective and the vendor would be at liberty to re-enter and sell. A default in payment having occurred, a notice was given in the terms mentioned, but only to one of the purchasers. An extension of time was applied for and refused, and after thirty days from the date of the notice the vendor re-entered. Five days later the purchaser tendered the balance unpaid, which was refused by the vendor on the ground that no conveyance was tendered for execution, and that the purchasers had abandoned the contract. Two weeks later the purchasers sued for specific performance of the contract:—Held, that the notice as given did not comply with the conditions of the contract requiring notice to all of the purchasers, and that there was no such laches attributable to the purchasers as would amount to abandonment. *Bark Fong* v. *Cooper*, 18 B.C.R. 271; 49 S.C.R. 14.

D. Foreclosure.

Time to redeem.]—In an action for foreclosure of the purchaser's interest under an agreement for sale of land, upon default in payment of the purchase-money, apart from

special circumstances, one month (or at most, two months) should be allowed as the time for redemption. The security afforded the vendor by the terms of the agreement for sale, coupled with his right to enforce a vendor's lien, should not be treated as to time for redemption in the same way as a mortgage. The purchaser is entitled to apply for further extension before the expiration of the limited time, if he can show a reasonable prospect of payment by further indulgence, and that the property is worth more than the amount due the plaintiff. *Davis* v. *Von Alvensleben and Gibb*, 20 B.C.R. 74.

See CONTRACT.

See EQUITY.

See MISREPRESENTATION AND FRAUD.

See SPECIFIC PERFORMANCE.

VENUE.

See CRIMINAL LAW.

See PRACTICE.

VICTORIA CITY MAP ACT.

Boundaries.]—The Act and its amendments have reference to streets only, and do not justify interference by private persons with the boundaries of a lot held by purchase and twenty years' possession. *Crowther* v. *Beaven*, 1 B.C.R., Pt. II., 116.

WAIVER.

Mandatory injunction.]—A party obeying a mandatory injunction, for disobedience to which he is liable to attachment, cannot be said to have exercised any election, or to have waived any right. *Cons. Ry. Co.* v. *City of Victoria*, 5 B.C.R. 266.

See APPEAL.

See PRACTICE.

WATERS AND WATERCOURSES.

I. RIGHTS IN, 1000.
- *A. Navigable waters*, 1000.
- *B. Riparian owner*, 1001.
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- *A. Esquimalt Waterworks Act*, 1017.
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- *C. Sandon Water Works and Light Company Incorporation Act*, 1018.

IV. EXPROPRIATION, 1018.

I. RIGHTS IN.

A. Navigable Waters.

1. Right to user of—Injunction.]—1. Every subject of the realm has a right to the user, for legitimate purposes, of public navigable waters and harbours within the realm, where the tide ebbs and flows. 2. He cannot be deprived of that right, except by legislative authority, duly exercised. 3. If his land fronts on tidal waters, and access thereto is obtainable by the user of such waters, no mere license or permission from the Crown to another to obstruct that user can be sustained, and any plea to that effect is bad. 4. The right to continue such an obstruction cannot be acquired by the Statute of Limitations, because there can be no presumption of a grant. 5. Remedy for personal loss sustained by obstruction to such right may be materially affected by party's presumed acquiescence, or silence with knowledge. 6. Such an obstruction inflicting private injury cannot be justified by the allegation that the obstruction itself is a public benefit; nor is the remedy lost by the allegation that the private injury is merged in the greater public wrong. 7. In

such cases, the Crown acts for the public, the individual for himself. 8. Semble, the Crown could not, in British Columbia, at the time the titles herein were originated (viz., in 1858), or at any time since, by subsequent license, legalize any addition to, or the continuance of, an obstruction which it had not the power to authorize in the first instance; and any leave or license to that effect would be inoperative. *McEwen* v. *Anderson,* 1 B.C.R., Pt. II., 308.

2. Tidal rivers—Injunction to restrain pollution of.]—The Crown, in the right of the Dominion of Canada, has the right to take proceedings to restrain by injunction the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney-General to restrain any public nuisance caused by the improper conduct in question. The fact that a statute makes the conduct in question an offence, and imposes fines and imprisonment for its commission, does not derogate from the right of the Court at the motion of the party injured to restrain its commission by injunction. *The Attorney-General for the Dominion of Canada* v. *Ewen; The Attorney-General for the Dominion of Canada* v. *Munn,* 3 B.C.R. 468.

3. Public landing place.] — Whoever interferes with the free use of a public landing place or wharf erected on land acquired for that purpose only by a municipality under a statute is a wrongdoer, and the municipality has no power to license such interference. *Lee* v. *The Olympian,* 2 B.C.R. 84.

4. Boom of logs.]—The tying of a boom to piles driven into the bank of a navigable river is not an interference with navigation when done in a reasonable manner, for a reasonable period, and at such places as are open to the owner of the boom to do so. *Kennedy* v. *The Surrey,* 11 B.C.R. 499.

B. Riparian Owner.

1. Spring or stream on land owned.]—The owner of land on which there is a spring or stream has rights therein to the exclusion of all other persons not holding records under the Water Act. *In re Milsted,* 13 B.C.R. 364.

2. No defined course.] — Until water reaches a watercourse, the lower of two proprietors owes no servitude to the upper. He is at liberty to protect himself, and is not liable for the damage which the other suffers from the exercise of such right of protection. *Graham* v. *Lister,* 14 B.C.R. 211.

3. Rights of.] — A riparian owner in order to maintain an action for interference with the bed of a stream must show not merely some sensible disturbance, but that there has been either actual damage or that there is a reasonable possibility of damage; and in determining whether this burden has been discharged, regard must be had to the circumstances of the particular case. *West Kootenay Power & Light Co.* v. *City of Nelson,* 12 B.C.R. 34; 2 M.M.C. 335.

4. Destruction of rights.]—The common law right of riparian owners to the undiminished flow of the stream is taken away by legislation. A riparian owner, therefore, who has no grant of the water rights in the stream, or special statutory title thereto, is not entitled to an injunction restraining the exercise of a grant under the Water Act, although that exercise diminishes the flow of water to and past his land. *Cook* v. *Vancouver Corporation,* 17 B.C.R. 477; 1914, A.C. 1077.

5. Water privileges for mining purposes.]—The licensee has no right so to use the water so as to foul the stream and prevent riparian proprietors lower down from using the water for milling purposes. *The Columbia River Lumber Co.* v. *Yuill,* 2 B.C.R. 237; 1 M.M.C. 64.

6. Rights under Water Acts.] — The waters of a stream may be unoccupied under the British Columbia Land Ordinance, 1865, even though there may be a riparian proprietor upon a part of it. *Carson* v. *Martley,* 1 B.C.R., Pt. II., 189, 281; 20 S.C.R. 634.

7. Land Ordinance, 1865—Rights of riparian owners under.]—On the construction of the Land Ordinances and Acts:—Held, that under sec. 44 of the Land Ordinance, 1865, no person is empowered to take water from any stream who is not at common law a riparian proprietor:—Held, that the Commissioner should, before granting any authority to divert water under the Land Acts, see that all the requirements of the statute have been complied with, but that the applicant is responsible for the insufficiency of his record. Semble, that the owner of a water privilege cannot satisfy sec. 50 of the Land Act, 1875, by using the ditch of another. Semble, that even prior to passing sec. 50, no exclusive right could be acquired until such ditch was constructed:—Held, that sec. 44 of the Land Ordinance, 1865, did not enable persons to acquire water rights as against riparian

owners of land acquired prior to the passage of that Act. The duties of a Commissioner in considering applications for water under Land Acts pointed out. *Carson & Holt* v. *Clark & Martley*, 1 B.C.R., Pt. II., 189, 281; 20 S.C.R. 634.

8. Conflict of rights.]—Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under Provincial statutes on lands within the railway belt. The records themselves did not show under what statutes they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown as far back as 1876. Gregory, J., at the trial, held that the presumption was that the water records were obtained under the provisions of the laws in force at the time they were granted, viz.: 1875 and 1884; and on the evidence, that plaintiff had not proved any damage by reason of the use made by defendants of the water claimed by her; that her alleged riparian rights had not been established by the evidence; that if she had any such rights, the defendants had similar, and probably superior rights, and that she was not in a position to prove that her rights had been interfered with. An appeal from this judgment was allowed. *George* v. *Mitchell; George* v. *Humphrey Brothers*, 17 B.C.R. 531.

C. In Railway Belt.

1. Timber leases from Dominion Government—Free miner of British Columbia —Conflicting rights — Canadian Pacific Railway Belt.] — Lessees of the Dominion Government in the Canadian Pacific Railway Belt, operating a saw mill by water power, are entitled, as riparian proprietors, to an injunction restraining Provincial free miners located up-stream, after occupation by said lessees, and having a mining water record, from fouling such stream, the natural source of the water supply, so as to interfere with the lessee's user thereof. A grant of water privileges under the Placer Mining Act, 1891, does not sanction the user of the water to the detriment of the rights of others. The Dominion Government is in possession of such lands within the railway belt as trustee to administer same, and it was competent to it to grant a timber lease to the plaintiffs, who would have the right to the use of the water flowing through their limits in its ordinary and natural condition. *Columbia River Lumber Co.* v. *Yuill*, 2 B.C.R. 237; 1 M.M.C. 64.

2. Provincial records.]—Plaintiff alleged damage by wrongful diversion and obstruction of water claimed by her under several water records granted under Provincial statutes on lands within the railway belt. The records themselves did not show under what statutes they were obtained, nor that they were granted in connection with plaintiff's lands, which had been acquired by pre-emption and purchase from the Crown as far back as 1876:—Held, that the presumption was that the water records were obtained under the provisions of the laws in force at the time they were granted, viz.: 1875 and 1884:—Held, further, on the evidence, that plaintiff had not proved any damage by reason of the use made by defendants of the water claimed by her; that her alleged riparian rights had not been established by the evidence; that if she had any such rights, the defendants had similar, and probably superior rights, and that she was not in a position to prove that her rights had been interfered with. *George* v. *Mitchell; George* v. *Humphrey Brothers*, 16 B.C.R. 510; reversed on appeal, 17 B.C.R. 531.

3. Grant of water rights.] — Certain water rights in land known as the Railway Belt for British Columbia were granted to the company by the Water Commissioners under the Water Clauses Consolidation Act, 1897 (61 Vict., c. 190, sec. 4). On an information filed by the Dominion claiming that the grant was invalid and conveyed no interest to the company, it was held that the Railway Belt having been conveyed by the Province to the Dominion by Provincial statutes for railway purposes, as contemplated by the 11th article of the Terms of Union, it resulted that the proprietary right therein, which before the transfer belonged to the Crown in right of the Province, after the transfer belonged to the Crown in right of the Dominion for a public purpose. Being public property both before and after the transfer, they were public property within the meaning of sec. 91 of the British North America Act, 1867, and as such were under the exclusive legislative authority of the Dominion Parliament; and that the Water Clauses Consolidation Act could not affect the water upon those lands, and on its true construction did not purport to do so. *Rex*

v. *Burrard Power Co.*, 12 Ex. C. R. 295; 43 S.C.R. 27; 1911, A.C. 87.

II. WATER ACTS.

A. Rights Under.

1. In General.

1. Who entitled.]—The British Columbia Land Ordinance, 1865, was not passed for the benefit of riparian owners only, but so that any cultivator of land might obtain a grant of water thereunder. *Carson* v. *Martley*, 1 B.C.R., Pt. II., 189, 281; 20 S.C.R. 634.

2. Use for mining purposes—Fouling waters of creek—Right to deprive of use where natural descent.] — Plaintiffs were entitled, as riparian proprietors, to the use of the natural flow of the water of the stream Quartz Creek, running through timber lands leased by them from the Dominion Government. The lands so leased were part of the lands in the railway belt granted to the Dominion by the Province of British Columbia by 43 Vict., British Columbia, c. 11, in aid of the construction of the Canadian Pacific Railway. Defendants, as free miners licensed by the Provincial Government, obtained from it a grant of the right to use, for mining purposes, the water of a stream running into Quartz Creek above the plaintiff's saw-mill, by record under the Placer Mining (British Columbia) Act, 1891, secs. 56 and 57. Defendants so used this water as to foul Quartz Creek and stop the plaintiff's mill:—Held, 1. No person, unless by grant or prescription, is entitled to deprive another of the beneficial use of water which would naturally descend to him. 2. A right granted by a statute, which does not, in express terms, derogate from the rights of others, cannot be held to have done so by implication. 3. A grant of water privileges under the Provincial Mining Acts does not sanction the user of the water to the detriment of the rights of others, however acquired, to the same water at another part of the stream. 4. The Dominion Government, under 43 Vict., British Columbia, c. 11, were in possession of the lands, as trustees to administer same, and it was competent to them to grant a lease to the plaintiffs, carrying the ordinary rights to the water of a riparian proprietor. *The Columbia River Lumber Co.* v. *Yuill and others*, 2 B.C.R. 237; 1 M.M.C. 64.

3. Water record.]—No one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights, and the right to a flow of water is vested either in the Crown or in the holder of such a record. *Spruce Creek Power Company, Limited* v. *Muirhead*, 2 M.M.C. 158; 11 B.C.R. 68.

4. Locus standi to attack record.]—No one has any locus standi to attack a water record who has not acquired one himself, or who has not what is equivalent to one under the Act. A right to water under sec. 29 of the Water Clauses Consolidation Act, as amended in 1904, c. 56, confers such a right. *Brown* v. *Spruce Creek Power Co.*, 11 B.C.R. 243; 2 M.M.C. 254.

5. Insufficient water.]—Where there is not sufficient water in a stream to satisfy the number of inches granted to various record holders, the holder of a prior record is entitled to take water to the full amount thereof before the holder of a subsequent record can take any. *Campbell* v. *Brownlee*, 2 M.M.C. 571.

2. How Acquired and Lost.

1. Enjoyment of rights under — Subsequent attack on, for failure to comply with statutory notices.] — Where water rights have been enjoyed under an alleged water record, and such rights are subsequently attacked, in an action for damages, on the ground that the statutory notices and conditions had not been complied with:—Held, that error in these matters could not be taken advantage of long afterwards, at a trial, but should be raised within a reasonable time by prohibition or certiorari. *Carson* v. *Martley*, 1 B.C.R., Pt. II., 281; 20 S.C.R. 634.

2. Joint record—Application — Notice —Duty of Gold Commissioner.] — Water records under the Water Clauses Act may be held jointly. If an applicant asks for more in his notice than he is entitled to, that does not invalidate his notice; it is valid for that which he is entitled to, and it is the duty of the Gold Commissioner to adjudicate upon and not reject the application. Semble, a supply of water for fire purposes may be necessary as being directly connected with the working of a mine or inci-

dent thereto. *Re Water Clauses Consolidation Act*, 8 B.C.R. 214; 1 M.M.C. 460.

3. Water Clauses Consolidation Act—Notice—"In the office"—Conflicting and concurrent applications — Evidence and procedure.]—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 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 sec. 9 of the Water Clauses Consolidation 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. *War Eagle, etc., Co.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 374; 1 M.M.C. 422.

4. Lapse of record by abandonment of pre-emption claims.] — Where holders of separate pre-emption records, 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 record in their joint names, the joint water record previously granted to them as partners in connection with their separate pre-emption claims cannot be considered as having been abandoned. The effect of the transaction caused the areas to become unoccupied land of the Crown, and upon their re-location, the water record in connection therewith continued to subsist as a right appurtenant to the joint pre-emption claim. *Eastern Townships Bank* v. *Vaughan*, 13 B.C.R. 77; 41 S.C.R. 286.

5. Notices.]—The provisions of sec. 45 of the Land Ordinance, 1865, with regard to notices are directory only, and even were they imperative, a grantee of water who has used the water granted for several years would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by that section, as it would be presumed that the same were given before the grant was recorded. *Martley* v. *Carson*, 1 B.C.R., Pt. II., 189, 281; 20 S.C.R. 634.

B. Applications.

1. In General.

1. Powers of Gold Commissioner—Under Water Clauses Consolidation Act—Water record.]—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 sec. 9 of the Water Clauses Consolidation 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. *War Eagle Consolidated Mining and Development Co., Ltd.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 374; 1 M.M.C. 422.

2. Powers of — Under Water Clauses Consolidation Act — Water record.] — Where two officials are called upon to exercise their functions in regard to application for water rights in respect of the same water, the official who is determining the latter application should stay his hand until the final result of the prior application before another official is known. *War Eagle Consolidated Mining and Development Co., Ltd.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 381; 1 M.M.C. 465.

3. Layman.]—A layman is a lease holder and may apply for a water record, which is appurtenant to the mine and not to the miner. *Brown* v. *Spruce Creek Power Co.*, 11 B.C.R. 243; 2 M.M.C. 254.

4. Joint application.] — Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by sec. 36, they are bound by it. *Ibid.*

5. Powers of Gold Commissioner—Under Water Clauses Consolidation Act—

Water record.]—Water records under Part II. of the Water Clauses Consolidation Act may be held jointly. Mine owners, in their notice of application to the Gold Commissioner for water records, included in their notice, among the purposes for which the water was required, a purpose not authorized by sec. 10 of the Act, i.e., "domestic and fire purposes." At the hearing before the Gold Commissioner, applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application. On appeal, the trial judge held that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers, and he referred the matter back for re-hearing, and his decision was affirmed by the Full Court. 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 Railway Co.*, 8 B.C.R. 214; 1 M.M.C. 460.

6. Jurisdiction of assistant commissioner.] — The defendant Company, which held a record for 25,000 inches of water out of the St. Mary's River, granted on the 8th of May, 1906, applied, under sec. 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 plaintiff Company, who held a record, granted on the 20th of 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 defendant Company. The Commissioner decided that he had jurisdiction under sec. 27, but upon it appearing that the defendant Company had taken certain proceedings under sec. 84, et seq., to have their undertaking approved by the Lieutenant-Governor-in-Council, the Commissioner ruled that his jurisdiction was voided by these proceedings. They appealed under sec. 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 plaintiff Company for prohibition:—Held, that the Commissioner had jurisdiction to entertain the application. *Cranbrook Power Company* v. *East Kootenay Power Company*, 13 B.C.R. 275.

2. Applications Pending under Repealed Acts.

Acquisition of right.]—Sec. 329 of the Water Act, 1909, enacts that any applications under any former Act not completed at the time of the passing of the said Act may be continued to completion under such former Act, or under the Water Act, 1909, as the applicant may elect. Sec. 333 repeals the Water Clauses Consolidation Act, 1897, saving, inter alia, the right to complete any pending application thereunder:—Held, that the appellants here having acquired a right under the Water Clauses Consolidation Act, 1897, but that right not having been determined before the repeal of the Act by the Water Act, 1909, and they having elected, under the provisions of the new Act, to continue their application to completion under the old Act, they were entitled to do so. *McLean* v. *North Pacific Lumber Co.*, 15 B.C.R. 148.

C. Records and Licenses Under.

1. Consolidation—Amendment.]—Where a company holds distinct water records acquired from different owners, they cannot be consolidated. Where a power company has obtained a certificate from the Lieutenant-Governor-in-Council approving its specified purposes, one of which is to alter the point of diversion of its water, it is entitled to have its water record amended, without the imposition of terms, to cover the alteration. *In re Water Clauses Consolidation Act and Rossland Power Co., Limited*, 10 B.C.R. 356; 2 M.M.C. 135.

2. Lieutenant-Governor.]—The Lieutenant-Governor-in-Council has no power to grant a water record. *Cranbrook Electric Light Co.* v. *East Kootenay, etc., Co.*, 2 M.M.C. 563.

D. Right to Apply.

Riparian owners.]—Under sec. 44 of the Land Ordinance, 1865, any cultivator of land could obtain a grant of water, whether he were a riparian owner or not. *Martley* v. *Carson*, 1 B.C.R., Pt. II., 189, 281; 20 S.C.R. 634.

E. Unoccupied Water.

Riparian owners.] — Under the Land Ordinance, 1865, waters may be unoccupied

even though there be a riparian owner on part of them. *Martley* v. *Carson*, 20 S.C.R. 634.

F. Mining Purposes.

1. Gold Mining Ordinance — Natural flow—License to divert.]—Each company had a hill claim, fronting on the right bank of Williams' Creek, and dependent on its water for the means of mining it. The B. N. Co., whose claim was higher up-stream than the J. L. Co.'s, turned nearly all the water of the creek from its bed at a point on the stream some distance above their claim, and conveyed it by a ditch to their ground, thereby depriving the J. L. Co. of water and obliging them to stop work. The B. N. Co. claimed the right to do so, by virtue of sec. 36 of the Gold Mining Ordinance, which entitles a miner to use "so much of the water naturally flowing through or past his claim" as may be necessary to work it:—Held, reversing the Gold Commissioner's decision, that the water so used by the B. N. Co. was not "water naturally flowing through or past" their claim, as its natural flow had been intercepted and turned into a ditch above the claim, and that the B. N. Co. had, therefore, no right to such water under sec. 36. The J. L. Co., having complied with Part X. of the same Ordinance, referring to "ditches," obtained from the Gold Commissioner, in April, 1882, a license to divert 150 inches of water from the creek at their ditch-head, which was higher up-stream than both their and the B. N. Co.'s claims, and use it, by means of their ditch, on their grounds for mining purposes, for five years. The B. N. Co. held no similar license, either directly or derivatively:—Held, that owners of hill claims could only acquire water privileges such as those claimed in the present action by complying with Part X., and that under the circumstances stated, the J. L. Co. had an exclusive right to use 150 inches of water, according to the terms of their license and by virtue of it, and that the B. N. Co., having no similar license, had no right to any of the water of Williams' Creek:—Held, also, that the grant of a water privilege, under Part X., need not be by deed. *Jenny Lind Co.* v. *Bradley-Nicholson Co.*, 1 B.C.R., Pt. II., 185; 1 M.M.C. 9.

2. Free miners.]—It was the intention of the Legislature, by sec. 29 of the Water Clauses Consolidation Act, as enacted by sec. 2 of c. 56, 1903-4, to secure to free miners, occupants of placer ground, whether they hold as original locators or as leaseholders, that continuous flow of water which the section specifies. A free miner having obtained certain rights on one creek under sec. 29, does not forfeit them because he obtains additional rights on another creek under another section. The enactment contained in said c. 56 of 1903-4 shows a clear intention to cut down the rights of holders of water records, and to increase the benefits accruing to the individual free miner under the Placer Mining Act. *Ginaca and Mourot* v. *The McKee Consolidated Hydraulic, Limited*, 11 B.C.R. 481; 2 M.M.C. 288.

3. Record not appurtenant to lease.]—The plaintiff Company was the holder of a mining lease acquired in 1890, and after two renewals was finally renewed in 1905 for 20 years; a water record was issued for 1,000 inches of water for use on the mining ground so leased in 1897, which was to continue in force for five years. This record was never renewed. The defendant claimed the water by virtue of a water record obtained by him subsequent to the issue of the water record of 1897. In a dispute as to the right of user of the water in question:—Held, that the plaintiff's lease did not in itself carry the right to water, and the water record of 1897, not having been renewed, expired at the end of the period for which it was originally issued. *Lightning Creek Mining Company* v. *Hopp*, 19 B.C.R. 586.

G. Ditches.

Ditch under Land Act, 1888—Running through United States territory.]—The fact that a ditch constructed in intended compliance with the provisions of sec. 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, that the plaintiff's water record was valid. *Covert* v. *Pettijohn*, 9 B.C.R. 118.

H. Power Companies.

1. Alteration of points of.]—When a power company has submitted the documents specified in sec. 85 to the Lieutenant-Governor-in-Council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued, under sec.

87, approving the proposed undertaking, the power company is entitled, under sec. 89, to have the said record amended, and is not bound to give fresh notices or submit to such terms as the Commissioner might impose, in ordinary cases, under sec. 27. *In re Rossland Power Co.*, 10 B.C.R. 356; 2 M.M.C. 135.

2. Consolidation of records.]—Where a company holds distinct records acquired from different owners, they cannot be consolidated. *In re Rossland Power Co.*, 10 B.C.R. 356; 2 M.M.C. 135.

I. Jurisdiction Under.

1. County Court.]—The County Court has jurisdiction over water rights appurtenant to placer claims. Though such jurisdiction is concurrent with that of the Supreme Court, it is not ousted by the mere fact that an action was begun in the Supreme Court by the same parties respecting the same subject-matter before it was begun in the County Court, and if no objection is taken, it will continue to exercise its jurisdiction. If objection is taken, the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed. It is too late to object to the jurisdiction after judgment. *Brown* v *Spruce Creek Power Company, Limited*, 11 B.C.R. 243; 2 M.M.C. 254.

2. County Court.]—The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property. *Spruce Creek Power Company, Limited* v. *Muirhead*, 11 B.C.R. 68; 2 M.M.C. 158.

J. Board of Investigation.

Powers of.]—The powers of the board of investigation under the Water Act do not include jurisdiction to determine the existence or extent of an easement to the use of water. *In re Evans and McLay*, 18 B.C.R. 191.

K. Officials Under.

1. Powers and Duties of.

1. Gold Commissioner—Application for record pending before—Adjudication of similar application by Assistant Commissioner.] — 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. 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. *War Eagle Consolidated Mining and Development Co., Ltd.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 374; 1 M.M.C. 422.

2. Similar applications for same water—Official should stay his hand who is determining the later application.]—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 result of the prior application before another official is known. *War Eagle Consolidated Mining and Development Co., Ltd.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 381; 1 M.M.C. 465.

3. Inclusion of purpose not authorized.]—Mine owners, in their notice of application to the Gold Commissioner for water records, included in their notice, among the purposes for which the water was required, a purpose not authorized by sec. 10 of the Act, i.e., "domestic and fire purposes." At the hearing before the Gold Commissioner, applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application. On appeal:—Held, that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers. *Centre Star Mining Co.* v. *British Columbia Southern Railway Co.*, 8 B.C.R. 214; 1 M.M.C. 460.

4. Functus officio.] — A Commissioner, prior to the passage of the amendment of 1905, having adjudicated upon an application for a record, and having made the appropriate entry, is functus officio, and has no power to amend such record. Any such amendment, being a nullity, cannot be reviewed in any proceedings under sec. 36. *Wallace* v. *Flewin*, 11 B.C.R. 354.

5. Rossland Water and Light Company Act—Powers of Commissioner in conflict with rights conferred by.]—Under sec. 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the

City of Rossland, which purchased the water works 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 sec. 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the City. *In re Water Clauses Consolidation Act. Centre Star Mining Company, Limited* v. *Corporation of the City of Rossland,* 9 B.C.R. 403.

6. Diversion.] — A Commissioner has power to entertain an application to change the point of diversion fixed by the water record of a power company. *Cranbrook Electric Light Co.* v. *East Kootenay Power and Light Co.,* 2 M.M.C. 563.

2. Adjudication by.

Reasons for decision.] — If the action taken by the Gold Commissioner is right, it is not affected because he assigned the wrong reasons for it or relied on one section instead of on another which in fact authorized his action. *Brown* v. *Spruce Creek Power Co.,* 11 B.C.R. 243; 2 M.M.C. 254.

L. Appeals Under.

1. Who may appeal.]—Anyone affected by a decision appealed from under sec. 36 of the Water Clauses Consolidation Act may be let in on the hearing of the appeal, even though the month for giving notice of appeal has expired. Such person may make his application on the hearing of appellant's motion for directions. *In re Waters Consolidation Act,* 8 B.C.R. 17; 1 M.M.C. 421.

2. Hearing de novo.]—Sec. 36 of the Water Clauses Consolidation Act, 1897, R.S.B.C., c. 190, provides that any person affected by any decision of a Commissioner or Gold Commissioner under the Act, may appeal therefrom to the Supreme or County Court in a summary manner by filing a petition pursuant to the procedure prescribed in the section:—Held, that a hearing so had is a trial de novo and that the judge is bound to go fully into the merits of the application, as he must make such order in relation to the matters dealt with in the decision appealed from, and respecting the rights of all parties in interest and affected by the decision appealed from, whether named in the petition or not, as he deems just. *East Kootenay Power and Light Company, Limited* v. *Cranbrook Electric Company, Limited,* 14 B.C.R. 266.

3. Hearing de novo.]—The appeal under sec. 36 of the Water Clauses Consolidation Act from the decision of the Gold Commissioner is a trial de novo. *Ross* v. *Thompson,* 10 B.C.R. 177.

4. Hearing de novo.] — The right of appeal given by sec. 36 of the Water Clauses Consolidation Act is in effect a right to a re-trial before a judge of the County Court or a judge of the Supreme Court; and the appropriate method of dealing with questions of fact on that appeal is by examination and cross-examination of witnesses viva voce. *Wallace* v. *Flewin,* 11 B.C.R. 328; 2 M.M.C. 283.

5. Inherent jurisdiction.]—Sec. 36 of the Act does not contain an exhaustive code of procedure, and the Supreme Court, having once become seized of the matter, has inherent jurisdiction to bring the appeal to hearing and disposition. *Ibid.*

6. Time for appealing.]—In a proceeding under the Water Clauses Consolidation Act, 1897, before the County Court judge, on appeal from the Water Commissioner, the respondents objected, inter alia, to the jurisdiction of the learned County Court judge, who overruled the objection and proceeded with the hearing, reserving his decision on the petition generally. Respondents appealed within the 21 days given in sec. 39 as the time within which an appeal must be taken from the decision of any Supreme or County Court judge in any proceedings under the Act:—Held, by the Full Court, that the term "decision" as used in sec. 39 means final disposition of the whole case before the judge on appeal from the Water Commissioner. *Bole* v. *Roe and Abernethy,* 13 B.C.R. 215.

7. Appeal—Right to—Party interested—Who is within Rivers and Streams Act, sec. 12.] — Sec. 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County judge he may appeal to the Supreme Court:—Held, that "party interested" means one who was a party to the proceedings before the judge appealed from. *In re Smith,* 9 B.C.R. 329.

M. Practice.

Change of venue.] — A motion to the Court to change the venue of the hearing of an appeal is properly made in Victoria

though the petition has been filed in the Vancouver Registry. *Wallace* v. *Flewin*, 2 M.M.C. 283.

III. SPECIAL ACTS.

A. Esquimalt Waterworks Act.

Unrecorded water.] — By the Water Clauses Consolidation Act, 1897, sec. 4, the right to the use of all unrecorded water in any river, lake or stream is declared, subject to a proviso in favour of existing legal rights, to be vested in the Crown in right of the Province. Unrecorded water, by the interpretation clause (sec. 2), includes all water not held for the time being under special grant by public or private Act. In an action by the Corporation of the City of Victoria claiming to appropriate for the purpose of the municipality certain waters described as flowing from two different sources, Goldstream River and Niagara Creek, as being unrecorded water and liable to be recorded in its favour under the said Act, it appeared that the waters so claimed had, under the Esquimalt Waterworks Act, 1885, and the Extension Act, 1892, vested in the company by force of sec. 10 of the former Act, subject to a perpetual and onerous obligation imposed by sec. 10 of the Extension Act of supplying water to the corporation if required after notice and in large quantity; that considerable outlay had been incurred by the company in storing and conveying the water in suit with a view of meeting such obligations; and that without the waters in suit they would be unable to meet it:—Held, that the company's Acts of 1885 and 1892 are private Acts in the sense that they confer special rights and impose special obligations upon them for special purposes; that the Act of 1897 did not apply to the company; that it was a subsequent general statute, and could not be intended to interfere with rights granted by special legislation to an extent which prevented the fulfillment of the statutory obligations imposed thereby; that under the true construction of sec. 2 of the Act of 1897 the waters in suit, having been granted to the company by special legislation, were not unrecorded within its meaning; and that the plain intention of the proviso to sec. 4 was to preserve any right of diversion or appropriation existing under any Act already passed. *Esquimalt Waterworks Co.* v. *The Corporation of the City of Victoria*, 12 B.C.R. 302; 2 M.M.C. 480; 1907, A.C. 499.

B. Rossland Water and Light Company Incorporation Act.

Paramount but not exclusive rights.]—Under sec. 11 of the Act, 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 sec. 18 of the Water Clauses Act for an interim record of the surplus water not used by the City. *Centre Star Mining Co.* v. *City of Rossland*, 2 M.M.C. 27; 9 B.C.R. 403.

C. Sandon Water Works and Light Company Act.

Authority of Lieutenant-Governor a condition precedent.]—By sec. 9 of the Sandon Water Works and Light Company Act (B.C. Stat. 1896, c. 62), the company was 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 powers 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 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 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. *The Byron N. White Co.* v. *The Sandon Water Works and Light Co., Ltd.*, 10 B.C.R. 361; 2 M.M.C. 240; 35 S.C.R. 309.

IV. EXPROPRIATION.

Municipal corporation.] — A municipal corporation which has obtained water

records under the Water Act must proceed under that Act to expropriate land required for a waterworks system, and not under the Municipal Act. *Lewis* v. *Municipality of Delta*, 16 B.C.R. 228.

See MINES AND MINERALS.

WAY.

See EASEMENT.

See HIGHWAY.

See MUNICIPAL CORPORATION.

WILL.

I. TESTAMENTARY CAPACITY, 1019.
A. *Undue influence*, 1019.
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III. REVOCATION, 1022.
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I. TESTAMENTARY CAPACITY.

A. Undue influence.

1. Burden of proof.]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*, 27 S.C.R. 13.

2. Instrument instructed by legatee—Onus of proof—Undue influence—Testamentary capacity.] — Testator was a bachelor of 84. He had always been of careful habits and very determined mind, and had accumulated a small fortune by saving. He lived unattended in a small cottage, which he owned. His only relatives were abroad. He had, commencing 13 years before his death, carried on a correspondence with the plaintiff, his nephew, who lived in England, and was in indigent circumstances, intimating an intention to provide for him by making a will in his favour. No testamentary disposition in favour of any other relative was indicated. Plaintiff obtained admission to a sailors' home in England in 1887, when testator wrote: "I am glad you have got into that noble institution; it is all you will want for life." Testator, in his subsequent correspondence, made no allusion to any intention to leave the plaintiff anything. Testator in 1891 was found in his cottage in a state of physical collapse from cold, weakness and neglect, and was taken to the house of the defendant, who was a friend of long standing. He died there eight days afterwards. Seven days before his death he made the will in question, leaving all his property to the defendant, who, at testator's request, employed and instructed a solicitor, who drew the will at his office. The solicitor attended the testator, read the will over to him twice, and asked him if he understood it and wished to leave his property to the defendant, to which testator answered "Yes," and also asked if he had power to alter the will afterwards. The evidence of the solicitor and of the attending physician was that the testator was then of testamentary capacity:—Held, at the trial, that, where a will is instructed or procured by the person propounding and taking a benefit under it, the onus of proof of its validity is shifted upon that person, who must remove any suspicion raised in the mind of the Court by the surrounding circumstances. That the facts in evidence (set out in the judgment) had raised such a suspicion in its mind, which had not been removed. On appeal:—Held, that the evidence established the will as that of a free and capable testator, and removed the case from the region of suspicion. That the conduct of the defendant was not so suspicious as to warrant the litigation, and that costs should not be ordered to be paid out of the estate. *Adams* v. *McBeath*, 3 B.C.R. 513; 27 S.C.R. 13.

3. Burden of proof.]—On the evidence in this case it was held that at the time of

making the will in question the testator was mentally competent. *Forman and Heisterman* v. *Ryan*, 17 B.C.R. 130.

4. Testamentary capacity — Best evidence of.]—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 anyone capable of getting 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 party 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.

II. Attestation.

By person interested.]—The testatrix by her will bequeathed the residue of her estate to trustees upon trust, after a life interest, to pay and divide it between two named sisters equally; there was a clause providing that in the event of either sister dying in the testatrix's lifetime leaving a child or children who should survive the testatrix, and being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, such child or children should take the share which his, her or their parent would have taken if such parent had survived the testatrix; there then followed a clause of maintenance and advancement for the children "entitled in expectancy." The husband of one of the two named sisters attested the will:—Held, that as to her share there was an intestacy:—Held, also, that as there was a complete disposition of the legal estate, and an intestacy only as to the beneficial interest, the jus mariti of the testatrix's surviving husband was excluded, and the undisposed of beneficial interest was held in trust for the next of kin. *In re Fry*, 18 B.C.R. 63.

III. Revocation.

Non-production.] — The plaintiff's deceased husband admittedly made a will in proper form, giving her all his property. After its execution he left it with his wife for safe keeping, she putting it away in the drawer of a desk with her own will. Upon the husband's decease she could not find the will where she had left it, and after diligent search it could not be produced. In an action to establish the will:—Held, that the presumption of revocation which arises on the non-production of a will may be rebutted by evidence as to the relationship between the testator and his wife, his words and actions subsequent to the execution of the will, and any evidence which may tend to rebut the presumption:—Held, further, that presumption is weakened where the testator did not have the custody of the will. *Unwin* v. *Unwin*, 20 B.C.R. 77.

IV. Construction.

A. In General.

Incorporation.] — The words, "Will, simply appointing an executor," written immediately above, and apparently as part of the will, can be construed as incorporated with it so as to show the intention of the testator. *In re Jerome*, 1 B.C.R., Pt. I., 87.

B. Devisees and Legatees.

1. Wife.

Alleged bigamous marriage.] — In December, 1873, the plaintiff, Annie J. Marks, then aged 21, was returning from a visit to Detroit. Whilst waiting at the Windsor depot she made the acquaintance of the deceased, A. J. Marks, then a widower. After an acquaintance of an hour or so, she decided to go with him by train to Stratford, during which time the couple became engaged. She did not return to her home in Kincardine, but waited for a few weeks, when she received and accepted a request from him to meet her at Brantford. They went thence to Buffalo, where she contended they were married. After a short absence they returned

to Kincardine, where they kept house as man and wife until the spring of 1876, when he sold the furniture, kept the proceeds and left her, but returned in the fall of 1877. During his absence he did not provide for her support. He lived with her until the spring of 1878, when he left for Winnipeg. They apparently parted on friendly terms; she did not request to be taken with him; they did not correspond with each other; she made no demand for support from him and he gave her none. In 1895 he returned to Kincardine, but did not visit her, although he visited her mother and made enquiries concerning her. He died in October, 1904, but commencing in January of that year he opened a correspondence with her. These letters were produced at the trial by her. In all of these communications he addressed her as "Dear friend" and she replied in the same way. In 1888 she lived with a man named Frankboner in Michigan, assumed his name and went as his wife. For the purposes of this action she had visited Buffalo, but was unable to discover any record of her marriage. She gave evidence to the effect that no public records of marriages in Buffalo were kept before 1878. She could not trace the witnesses, the hotel where she was married having been destroyed, and the minister being dead. She also gave evidence that deceased had taken possession of her marriage certificate in 1878, but his son swore that he had searched through all his father's papers in vain for the certificate, or any evidence that the plaintiff had ever been the wife of A. J. Marks. In November, 1903, nearly two years after his marriage to the defendant, Susan Elizabeth Marks, deceased wrote to plaintiff Annie, stating that he had obtained her address from her sister. He then addressed her as "Dear friend," and this correspondence continued until August, 1904, she sending in one of the letters her photograph, with "A Frankboner" written on the back. In a letter from the deceased to her he spoke of the time "you and I were one" at Tift House in Buffalo. This is the only reference to their former relations. At the trial plaintiff's sister and cousin swore to having seen the paper supposed to be the marriage certificate, but neither witness remembered the contents of the document. Deceased married Susan in March, 1902, at Nelson, B.C., prior to his opening up correspondence with Annie, and during this period he also, when absent, wrote to Susan, but always addressed her as "My dear wife," and signed himself "Your loving husband." He made his will at Nelson on the 6th of May, 1904, leaving to "my wife" $50 per month during her lifetime, payable out of his estate. It is on this clause in the will that action was brought, it being contended that the marriage with Susan was a bigamous union and that the legacy ought, therefore, to go to Annie, who set up her alleged marriage in 1873: — Held, that there was nothing in the evidence to displace the presumption that the deceased had not committed bigamy in marrying Susan in 1902, and that she was the person designated in the will as "my wife" and "my said wife." *Marks* v. *Marks*, 13 B.C.R. 161; 40 S.C.R. 210.

2. Distribution per Stirpes or per Capita.

Issue.]—Under a bequest in favour of certain persons, if living at the testator's death, and the issue of such of them as should be then dead, "to be equally divided between them, share and share alike," such issue take per capita and not per stirpes. *In re Bossi*, 5 B.C.R. 446.

C. Vested and Contingent Interests.

1. Specific devise subject to a prior life estate—Period of vesting.]—The testator, after leaving his property in trust for his widow for life, with remainder to his children or their issue in certain shares, made certain specific devises to his children, to vest in possession on the death of his widow; and the will directed that in the event of the death of any of his children without leaving lawful issue, his, her or their share should fall into residue and be divided among the survivors in the proportions named:—Held, that the word "share" applied as well to the specific devises as to the remainder expectant on the widow's death; and, accordingly, until the specific bequests fell into possession, the children took no vested interest therein. *In re Finlayson*, 5 B.C.R. 517.

2. Legacy—Vested estate.]—Held, that the following language in a will: "I give, devise and bequeath to such of my wife's children as are alive at the time of my death all money or moneys deposited in my name in any bank or banks in the Province of British Columbia, said money to be divided between each of the said children

share and share alike when they shall attain the age of 21 years. Until such time the said money and interest as aforesaid is to remain untouched except as hereinafter provided," created a vested interest in the children, payable on their respectively attaining 21 years of age. *Re George Baillie, deceased,* 3 B.C.R. 350.

D. What May Be Devised and Bequeathed.

1. What Interest Passes.

1. Conditional limitation — Executory bequest.]—The testator by his last will provided, inter alia, as follows: "I devise and bequeath all my real and personal property to my wife, Jane Taylor, as long as she remains unmarried. In the event of my said wife marrying at any time after my death, I devise and bequeath all my said real estate and personal property unto my daughter:—Held, that as to the real estate these provisions constituted a conditional limitation, conferring on the wife a fee determinable on her marrying again, and as to the personal estate, these provisions conferred an absolute interest subject to an executory bequest in favour of the daughter, contingent on the wife's re-marriage. *In re G. O. Taylor, deceased,* 19 B.C.R. 447.

2. Alternative executory gift.] — Upon the construction of the devise set out below:—Held, (1) That the life estate in the land given to the husband of the testatrix was an equitable one, as was also the limitation to his heirs. (2) That a cestui que trust may be made one of the trustees of the land devised without thereby merging his equitable estate in the legal estate held qua trustee: there is not a union of two estates in the same person in the same right. (3) That the word "heirs" used in the devise indicated the heirs general of the husband. (4) That, under the first uses declared in the will, the husband took a life estate in the "$6,000 interest" and the fee simple in the remaining interest; and the daughter took an estate tail expectant on the death of her father in the $6,000 interest. (5) That these estates were subject to be divested by one of two alternative executory gifts, affecting (a) in case of the sale of the property before the death of the husband and daughter, and (b) in case the property should remain unsold at the death of the husband and daughter. (6) That two clauses in the will being repugnant, the later governed. (7) That an absolute gift of the income, in the circumstances of the case, was by implication a gift of the corpus. *In re Ley, deceased,* 17 B.C.R. 385.

2. Rule in Shelley's Case.

Vested, subject to be divested.]—Where a testator devised to his wife all his real estate for life and directed that at her death it should be divided equally between two brothers, children of a deceased brother, and a sister, and 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;" and where the sister predeceased the wife, leaving a son, the plaintiff, and disposed by will of her real and personal property:—Held, on appeal, that the sister took a vested remainder to which the rule in *Shelley's Case* was not applicable; that, she having died before her estate became vested in possession, her estate, under the clause above quoted, was divested, and her heirs took her share as personæ designatæ as upon an executory gift over to them as a class, and that the plaintiff was therefore entitled to take his share as purchaser under the will of the testator. *Glendenning* v. *Dickenson,* 15 B.C.R. 354.

V. Specific Legacies.

Subject to liability.]—Where a testator leaves "all mining properties in Cariboo I may possess at the time of my decease," and at the time of his death owns certain shares in a mining company in Cariboo, on which there are existing calls, duly made and fully payable, but unpaid, at his death, and on which other calls have been made and become payable since his death, the legatee is entitled to the shares free from all calls for which the testator might have been sued, but subject to all calls not made in the testator's lifetime. *Hanson* v. *Ross,* 1 B.C.R., Pt. II., 49.

VI. Advancement.

Interest.]—Where the will gave to the trustees a power of advancement in favour of the testator's sons the power was exercisable during the continuance of the life estate, but any son in whose favour an advancement was made was chargeable with interest thereon at the rate of five per centum. *In re Findlayson,* 5 B.C.R. 517.

VII. CONDITIONS.

Restraint of alienation.]—A condition in restraint of alienation to a devise in fee, even though its operation is limited to a particular time, e.g., to the life of the devisee, is void in law, as being repugnant to the nature of an estate in fee simple. *In re Richard Carr, deceased. Carr* v. *Carr*, 20 B.C.R. 82.

VIII. CHARGE OF LEGACY.

1. Pecuniary legacies—Payable out of residuary realty.]—H. R., the testator, gave £250 to M., and lands at N. in fee to W., and gave certain other lands and also pecuniary legacies to other persons, and "all the rest and residue of my real and personal property" to D. absolutely. W. died in the testator's lifetime, so that the lands at N. fell into the residuary devise, and were the only lands comprised in such devise:—Held, that the pecuniary legacies were well charged on the lands at N. *Manson* v. *Ross*, 1 B.C.R., Pt. II., 49.

2. Residuary devise.]—Where the residuary devise was of "the balance and remainder of the property and of my estate" of the testator, a previous legacy was held to be charged on the realty, and to be effectual in priority to parties who had, with notice of the will, advanced moneys to the residuary devisee on the security of the lands devised. *Cameron* v. *Harper*, 2 B.C.R. 15; 21 S.C.R. 273.

IX. CUMULATIVE LEGACIES.

Will and codicil.]—The will bequeathed $1,000 to each of the executors "for the trouble they will have in carrying out the trusts of this, my will." By a codicil, reciting that the original executors had died, new executors were appointed, and a provision made authorizing the executors for the time being to retain, as remuneration for their services, a commission of five per cent. on all moneys collected under the will. The codicil further provided that the will should be construed as if the names of the new executors were inserted throughout in place of the names of the original executors:—Held, that the existing executors were entitled only to the commission mentioned in the codicil. *In re Bossi*, 5 B.C.R. 446.

X. CONFLICT OF LAWS.

Lex rei sitæ.]—Contracts of marriage made in a foreign country, the domicile of parties, by the terms of which, in accordance with the laws of that country, the alienation by a testator (one of the parties to the contract) of his real estate away from his wife and family is forbidden, will prevent a contrary disposition of same even though, acording to the lex loci rei sitæ, there be no such restriction. By the comity of nations the contract travels abroad, and, as between the parties to that contract and their representatives, attaches to the testator's real estate in places other than the domicile. Marriage, carried out in consideration of such a contract, and in accordance with the laws of the domicile, will, in its incidents touching the real estate of one of the parties, as between those parties and their representatives, be respected and sustained, as to those incidents, in countries other than the domicile, when there is no direct local legislation to the contrary. Remarks on the Land Registry Ordinance, 1870. *In re Klaukie's Will*, 1 B.C.R., Pt. I., 76.

See EXECUTOR AND ADMINISTRATOR.

WINDING-UP.

See COMPANY.

WITNESS.

See EVIDENCE.

WOODMAN'S LIEN.

1. Action for wages — Pursuing both remedies—Estoppel.]—Where a workman has recovered part of his wages by seizure and sale in a joint action with other workmen against his employer under the Woodman's Lien for Wages Act, he is estopped from proceeding under sec. 27 of the Mechanics' Lien Act for the balance of his wages. *Wake* v. *The Canadian Pacific Lumber Company, Limited*, 8 B.C.R. 358.

2. Saw-mill men.] — There is no lien given to saw-mill men by the Woodman's Lien for Wages Act, but only to those engaged in getting the timber out of the forest. *Davidson* v. *Frayne*, 9 B.C.R. 369.

3. Mechanic's lien.] — Where a workman has recovered judgment, jointly with others, under the Woodman's Lien for Wages Act against his employer, he cannot afterwards proceed under the Mechanics' Lien Act against the owner of the land whereon the timber was cut. *Wake* v. *Canadian Pacific Lumber Co.*, 8 B.C.R. 358.

4. Hire of horses.]—Defendant hired a team of horses from plaintiff for certain logging operations, and, on default of payment for the use of the horses, which were driven by a man employed by defendant, plaintiff filed a lien against the logs for the amount due:—Held, that plaintiff was not a woodman within the meaning of the statute. *Muller* v. *Shibley*, 13 B.C.R. 343.

5. Pay-roll.]—Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person, by requiring only the production of the pay-roll, is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll. *Young* v. *West Kootenay Shingle Co.*, 11 B.C.R. 171.

WORK AND LABOUR.

See BUILDING CONTRACT.

See CONTRACT.

See MASTER AND SERVANT.

See MECHANIC'S LIEN.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT.

WRIT.

See PRACTICE.

YUKON COURTS.

I. MINERS' LIEN ORDINANCE, 1030.
II. REFERENCES, 1030.
III. APPEAL, 1031.
A. Jurisdiction, 1031.
B. Time, 1031.
IV. COSTS, 1034.

I. MINERS' LIEN ORDINANCE.

"Owner"—Sufficiency of claim.] — A mortgagee is not an "owner" entitled to be named by a lien claimant when filing his claim for lien. He may be brought in by subsequent proceedings, e.g., as here, by originating summons. A statement in a claim for lien that it is "for wages for work and labour done and performed on and in respect of said [mining] claims," with the amount due and date of employment is a sufficient statement under sec. 7 (b) of the Miners' Lien Ordinance. Where labourers working on a mining claim cut certain timber as part of their regular work, but which timber was subsequently diverted to purposes other than for the mining claims, such work is work done in connection with the mining claims, and such subsequent diversion does not affect the rights of lien claimants. *Bradshaw* v. *Saucerman*, 18 B.C.R. 41.

II. REFERENCES.

1. Order of reference—Jurisdiction of Court to make — North-West Territory Orders XXIII, rules 233 and 236, and XXXIII., rule 401 — Consolidated Ordinances North-West Territory 1898, c. 21.] —The power to make an order of reference in an action is not merely a question of "procedure and practice," within the meaning of sec. 3 of the Judicature Ordinance, and therefore the Yukon Court has not power under this section to make an order of reference. *Williams* v. *Faulkner and Kroenert; Raymond* v. *Faulkner and Kroenert*, 8 B.C.R. 197.

2. Order of reference—Jurisdiction of Courts to make.] — In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location of plaintiff's claim) for the purpose of establishing an official boundary between the hill and creek claims, and which cut off part of plaintiff's claim. On motion to the Court the report was confirmed and judgment entered acordingly:—Held, on appeal, that the reference was a nullity, as it involved the determination of a mixed question of law and fact, and was not a matter of "practice and procedure" but of jurisdiction; and it was beyond the power of the Court to order the reference even by con-

sent; that the Yukon Court has no power to make an order of reference, and as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer, the doctrine of extra cursum curiæ did not apply. *Stevenson* v. *Parks*, 10 B.C.R. 387.

III. APPEAL.

A. Jurisdiction.

1. Case pending at time of Act.]—The Act 62 & 63 Vict., c. 2, sec. 7, which gives a right of appeal to the Supreme Court of British Columbia in cases from the Yukon Territory as therein specified, applies to an action pending when the Act came into force, but tried and decided afterwards. *Courtney* v. *The Canadian Development Co.*, 7 B.C.R. 377.

2. Jurisdiction to hear case prior to Act.]—The Act 62 & 63 Vict., c. 2, giving the right of appeal to the judge of the Supreme Court of British Columbia sitting together as a Full Court in cases from the Yukon as therein specified, does not apply to a case tried before the Act came into force and decided after. *Canadian and Yukon Prospecting and Mining Company, Limited* v. *Casey*, 7 B.C.R. 373.

3. Appealable amount.] — Where the plaintiff's claim for $408 was dismissed, and the defendants on their counterclaim obtained judgment for $735, it was held that the appeal must be limited to the judgment on the counterclaim, as the claim was not for an appealable amount. *Canadian Development Co.* v. *Le Blanc and others*, 8 B.C.R. 173.

B. Time.

1. Final judgment.]—In an action by executors to recover certain moneys due to their estate, the judge of the Territorial Court, at the request of the plaintiffs, selected one of the items and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was, within the meaning of the Yukon Territorial Act, 1899, sec. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal, therefore, to the British Columbia Court lay after the expiration of twenty days. *McDonald* v. *Belcher*, 1904, A.C. 429.

2. Jurisdiction of Full Court to extend time.]—By the Yukon Territory Act (62 & 63 Vict., c. 11), the Supreme Court of British Columbia, sitting together as a Full Court, is constituted a Court of Appeal from final judgments of the Territorial Court, and notice of appeal should be given within twenty days after judgment. From interlocutory orders or judgments there is no appeal:—Held, by the Supreme Court of British Columbia, sitting as a Full Court, that it has no jurisdiction to extend the time for appealing. In an action on an alleged promissory note in the Territorial Court of the Yukon, the plaintiffs' counsel, at the close of his case, asked leave to amend the claim by inserting counts on an account stated, and leave was refused. The trial proceeded and the claim on the note was dismissed and a reference was ordered for the purpose of taking accounts, and an order to that effect was taken out on the 30th May, without specifying the date from which the accounts were to be taken. On taking the accounts the referee, at the discretion of the judge, and as to which it did not appear that plaintiffs had notice, took the accounts as beginning at a date unsatisfactory to plaintiffs, and the referee's report was confirmed by the judge:—Held, on appeal, that as the plaintiffs should have been allowed to amend their pleadings, and although the order of the 23rd of May, being final so far as the claims on the note was concerned, and an appeal from it had not been brought in time, yet, as an amendment had been improperly refused, and the judge, in giving his judgment on the 23rd May had not made it clear to the plaintiffs what his judgment really decided, the case should be examined on the merits:—Held, on the merits, that the judgment of Dugas J. must be affirmed. Per Hunter, C.J., and Drake, J.: In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for appealing from final orders, and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action. Per Hunter, C.J.: (1) It is incumbent on a successful party to take care that any order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any

prior or contemporaneous record or other competent document should be given to the party aggrieved. (2) A man is not bound to say "yes" or "no" at once when confronted with a demand for the payment of money about which there may be doubt as to his liability to pay, but he is entitled to reasonable time according to the circumstances of the case, to consider the position, and to make up his mind whether he really owes the money or not, and as to what course he will take. *Belcher* v. *McDonald*, 9 B.C.R. 377.

3. Extension of time.]—The Court may extend, on terms, the time for appealing to the Full Court from the Territorial Court of the Yukon. The respondent is entitled to a copy of the appeal book. *Banks* v. *Woodworth*, 7 B.C.R. 385.

IV. Costs.

Solicitor and client—Lump charge for professional services—Whether champertous.]—Plaintiffs, advocates in the Yukon, sued 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 10 per cent. if collected by them:—Held, on appeal, dismissing the action: Per Drake, J., that by Yukon law an advocate cannot legally obtain a lump sum for professional services except 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.